Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Stronger Futures in the Northern Territory Act 2012 and related legislation

Eleventh Report of 2013

June 2013

ISBN 978-1-74229-888-7

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Mr Dan Tehan MP	Wannon, Victoria, LP
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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination against Women
Congress	National Congress of Australia's First Peoples
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FaHCSIA	Department of Families, Community Services and Indigenous Affairs
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NTER	Northern Territory Emergency Response
RDA	Racial Discrimination Act 1975
SEAM	Improving School Enrolment and Attendance through Welfare Reform Measure

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Introduction

1.1 In this report the Parliamentary Joint Committee on Human Rights (the committee) considers the *Stronger Futures* legislation in the performance of its role of examining bills, Acts and legislative instruments for compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.2 The *Stronger Futures* legislation comprises three principal Acts (the Stronger Futures package), plus associated delegated legislation. The three Acts are:

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

1.3 A list of the relevant primary legislation and the secondary legislation that has been adopted under those Acts appears at Appendix 1.

1.4 The *Stronger Futures* package was introduced into the Parliament on 23 November 2011.

1.5 The three bills were passed by the House of Representatives on 27 February 2012 and were introduced into the Senate on the same day.

1.6 The Senate passed the bills with amendments on 28 June 2012, with the House of Representatives agreeing to the amendments passed by the Senate on that day.

1.7 The bills received royal assent on 29 June 2012, and their substantive provisions commenced by proclamation on 16 July 2012.

Conduct of the examination

1.8 On 15 June 2012, while the bills were before the Senate, the National Congress of Australia's First Peoples (Congress) wrote to the committee asking it to examine the bills.[1]

1.9 The committee decided as a first step to write to the Minister for Families, Community Services and Indigenous Affairs requesting advice on the compatibility of the bills with human rights.[2]

1 National Congress of Australia's First Peoples, Letter to the Hon Harry Jenkins MP, 15 June 2012.

1.10 On 28 June 2012, the Minister responded to the committee's letter.[3] The committee received additional information from Congress on 28 June 2012.[4]

1.11 Each of these documents is accessible via the committee's website.[5]

1.12 On 6 July 2012 the committee received a letter dated 28 June 2012 from the then Attorney-General in response to a request of 28 May 2012 from Senator Siewert to refer the *Stronger Futures* package to this committee. The Attorney-General attached to that letter a copy of her reply of 28 June 2012 to Senator Siewert's request.

1.13 The Attorney-General declined to refer the bill to this committee, noting that the bills had already been the subject of scrutiny by the Senate Standing Committee for the Scrutiny of Bills, as well as the subject of a major inquiry by the Senate Community Affairs Legislation Committee, and that various amendments would be proposed as a result.

1.14 The Attorney-General noted that it would be possible under the committee's mandate to review the operation of the legislation once it had been enacted. The Attorney-General expressed her view that the legislation was consistent with the provisions of the *Racial Discrimination Act 1975* (RDA) and that there had been extensive consultation over the arrangements proposed in the bills.

1.15 The committee received over 20 written representations requesting it to carry out an examination of the legislation (see list at Appendix 2). A number of those submissions contained detailed analyses of significant human rights issues to which the legislation gives rise.

1.16 The committee notes that the Senate Community Affairs Legislation Committee undertook a detailed inquiry into the content and operation of the legislation. In light of that inquiry, the committee decided not to undertake a formal inquiry itself but to draw on the material before and conclusions of that committee, as well as to take into account relevant developments since mid-2012. The committee considers that the most useful contribution it can make in relation to the issue is to highlight specific human rights concerns and matters of principle.

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2 Letter from Mr Harry Jenkins MP to the Hon Jenny Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 20 June 2012 Because the bills were introduced into Parliament before the requirement under the *Human Rights (Parliamentary Scrutiny) Act 2011* to provide a statement of compatibility with human rights took effect, the bill was not accompanied by an independent and detailed statement explaining how the bill engaged the human rights set out in the relevant human rights instruments.

3 Letter from the Hon Jenny Macklin MP to the Hon Harry Jenkins MP, 27 June 2012.

4 Additional Information received from National Congress of Australia's First Peoples, dated 28 June 2012.

5 See: http://www.aph.gov.au/joint_humanrights/.

1.17 This report sets out the committee's analytical framework for the assessment of human rights compatibility and addresses a number of issues of general relevance raised by the *Stronger Futures* package. It then goes on to apply this analytical framework to a number of the *Stronger Futures* measures on which the committee has decided to focus its comments: the tackling alcohol abuse measure, the income management measure, and the school attendance measure.

1.18 The report does not deal with the food security measures relating to the licensing regimes for food stores in certain areas, certain land reform measures, and amendments relating to the extent to which customary law may be taken into account in bail and sentencing decision, or restriction on access to pornography in certain areas.

Acknowledgements

1.19 The committee expresses its appreciation to all those organisations and individuals who have made submissions to it on the legislation.

Background to the Stronger Futures package

The Northern Territory Emergency Response[6]

1.20 The Northern Territory Emergency Response (NTER) involved a series of legislative and policy interventions by the Commonwealth following the publication in June 2007 of *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'*, the Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse.[7]

1.21 On 21 June 2007, in response to that report, the Howard Government announced the 'national emergency response to protect Aboriginal children in the Northern Territory' from sexual abuse and family violence; the then Opposition leader expressed in principle support for the intervention.

1.22 The aims of the NTER measures were to protect children and make communities safe and in the longer term to create a better future for Aboriginal communities in the Northern Territory. The NTER legislation was introduced into and passed by the House of Representatives on 7 August 2007, and introduced into the Senate on 7 August and passed by it on 16 August 2007. The legislation received royal assent on 17 August 2007.

1.23 The NTER legislation when originally enacted comprised a package of five Acts:

- *Northern Territory National Emergency Response Act 2007* (NTER Act);
- *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (SSWP Act);
- *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (FCSIA Act);
- *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 2007* (Appropriation Act No 1); and
- *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 2007* (Appropriation Act No 2).

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6 This summary of the NTER draws on: Senate Community Affairs Legislation Committee, *Inquiry into Stronger Futures in the Northern Territory Bill 2011 and two related bills*, Report, March 2012, and Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER*, 2 November 2011.

7 *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred',* 2007.

1.24 The NTER legislation applied to a number of 'prescribed areas' in which Aboriginal people were the sole or predominant inhabitants, including Aboriginal land, declared town camps and other declared areas. The NTER package included:

- bans on the sale and consumption of alcohol in prescribed areas;
- bans on the possession and supply of pornographic material in prescribed areas;
- compulsory acquisition by the Commonwealth of 5-year leases over declared Aboriginal land, Aboriginal 'community living areas' and town camps;
- denial of compensation equivalent to that to which another landholder in the Northern Territory would be entitled for compulsory acquisition;
- the exclusion of customary law and cultural practice as a factor relevant to sentencing and bail decisions;
- the application of income management to residents of prescribed (and other declared) areas;
- the denial of review by the Social Security Appeals Tribunal of income management decisions; and
- modifications to the permit system to allow greater access to Aboriginal land.[8]

1.25 The NTER Act, the SSWP Act and the FCSIA Act provided that acts done under or for the purposes of those Acts were excluded from the operation of Part II of the *Racial Discrimination Act 1975* (RDA) (which prohibits racial discrimination) and were 'special measures' for the purposes of section 8 of that Act. The operation of certain Northern Territory and Queensland legislation dealing with discrimination was also excluded.

1.26 The manner in which the NTER was introduced, in particular the lack of consultation with affected groups, gave rise to much criticism, including from the perspective of human rights. The suspension of the operation of the *Racial Discrimination Act 1975* gave rise to particular concern, and the government's characterisation of the intervention measures as 'special measures' under the *Racial Discrimination Act 1975* was the subject of considerable criticism.

1.27 Between 2008 and 2010, a former Senate committee, the Select Committee on Regional and Remote Indigenous Communities, tabled a number of reports in the Senate, reporting on the impact of the NTER measures. That Committee made a number of recommendations over the life of the inquiry. A special review of the

8 See Australian Human Rights Commission publication, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER*, 2 November 2011, pp 5-6.

NTER was completed in 2008 by the NTER Review Board,[9] and a number of implementation and evaluation reports were published by the Commonwealth government during this period.[10]

1.28 In 2010, following these reviews of the NTER and continuing concern about its impact and human rights compatibility, various changes were made to the NTER. These included the reinstatement of the *Racial Discrimination Act 1975*, the replacement of the blanket application of the income management provisions by more limited and targeted application of the regime.[11] The *Stronger Futures* package repealed the NTER Acts but retained policy elements of this legislation.[12]

9 *Northern Territory Emergency Response – Report of the NTER Review Board*, October 2008.

10 See Senate Community Affairs Legislation Committee, *Inquiry into Stronger Futures in the Northern Territory Bill 2011 and two related bills*, Report, March 2012, para 1.13.

11 See *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2009*.

12 The measures that were not continued were: five-year leases; the statutory rights provisions under the *Aboriginal Land Rights (Northern Territory) Act 1976* that provide a mechanism for government to retain certain rights and interests in buildings and infrastructure constructed or upgraded on Aboriginal land with government funds; the requirement to install filters and conduct audits of publicly funded computers; the power enabling police to enter a private residence as if it were a public place to apprehend an intoxicated person; and the 'business management areas' powers. See FaHCSIA answers to Questions on Notice No. 6, Senate Community Affairs Legislation Committee, *Report on Inquiry into Stronger Futures in the Northern Territory Bill 2011 and two related bills*, March 2012, Appendix 4.

Overview of the Stronger Futures package

1.30 The *Stronger Futures* legislation comprises the following Acts:

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

Stronger Futures in the Northern Territory Act 2012

1.31 The *Stronger Futures in the Northern Territory Act 2012* involves three key measures:

- the *tackling alcohol abuse measure*: the purpose of this measure was 'to enable special measures to be taken to reduce alcohol-related harm to Aboriginal people in the Northern Territory.'[13] It provided for the preservation of existing alcohol protections in 'alcohol protected areas' with additional provisions that 'enable the geographic areas covered by these protections to be changed over time and for local solutions to be developed.'[14] It also provided power for the Minister for Indigenous Affairs to approve alcohol management plans.
- the *land reform measure*: the land reform measure enabled the Commonwealth to amend Northern Territory legislation relating to community living areas and town camps to enable opportunities for private home ownership in town camps and more flexible long-term leases.
- the *food security measure*: the purpose of this measure was 'to enable special measures to be taken for the purpose of promoting food security for Aboriginal communities in the Northern Territory', by modifying licensing arrangements for community stores to continue to improve access by Aboriginal communities to fresh, healthy food.[15]

1.32 The legislation involves a 10 year timeframe with most provisions other than the alcohol measures being reviewed after 7 years.

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13 Stronger Futures in the Northern Territory Bill 2011, replacement revised explanatory memorandum, p 1.

14 Stronger Futures in the Northern Territory Bill 2011, replacement revised explanatory memorandum, p 2.

15 Stronger Futures in the Northern Territory Bill 2011, replacement revised explanatory memorandum, pp 2-3.

Social Security Legislation Amendment Act 2012

1.33 The *Social Security Legislation Amendment Act 2012* involves the following key measures:

- *income management*: the income management regime provides for a system under which the recipients of certain social welfare payments may have a proportion of their income quarantined for use on priority needs for themselves or their families/dependants.
- *school attendance*: the school attendance measures are intended to contribute to bringing about improvements in low school attendance rates by providing a system under which parents or carers of children who are in receipt of certain social security payments may be required to take various steps to ensure that their child attends school regularly and may have their payments suspended or cancelled if they fail to take the relevant steps.

Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012

1.34 The *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*:

- repealed the *Northern Territory National Emergency Response Act 2007* and enacted savings and transitional provisions;
- made consequential amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976*;
- amended the *Classification (Publications, Films and Computer Games) Act 1995* to add a sunset and review date to Part 10 of the Act which allowed special measures to be taken to protect children living in Aboriginal communities in the Northern Territory from being exposed to material that is or is likely to be classified as restricted material or X18+;
- enacted savings provisions in relation to the transitioning of areas, declarations, liquor licences and permits for the tackling alcohol abuse measure;
- enacted transitional provisions in relation to the community stores licences in place under the *Northern Territory National Emergency Response Act 2007* immediately prior to its repeal; and
- amended the *Crimes Act 1914* to insert certain exceptions to the rules that prevented consideration of customary law or cultural practices in bail and sentencing for certain offence provisions (relating to entering, remaining on or damaging cultural heritage, or damaging or removing a cultural

heritage object) for both Commonwealth and Northern Territory offences.[16]

Statement of compatibility

1.35 The *Stronger Futures* bills were introduced before the requirements of the *Human Rights (Parliamentary Scrutiny) Act* 2011 in relation to the provision of statements of compatibility commenced operation. Accordingly, the bills were not accompanied by freestanding statements of compatibility, although a number of human rights compatibility issues were addressed in the explanatory memoranda.

1.36 As noted above, in response to a request from the committee, the Minister for Families, Community Services and Indigenous Affairs wrote to the committee on 27 June 2012, providing an overview and detailed analysis of the three bills which set out the government's views on the issue of human rights compatibility.[17]

1.37 In her letter of 27 June 2012 to the chair of the committee, the Minister for Families, Community Services and Indigenous Affairs stated:

> From the outset of the development of the Stronger Futures approach, including the Bills, the Government has been absolutely clear that all measures in the Stronger Futures Bills would be consistent with the Racial Discrimination Act. The Bills do not suspend or limit the application of the Racial Discrimination Act in any way, the Bills do not suspend or limit the rights that any person has under the Racial Discrimination Act to challenge the legislation or any action taken under it. If a person has concerns that an action of the legislation does not comply with the Racial Discrimination Act the person will be able to seek redress under the Racial Discrimination Act.
>
> To make our commitment even more clear I am proposing an amendment so that it is explicit that the Stronger Futures in the Northern Territory Act does not affect the operation of the Racial Discrimination Act.[18]

1.38 In her letter to the committee the Minister set out the government's commitment to ensuring conformity with Australia's international obligations:

> In developing the legislation careful consideration was given to Australia's obligations under key international human rights instruments. The Government carefully considered the application of the Racial Discrimination Act, the International Convention on the Elimination of All

16 Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011, replacement explanatory memorandum, outline.

17 Letter from the Hon Jenny Macklin MP to the Hon Harry Jenkins MP, 27 June 2012.

18 Letter from the Hon Jenny Macklin MP to the Hon Harry Jenkins MP, 27 June 2012, p 2. The amendment foreshadowed by the Minister now appears as section 4A of the *Stronger Futures in the Northern Territory Act 2012.*

> Forms of Racial Discrimination and other key international instruments in the development of the Bills. This is reflected in the Explanatory Memoranda to the Bills. To provide your Committee with further information on this and as requested, we have prepared an assessment of the Bills in relation to relevant international human rights instruments…
>
> I believe that after a fair review of the provisions in the Bills, and the additional information I have now provided the Committee should be reassured that the Government has met its obligations under domestic and international law on human rights.[19]

1.39 The committee expresses its appreciation to the Minister for the detailed analysis she provided in the attachments to her letter,[20] which performed many of the functions of a statement of compatibility.

