Paul Howorth
LLM, LLB, BPD(Hons)

Mobile:

Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee

Re: Your Inquiry Regarding the
Stronger Futures in the Northern Territory Bill 2011 and two related bills

I welcome the opportunity to make a submission in my personal capacity to your inquiry.

My Interest and Contention

My interest is in evaluating the Australian Government's policies and laws about Aboriginal people in Australia to determine the degree to which these may hinder or enhance the incorporation into Aboriginal development practice of Australia's obligations under international human rights treaties.

My contention here is that, from a human rights perspective, there are inconsistencies within and between some of the measures included in the *Stronger Futures Bills* and that these inconsistencies challenge claims made by the Australian Government that the *Stronger Futures Bills* would help Aboriginal people to enjoy all of their human rights equally with others in the Australian community.

Human Rights References in the *Stronger Futures Bills*

The Explanatory Memorandum to the *Stronger Futures in the Northern Territory Bill 2011* makes two references to human rights.

The first reference is in the Outline, with reference to the claim that the tackling alcohol abuse measure, the land reform measure and the food security measure are each considered to be a special measure within the meaning of section 8(1) of the *Racial Discrimination Act 1975* (Racial Discrimination Act). The Government claims the Bill is enacting these special measures to help Aboriginal people to enjoy their human rights equally with others in the Australian community.

The second reference is in the Background section to Part 4 - Food Security. The Government's view is that this special measure advances the enjoyment by Aboriginal people of human rights, such as the right to an adequate standard of living, including adequate food, and the right to the highest attainable standard of physical and mental health.

Notably, the text of the Bill itself makes no reference to the advancement of the human rights of Aboriginal people as being an object or purpose of the proposed Act.

No references are made to the advancement of the human rights of Aboriginal people in the Explanatory Memorandum to, or the text of, either the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* or the *Social Security Legislation Amendment Bill 2011.*

It may be that the Australian Government is satisfied that the substantive content of the *Stronger Futures Bills* package sufficiently implies a commitment to human rights, and that this commitment does not need to be expressed. However, it may also be that the Australian Government has only intended to make a mere passing reference to human rights as an attempt to invoke these in a general way as a justification for the passage of these Bills.

Whatever the case, leaving the claimed commitment to human rights to implication and / or the making of a mere passing reference to human rights as a justification for the passage of these Bills could mislead the Parliament that these Bills are consistent with all of Australia's international human rights obligations.

In fact, an analysis of all of the measures proposed by the Bills demonstrates that these Bills, when read together as a package and in light of all of Australia's international human rights obligations, are *not* consistent with those obligations.

The Definition of Human Rights

Human rights are not a set of mere concepts that any government may generally define or choose from for public policy purposes. Human rights arise from internationally recognised sources.

The Committee would be aware that the current Parliament has recently passed the *Human Rights (Parliamentary Scrutiny) Act 2011*. The *Stronger Future Bills* are not subject to this Act as their introduction to Parliament predates the commencement of it. However, section 3(1) of that Act defines human rights in the following terms:

> ***human rights*** means the rights and freedoms recognised or declared by the following international instruments:
>
> (a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);
> (b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);
> (c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);
> (d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);
(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);
(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

Therefore, far from being something general, human rights amount to *all* of those rights specifically recognised in and declared by *all* of the international human rights Covenants and Conventions that Australia has ratified. These are Australia's international human rights obligations, and as such, any policies and laws of the Australian Government that claim to protect or promote human rights must be appraised against all of these obligations. The *Stronger Futures Bills* should be no exception, despite their introduction prior to the passing of the above definition of human rights. In my view, for the Committee or the Parliament to use a narrower or alternative definition of human rights would be a cynical exercise.

Reading the Bills Together

The three *Stronger Futures Bills* must be read together. This is because they are clearly a single package of different but highly related measures designed to deliver the same public policy outcome.

The Special Measures

The *Stronger Futures in the Northern Territory Bill 2011* proposes three special measures: the tackling alcohol abuse measure, the land reform measure and the food security measure. The Australian Government has sought to ensure that these measures meet the requirements of section 8(1) of the *Racial Discrimination Act*. That Act amounts to the incorporation into Australian domestic law of Australia's international obligations under its membership to the *Convention on the Elimination of Racial Discrimination* (CERD), one of the human rights treaties listed in section 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

To be consistent with both the *Racial Discrimination Act* and the CERD, one of the essential (that is, statutorily required) characteristics of any proposed special measure is that it must exist for the sole purpose of securing the advancement of a group *so that they can enjoy human rights and fundamental freedoms* equally with others.

It is not my aim here to explore whether, in operation, the proposed special measures would in fact meet the special measure requirements under the *Racial Discrimination Act* or the CERD.

The point I want to make is that it should follow that *any other measures* that form part of the *same package* of law containing special measures should not be inconsistent with Australia's international human rights obligations as that inconsistency could impede a group's enjoyment of human rights, thereby defeating the sole purpose justification for special measures.

The Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM)

The SEAM is an established measure under existing social security law. However, the changes proposed in *Social Security Legislation Amendment Bill 2011* amount to giving the Australian Government a discretionary power (subject to certain administrative requirements) to suspend social security payments to families with school age children in the Northern Territory. Though the SEAM does not expressly target Aboriginal families, given the current profile of poor school enrolment and attendance in the Northern Territory, Aboriginal families would be most at risk from the application of this measure. Of course, social security payments are often the only source of income for these families.

The *Convention on the Rights of the Child*

The *Convention on the Rights of the Child* (CRC) is also one of the human rights treaties listed in section 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Australia ratified the CRC in 1990.

Unlike the CERD, the CRC has not yet been incorporated into Australian domestic law. However, the CRC does nonetheless create international human rights obligations that Australia must respect, particularly I suggest when it is invoking human rights as a justification for special measures.

The CRC requires the protection and promotion of the human rights of children. While all of these rights are important, there are several that I wish to draw attention to with reference to the SEAM.

Article 26 (1) obliges States Parties to recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

Article 27(1) obliges States Parties to recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Though article 27(2) acknowledges that parents have primary responsibility for providing an adequate standard of living, article 27(3) obliges States Parties to take *appropriate* measures to assist parents in the case of need through the provision of material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Article 28(1) recognises the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, States Parties are obliged to, amongst other things, take measures to encourage regular attendance at schools and the reduction of drop-out rates (article 28(1)(e)).

The SEAM touches upon the subject matter of all three of these articles, and arguably may breach each of them.

With reference to article 26, the suspension of social security payments to parents quite clearly could impede a child’s right to benefit from social security.

With reference to article 27, through the suspension of social security payments a child's right to an adequate standard of living could be severely impeded, calling into question the appropriateness of a measure that would deny a child's parents their only means of income.

With reference to article 28, though the article allows States Parties to take measures to encourage regular attendance at schools and the reduction of drop out rates, one would expect any such measures to be consistent with the other rights declared in the CRC.

Internal inconsistency?

The Vienna Convention on the Law of Treaties (VCLT) sets out the rules for international treaty interpretation. Article 31(1) of the VCLT requires that treaties be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty within their context (that is, taking a systematic view of the entire treaty with a particular emphasis upon the object and purpose of the treaty). This not only justifies but also compels the interpretation and application of the provisions of human rights instruments in a consistent manner.

Thus, any measure designed under article 28 of the CRC should not be inconsistent with the realisation of the rights of children set out in articles 26 and 27, or the whole of the CRC in general. This is a matter of internal consistency and I suggest that there is a real question whether the SEAM measure taken just on its own meets the internal consistency test so far as Australia's international human rights obligations under the CRC are concerned. On behalf of the Parliament, the Committee should at the very least satisfy itself about this question.

External inconsistency?

In my view, there is then the matter of what I will call external consistency. A measure adopted in pursuit of the rights set out in one treaty should not be inconsistent with the rights set out in another treaty, where the common overriding object and purpose of these treaties is the protection and promotion of human rights generally.

In the case of the *Stronger Futures Bills*, assuming that the suggested special measures would be validly applied in accordance with Australia's international human rights obligations under the CERD, their sole purpose of advancing a group so that the group may enjoy its human rights equally with others may be impeded by the SEAM, if that measure, by design or effect, denies or frustrates any of the human rights declared by the CRC.

While it is a well-recognised tenet of international human rights law that States Parties may enjoy a national margin of appreciation in the difficult act of balancing all of its international human rights obligations, this should not amount to playing one set of rights off against another to the extent that the pursuit of one human right can be achieved through the denial of another. Indeed, the Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993 confirmed that:

All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

This commitment was reasserted at the 2005 World Summit in New York.

Now, though it may in practice be unfair to expect and unusual for a State to pursue all of its international human rights obligations to an equal degree all of the time, it would also be unfair to allow a State to claim the realisation of one human right through the obvious breach another, particularly when a State may have other means available to it.

In Conclusion

My submission has aimed to draw the Committee's and the Parliament's attention to the danger of implicit and / or shallow references to human rights within or in relation to Bills. Whether or not it would in fact be found that the package of measures proposed by the *Stronger Futures Bills* breaches Australia's international human rights obligations, due regard for these obligations during the drafting of legislation ought to require more than a mere passing reference to human rights.

Even though the introduction of these Bills predates the commencement of the *Human Rights (Parliamentary Scrutiny) Act*, the general convention that the Parliament must not be misled means that, where a Bill or the supporting material for a Bill claims the promotion of human rights, a proper and transparent examination of that claim is warranted and I recommend to the Committee that a proper and transparent examination is what it undertakes.

Yours sincerely

Paul Howorth
LLM, LLB, BPD(Hons)