19 Letter from the Hon Jenny Macklin MP to the Hon Harry Jenkins MP, 27 June 2012, p 3.

20 *Assessment of Policy Objectives with Human Rights: Stronger Futures in the Northern Territory Bill 2012 and Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) 2012* [*Stronger Futures Assessment*] and *Assessment of Policy Objectives with Human Rights: Social Security Legislation Amendment Bill 2011* [*Social Security Assessment*], attachments to Letter from the Hon Jenny Macklin MP to the Hon Harry Jenkins MP, 27 June 2012, p 2.

Related Parliamentary inquiries

Senate Community Affairs Legislation Committee

1.40 The *Stronger Futures* package of bills was referred to the Senate Community Affairs Legislation Committee on 25 November 2011.

1.41 The Community Affairs Legislation Committee conducted a number of hearings and received over 400 submissions in relation to the *Stronger Futures* package. The Committee tabled its report on 14 March 2012.[21]

1.42 The detailed report focused on a range of policy issues and recommended a number of improvements to the draft legislation.[22]

1.43 The majority report expressed views on a number of important human rights matters. In particular, the report documented extensive concerns regarding the consultative approaches being made by the government. A number of submissions to the inquiry analysed in detail the human rights issues to which the bills gave rise. Many of these submissions dealt with the process of consultation, the practical operation of the previous intervention measures, and the likely effect of the proposed measures.

1.44 The report concluded that, despite the evident efforts by government to consult with affected communities, the process appeared to have fallen short of what was required for a genuine process of consultation with the communities carried out in a culturally appropriate and sensitive way concerned.

1.45 In this regard, the Community Affairs Legislation Committee supported the adoption of the criteria proposed by the Australian Human Rights Commission for meaningful and effective consultation processes.[23]

Additional comments by Coalition Senators

1.46 The Coalition Senators made additional comments and recommendations. In particular they argued that, 'long term change will require long term strategic investment and involvement' and 'demands a degree of leadership and monitoring':[24]

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21 Senate Community Affairs Legislation Committee, *Report on the Stronger Futures in the Northern Territory Bill 2011 [Provisions]; Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 [Provisions]; Social Security Legislation Amendment Bill 2011 [Provisions]* (*Stronger Futures Report*).

22 See Senate Community Affairs Legislation Committee, *Stronger Futures Report*, pp viii – ix.

23 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, recommendation 10, para 4.17.

24 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 3.2 (Additional Comments).

> A lengthy 10 year timeframe for the specific measures contained in the stronger futures legislation is considered counterproductive to achieving the necessary outcome of empowering individuals and communities to take control of their lives and of the management of their communities as soon as possible. The proposed legislation has also encouraged the emotive criticism that the government is embarking on a further 10 year intervention into the lives of Aboriginal people in the Northern Territory.[25]

1.47 They recommended an earlier timeframe for a sunset provision for the legislation:

> The Stronger Futures in the Northern Territory Bill 2011, the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill be formally reviewed after 3 years and lapse after 5 years from the date of assent.[26]

Dissenting report by Australian Greens

1.48 The Australian Greens did not support the passage of the bills, arguing that the whole approach had undermined and disempowered Aboriginal people.[27]

1.49 Similar to the Coalition Senators, the Australian Greens recommended that, should the legislation be passed, it should sunset after five years rather than ten.[28]

1.50 The Australian Greens rejected the proposal for expanding compulsory income management.[29] They also did not support the School Enrolment and Attendance through Welfare Reform Measure, arguing that it was not working and there was insufficient evidence to support its expansion.[30]

Senate Standing Committee for the Scrutiny of Bills

1.51 The *Stronger Futures* package of bills was considered by the Senate Standing Committee for the Scrutiny of Bills, and was the subject of *Alert Digest No 1 of 2012* and that Committee's *Second Report of 2012*.

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25 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 3.4 (Additional Comments).

26 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, recommendation 4 (Additional Comments).

27 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, recommendation 16 (Dissenting Report).

28 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 1.144 (Dissenting Report).

29 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, pp 90 – 91 (Dissenting Report).

30 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, pp 92- 97 (Dissenting Report).

1.52 The Scrutiny of Bills Committee did not comment on the income management provisions contained in the Social Security Legislation Amendment Bill 2011.

1.53 In relation to the other two bills, that Committee raised a number of matters, mainly focusing on issues such as reverse burdens of proof, strict liability offences, the appropriateness of particular penalties and impermissible delegation of legislative power, and the protection of personal data and privacy.

The committee's mandate

1.54 The committee's remit is to consider bills and legislative instruments introduced into the Parliament for compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, as well as to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on these matters. The Act defines human rights by reference to the rights and freedoms contained in seven core UN human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD)

1.55 This section addresses the question of the relevance of the United Nations Declaration on the Rights of Indigenous Peoples to the committee's mandate, the criteria for determining whether a racially based measure is a 'special measure' for the purposes of human rights law and its relation to the guarantee of non-discrimination on the ground of race, and the nature of the consultation with Indigenous communities that is required under international law in relation to law and policies affecting those communities.

Relevance of the United Nations Declaration on the Rights of Indigenous Peoples

1.56 A number of submissions have referred to the United Nations Declaration on the Rights of Indigenous Peoples and urged the government and this committee to recognise and apply this as a relevant standard in analysing human rights issues affecting Indigenous peoples. Congress called for the Declaration to be included formally in the mandate of the committee, a call that was supported by the Australian Human Rights Commission[31] and has recently been restated by the

31 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*, 7 July 2010, para 17.

Aboriginal and Torres Strait Islander Social Justice Commissioner of the Commission.[32]

1.57 While the Declaration is not currently listed as one of the international instruments against which the committee is to scrutinise bills and legislation for human rights compatibility,[33] many international lawyers and others accept that in many respects the Declaration spells out the details of relevant obligations under the human rights treaties listed in the committee's terms of reference. It is also considered to represent customary international law binding on Australia in many, though not all, respects.

1.58 The government has accepted the relevance of the Declaration to the work of the committee. For example, the statement of compatibility for the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 refers to the provisions of the Declaration on the Rights of Indigenous Peoples, noting that while the Declaration 'is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful elaboration on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples.'[34]

1.59 The committee notes that the Declaration does not have the formal status of a treaty, and that some of its provisions may go further than Australia's existing treaty obligations in relation to Indigenous peoples and may not yet form part of customary international law. For example, while an obligation to consult with Indigenous peoples in relation to actions which may affect them does appear to be accepted as part of customary international law, the status of the important provisions of the Declaration that require 'free prior and informed *consen*"[35] rather

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32 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2012*, pp 36-37 and Recommendation 1.4.

33 Under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

34 Explanatory memorandum, pp 23-24. See to similar effect the Native Title Amendment Bill 2012, statement of compatibility, p 5.

35 See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, A/HRC/12/34, para 38 (2009):

"It should be emphasized that the duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in the United Nations Declaration on the Rights of Indigenous Peoples, and is firmly rooted in international human rights law. This duty is referenced throughout the Declaration in relation to particular concerns (arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, and 38), and it is affirmed as an overarching principle in article 19, which provides: '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.'"

than *consultation* is debated, with many governments (including Australia)[36] and scholars of the view that the requirement of prior consent in all cases of laws, policies or actions affecting Indigenous peoples does not yet represent settled international law.

1.60 However, the committee notes that to the extent that provisions of the Declaration do not reflect treaty obligations and have not yet attained the status of customary international law, the Declaration is nonetheless an influential and authoritative source of guidance that should be drawn on in policymaking and the development of legislation.

1.61 The committee considers that a study documenting the extent to which the provisions of the Declaration reflect Australia's existing obligations under the seven human rights treaties that fall within the committee's mandate as well as of their status under customary international law would be helpful.

Committee view

1.62 The committee agrees that the Declaration on the Rights of Indigenous Peoples, while not enshrined in domestic law, is an important and relevant instrument for its work, and provides specific guidance as to the content of the rights in the human rights treaties which fall within the committee's mandate. The committee will draw on the Declaration as appropriate in interpreting those treaties and expects that statements of compatibility will refer to provisions of the Declaration where those are relevant.

36 See the statement by the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs setting out Australia's support for the Declaration on 3 April 2009, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House, Canberra, 3 April 2009 ('While there is continuing international debate about the meaning of "free, prior and informed consent", we will consider any future interpretations in accordance with Article 46.')

Relevant rights

1.63 The key rights engaged by the *Stronger Futures* package of legislation include the following:

- the right to self-determination guaranteed by article 1 of ICCPR and article 1 of the ICESCR;
- 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.

Right to self-determination

1.64 The right to self-determination is protected in article 1 of the ICESCR and article 1 of the ICCPR, and guarantees the right of groups of peoples to have control over their destiny and to be treated respectfully. In Australia, it is particularly relevant to Aboriginal and Torres Strait Islander peoples.

1.65 Article 1 of each of the International Covenants provides that by virtue of the right, peoples 'freely determine their political status and freely pursue their economic, social and cultural development.'

1.66 The Declaration on the Rights of Indigenous Peoples provides further guidance as to the different dimensions of the right to self-determination. For example, article 5 of the Declaration provides that 'Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.'

1.67 Other relevant articles of the Declaration include:

> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order

> to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> Article 20(1)
>
> Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> Article 23
>
> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Right to equality and non-discrimination

1.68 The definition of 'racial discrimination' contained in article 1(1) of the ICERD provides that:

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

1.69 Accordingly, treatment which is explicitly based on race, which has the purpose of distinguishing between individuals or groups on the basis of race, or which affects overwhelmingly or disproportionately members of a particular racial or ethnic group, will amount to differential treatment based on race for the purposes of human rights law. Thus, legislation or a policy may be based on race for the purposes of human rights law even if it does not explicitly refer to race or ethnic origin, if its impact is disproportionately on the members of a particular racial or ethnic group.

1.70 Such differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds and is a proportionate measure in pursuit of a legitimate objective. As the UN Committee on the Elimination of Racial Discrimination put it in its General Recommendation No. 32:

> On the core notion of discrimination, in its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim'.

1.71 As a logical corollary of this principle, in its general recommendation No. 14 (1993) on article 1, paragraph 1, of the ICERD, the Committee observed that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.

1.72 The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.[37]

Right to social security/adequate standard of living

1.73 The rights to social security and an adequate standard of living are protected in articles 9 and 11 of the ICESCR, respectively. The UN Committee on Economic, Social and Cultural Rights has stated that social security should be available, adequate and accessible. Adequacy means that:

> the benefits must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the [ICESCR]. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[38]

1.74 In a letter sent to the Australian government dated 9 March 2012, the UN Special Rapporteurs on Extreme Poverty and Human Rights and Rights of Indigenous Peoples wrote in relation to the provision of social security benefits under the ICESCR:

> States parties must also ensure that the level of benefits and the form in which they are provided are in compliance with the principles of human dignity and non-discrimination. In complying with the right to social security, States must ensure that social assistance is equally available to all individuals and that qualifying conditions for benefits are reasonable, proportionate and transparent. Moreover, the withdrawal, reduction or

37 UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, (2009), para 8 (footnotes omitted).

38 UN Committee on Economic, Social and Cultural Rights, General Comment No. 19, (2008) para 22.

> suspension of benefits must be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law….
>
> When States impose excessive requirements and conditions on access to public services and social benefits, and severe sanctions for non-compliance, such measures threaten welfare beneficiaries' enjoyment of a number of human rights, including the right to participate in the decisions that directly affect them, and to be free from arbitrary or unlawful State interference in their privacy, family, home or correspondence. The cumulative impact of living in such circumstances threatens the beneficiaries' right to enjoy the highest attainable standard of living.

Right to privacy

1.75 The right to privacy is protected in article 17 of the ICCPR. Among other things, article 17 prohibits unlawful or arbitrary interference with a person's privacy, family and home. The right to privacy encompasses freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

Specific human rights issues

Special measures

1.76 The government has stated that the various legislative measures that form part of the *Stronger Futures* package give effect to Australia's positive obligations under the applicable human rights treaties to ensure the enjoyment by Indigenous citizens and others of a range of human rights. These include the rights to life and health, to education, to social security and an adequate standard of living, to personal integrity and privacy, and the rights of children.

1.77 The government has consistently maintained that many of the measures which form part of the *Stronger Futures* package are 'special measures' and are therefore not discriminatory under the ICERD or the *Racial Discrimination Act 1975*.[39] The government has generally asserted this conclusion without any supporting analysis based on the criteria generally accepted in international law for such measures.

The criteria for 'special measures' under human rights law

1.78 The committee recalls that special measures of advancement are a well-established category in international human rights law.[40] They are recognised explicitly in the ICERD, CEDAW, and the CRPD. The equality and non-discrimination guarantees of other treaties (in particular the ICCPR and ICESCR) have been interpreted so as to permit, and in some cases require, the taking of such measures. Generally they have been understood as involving the granting of a benefit or preference to members of a disadvantaged group on the basis of membership of that group, where differential treatment on that ground is generally prohibited as discrimination.

1.79 Special measures are considered not to be discrimination for the purposes of the human rights treaties, and thus persons who are not members of the group that is granted the benefit or preference may not claim that they have been discriminated against by being denied access to that benefit or opportunity. While some see special measures as discrimination which is excused, others, applying a substantive equality approach, take the view that special measures do not involve discrimination but are

39 This argument is not made in relation to the income management provisions, presumably because they are intended to apply not only to Aboriginal communities or to communities in which the majority of the population is Aboriginal.

40 See *The concept and practice of affirmative action, Final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5*, UN Doc E/CN.4/Sub.2/2002/21 (2002).

an example of differential treatment of people that is justified as based on relevant differences (for example, the continuing effects of historical discrimination).[41]

1.80 Article 1(4) of the ICERD defines 'special measures' for the purposes of that convention in the following terms:

> 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.[42]

1.81 The UN Committee on the Elimination of Racial Discrimination has set out its understanding of the meaning of the provisions in the ICERD relating to special measures:

> 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.
>
> Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.

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41 See, for example, UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32,(2009), para 20 ('Accordingly, special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality').

42 Article 4(1) of the CEDAW contains a similarly worded provision in relation to special measures taken on the basis of sex. See CEDAW, General Recommendation No. 25, 'Temporary special measures' (2004) and M Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (OUP 2012), 'Article 1' and 'Article 4'.

> States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.[43]

1.82 In 1985 in *Gerhardy v Brown*, the High Court of Australia held that the following criteria need to be satisfied in order for a measure to be characterised as a 'special measure':

- 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.[44]

1.83 It has been accepted that, as a general rule, any special measure should so far as possible be developed in consultation with the group whose members are to be the beneficiaries of the measure.[45]

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43 UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, (2009), paras 16-18.

44 *Gerhardy v Brown* (1985) 159 CLR 70, 133 (Brennan J). See also Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER*, 2 November 2011, p 7.

45 Congress has set out its views of the requirements for measures to qualify as special measures. They must:

- Have the sole purpose of ensuring equal human rights.
- Obtain the prior, informed consent of the people affected.
- Be designed and implemented through prior agreement with the people concerned.
- Have clarity in regard to the results to be achieved from the special measures.
- Have accountability to the people concerned.
- Be appropriate to the situation to be remedied and grounded in a realistic appraisal of the situation to be addressed.
- Have justification for the proposed special measures including how they will obtain the perceived outcomes.
- Be temporary and only maintained until disadvantage is overcome.
- Have a system for monitoring the application and results of special measures.

1.84 For almost thirty years the criteria set out by Brennan J in *Gerhardy v Brown* have served as an authoritative and persuasive point of reference for determining whether a particular measure is a 'special measure' under the RDA and the ICERD, and have been considered to be in conformity with the international law on the subject.[46]

1.85 However, in a recent decision, *Maloney v R*,[47] the High Court of Australia revisited *Gerhardy*. While the judgments in *Maloney* do not represent a major departure from *Gerhardy*, they place greater emphasis on the words of articles 1(4) and 2(2) of the ICERD,[48] and adopt a number of conclusions which are arguably not in conformity with the current state of international law and practice relating to special measures. The relevance of the *Maloney* case and its relation to the international legal standards is discussed below.

Application to the Stronger Futures measures

1.86 While the *Stronger Futures* bills were introduced without separate statements of compatibility, the explanatory memorandum to the Stronger Futures in the Northern Territory Bill 2011 briefly addressed some human rights issues, in particular the question of whether certain of the measures were 'special measures' for the

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National Congress of Australia's First Peoples, *Statement to the Parliamentary Joint Committee on Human Rights on the Parliamentary Scrutiny of Human Rights as applied to the Stronger Futures in the Northern Territory Bills (2011)*, June 2012, attachment to letter of 15 June 2012 to Mr Harry Jenkins MP, p 7.

46 While these criteria have been widely considered to be a correct statement of what constitutes a 'special measure' under international law , the finding of Brennan J and the other members of the High Court in *Gerhardy v Brown* that the legislative recognition of the traditional rights to land of Indigenous peoples can only be justified as a special measure, does not represent the international legal position. Such race-based differential treatment may be justified under international law if it is based on objective and reasonable criteria and is a proportionate measure adopted in pursuit of a legitimate goal.

47 [2013] HCA 28.

48 See, for example, the judgment of French CJ, [2013] HCA 28, [21], who writes:

"[T]he court, in proceedings which turn upon the characterisation of a law as a special measure, may:

- determine whether the law evidences or rests upon a legislative finding that there is a requirement for the protection of a racial or ethnic group or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms;
- determine whether that finding was reasonably open;
- determine whether the sole purpose of the law is to secure the adequate advancement of the relevant racial or ethnic group or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedoms; and
- determine whether the law is reasonably capable of being appropriate and adapted to that sole purpose."

advancement of Aboriginal people within the meaning of the ICERD. In relation to a number of the measures, the explanatory memorandum stated the government's view that it was a 'special measure' because it was intended to address specific Aboriginal disadvantage and help Aboriginal people to enjoy their human rights equally with others in the Australian community.[49] It noted that there had been consultation with Aboriginal communities and others, and that there were reviews proposed of the operation of the provisions that would take place at specific times after the commencement of the legislation.

1.87 However, there was little detailed analysis of the applicable criteria for a measure to qualify as a 'special measure', and of whether some or all of these measures satisfied the criteria. Nor was there any reasoned response to criticism made of the similar provisions in the earlier Northern Territory Emergency Response, many features of which the *Stronger Futures* legislation proposed to continue. These included criticism by the UN Special Rapporteur on the Rights of Indigenous Peoples in his report following a visit to Australia in 2009.[50] There was also relatively little explicit and detailed consideration of other human rights, for example the right to social security.

1.88 The submissions to the Senate Community Affairs Legislation Committee[51] and to this committee by the Australian Human Rights Commission, the Congress, the Australian Lawyers Alliance and others, have challenged whether various measures asserted to be 'special measures' can be properly characterised as such.[52] In particular, the following issues have been raised:

- whether a measure which limits the enjoyment of rights of (some) members of a particular racial group can be justified as a 'special measure' insofar as it is claimed that the measure is intended, designed and likely to

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49 Stronger Futures in the Northern Territory Bill 2011, explanatory memorandum, p 1. This position is repeated in relation to each element, in the Notes on clauses, at p 3 (alcohol-related measures), p 20 (land reform measures), and p 29 (food security measures). See also Stronger Futures in the Northern Territory Bill 2011, revised explanatory memorandum, pp 1,3, 20 and 29.

50 Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 (2010).

51 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 113-122, [234-246] See also Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER*, 2 November 2011.

52 See submission by the Australian Lawyers Alliance, Letter to the PJCHR, 13 August 2012, and attached submission to the Senate Community Affairs Legislation Committee entitled *The Stronger Futures Legislative Package: Assessment of Non-Compliance With Human Rights*, 29 June 2012, pp 4-8.

bring about a higher level enjoyment of human rights overall for members of the group;

- whether consultation and consent are required elements for a measure to be considered a special measure under international law and under the *Racial Discrimination Act 1975*;
- what criteria must be in place to assess the likely effectiveness of the purported 'special measure' and what monitoring measures are required in order to assess the ongoing relevance and justifiability of the measure.

1.89 A related issue is whether a measure which responds to particular deprivations of a particular racial group and seeks to improve the level of enjoyment of human rights by members of that group is even *prima facie* discrimination that can be justified as a 'special measure', or is simply a substantive equality measure (that is, a measure that treats persons differently because their circumstances are relevantly different).

1.90 The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor James Anaya, addressed this issue in his report following a visit to Australia in 2009.[53] While the report considered the Northern Territory Emergency Response (NTER) (some elements of which the *Stronger Futures* legislation did not continue), a number of his comments are still pertinent to those aspects of the *Stronger Futures* legislation which continue elements of the NTER measures. The Special Rapporteur wrote:

> As already stressed, special measures in some form are indeed required to address the disadvantages faced by indigenous peoples in Australia and to address the challenges that are particular to indigenous women and children. But it would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.[54]

1.91 The Australian Human Rights Commission has expressed a similar view:

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53 Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 (2010).

54 Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 , para 21 (2010).

> Measures that seek to provide a benefit to a racial group or members of it, but operate by limiting certain rights of some, or all of that group, should be approached with particular care. …
>
> In the Commission's view, such measures will *not* be special measures where they are implemented without the consent of the group to whom they apply.[55]

1.92 In its response to the draft report of the Special Rapporteur, the government did not specifically respond to his criticism of the use of the terminology of 'special measures' but noted that, even if a racially based measure did not qualify as a 'special measure', it might nevertheless be permissible under international law if it were 'legitimate differential treatment'.[56]

Differential treatment based on race as legitimate differential treatment

1.93 As the government has pointed out and the UN Special Rapporteur has accepted, under international human rights law, differential treatment based on race that does not qualify as a 'special measure' may still be legitimate if it can be shown to be based on objective and reasonable criteria adopted in the pursuit of a legitimate goal. In the case of differential treatment based on race or ethnic origin, a high level of scrutiny is appropriate for the evaluation of such measures. As the UN Committee on the Elimination of Racial Discrimination Committee has noted:

> The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.[57]

1.94 As the Special Rapporteur commented in relation to the NTER measures, in terms still relevant to the *Stronger Futures* package:

> The Special Rapporteur stresses that any government measures that discriminate on the basis of race must, in order to comply with Australia's human rights obligations service the highest scrutiny and be found to be proportional and necessary to advance valid objectives. …[T]he

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55 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), paras 88-89.

56 Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia,* A/HRC/15/37/Add.4, paras 55 and 62 (2010).

57 UN Committee on the Elimination of Racial Discrimination, General Recommendation No 32, para 8.

> discriminatory measures of the NTER cannot be found necessary to the legitimate objectives they are intended to serve, if the discriminatory treatment is not shown to actually be achieving the intended results.[58]

1.95 The question is not simply whether the NTER measures are yielding results, but whether the discriminatory rights-impairing aspects of the measures are themselves proportional to and necessary for the achievement of the results.[59]

1.96 Accordingly, it is necessary to assess the individual measures against this standard.

Committee view

1.97 The committee has previously noted the tendency for explanatory memoranda to invoke the category of 'special measures' as a justification for legislation that involves differential treatment based on race or ethnic origin, without sufficient analysis of whether the differential treatment may be justified as legitimate differential treatment based on reasonable and objective grounds without reference to special measures, or without specific consideration of whether the measures do in fact satisfy the detailed criteria of a 'special measure.'[60]

1.98 The committee notes that the government has not provided a detailed explanation of why the *Stronger Futures* measures can be legitimately viewed as 'special measures' under international law; it has merely asserted that it is its 'policy intention' that it is so.

1.99 The committee notes the view of the Special Rapporteur on Indigenous Peoples that a measure which criminalises conduct by some members of the group to be benefited, in order to promote the overall benefit of the group, is not appropriately classified as a 'special measure'. The committee shares this view, which it considers reflects the current position in international law.

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

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58 Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 , para 63 (2010).

59 Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 , para 65 (2010).

60 For an example of a measure appropriately characterised as a 'special measure', see the Indigenous Education (Targeted Assistance) Amendment Bill 2013, considered in PJCHR, *Sixth Report of 2013,* pp 111-113.

Special measures and the decision of the High Court in Maloney v R

1.101 On 19 June 2013, during the finalisation of the committee's report, the High Court of Australia delivered judgment in the case of *Maloney v R*.[61] The case involved an appeal by Ms Maloney, a resident of Palm Island, against her conviction for possession of more than a prescribed quantity of alcohol in a restricted area on Palm Island contrary to provisions of the Queensland *Liquor Act 1992*.

1.102 Ms Maloney had challenged the statutory provisions imposing the alcohol restrictions on the ground that they involved racial discrimination and argued that, as a result, section 10(1) of the *Racial Discrimination Act 1975*[62] (RDA) rendered those provisions inoperative so that residents of Palm Island were not bound by the restrictions imposed.

1.103 That Act is intended to give effect to Australia's obligations under the ICERD. Section 8 of the RDA provides that certain provisions of the RDA (including section 10) do not apply to, or in relation to, the application of special measures within the meaning of article 1(4) of the ICERD.

1.104 In six separate judgments, which reflected substantially similar reasoning and conclusions, the High Court dismissed the appeal. The Court held that, although the legislation did not on its face refer to race, the provisions regulating the possession of liquor on Palm Island involved racially based differential treatment, because their purpose and effect were to apply to a community the overwhelming majority of whose population was Aboriginal. Thus, the effect of subsection 10(1) of the RDA would be that the rights which were denied on the basis of race to Aboriginal residents of Palm Island (principally the right to property, meaning the right to

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61 [2013] HCA 28 (19 June 2013).

62 Subsections 10(1) and (2) of the *Racial Discrimination Act 1975* provide:

> 10 Rights to equality before the law
>
> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

possess liquor on the same terms as other residents of Queensland[63]) would be extended to them, unless the provisions constituted a 'special measure'.

1.105 The Court went on to hold that these provisions were a 'special measure' within the meaning of section 8 of the RDA and article 1(4) of the ICERD. They considered that the fact that criminal liability was imposed on some members of the group whose enjoyment of rights was claimed to be advanced by a measure was no bar to the measure being classified as a special measure.

1.106 The members of the Court also held that consultation with and the consent of members of the group for whose benefit the measure was adopted was not a legal requirement for a measure to be classified as a special measure, though they noted that the fact of consultation might be relevant to whether a measure could properly be characterised as being for the advancement of the group concerned.

1.107 While various members of the Court made reference to a number of international sources, including various general recommendations of the UN Committee on the Elimination of Racial Discrimination and general comments of the UN Human Rights Committee, they did not find that these were authoritative or persuasive sources in support of a more limited interpretation of the special measures provisions of the ICERD, namely one which required adequate consultation with the affected group as a legal condition of being a special measure. The Court made no reference to the views of the UN Special Rapporteur referred to above[64] on the issue of whether the imposition of criminal liability on some members of the group can constitute a 'special measure'.

1.108 The Court proceeded on the basis of the judgment in *Gerhardy v Brown* and the constraints of section 10 of the RDA which the Court interpreted as having the effect of rendering all legislation which involves racially based treatment discriminatory – and thus only capable of being lawful if can be characterised as a special measure.

1.109 The relevant international law is not so constrained – a racially based distinction may be justified as a reasonable and proportionate measure in pursuit of a legitimate goal, even if it is not a special measure (special measures are just one example of a reasonable and proportionate measure adopted in pursuit of a legitimate goal).

1.110 Furthermore, the committee notes the Special Rapporteur's view – which reflects international practice and scholarly discussions of the subject – that it is not

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63 Five of the six justices held that there was a relevant human right affected by the legislation, namely the right to property. Kiefel J did not consider that any relevant right or freedom was engaged by the legislation, but nevertheless went on to consider whether the measures would in any event be characterised as special measures. She concluded that they would be [2013] HCA 28, [150]-[162], [177-188].

64 See paragraph 1.90.

appropriate to classify as a 'special measure', a measure which criminalises conduct by some members of the group to be benefited in order to promote the overall benefit of the group.

1.111 The committee is unaware of any case in which an international body has classified such a measure as a 'special measure', and the High Court judgments contain no reference to any such instance under international law. The examples given internationally and the assumption underlying international discussion of special measures is that they involve the direct conferral of benefits on members of a particular racial group which are not provided to persons who are not members of that racial group, in order to advance the enjoyment of human rights of the benefitted group.

Committee view

1.112 The committee notes that the views of the High Court in *Maloney* are authoritative for the purposes of Australian domestic law in its current form.

1.113 The committee's mandate requires it to assess measures against the ICERD and the other human rights treaties.

1.114 The committee remains of the view that the automatic invocation of the special measures provision to justify every racially based measure does not reflect the accepted analytical framework adopted under international law.

1.115 To the extent that the formulation of section 10 of the RDA contributes to the need to resort to the category of special measures to defend all racially based distinctions, the committee recommends that the provision be reviewed in light of the decision in *Maloney*, the international practice and the committee's comments.

Criteria for effective and meaningful consultation with Indigenous communities

1.116 One of the much criticised features of the NTER was the failure to consult with the communities and groups affected by the measures introduced. The committee acknowledges that in developing and introducing the *Stronger Futures* measures the government was well aware of the deficiencies of the NTER process, and went to considerable effort to consult with Indigenous communities and other stakeholders around many aspects of the proposed measures.

1.117 As will be clear from the discussion above, the question of proper consultation with Indigenous groups and other affected communities is relevant for a number of human rights. It is of particular relevance to the enjoyment by Indigenous people of the right to self-determination guaranteed by articles 1 of the ICCPR and the ICESCR. This is also recognised in the general statement in article 19 of the Declaration on the Rights of Indigenous Peoples 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.

1.118 The government noted in this regard in relation to the *Stronger Futures in the Northern Territory Bill 2011*:

> The measures in the Bill have been developed taking into account the views of the Aboriginal people expressed during the extensive consultation process following the release of the Stronger Futures in the Northern Territory Discussion Paper in June 2011. The results of these consultations were published in the Stronger Futures in the Northern Territory Report on Consultations in October 2011.[65]

1.119 The Senate Community Affairs Legislation Committee considered a number of submissions related to the question of whether the consultation had been appropriate and adequate. Both the majority report and the dissenting report of the Australian Greens expressed concern about this aspect of the measures. While noting the efforts made by the government in good faith to consult with affected communities and groups, the majority report stated:

> Nevertheless, the committee is concerned that there remains misunderstanding of the stronger futures bills in the Northern Territory and that the committee has heard complaints raised about the manner in which the consultations were undertaken. The committee notes with serious concern the degree of confusion, and frustration expressed in relation to the Stronger Futures consultations. There appears to be a discrepancy between the level of consultation undertaken, as reflected in FAHCSIA's evidence and the consultation evaluation report, and the level of understanding within communities.
>
> While the committee appreciates that the Commonwealth government made significant efforts to consult with people on the changes, and to inform them of the impact, more needs to be done to ensure that these processes are effective. The committee notes the development of the framework for engaging with Aboriginal and Torres Strait Islander Australians, but emphasises that the success of such a framework lies in commitment to implementation by agencies. It notes also the concern of the Australian Human Rights Commission that the capacity of communities has declined since the introduction of the Northern Territory Emergency Response, and that this could make effective consultation more difficult.
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> The committee agrees with the Australian Human Rights Commission that the criteria (outlined in paragraph 4.12) should guide the way that governments and agencies engage with Aboriginal and Torres Strait

65 Stronger Futures in the Northern Territory Bill 2011, explanatory memorandum, p 1; replacement revised explanatory memorandum, p 1.

> Islander communities. Consultations should also build on the cultural competency principles advocated by the Australian Human Rights Commission.[66]

1.120 The Senate Community Affairs Legislation Committee recommended that the government should, when conducting further consultation in relation to *Stronger Futures*:

- work with the framework provided by the Australian Human Rights Commission for meaningful and effective consultation processes that are culturally safe, secure and appropriate; and
- give consideration to the effective use of Land Councils in consultation processes given their knowledge and expertise in consulting appropriately with communities.[67]

1.121 Those criteria were developed by the Aboriginal and Torres Strait Islander Social Justice Commissioner [68] and may be summarised as follows:

- 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;
- 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;

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66 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, pp 62-63 [4.14-4.16] (footnotes omitted).

67 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, recommendation 10, p 63.

68 See the full discussion in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* 2010, Chapter 3, pp 58-66 and Appendix 4.

- consultation processes need to respect representative and decision-making structures; and
- governments must provide all relevant information and do so in an accessible way.[69]

Committee view

1.122 The committee considers that effective and meaningful consultation with affected Indigenous communities is an important and necessary requirement for safeguarding human rights, in particular the right to self-determination guaranteed by article 1 of each of the International Covenants on Human Rights, as well as by the UN Declaration on the Rights of Indigenous Peoples.

1.123 The committee endorses the recommendation of the Senate Community Affairs Legislation Committee that the framework articulated by the Australian Human Rights Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner for meaningful and effective consultation with Indigenous communities should be adopted by government.

69 This list is derived from the headings in the Commissioner's own formulation contained in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* 2010, Appendix 4.

Framework for analysis

1.124 Once it is shown that a legislative or other measure involves a restriction on a right, it will be necessary to justify that restriction. While the formulations of what constitutes a permissible limitation vary somewhat from right to right, the committee has consistently taken the approach that in order to justify a limitation of a right, the government must demonstrate that:

- the limitation pursues a legitimate objective;
- there is a rational connection between the measure adopted and the achievement of that objective; and
- the measure is a proportionate to that objective (which will normally include consideration of whether there are other less restrictive means of achieving the aim).[70]

1.125 Of importance to an assessment of the permissibility of a limitation is whether there are safeguards against abuse, in particular whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse impact.

1.126 The committee underlines that any restriction on fundamental rights which is stated to be necessary to achieve a legitimate purpose, must be supported by evidence and a monitoring process which will assess the correctness of the assumption that the measure will contribute to achieving the goal. The justification for such limitations should be accompanied by a reasoned (and evidence-supported) explanation of why a less restrictive alternative would not be available.

1.127 The committee notes that the government bears the onus of demonstrating that a restriction is justifiable. The committee has consistently emphasised that the mere assertion that a restriction is rational, reasonable and proportionate, without further explanation or support, will generally be insufficient to discharge that onus. The committee notes that in many cases it will be necessary for government to provide empirical or other evidence to justify a conclusion that a limitation of a right is permissible.

70 See PJCHR, *Practice Note 1*.

Measures to address alcohol abuse

Overview

1.128 The first component of the *Stronger Futures in the Northern Territory Act 2012* relates to measures to tackle alcohol abuse. The Act incorporates:[71]

- the continuation of alcohol restrictions in dry communities;
- a legislative basis for local alcohol management plans (AMPs) which allow communities to develop local solutions to reduce alcohol-related harm and become 'community managed alcohol areas', where legislated alcohol restrictions may be lifted;
- provision for the Commonwealth to request the Northern Territory government to appoint an assessor to examine the trading practices of licensed premises that may be causing alcohol-related harm to Aboriginal people;
- provision for an independent review of alcohol laws in the Northern Territory within two years; and
- provisions requiring any alcohol-related signs to be respectful to Aboriginal people and to have community input into their design and wording.

Human rights issues

1.129 The government has maintained that the goals of the alcohol measures are to achieve results that would advance the enjoyment of human rights.[72] These include:

- The right to security of the person and to protection by the State against violence or bodily harm (article 5(b) of the ICERD) and the right to liberty and security of the person (article 9 of the ICCPR). The analysis notes that there is 'clear evidence that alcohol abuse is a major factor in community and family violence in remote Northern Territory Aboriginal communities'.[73]
- The right of children to enjoy such measures of protection as are required by their status as minors (article 24 of the ICCPR) and to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment of exploitation (article 19 of the CRC), and the rights of children to the highest attainable standard of physical and mental health (article 24 of the CRC).

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71 This list is taken largely verbatim from the *Stronger Futures Assessment*, p 2.

72 *Stronger Futures Assessment*, pp 3-4.

73 *Stronger Futures Assessment*, p 3.

- The right of everyone to the highest attainable standard of physical and mental health (Article 12 of the ICESCR). The analysis notes that there 'is a well-documented link between high alcohol consumption and health risks'.[74]
- The right to a standard of living adequate for the physical, mental, spiritual, moral and social development of children (article 27 of the CRC).

1.130 In addition to seeking to promote these rights, these measures give rise to a number of human rights compatibility concerns. The key concern is whether it constitutes racial discrimination insofar as its major impact is on Aboriginal communities.

Racial discrimination

1.131 The committee notes that it is Aboriginal communities which are the subject of the tackling alcohol measures and that the restrictions fall predominantly on Indigenous citizens of those areas. It notes the argument put forward by the government that the incidence of alcohol-related harm is significantly higher among Aboriginal communities and in the Northern Territory than in other parts of the country.

1.132 Accordingly, as a measure which is based on race or whose purpose and effect is to regulate the activities of persons of a particular racial or ethnic group, it must be clearly demonstrated to be pursuing the goals set out in a reasonable and proportionate way. As a restriction on the enjoyment of rights, including the right not to have one's privacy unlawfully or arbitrarily interfered with (article 17, ICCPR), it must be shown to be a reasonable and proportionate measure with a rational connection to the achievement of the legitimate objective.

Legitimate objective

1.133 The Minister for Families, Community Services and Indigenous Affairs stated in her letter to the committee that 'the primary objective of the tackling alcohol abuse measures is to reduce alcohol related harm to Aboriginal people of the Northern Territory'.

1.134 The Minister's analysis stated that:

> The policy intention is that the tackling alcohol abuse measure is a 'special measure' within the meaning of art 1(4) of the ICERD (and s 8(1) of the *Racial Discrimination Act 1975* (RDA)).[75]

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74 *Stronger Futures Assessment*, p 3.

75 *Stronger Futures Assessment*, p 3. A similar statement is made in the explanatory memorandum to the bill that 'the Government considers that the tackling alcohol abuse measure is a special measure under the Racial Discrimination Act': Stronger Futures in the Northern Territory Bill 2011, explanatory memorandum, Notes on clauses, p 3.

1.135 It further noted that under the ICERD, 'special measures' are not considered discriminatory and referred to General Recommendation No. 32 of the UN Committee on the Elimination of Racial Discrimination dealing with special measures under the Convention.[76] The Minister's analysis goes on to state:

> This measure is required because Aboriginal people in the Northern Territory are significantly disadvantaged by alcohol abuse and its effects. In particular, children are significantly disadvantaged by the negative impact alcohol abuse has on a safe living environment.[77]

1.136 The analysis noted:

> Research evidence indicates that alcohol consumption and consequent alcohol-attributable deaths and hospitalisations for both Aboriginal and non-Aboriginal people in the Northern Territory [have] occurred at levels far higher than elsewhere in Australia and that rates for Aboriginal people are higher than for non-Aboriginal people. In the consultations it was reported that parents were spending time drinking and gambling rather than looking after children. Alcohol restrictions will assist in improving standards of living and care for children in affected communities. There is also evidence that alcohol abuse is a risk factor in child neglect in the Northern Territory.[78]

Rational connection

1.137 The Minister's analysis refers to the conclusion of the Senate Community Affairs Legislation Committee on the bills which acknowledges the extent of the problem and states that the evidence it had received indicated that the measures in the *Stronger Futures* bill 'will go some way to supporting the Northern Territory as it seeks to address alcohol-related harm…'.[79]

1.138 That committee also, however, 'concede[d] that more does need to be done, particularly in the areas of alcohol education and rehabilitation.'[80]

Proportionality

1.139 The Minister's analysis noted that there were two mechanisms in the bill to ensure that the alcohol-related measures were not continued after their objective had been achieved. These were an independent review of the operation of the

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76 *Stronger Futures Assessment*, p 3.

77 *Stronger Futures Assessment*, p 3 (footnote omitted).

78 *Stronger Futures Assessment*, p 4 (footnote omitted).

79 *Stronger Futures Assessment*, p 5.

80 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 3.36.

legislation after seven years, and an automatic sunset for the operation of the legislation after ten years.[81]

1.140 The Minister's analysis also stated:

> To the extent that the measure restricts rights, those limitations are reasonable, necessary and proportionate having regard to evidence of the very high levels of alcohol-related harm to Aboriginal people in the Northern Territory, the improvement occasioned by the restrictions so far, and support received during consultation.[82]

1.141 The Minister's analysis refers to a number of documents where the 'evidence and results of consultation and evaluation are set out in detail'. However, it does not identify specific rights which may be subject to restriction, nor does it analyse in detail how any such restrictions are a rational and proportionate means of pursuing a legitimate objective or identify other, less restrictive, means that might have been employed.

1.142 The committee has already referred to the problems in relation to consultation which may be relevant to whether a measure is considered proportionate. However, also of relevance are the issue of whether the consent of the relevant community (or a majority of it) to the imposition of alcohol restrictions has been obtained, and also whether there is any clear evidence that the measures have had an impact on reducing alcohol consumption and the harms linked to abuse of alcohol. These two are linked, as studies have shown that the systems of alcohol restriction likely to be effective are those decided on by the community rather than ones which are imposed from outside.[83]

1.143 The *Stronger Futures* measures provided for the automatic continuation of a number of alcohol-protected areas that had been established without the consent of the community. However, at the same time the package provided for transition to a situation under which alcohol management plans (AMPs) would be approved by the Minister only if they satisfied a detailed set of criteria, which included support from the community.

1.144 The committee notes that in its submission to the Senate Community Affairs Legislation Committee, the Australian Human Rights Commission stated that it supported 'the introduction of alcohol restrictions to address the impact of alcohol abuse within communities where such restrictions have community support'. The Commission not only saw these as the type of restrictions that were most likely to be

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81 *Stronger Futures Assessment*, p 4.

82 *Stronger Futures Assessment*, p 4.

83 See Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 230, 242-244.

effective, but would also not be subject to the human rights objections to which compulsory alcohol restrictions imposed from outside the community were subject:

> 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.[84]

1.145 The Commission was also of the view that 'a substantial focus of the Government should be on transitioning communities to locally developed alcohol management plans'.[85] It is not clear from the explanatory statement accompanying the Rule how many alcohol-protected areas which were established under the NTER measures (which expired in August 2012) and which were continued under the *Stronger Futures* legislation, are still in force.

1.146 In its submission to the Senate Community Affairs Legislation Committee the National Congress of Australia's First Peoples stated:

> Congress supports the proposed initiative of community developed Alcohol Management Plans in replacement of blanket imposition of alcohol measures. This measure allows communities to develop their own plan enabling community control in regards to alcohol management, however the planning process must be adequately resourced. This includes access to drug and alcohol expertise, administration support, program development and sustainability guidelines and resources for monitoring success and achieving the outcomes of the plan. Each community-based Alcohol Management Plan should be allowed to develop in reference an over-arching strategy which entails tackling issues of supply and demand, treatment and diversionary programs incorporating early intervention, education and health promotion.[86]

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84 See Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 267.

85 See Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 258.

86 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills, February 2012*, para 48.

1.147 The Congress recommended that 'communities be allowed to develop their own Alcohol Management Plan, rather than have legislation imposed upon them.'[87]

1.148 On 25 February 2013 the Minister made the *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013*.[88] The rule prescribes the minimum standard required to be met by Alcohol Management Plans (AMPs) and set out the framework for AMPs to be developed by communities under the *Stronger Futures in the Northern Territory Act 2012*.[89] These standards relate to:

- consultation and engagement;
- managing the alcohol management plan;
- alcohol management plan strategies – supply, demand and harm reduction;
- monitoring, reporting and evaluation; and
- clear geographical boundaries.[90]

1.149 The rule was accompanied by a self-contained statement of compatibility which repeated the government's position that the tackling alcohol measures were a 'special measure' designed to help overcome significant disadvantage suffered by Aboriginal people in the Northern Territory, particularly women and children, as a result of alcohol abuse and its effects.[91] The statement also maintained that the tackling alcohol abuse measure, including the development and approval of AMPs, would enhance the enjoyment of the right to security of person against violence and bodily harm. It further stated that the measure would enhance the enjoyment of the right to health and to an adequate standard of living for Aboriginal people in general and the rights of Aboriginal children in particular. The statement of compatibility notes that the rule will support the exercise of the right to self-determination under the ICERD and the ICCPR:

> The minimum standards prescribed by this rule will require comprehensive and ongoing community consultation and engagement process in the

87 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills, February 2012*, p 15.

88 F2013L00290, made under subsection 17(2) of the *Stronger Futures in the Northern Territory Act 2012*.

89 *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013*, explanatory statement, p 2.

90 *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013*, explanatory statement, p 2.

91 *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013*, statement of compatibility, pp 9-10.

> development and implementation of Alcohol Management Plans, including using interpreters and community advocates. This will ensure that everyone in a community has their say on the development of an Alcohol Management Plan, and that the plan is aimed at reducing alcohol supply, demand and harm and tailored to each community's priorities for addressing alcohol-related harm. The Minister must not approve an AMP unless satisfied that the prescribed requirements in the rules have been met (see subsection 17(3)). The prescribed minimum standards, taken together, will encourage community groups to take ownership of the way that they manage alcohol in their community and therefore likely engage and advance the right to self-determination.[92]

Stronger Futures in the Northern Territory Six-Monthly Progress Report (June 2012)

1.150 On 20 June 2013 the Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform, the Hon Jenny Macklin MP and the Minister for Indigenous Health, the Hon Warren Snowdon MP, released the first *Stronger Futures in the Northern Territory Six-Monthly Progress Report*. The report provides an overview of developments under the *Stronger Futures* legislation during the first six months of the *Stronger Futures* measures (from 1 July 2012 to 31 December 2012).[93]

1.151 The report notes that the *National Partnership Agreement on Stronger Futures in the Northern Territory Tackling Alcohol Abuse Implementation Plan* was signed on 3 June 2013 and includes the following elements: community alcohol management planning; enhanced long-term licensing and compliance and respectful signs; and legislative review.

1.152 The report further states that focus of the measure 'has been the development of a comprehensive approach to combatting alcohol abuse in the Northern Territory.'[94] The approach includes:

- a commitment of more than $75 million over 10 years for the *Stronger Futures* tackling alcohol abuse measure;
- the *Stronger Futures* in the Northern Territory legislation which maintains alcohol restrictions in remote communities, provides for stronger penalties for 'grog' running, provides for the assessment of licensed premises that may be causing substantial alcohol- related harm to the

92 *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013*, statement of compatibility, pp 11-12.

93 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), pp 36-39.

94 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), p 36.

community, and which provides for a minimum standards framework for alcohol management plans; and

- the implementation plan under the National Partnership Agreement that sets out the framework for Australian Government collaboration with the Northern Territory Government including on additional licensing inspectors, respectful signage and alcohol management plans.[95]

1.153 Under the heading 'What has been achieved?', the report notes the *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013* came into effect on 25 February 2013, and that the Australian Government:

> had allocated $23.6 million over eight years in the Alcohol Management Plan Community Fund for short-term, non-ongoing community-based projects to support harm reduction and supply and demand reduction strategies as part of an alcohol management plan, and for governance and leadership support for people involved in alcohol management planning.'[96]

1.154 The report notes that the government:

> is providing additional funding to the Northern Territory to support long-term Northern Territory Liquor Act compliance in alcohol-protected areas, community-managed alcohol areas, regional centres and supply routes through inspection and enforcement of liquor regulations in licensed premises. The additional funding will support engagement with key stakeholders on emerging issues, and maintenance of alcohol and prohibited material signs at key access points in the Northern Territory.[97]

1.155 The report referred to the employment of additional compliance officers, discussion of proposals to introduce special restrictions for major events, and the removal of '[a]ll 250 of the blue highway signs notifying alcohol and pornography restrictions . . . across the Northern Territory and [their replacement] with 49 redesigned, more respectful signs, strategically positioned on borders, major highway intersections, airstrips and barge landings.'[98]

1.156 Finally, the report notes that the *Stronger Futures in the Northern Territory Act 2012* provides for an independent review of Commonwealth and Northern

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95 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), p 36.

96 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), p 38.

97 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), p 38.

98 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), p 38.

Territory laws relating to alcohol, two years after commencement of the Act, that is, from July 2014. The review must be completed by 15 July 2015.[99]

1.157 However, the report provides no detailed data to permit any meaningful assessment of the efficacy of the measures on the abuse of alcohol in the communities affected.

Committee view

1.158 The committee acknowledges that the goal of seeking to reduce alcohol-related harm in Aboriginal communities in the Northern Territory is an important social objective, the achievement of which in whole or part would contribute to the enhanced enjoyment of a number of human rights.

1.159 The committee notes that the measure is one which is based on race or ethnic origin within the meaning of the relevant human rights treaties and therefore is required to be scrutinised carefully to ensure that a compelling case has been made for the introduction of such measures and their continuation. The committee does not consider that the measures are appropriately classified as 'special measures' within the meaning of the ICERD. Nonetheless, they may be justified if shown to be a reasonable and proportionate measure rationally connected to the achievement of this purpose.

1.160 The committee considers that alcohol management plans following compliance with the detailed criteria set out in the *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013* are likely to avoid the human rights compatibility concerns that attached to alcohol restrictions permitted under the NTER and continued under the *Stronger Futures* package.

1.161 However, the committee is concerned to know whether there are now any communities in which alcohol restrictions apply which have not followed the procedures set out in the Rule prior to approval by the Minister and, if so, what timetable is in place for those arrangements to be brought under the new framework set out in the Rule.

1.162 Finally, the committee considers it important to ensure continuing close monitoring of the impact of alcohol management plans and the operation of other alcohol restrictions.

99 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), p 39.

Income management

Overview

1.163 The *Stronger Futures* package includes a number of provisions which subject certain recipients of welfare benefits to income management.[100] A person may become subject to the income management regime where:

(a) a child protection officer of a State or Territory requires the person to be subject to the income management regime; or

(b) the secretary of the department has determined that the person is a vulnerable welfare payment recipient; or

(c) the person meets the criteria relating to disengaged youth; or

(d) the person meets the criteria relating to long-term welfare payment recipients; or

(e) the person, or the person's partner, has a child who does not meet school enrolment requirements; or

(f) the person, or the person's partner, has a child who has unsatisfactory school attendance; or

(g) the Queensland Commission requires the person to be subject to the income management regime; or

(ga) an officer or employee of a recognised State/Territory authority requires the person to be subject to the income management regime;[101] or

(h) the person voluntarily agrees to be subject to the income management regime.

1.164 If a person is subject to the income management regime, the secretary of the department (or delegate) will deduct amounts from the person's welfare payments and credit those amounts to the person's income management account (50% or more of the overall payment for most categories, 70% in certain cases).

1.165 Amounts may be deducted from this account in order to make payments for meeting the 'priority needs' of the person, the person's children, the person's partner, and any other dependants of the person. Persons subject to income

100 These arrangements are established under Part 3B of the *Social Security (Administration) Act 1999*. The simplified outline of Part 3B of the *Social Security (Administration) Act* 1999 contained in that Act provides an overview of the income management regime following the enactment of the *Stronger Futures* package.

101 This category was added by the *Stronger Futures* legislation, namely section 123UFAA of the *Social Security Amendment Act 2012*.

management use a BasicsCard to purchase permitted items and services from establishments that will accept the card.[102]

1.166 'Priority needs' are defined as:[103]

- food, non-alcoholic beverages, clothing, footwear, basic personal hygiene items, and basic household items;
- housing (including rent, home loan repayments, repairs, and maintenance), household utilities (including electricity, gas, water, sewerage, garbage collection, and fixed-line telephone), rates and land tax;
- health (including medical, nursing, dental or other health services, pharmacy items, the supply, alteration or repair of artificial teeth, of an artificial limb (or part of a limb), artificial eye or hearing aid, or of a medical or surgical appliance, the testing of eyes, the prescribing of spectacles or contact lenses, the supply of spectacles or contact lenses;
- the management of a disability; child care and development;
- education and training;
- items required for the purposes of the person's employment (including a uniform or other occupational clothing, protective footwear, and tools of trade);
- funerals;
- public transport services, where the services are used wholly or partly for purposes in connection with any of the above needs;
- the acquisition, repair, maintenance or operation of a motor vehicle, a motor cycle, or a bicycle that is used wholly or partly for purposes in connection with any of the above needs; and
- anything specified in a legislative instrument made by the Minister.

1.167 'Excluded goods' or 'excluded services' are not priority needs.[104] 'Excluded goods' are alcoholic beverages, tobacco products, pornographic material, and goods

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102 For further details of the number and types of BasicsCards issued and the number of merchants where they may be used, see Closing the Gap in the Northern Territory Monitoring Report, January – June 2012, Part Two, pp 95-96.

103 *Social Security Administration Act 1999*, section 123TH.

104 *Social Security Administration Act 1999*, subsection 123TH(2).

specified in a legislative instrument made by the Minister.[105] 'Excluded services' are gambling or a service specified in a legislative instrument made by the Minister.[106]

1.168 There are five broad categories of persons who may be subject to income management:

- persons who are 'vulnerable welfare payment recipients';[107]
- persons who fall under disengaged youth income management;[108]
- person who are long-term welfare payment recipients;[109]
- persons referred for income management by State child protection authorities where they assess that a child is at risk of neglect;[110] and
- persons who have opted in to voluntary income management.

1.169 The income management arrangements introduced by the *Stronger Futures* package involve a refinement to, but also an extension of, the operation of the income management regime.[111]

1.170 Under the original 2007 NTER measures the income management regime applied to most welfare payment recipients in prescribed Aboriginal lands and communities in the Northern Territory. These measures were redesigned in 2010 to remove direct reference to race in their application, and were targeted towards disengaged youth, long-term welfare payment recipients, and persons assessed as vulnerable; there was also the possibility for persons who do not fall within any of these categories to voluntarily opt in to the income management regime.

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105 *Social Security Administration Act 1999*, subsection 123TI (1).

106 *Social Security Administration Act 1999*, subsection 123TI (2).

107 Defined in section 123UCA of the *Social Security Administration Act 1999* and the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2012* [*Principles*]. The category may encompass persons who are 'experiencing an indicator of vulnerability'; these include financial exploitation, financial hardship, failure to undertake reasonable self-care, and homelessness or risk of homelessness: *Principles,* subsections 4(2) and 6(1).

108 *Social Security (Administration) (Specified income management Territory - Northern Territory) Specification 2012,* F2012L01613.

109 *Social Security (Administration) (Specified income management Territory - Northern Territory) Specification 2012*, F2012L01613.

110 *Social Security (Administration) (Declared child protection State - New South Wales, Queensland, South Australia and Victoria) Determination 2012*, F2012L01377.

111 This summary draws on the submission of the Australian Human Rights Commission to the Senate Community Affairs Legislation Committee. See Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 148-159.

1.171 The *Stronger Futures* measures retained the 2010 NTER measures and introduced changes, including the creation of an external referral process from recognised state or territory authorities (to be specified by legislative instrument) and the application of income management in new regions outside the Northern Territory.

1.172 The income management regime was extended to five areas outside the Northern Territory[112] with effect from 1 July 2012. These are the local government areas of Bankstown (NSW), Logan and Rockhampton (Queensland), Playford (South Australia) and Greater Shepparton (Victoria).[113] It has also been extended to certain regions in Western Australia (Perth Metropolitan and the Kimberley region); Queensland (Cape York communities);[114] Anangu Pitjantjatjara Yankunytjatjara (APY) Lands (South Australia)[115] and Ngaanyatjarra Lands (NG Lands) and Laverton Shire in Western Australia.[116]

The cost of income management

1.173 The Department of Families, Community Services and Indigenous Affairs (FaHCSIA) and the Department of Human Services (DHS) have estimated that income management would apply to 20,000 people in the Northern Territory and that the estimated costs for administration of income management were:

- remote areas—between $6,600 and $7,900 per person, per annum;
- rural areas—between $3,900 and $4,900 per person, per annum; and
- urban areas—between $2,400 and $2,800 per person, per annum.[117]

1.174 DHS estimated that income management service delivery in the Northern Territory cost $90.8 million in 2010-11 and $82.0 million in 2011-12, and estimated the costs to be $75.7 million in 2012-13 and $76.2 million in 2013-14.[118] The

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112 For its application to the Northern Territory, see *Social Security (Administration) (Recognised State or Territory - Northern Territory) Determination 2012*, F2012L01979.

113 *Social Security (Administration) (Vulnerable income management areas) Specification 2012*, F2012L01614; *Social Security (Administration) (Declared income management areas) Determination 2012*, F2012L01371.

114 Social Security (Administration) – Queensland Commission (Family Responsibilities Commission) Specification 2012.

115 Social Security (Administration) (Declared income management area - Anangu Pitjantjatjara Yankunytjatjara lands) Determination 2012 F2012L01943.

116 Social Security (Administration) (Declared income management areas –Ngaanyatjarra Lands and Laverton) Determination 2013, F2013L00652

117 Australian National Audit Office, *Administration of New Income Management in the Northern Territory*, Report No. 19, tabled 31 January 2013, p 94.

118 Australian National Audit Office, *Administration of New Income Management in the Northern Territory*, Report No. 19, tabled 31 January 2013, p 95.

Australian government committed $117.5 million over five years to administer income management in the five additional areas to which income management was extended from July 2012.[119]

Human rights issues

1.175 The government has stated that the goals of income management are to achieve results that would advance the enjoyment of a number of rights. These include the rights to an adequate standard of living, to social security, and to health, and the rights of children.

1.176 Notwithstanding that the measures seek the advancement of human rights, the income management regime gives rise to a number of human rights compatibility issues. These include whether the income management regime in its various manifestations is consistent with the right to be free from discrimination on the ground of race or ethnic origin, the right to be free from discrimination on the ground of sex, the right to equal protection of the law, the right to social security, the right to an adequate standard of living, and the right to privacy.

Racial discrimination

1.177 The government has maintained that the income management regime does not involve racial discrimination. This position appears to involve two arguments. First, that because the income management regime makes no reference to race in the criteria for those who are liable to be subjected to compulsory income management or who may elect voluntary income management, the measures do not involve differential treatment that is racially based. Second, the government maintains that in any event income management is a reasonable and proportionate means of ensuring the well-being of vulnerable individuals and families. As the Minister's analysis put it:

> Income management, including as amended by this Bill, is consistent with the obligation of the State to undertake not to engage in any act or practice of 'racial discrimination' against persons, groups of persons or institutions (art 2(1)(a) of the ICERD).
>
> Income management applies in the same way to any person receiving a social security payment in a designated income management area regardless of race.[120]

1.178 Income management does not apply in every part of Australia, although its operation is being expanded, and the legislation is capable of national application. The areas into which the measure has been expanded from 1 July 2012 were chosen having regard to a range of objective, non-race-based criteria, including

119 See FaHCSIA, *Building Australia's Future Workforce - Targeted locations income management*, Budget Factsheet, Budget 2011-12, June 2011.

120 *Social Security Assessment*, p 3.

unemployment levels, youth unemployment, skills gaps, the number of people receiving welfare payments, and the length of time people have been on income support payments.[121]

1.179 The government has stated that the basis on which income management was been extended to the five new communities is as follows:

> As part of the 2011-12 Budget, the Australian Government is implementing the Building Australia's Future Workforce package. This includes introducing new measures to promote long term economic participation in various of the nation's most disadvantaged communities. The measures involve extra responsibilities and more assistance for teenage parents on income support, jobless families and other vulnerable groups, to support children and families and help parents enter or return to the workforce.[122]

1.180 In areas where income management applies or will apply, it is and will be applied to income support recipients on the basis of non race-based criteria related to indicators of risk for the welfare recipient or to children in their care; following assessment by a delegate; or following assessment by a state or territory body exercising a discretionary power to apply income management. It can also be applied at the request of an income support recipient (voluntary income management).[123]

1.181 In assessing this argument it may be recalled that the original NTER measures which preceded the *Stronger Futures* version of the measures, were originally designed to address the situation in Aboriginal communities in the Northern Territory, and that the overall *Stronger Futures* framework has as its primary goal the alleviation of disadvantage in those communities.

1.182 The government recognises that a significant proportion of people on income management, particularly in the Northern Territory, are Indigenous. As the Minister notes, these measures apply overwhelmingly to Aboriginal people, even though their coverage is not expressly stated to be based on race and notwithstanding that a

121 *Social Security Assessment*, p 3.

122 *Social Security (Administration) (Declared voluntary income management areas — New South Wales, Queensland, South Australia and Victoria) Determination 2012*, explanatory statement, p 1.

123 *Social Security Assessment*, p 4.

number of additional areas have been added to the income management regime.[124] This reflects the fact that the proportion of Indigenous people in the Northern Territory on income support payments is high; and also reflects the fact that of the 4,096 people who chose voluntary income management in the Northern Territory, more than 98 per cent are Indigenous.[125]

1.183 The Australian Human Rights Commission has raised the question of whether the nature of the communities to which income management has been extended from July 2012 might raise issues of indirect discrimination on the basis of racial or ethnic origin:

> 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). 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. The Commission further understands that the communities of Shepparton and Logan have experienced very high migrant settlement in recent years, particularly humanitarian settlement.
>
> 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.[126]

1.184 It is clear that while the measures have been extended to communities that are not predominantly Aboriginal, the measures still apply overwhelmingly to such

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124 In October 2011 there were 16,393 people in the Northern Territory who were subject to income management. The majority were on compulsory income management (11,960), while there were 4,190 on voluntary income management, 198 persons on vulnerable income management and 45 were subject to child protection income management. 91 per cent of those subject to income management were Indigenous, and almost all of those on voluntary or subject to vulnerable or children protection income management were Indigenous. 61 per cent of the population subject to income management were women. J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* [*Evaluating New Income Management*], July 2012 (Social Policy Research Centre, UNSW, Australian National University and Australian Institute of Family Studies), p xvii.

125 *Social Security Assessment*, p 3.

126 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 173-174.

Aboriginal communities.[127] Accordingly, this means that they will fall within the definition of racial discrimination in article 1 of the ICERD, which refers to measures as racially discriminatory if they have 'the purpose or effect' of restricting the enjoyment of human rights. As such, in order to be non-discriminatory they will need to be shown to be based on objective and reasonable grounds and is a proportionate measure in pursuit of a legitimate objective. The analysis conducted under this test is essentially similar to that considered when assessing whether a restriction on a right is permissible.

Right to social security, the right to an adequate standard of living and right not to have one's privacy, family and home unlawfully or arbitrarily interfered with

1.185 The income management regime limits the right to social security, the right to an adequate standard of living and the right to privacy. Accordingly, the burden lies on the government to justify that such limitations are justifiable, namely that they are a rational and proportionate means of pursuing legitimate objectives.

Legitimate objective

1.186 The rationale for the income management regime has been set out in a number of explanatory memoranda and statements accompanying the *Stronger Futures* legislative measures. For example, the statement of compatibility relating to one of the most recent legislative instruments made under the *Stronger Futures* legislation states that the key objectives of income management are to:

- reduce immediate hardship and deprivation by directing welfare payments to the priority needs of recipients, their partner, children and any other dependants,
- help affected welfare payment recipients to budget so that they can meet their priority needs,
- reduce the amount of discretionary income available for alcohol, gambling, tobacco and pornography,
- reduce the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments, and
- encourage socially responsible behaviour, particularly in the care and education of children.[128]

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127 In its submission to the Senate Community Affairs Legislation Committee the Australian Human Rights Commission stated that, according to government statistics, as of March 2011 94.2% of people on income management in the Northern Territory were Indigenous, compared with an Indigenous population of 30% of the overall population of the Northern Territory. Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 172.

128 *Social Security (Administration) (Declared income management areas —Ngaanyatjarra Lands and Laverton) Determination 2013*, statement of compatibility, p 5.

1.187 As the Minister's analysis noted:

> The policy objective of income management is to support vulnerable individuals and families by helping to ensure that a portion of a person's income support and family payments is spent on essential needs, and limiting expenditure on excluded items, including alcohol, tobacco, pornography and gambling goods and activities.[129]

1.188 The Minister also states that, in addition to engaging the right to social security, income management advances the right to housing 'by helping to ensure that a portion of a person's income support payments is spent on priorities such as housing (rent)' and the rights of children, including the right to benefit from social security (article 12 of the ICESCR), the right to the highest attainable standard of health (article 24 of the CRC) and the right to an adequate standard of living (article 27 of the CRC).[130] The Minister summarises the goal and intended impact of such measures in relation to children as follows:

> The central purpose of income management is to ensure that a portion of income support payments are used to cover minimum basic essential goods and services, including food, rent and utilities. This improves living conditions for the children of income support recipients subject to income management.[131]

Rational connection

1.189 There is a range of evidence available on the effects, positive and negative, of income management. The Senate Community Affairs Legislation Committee received a significant number of submissions and received evidence on the impact of income management.[132] It concluded:

> The committee takes the view that public opinion on the effectiveness and public benefit of income management remains divided. The committee is generally supportive of initiatives that aim to empower and protect vulnerable Australians but would be concerned if the measures prevent those in circumstances of distress from improving their situation.[133]

1.190 The Minister's analysis states that 'substantial benefits can be achieved for individuals through income management, including ensuring that sufficient food is

129 *Social Security Assessment*, p 3.

130 *Social Security Assessment*, p 3.

131 *Social Security Assessment*, p 3.

132 See Senate Community Affairs Legislation Committee, *Stronger Futures Report*, paras 3.104-3.114.

133 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, paras 3.115-3.117.

available to recipients and dependents, stable and adequate housing is secured, access to essential utilities is maintained and harassment is minimised.'[134]

1.191 The Minister's analysis refers to evaluations in the Northern Territory and Western Australia that 'indicate that income management is having a positive effect on the lives of many individuals', and states that many participants in a Western Australian evaluation believed that it had had a positive impact on the well-being of individuals, children and families and that in the Northern Territory, 'there is evidence that income management is achieving positive outcomes, particularly for children.'[135]

1.192 The analysis also refers to the evidence and statements put before the Senate Community Affairs Legislation Committee, noting that some statements 'were very supportive, others not', and that that committee 'took the view that public opinion on the effectiveness and public benefit of income management remains divided'.[136]

1.193 The dissenting report of the Australian Greens noted that income management was not discussed during the *Stronger Futures* consultation, and that communities were not consulted on the five new trial sites where income management was introduced.[137] The dissenting report referred to 'numerous submissions [which] pointed to the lack of evidence that income management leads to better outcomes or improved ability to budget'[138] and to many submissions which 'suggest that compulsory income management can actually disempower the people subject to it'.[139]

1.194 The Australian Greens stated their belief that 'a form of income management may be useful for some people in managing their finances but it will not be effective unless people enter into it voluntarily and the processes involved are transparent and clear.'[140]

1.195 The findings of an evaluation commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs published in July 2012 and relating to income management in the Northern Territory up until October 2011

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134 *Social Security Assessment*, p 3 (footnote omitted).

135 *Social Security Assessment*, p 4 (footnote omitted)

136 *Social Security Assessment*, p 4 (footnote omitted).

137 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 1.92 (Dissenting Report).

138 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 1.94 (Dissenting Report).

139 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 1.96 (Dissenting Report).

140 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 1.98 (Dissenting Report).

show diverse impacts across the different schemes, both in how those subject to income management viewed and experienced the process and also in the effect it had an impact on their lives so far as ensuring that priority needs of themselves and their families were concerned.

1.196 The FaHCSIA-commissioned study found that:

> Indigenous people subject to income management report strong perceptions of improvements in the wellbeing of children in their community, especially those living in NTER prescribed areas.

1.197 The study, however, was cautious about this finding:

> [S]uch perceptions do not necessarily line up with objective data where it is possible to test this. Caution is needed in attributing these perceived improvements specifically to income management, given the other major policy changes associated with the NTER and the substantial additional resources spent in the Northern Territory in other policy areas since the NTER commenced.

1.198 The study noted that:

> Many people subject to income management reported that it makes little practical difference to their lives.
>
> For many there is a strong sense of having been treated unfairly and being disempowered. Only a quarter of people subject to income management who were surveyed said that they never felt a sense of unfairness.
>
> Generally non-Indigenous people subject to income management are more negative about the program than Indigenous people, and a higher proportion believe that income management has made no difference or has been harmful to them and their families.

1.199 The study concluded:

> The evidence gathered to date for this evaluation suggests that NIM has had a diverse set of impacts. For some it has been positive, for others negative and for others it has had little impact. Taken as a whole there is not strong evidence that, at this stage, the program has had a major impact on outcomes overall. Although many individuals report some gains, others report more negative effects.
>
> There is little evidence to date that income management is resulting in widespread behaviour change, either with respect to building an ability to effectively manage money or in building 'socially responsible behaviour' beyond the direct impact of limiting the amount that can be spent on some items. As such, the early indications are that income management

> operates more as a control or protective mechanism than as an intervention which increases capabilities.[141]

1.200 In this context the committee notes the comments dated 9 March 2012 sent to the government by the UN Special Rapporteurs on Extreme Poverty and Human Rights and Rights of Indigenous Peoples in relation to the provision of social security benefits under the ICESCR. They requested that the government:

> Please provide evidence that rights-limiting provisions of the Stronger Futures Bills (including the compulsory alcohol management and income management schemes) will contribute to achieving the objects of the bills, including the object of the Stronger Futures Bill to 'support Aboriginal people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy'. Is your Excellency's Government of the view that these measures are the least restrictive means of achieving these objects? [142]

1.201 The government replied to this communication on 20 July 2012.[143] The government's response provided an overview of the purpose of the legislation, the processes of consultation (including the inquiry by the Senate Community Affairs Legislation Committee) and the funding allocations made for the purpose of the *Stronger Futures* package. The letter noted that the government's intention that all the *Stronger Futures* measures would be consistent with the RDA, and attached the detailed analysis of the human rights compatibility of the *Stronger Futures* legislation that accompanied the Minister's letter of 27 June 2012 to this committee.[144]

Proportionality

1.202 The government has maintained, in the Minister's analysis and in the explanatory statements accompanying a number of the legislative instruments adopted to implement the *Stronger Futures* measures:

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141 J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* [*Evaluating New Income Management*], July 2012 (Social Policy Research Centre, UNSW, Australian National University and Australian Institute of Family Studies), pp xviii-xix.

142 Joint letter from the Special Rapporteur on extreme poverty and human rights, Maria Magdalena Sepúlveda Carmona, and the Special Rapporteur on the rights of indigenous peoples, James Anaya to the Government of Australia, 9 March 2012.

143 Letter from Mr Paul Wilson, Australian Permanent Mission, Geneva, to Ms Maria Magdalena Sepúlveda Carmona, Special Rapporteur on extreme poverty and human rights, and Mr James Anaya, Special Rapporteur on the rights of indigenous peoples, 20 July 2012.

144 *Assessment of Policy Objectives with Human Rights: Stronger Futures in the Northern Territory Bill 2012 and Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) 2012* and *Assessment of Policy Objectives with Human Rights: Social Security Legislation Amendment Bill 2011*, attachments to Letter from the Hon Jenny Macklin MP to the Hon Harry Jenkins MP, 27 June 2012.

> To the extent that [income management] may limit human rights those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of reducing immediate hardship and deprivation, encouraging socially responsible behaviour, particularly in the care and education of children, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[145]

1.203 Stakeholders, however, have identified various concerns with the regime, particularly in relation to its compulsory aspects. In its submission to the Community Affairs Legislation Committee the Congress argued:

> Congress remains adamant that the mandatory system must be replaced by a voluntary system with provision for case by case income management where warranted. Although income management has been extended to include all Australians, the majority of those affected on welfare are Aboriginal people and hence the measure continues to discriminate against Aboriginal people.[146]

1.204 Congress recommended that the compulsory income management scheme be replaced with a voluntary scheme.[147]

1.205 Similarly, the evaluation report commissioned by FaHCSIA stated:

> Compulsory Income Management is a blanket measure which is applied to a large number of people who, according to the analysis of survey data, interviews and other consultations, are able to manage their money and who report that they do not have problems related to alcohol, drugs or gambling.
>
> Compulsory Income Management has given rise to considerable feelings of disempowerment and unfairness.[148]

1.206 In relation to voluntary income management the study found:

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145 *Social Security (Administration) (Declared voluntary income management areas — New South Wales, Queensland, South Australia and Victoria) Determination 2012*, explanatory statement, p 5.

146 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills*, February 2012, para 55.

147 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills, February 2012*, p 17.

148 J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* [*Evaluating New Income Management*], July 2012 (Social Policy Research Centre, UNSW, Australian National University and Australian Institute of Family Studies), p xix.

> People on Voluntary Income Management are more positive about the measure and its effects than people subject to Compulsory Income Management.[149]

1.207 The study concluded:

> The evidence indicates that the program may make a contribution to improving the wellbeing for some, particularly those who have difficulties in managing their finances or are subject to financial harassment. Voluntary Income Management in particular is viewed positively by people to whom it is applied, and by other stakeholders.
>
> For Indigenous people on Voluntary Income Management, 59 per cent felt that income management had made things better for them and 47 per cent would recommend it to others. For Indigenous people subject to Compulsory Income Management 36 per cent felt that income management had made things better for them and 33 per cent would recommend it to others. Amongst non-Indigenous people subject to Compulsory Income Management, 20 per cent felt that income management had made things better and 32 per cent would recommend it to others.
>
> Many people subject to Compulsory Income Management appear not to demonstrate the behaviour problems or financial difficulties which the measure was intended to remedy.[150]

1.208 The study stated:

> Income management incurs costs to the individuals, who in many cases find it embarrassing and humiliating and in some cases de-motivating. There are very mixed findings as to the extent to which being subject to income management has led to greater control over money.[151]

1.209 The study also noted that Indigenous people were likely to spend extended periods on income management with few opportunities to exit the scheme once they were put on it:

> At this stage the introduction of NIM has not had an impact on the time people spend on income support.
>
> The evidence at this stage is that the majority of Indigenous people, in particular, subject to income management will remain income managed for an extended period of time with the rate of exit from income management for most subgroups being quite low. Around half of the non-

149 *Evaluating New Income Management*, p xx.

150 *Evaluating New Income Management*, p xxiii.

151 *Evaluating New Income Management*, p xxiii.

> Indigenous people subject to income management however exit within a year.[152]

1.210 Various concerns have also been expressed about the use of the BasicsCard. For example, the Senate Community Affairs Legislation Committee stated:

> The committee is gravely concerned by the anecdotal evidence it received which suggested people using the BasicsCard are encountering discrimination. The committee views such practices as completely inappropriate and considers cases of discrimination should be addressed.
>
> Ongoing work is needed with the community, Centrelink, elders and vendors, to ensure an understanding of the BasicsCard, including education for vendors that will ensure there is never discriminatory or stigmatising treatment.[153]

1.211 The FaHCSIA-commissioned study found:

> It is difficult in the evaluation to fully differentiate views about the BasicsCard from income management itself. However, the card is seen positively by some and negatively by others. The positive views seem driven by the safety the card can provide and the absence of costs (other than phone calls to check balances) on its use.
>
> [Some value] the BasicsCard but [resent] the associated loss of autonomy.
>
> For others, being subject to income management is experienced as restrictive and frustrating, making their lives more difficult and complicated and in some cases limiting their ability to fully engage in community life.[154]

1.212 Summarising the findings, the study concluded:

> At this stage of the evaluation, the evidence highlights a diversity of outcomes from NIM which are positive for some and negative for others. This raises two central questions: whether, to the extent that there are gains under the existing arrangements, the gains outweigh the costs; and whether or not alternative arrangements, including a more targeted approach and greater attention to the provision of higher quality services would permit the gains to be achieved without the negative outcomes.
>
> Our view is that these findings point towards the conclusion that income management may assist a proportion of those on income support to cope with particular issues they face. At the same time the program has been applied to many who do not believe that they need income management and for whom there is no evidence that they have a need for, or benefit

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152 *Evaluating New Income Management*, p xxiv.

153 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, paras 3.116-3.117.

154 *Evaluating New Income Management*, p xviii.

> from income management. Income management has led to widespread feelings of unfairness and disempowerment.
>
> The low numbers of people who have engaged with the incentives (matched savings and exemptions), and other support services which are intended to complement income management, may have mitigated the effectiveness of the program as it is the combination of all three components which is expected to improve wellbeing.[155]

Committee view

1.213 The committee considers that even though the income management regime is formulated without explicit reference to the race or ethnic origin of the potential participants, the history of the measure and the fact that it appears to apply overwhelmingly to Indigenous Australians suggest that it should be characterised as a measure that has the purpose or effect of limiting the rights of person of a particular race or ethnic origin within the meaning of article 1 of the ICERD. Accordingly, it must be closely scrutinised and the onus is on the government to demonstrate clearly that it pursues a legitimate objective and is based on objective and reasonable criteria and is a proportionate measure to achieve the legitimate objective.

1.214 The committee accepts that the goals pursued by the income management measures are important and legitimate goals and are intended to promote the enjoyment of various aspects of human rights as articulated in the Minister's analysis and the explanatory statements accompanying the legislative instruments.

1.215 The committee, however, considers that the income management regime involves a significant intrusion into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments.

1.216 The committee considers that the imposition of conditions restricting the use that may be made of such payments enforced through the BasicsCard system represents both a restriction on the right to social security and the right not to have one's privacy and family life interfered with unlawfully or arbitrarily.

1.217 Given the disparate impact on Indigenous people, the committee considers that the measures may also be viewed as racially based differential treatment within the meaning of article 1 of the ICERD. In light of the fact that there is some evidence to suggest that the majority of persons subject to income management are women, concerns may also arise as to the consistency of the measure with guarantees against non-discrimination on the basis of sex.

1.218 The committee notes that there appears to have been consultation with only some of the groups affected by decisions to extend the income management regime.

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155 *Evaluating New Income Management*, pp xxiii-xxiv.

1.219 The committee notes that the evidence relating to the impact of income management is not comprehensive or unequivocal, and largely concerns the 2007 NTER and the later 2010 measures, although it recognises that a number of these measures or aspects of them have been carried over into the *Stronger Futures* measures.

1.220 The committee notes that the available evidence suggests that the impact of income management varies significantly among different groups. In particular it appears that there is significant evidence to suggest that voluntary income management has been viewed with favour by those who have agreed to be subject to it and that it has had beneficial effects, while compulsory income management has led in many people to a sense of having been treated unfairly and being disempowered as a result, while others have found it beneficial.

1.221 The committee notes also that the major evaluation commissioned by FaHCSIA concluded that, while there is some evidence that compulsory income management has had some beneficial impacts, there is also evidence of equally significant adverse impacts. More importantly, there appears to be little evidence to support claims that compulsory income management has brought about behavioural changes on a significant scale, and the evidence also suggests that many people subject to compulsory income management 'appear not to demonstrate the behaviour problems or financial difficulties which the measure was intended to remedy'.[156]

1.222 The committee notes in particular the finding of the FaHCSIA-commissioned evaluation that 'while income management may assist a proportion of those on income support to cope with particular issues they face', '[a]t the same time the program has been applied to many who do not believe they need income management and for whom there is no evidence that they have a need for, or benefit from income management' and that income management 'has led to widespread feelings of unfairness and disempowerment.'[157]

1.223 The committee recognises the complex nature of the income management regime and the circumstances to which it applies, as well as the difficulty of evaluating the impact of such schemes. However, the committee considers that, in light of the evidence that is available to the committee and notwithstanding that the income management regime pursue legitimate goals, the government has not yet clearly demonstrated that:

- the income management regime to the extent it may be viewed as having a differential impact based on race, is a reasonable and proportionate measure and therefore not discriminatory; or

156 *Evaluating New Income Management*, p xxiii.

157 *Evaluating New Income Management*, p xxiv.

- the income management regime is a justifiable limitation on the rights to social security and the right to privacy and family.

School Enrolment and Attendance through Welfare Reform Measure (SEAM)

Overview

1.224 The Social Security Legislation Amendment Act 2012 made a number of amendments to the existing *Improving School Enrolment and Attendance through Welfare Reform Measure* (SEAM).[158]

1.225 The amendments set out a series of steps for responding to unsatisfactory non-attendance by children at school.[159]

1.226 These provisions apply to persons who are receiving a 'schooling requirement payment'[160] where such a person's child is enrolled at a school in a state or territory and a person responsible for the operation of the school gives the Secretary written notice that the child is failing to attend school as required by the law of that state or territory.[161]

1.227 The Secretary or school principal may issue a 'conference notice' requiring the person to attend a conference with a specified person at a specified place and time to discuss the child's school attendance including the possibility of a school attendance plan.[162]

1.228 If a 'schooling requirement person' fails to attend a conference, fails to enter into or amend a school attendance plan or fails to comply with a school attendance

158 See Schedule 2 of the *Social Security Legislation Amendment Act 2012*. The SEAM was originally implemented by amendments made in 2008 to the *Social Security (Administration) Act* 1999 by the *Social Security and Veterans' Entitlement Legislation Amendment (Schooling Requirements) Act 2008*. The measures appear in Part 3C of the *Social Security (Administration) Act 1999.*

159 The *Social Security Legislation Amendment Act 2012* inserted a new Division 3A into Part 3C of the *Social Security (Administration) Act 1999*, section 124NA.

160 Section 124D of the *Social Security (Administration) Act 1999*, defines a 'schooling requirement payment' to mean a social security benefit, a social security pension, or certain payments under the *Veterans' Entitlements Act 1986*. SEAM 'does not apply to family payments such as Family Tax Benefit and Child Care Benefit, or to Carer's Allowance and Mobility Allowance.' *Social Security Assessment*, p 6.

161 *Social Security (Administration) Act 1999*, section 124NA.

162 *Social Security (Administration) Act 1999*, section 124NB. Subsection 124NC(7) provides that a school attendance plan 'must contain requirements, that the schooling requirement person is required to comply with, that the notifier considers appropriate for the purpose of ensuring improved school attendance of the one or more children covered by the plan.'

plan, then a schooling requirement payment will not be payable to the person, unless certain conditions are satisfied.[163]

1.229 The possibility of this sanction is in addition to existing provisions which provide for the suspension of payment in cases in which a person has failed to comply with an attendance notice issued in relation to a child who is failing to attend school in accordance with the law in the state or territory concerned.[164]

1.230 Where a payment has been suspended for a total period of 13 weeks or more, the Secretary must determine that the payment is to be suspended or cancelled; payment may be suspended more than once.[165]

1.231 The Secretary may also reconsider a decision to suspend payment either on his or her own initiative or on application by the person affected, in cases where the person is complying with the attendance plan. Upon reconsideration the Secretary may order resumption of the payment, as well as the payment of arrears.[166]

1.232 SEAM was trialled in six locations in the Northern Territory (where it continues to operate) and six locations in Queensland (2009-2012), with additional 16 locations in the Northern Territory added in 2012.[167]

Stronger Futures in the Northern Territory Six-Monthly Progress Report (June 2012)

1.233 The first *Stronger Futures in the Northern Territory Six-Monthly Progress Report* released in June 2013 provides only general information about the implementation of the SEAM. The report describes developments in relation to SEAM during the first six months of the *Stronger Futures* measures (from 1 July 2012 to 31 December 2012).[168] The report describes a number of aspects of the application of the phased roll-out of the SEAM, including consultations and information sessions with communities. However, it does not contain any detailed description of the operation of the SEAM in practice or provide any empirical data that permits assessment of the impact of the measures or of any contribution that

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163 *Social Security (Administration) Act 1999*, subsection 124NE(1). The payment will not be suspended if the Secretary 'is satisfied that there are special circumstances applying as at that day, as determined in accordance with the schooling requirement determination (if any), that justify the failure to comply'. Subsection 124NE(2).

164 *Social Security (Administration) Act 1999,* sections 124K, 124L and 124M.

165 *Social Security (Administration) Act 1999,* subsections 124NF(2) and (3).

166 *Social Security (Administration) Act 1999,* section 124NG.

167 Senate Committee on Community Affairs Legislation, Report, para 3.135; *Social Security Assessment*, p 5.

168 Australian Government, *Stronger Futures in the Northern Territory, Six-Monthly Progress Report 1 July 2012 to 31 December 2012* (June 2013), pp 24-25.

the threat of suspension or cancellation of social security payments may have made to any improvements in school attendance rates.

Human rights issues

1.234 The government has maintained that the goals of SEAM are to achieve results that would advance the enjoyment of human rights. These include in particular the right of children to education guaranteed by article 28 of the CRC and article 13 of the ICESCR.[169] Article 28(1)(e) of the CRC requires States parties to take measures 'to encourage regular attendance at schools and the reduction of drop-out rates'.

1.235 In addition to seeking to promote the right to education, SEAM also gives rise to a number of human rights compatibility concerns. The measure gives rise to concern about whether it constitutes racial discrimination insofar as its major impact is on Indigenous communities. The measures also potentially limit the right to social security and to an adequate standard of living guaranteed by articles 9 and 11 of the ICESCR respectively, and the right to privacy which is guaranteed by article 17 of the ICCPR.

Racial discrimination

1.236 The government has maintained that SEAM 'is consistent with the obligation of the State to undertake not to engage in any act or practice of "racial discrimination" against persons, groups of persons or institutions' as required by article 2(1)(a) of the ICERD. This position appears to reflect two arguments. First, that because SEAM makes no reference to race in the criteria which may trigger the suspension of benefits,[170] the measures do not involve differential treatment that is racially based. Second, that the criteria are objective and reasonable and that to the extent that they apply predominantly to Indigenous people, that this reflects the recognised gap in educational attainment between Indigenous and non-Indigenous Australians, and the fact that the Northern Territory has the lowest school attendance rates in Australia.

1.237 As the Minister stated:

> The Australian Government recognises that a significant proportion of people on income management, particularly in the Northern Territory, are Indigenous. This reflects the fact that the proportion of Indigenous people in the Northern Territory on income support payments is high; and also reflects the fact that of the 4,096 people who chose voluntary income management in the Northern Territory, more than 98 per cent are Indigenous.[171]

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169 *Social Security Assessment*, p 7.

170 'SEAM applies in the same way to any person receiving relevant income support payments in a designated SEAM area, regardless of race.' *Social Security Assessment*, p 6.

171 *Social Security Assessment*, p 3.

1.238 It is overwhelmingly Aboriginal communities who have been affected by SEAM, even though the legislative criteria for the application of the measure are not explicitly based on race but on other neutral criteria. As the Minister notes, the additional Northern Territory sites selected for a phased roll-out from July 2012 had a significant Aboriginal population.[172]

1.239 Even though the measures are not expressly based on race, they still appear to apply overwhelmingly to such Aboriginal communities.[173] Accordingly, as the committee has noted in its discussion relating to the income management regime above, this means that they will potentially fall within the definition of racial discrimination in article 1 of the ICERD which refers to measures as racially discriminatory because they have 'the purpose or effect' of restricting the enjoyment of human rights. As such, in order to be non-discriminatory they will need to be shown to be based on objective and reasonable grounds and be a proportionate measure in pursuit of a legitimate objective. The analysis conducted under this test is essentially similar to that considered when assessing whether a limitation on a right is permissible.

Right to social security, right to an adequate standard of living and right to privacy

1.240 The SEAM involves an intervention into the family life of persons by requiring a parent or carer to adopt particular conduct, subjecting the person to a series of regulatory measures to encourage compliance, and providing for a sanction if the person fails to conform to the conduct stipulated. Insofar as the sanction of suspension or cancellation of benefit is concerned, that may also have an impact on the right to family life to the extent that it limits the economic resources that may be available to support members of the family, including family members who have no connection with any failure to take steps to address the unsatisfactory school attendance.

1.241 Limiting the payment of social security benefits when the conditions provided for under the legislation are satisfied will also potentially limit the right to an adequate standard of living.

1.242 The government states that SEAM is consistent with the right to social security, noting that 'SEAM does not make people ineligible for welfare payments, or reduce the amount paid, but places a condition on the receipt of payment.'[174]

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172 *Social Security Assessment*, p 7.

173 In its submission to the Senate Community Affairs Legislation Committee the Australian Human Rights Commission stated that, according to government statistics, as of March 2011 94.2% of people on income management in the Northern Territory were Indigenous, compared with an Indigenous population of 30% of the overall population of the Northern Territory. Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 172.

174 *Social Security Assessment*, p 6.

However, this is sufficient to constitute a limitation on the enjoyment of the right to social security.

1.243 Accordingly, the burden lies on the government to justify that such limitations are permissible, namely that they are rational, reasonable and proportionate means of pursuing a legitimate objective.

Legitimate objective

1.244 The government's justification for SEAM was set out in the analysis accompanying the letter of 28 June 2012 from the Minister for Families, Community Services and Indigenous Affairs to the chair of the committee.[175] That analysis stated:

> The policy objective of SEAM is to improve school enrolment and attendance in areas where school attendance and enrolment is very low.
>
> SEAM places certain conditions on income support payments received by parents to ensure that they receive the support they need to fulfil their basic responsibilities in relation to their children's schooling.[176]

1.245 In submissions made to the Senate Community Affairs Legislation Committee there was general agreement about the importance of improving access to and the quality of education for Aboriginal children in areas where there were low levels of school attendance.[177]

Rational connection

1.246 There is debate over whether SEAM has had a significant impact on school attendance. The Community Affairs Legislation Committee received advice from FaHCSIA and the Department of Education, Employment and Workplace Relations as to the positive outcomes of SEAM, drawing on the evaluations conducted of the operation of SEAM from 2007 to 2009 and in 2010.[178] FaHCSIA advised:

> an early 2009 evaluation report relating to SEAM's operation in the Northern Territory was released in mid-December 2011. A subsequent 2010 evaluation report has also been released and a copy has been provided to the committee. The 2010 report showed that SEAM is having a positive effect on both enrolment and attendance. From 2009 to 2010, students who were involved in the SEAM trial improved their attendance rates more than other children attending the same schools. We understand that this improvement was mostly a result of a decrease in unauthorised absences, those directly targeted by SEAM. Social worker contact provided by Centrelink was also shown to be vital in helping to improve the absence rates of referred students during the compliance

175 *Social Security Assessment*, p 2.

176 *Social Security Assessment*, p 5.

177 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 3.136.

178 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 3.149.

> period. This is particularly the case for students with higher absence rates, where assistance was provided to address attendance issues, helping to limit a relapse in absence rates.
>
> These evaluations also outlined a number of areas in which SEAM could be improved. The government has acted on these recommendations. Accordingly, the new model of SEAM proposes as part of the Stronger Futures package has key differences from the existing SEAM model.[179]

1.247 However, the Australian Human Rights Commission commented in its submission to the Community Affairs Legislation Committee:

> 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.[180]

1.248 The Commission referred to the evaluation of the SEAM trial for 2007−2009 which had 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'.[181] The Commission also quoted the finding of the *SEAM Evaluation Report* 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.[182]

1.249 In relation to the further evaluation of SEAM, covering 2010 and released in 2012, the Commission noted:

> 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

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179 Senate Community Affairs Legislation Committee, *Stronger Futures Report,* para 3.149.

180 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 192.

181 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 192.

182 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 193.

> compliance period is common, with an associated increase in unauthorised absences.'[183]

1.250 The Australian Human Rights Commission further noted:

> 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.[184]

1.251 The National Congress of Australia's First Peoples also questioned the underlying rationality of the measures:

> Programs that link parents' welfare payments to school attendance are based on assumptions of questionable validity, including the fact that they implicitly define the problem as one of parent or student negligence.[185]

1.252 The National Congress pointed out that:

> National and international research shows that the majority of reasons for nonattendance relate to a lack of recognition by schools of Aboriginal culture and history; failure to fully engage parents, carers and the community; and ongoing disadvantage in many areas of the daily lives of Aboriginal Australians (AIHW and Australian Institute of Family Studies, 2010).[186]

1.253 It was the view of the Congress that:

> [T]here is insufficient evidence to support improved attendance and educational outcomes through an expansion and extension of SEAM and that these resources would be better directed at alternatives such as changing the school environment and supporting community-driven initiatives. We note that the Department of Education, Employment and Workplace Relations released an evaluation report on SEAM for 2010 at

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183 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 194.

184 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 194.

185 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills*, February 2012, para 93.

186 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills*, February 2012, para 89.

> the concluding stages of the consultation period of this review. Due to the late timing of the release, there has been insufficient time to analyse the evaluation report and its implications. Accordingly, we reserve our position on the evaluation report.[187]

1.254 The Community Affairs Legislation Committee noted that a final evaluation of the SEAM trial was to be conducted in 2012 and recommended that the results be made publicly available as soon as possible following its completion, particularly in light of 'the inappropriate delay in releasing the 2010 evaluation of SEAM'.[188] As of mid-June 2013, the evaluation for 2012, if completed, does not appear to be publicly available.

Proportionality

1.255 The government maintains that SEAM is a reasonable and proportionate means of promoting the right to education of children. It notes that the 'qualifying condition is reasonable and proportionate', since school attendance is compulsory for school-aged children under state and territory law; there are a number of steps before a person's payment is suspended or cancelled, including the provision of assistance; and there are appeal and review mechanisms in place.[189] The Minister maintained:

> The conditions imposed on parents in receipt of social security in designated SEAM areas are reasonable taking into account the importance of children attending school, the evidence that SEAM improves educational outcomes, the support made available through SEAM such as school conferences and social work support, and the protection and review rights that are in place under the Social Security Law.[190]

1.256 The evidence referred to in the Minister's analysis includes the material presented by the government to the Senate Community Affairs Legislation Committee and the 2010 SEAM evaluation report.

1.257 The Minister's analysis also noted that:

> The suspension of payments under SEAM is as a last resort in a series of steps to ensure that parents/carers re-engage in the process of getting their children back to school. Provided parents/carers take steps to rectify

187 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills*, February 2012, para 89.

188 Senate Community Affairs Legislation Committee, *Stronger Futures Report*, para 3.152.

189 *Social Security Assessment*, p 6.

190 *Social Security Assessment*, p 7.

> compliance within 13 weeks, they will have their suspended income support payments back-paid.[191]

1.258 In submissions made to the Senate Community Affairs Legislation Committee there was recognition that the question of school attendance was a complex issue and that the problem of low school attendance needed to be approached holistically.[192] These views were accompanied on the part of some submitters by concerns that the SEAM measures involving suspension of payments were punitive.

1.259 For example, the National Congress of Australia's First Peoples submitted:

> Congress is concerned that the threat of income suspension is the principal tool for lifting school attendance. We believe this punitive approach is detrimental to the long term welfare of children and families. First, the negative stigma attached to being viewed as responsible for income suspension risks a child becoming further alienated from their family, schooling and other support structures, in effect making SEAM a self-fulfilling prophecy. A safer, more constructive solution, are programs which build on the strengths of the child. Second, income suspension penalises a whole family, including other children in the family who may be regularly attending school, by taking away their means of support.
>
> Notwithstanding our ongoing concerns with income suspension, we oppose outright the proposed 13 week income suspension penalty under SEAM, as it is excessive. As an example, a family of four children, even retaining all their family tax benefits, would be expected to survive on just the base rate of $52.64 per child per fortnight for a full 13 week period whilst on income suspension. We find this expectation unreasonable. …
>
> …
>
> The measure places on children an increasing burden of responsibility for a family's receipt of income support and consequently their financial wellbeing. It is the experience of Congress, based on feedback from Members, that children who do not attend school may already be living in difficult home situations where there may be poverty, over-crowding, substance abuse and violence. A child who is viewed by parents or carers as the cause of the withdrawal of income may be subject to further victimisation. The withdrawal of a family's income may result in the family struggling to pay for basic requirements and therefore pressuring other

191 *Social Security Assessment*, p 5.

192 See Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 185-190.

> family members for money. This 'humbugging' was identified as a behaviour that income management is trying to reduce.[193]

1.260 In its submission to the Community Affairs Legislation Committee, the Australian Human Rights Commission underlined the importance of consultation with affected groups in the design and in any extension of the SEAM program:

> The [Committee on Economic, Social and Cultural Rights] 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; and
> - review procedures at the national level have examined the reforms.[194]

1.261 The Commission drew attention to what it considered was inadequate consultation in the introduction of SEAM.[195] Adequate consultation is not only required in relation to limitations on economic and social rights, but by the UN Declaration on the Rights of Indigenous Peoples insofar as the SEAM measures were

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193 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed* Stronger Futures in the Northern Territory Bill *(2011) and accompanying Bills*, February 2012, paras 87-88, 92.

194 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 205.

195 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 227.

designed to apply primarily to, and have in fact applied predominantly to, Indigenous communities.

1.262 The Commission raised the question of 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':[196]

> 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.
>
> 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. 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.[197]

1.263 The Commission drew attention to the possibility that the payment of benefits could be suspended for relatively trivial failures and the decision to suspend a payment could in effect be delegated to a truancy officer.[198]

1.264 The Commission raised the question of whether the measures might 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.'[199]

Committee view

1.265 The committee accepts that the goal of seeking to promote the right to education of children in the Northern Territory and elsewhere by improving the low rates of school attendance is a legitimate objective. The committee shares the view

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196 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 195.

197 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 198-199 (footnotes omitted).

198 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, paras 220-224.

199 Australian Human Rights Commission, *Stronger Futures in the Northern Territory Bill 2011 and two related Bills,* Submission to the Senate Community Affairs Legislation Committee, 6 February 2012, para 200.

that the reduction of low school attendance rates, particularly in Aboriginal communities in the Northern Territory is an important and pressing objective and that Australia is under an obligation to ensure that all children effectively enjoy the right to a quality education. The committee acknowledges that the problem is a complex one that needs to be addressed in a holistic fashion and in close consultation with those who are affected.

1.266 The committee considers that the fact that the SEAM program has its predominant impact on Indigenous communities means that the program may come within the definition of racial discrimination in the ICERD as its effect is to limit the enjoyment of rights by persons of a particular racial and ethnic origin. It therefore must be justified as a proportionate measure based on objective and reasonable criteria adopted in pursuit of a legitimate goal.

1.267 The committee considers that the SEAM program involves a limitation on the right to social security, the right to privacy and family, the right to an adequate standard of living, and the rights of the child in relation to each of those rights. This interference must therefore be justified as a rational, reasonable and proportionate measure adopted in pursuit of a legitimate objective. The government bears the onus of clearly demonstrating that the measure is justified. In this case the committee would expect a clear demonstration, based on reliable empirical evidence, that the measures are having a significant impact on reducing low school attendance.

1.268 While the committee acknowledges that the process of evaluation of SEAM is continuing, thus far the evidence has been mixed. In the committee's view it has not yet been clearly demonstrated that the SEAM has had a significant impact on reducing low school attendance. Accordingly, at this stage the committee is not able to conclude that the government has shown that the interference with rights that the SEAM represents is justified.

1.269 The committee underlines the importance of continuing to monitor closely the impact of SEAM and of ensuring that there is an adequate process of consultation with those communities and groups where it currently applies or to which it is proposed to extend the measure.

Conclusion

1.270 The committee acknowledges the continuing severe disadvantage suffered by many Aboriginal communities and the fact that the level of enjoyment by Indigenous Australians of the human rights guaranteed by the UN human rights treaties is, in general, well below that of other members of the Australian community.

1.271 The committee recognises that ensuring that Indigenous Australians enjoy a comparable level of human rights to other Australians is a compelling policy goal and is plainly a legitimate objective within the framework of the human rights treaties.

1.272 The committee recognises the steps that the Commonwealth government has taken, in collaboration with other governments and institutions, and with Indigenous Australians, to close the gap between Indigenous Australians and the rest of the community. The committee acknowledges that the *Stronger Futures* measures have been motivated by the policy goal of seeking to reduce disadvantage and to promote equal enjoyment of human rights.

1.273 At the same time, as set out in this report, the committee has recognised that Indigenous people and many others have significant concerns about the human rights compatibility of a number of the measures central to the *Stronger Futures* measures. The committee notes that the issue of whether some of the measures have had the beneficial effects that were hoped for, is contested and that there is much work to be done in terms of evaluation of the ongoing impact of the measures.

1.274 The committee underlines the following aspects that emerge from the three major areas of the *Stronger Futures* measures that it has examined in this report, noting that they are of more general application.

1.275 The first is the critical importance of ensuring the full involvement of affected communities, in this case primarily Indigenous communities, in the policymaking and policy implementation process. The right to self-determination guaranteed by article 1 of each of the International Covenants on Human Rights, as well as the UN Declaration of the Rights of Indigenous Peoples, require meaningful consultation with, and in many cases the free, prior and informed consent of, Indigenous peoples during the formulation and implementation of laws and policies that affect them. This means ensuring the involvement of affected communities in decisions as to whether to adopt particular measures, in their implementation, and in their monitoring and evaluation. To do otherwise risks producing the disempowerment and feelings of exclusion and marginalisation that were revealed in the evidence presented to the Senate Community Affairs Legislation Committee and which are fundamentally at odds with the principles of respect for the dignity and autonomy of persons recognised in the human rights treaties and the UN Declaration on the Rights of Indigenous Peoples. The committee recognises the significant steps that the government has taken in this regard, but considers that more needs to be done.

1.276 The second aspect arises from the significant limitations on human rights that a number of the *Stronger Futures* measures represent, even though these limitations are motivated by the desire to enhance the protection of other rights. The income management measures and the school attendance measures in particular, involve extending regulation a long way into the private and family lives of the persons affected by these schemes.

1.277 The committee has underlined that the onus is on government to clearly demonstrate that these measures involve not just the pursuit of an important social objective, but that there is a rational connection between the measures and the achievement of the goal, and that the measures adopted are reasonable and proportionate to the achievement of that goal.

1.278 The committee has indicated the importance of continuing close evaluation of measures such as these which are claimed to have a beneficial effect, and notes that the potentially disempowering effects of such measures also need to be taken into account in any assessment of human rights compatibility.

1.279 The committee considers that it can usefully perform an ongoing oversight role in this regard and recommends that in the 44th Parliament the committee should undertake a 12 month-review to evaluate the latest evidence in order to test the continuing necessity for the *Stronger Future* measures.

Mr Harry Jenkins MP

Chair

Appendix 1: Stronger Futures package of legislation

Acts:

- 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
- Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012

Legislative instruments:

- Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1) F2012L01335
- Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1) F2012L01338
- Social Security (Administration) (Declared income management areas) Determination 2012 F2012L01371
- Social Security (Administration) (Declared voluntary income management areas - New South Wales, Queensland, South Australia and Victoria) Determination 2012 F2012L01374
- Social Security (Administration) (Declared child protection State - New South Wales, Queensland, South Australia and Victoria) Determination 2012 F2012L01377
- Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2012 F2012L01379
- Social Security (Administration) (Classes of Exempt Welfare Payment Recipients) Specification 2012 F2012L01380
- Stronger Futures in the Northern Territory Proclamation 2012 F2012L01543
- Social Security (Administration) (Specified income management Territory - Northern Territory) Specification 2012 F2012L01613
- Social Security (Administration) (Vulnerable income management areas) Specification 2012 F2012L01614
- Social Security (Administration) (Declared income management area - Anangu Pitjantjatjara Yankunytjatjara lands) Determination 2012 F2012L01943

- Social Security (Administration) (Recognised State or Territory - Northern Territory) Determination 2012 F2012L01979
- Social Security (Administration) (Recognised State/Territory Authority - NT Alcohol and Drugs Tribunal) Determination 2012 F2012L01980
- Stronger Futures in the Northern Territory (Food Security Areas) Rule 2012 F2012L02073
- Social Security (Administration) (Schooling Requirements - Person Responsible) Specification 2012 F2012L02179
- Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1) F2012L02182
- Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013 F2013L00290
- Social Security (Administration) (Declared income management areas – Ngaanyatjarra Lands and Laverton) Determination 2013 F2013L00652
- Social Security (Administration) – Queensland Commission (Family Responsibilities Commission) Specification 2012 F2012L02581
- Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013 F2013L00290

Appendix 2: Submissions received

Submission Number	Submitter
1	National Congress of Australia's First Peoples
2	Attorney-General
3	Australian Human Rights Commission
4	Aboriginal Justice Support Group
5	Australia Lawyers Alliance
6	Professor Jon Altman
7	Concerned Australians
8	Committee on Racial Equality (CORE)
9	Catholic Religious Australia
10	Institute of Sisters of Mercy of Australia and Papua New Guinea
11	Josephite SA Reconciliation Circle
12	The Hon Robyn Layton AO QC
13	Mornington Inter-Church Aboriginal Awareness Group
14	The Hon Alastair Nicholson AO RFD QC
15	Christian Brothers Oceania Province
16	Presentation Sisters WA
17	Reconciliation Manningham
18	Sisters of Charity of Australia
19	Sisters of Saint Joseph
20	Union NSW
21	Jumbunna Indigenous House of Learning
22	Whitehorse Friends for Reconciliation
23	Yolŋuw Makarr Dhuni

Additional Information

1 Additional information provided by National Congress of Australia's First Peoples on 28 June 2012

2 Additional information provided by National Congress of Australia's First Peoples on 9 August 2012