Submission to the Senate Inquiry into the Stronger Futures in the Northern Territory Bill 2011

Recommendation: That the Government initiate a plebiscite to determine whether Aboriginal people in the NT agree to live under special measures that discriminate against them.

Summary: This submission focuses human rights and the inappropriate use of Special Measures. This does not lessen the importance of other issues such as alcohol controls, income management and the lack of support for bilingual education and the security of the Homelands.

This submission comments on the following:

- The flawed nature of the consultations
- The use of Special Measures
- Blanket measures
- Land reform
- The documented needs of Indigenous people expressed by the Elders
- Breaches in various international conventions and declarations that will arise from this Bill if passed

Each comment is concluded with relevant questions for the proposer of this Bill.

This submission is based on the premise that Aboriginal people living under the NTER Intervention have not agreed to give up self management and have not agreed to discriminatory Special Measures that are counter to their interests. At no time during recent consultations did Government agents ask the essential question: "do you agree to have Government control your lives and over your Land?"

This approach widens the gap between the human rights enjoyed by mainstream Australians and Aboriginal communities in the NT.

Plebiscite. At no time has Government proposed a plebiscite of Aboriginal people living in the NT under the Intervention on the questions control of their lives and whether they agree to give up their Land. That would have been a much more democratic way to determine whether Special Measures are agreed to. What we have instead is a Government opinion based on survey that is interpreted by bureaucrats and consultants that, incredibly, Aboriginal people agree to be discriminated against and have agreed to have their land taken from them. Clearly, Government would not get that result if a democratic plebiscite were held.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was endorsed by the Australian Government in 2009. Article 19 states that *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.* This includes the process towards developing Special Measures.

Racial Discrimination Act. There is no moral and probably no legal basis to override parts of the Racial Discrimination Act through Special Measures, given the lack of evidence that the people affected have never consented to be discriminated against. The improper use of Special Measures by Government is an apparent attempt to appease the UN Human Rights Commission and to suggest that the Racial Discrimination Act and Convention for the Elimination of Racial Discrimination have not been violated. The land reform measures outlined in Section 35 of the Bill have potentially dire consequences for communities.

Flaws in the Consultations

The November 2011 NTER Evaluation Report had as one of its objectives; "to inform policy development and decision making". Nevertheless, flaws in the consultations' approach to determining Aboriginal people's needs are significant. These flaws have been transferred to the Bill and leave Aboriginal people subject to the proposed laws engender a loss of dignity and a sense of powerlessness. The Bill itself is thus flawed:

Elders. The Advisory Group appointed to the Evaluation did not include any Elders that live permanently under the Intervention in any of the prescribed communities. This is an unfathomable oversight. The community leadership and capacity section of the Evaluation Report indicated an extraordinary and essentially offensive attitude to the role of the Elders in their communities.

It would appear that even before the consultations began, there was no attempt to seek genuine cultural advice from respected community Elders who understand and live each day with the issues facing people under the Intervention. The Little Children are Sacred report noted:

An overwhelming request from both men and women during community consultations was for Aboriginal law to be respected, recognised, and incorporated within the wider Australian law where possible.

Similar sentiments were noted in the recent consultations but there seems to be little interest on the part of the consultation implementers.

The consultation report noted (page 154) that institutional reform had *"dissolved pre-existing community representative structures*" and *"this has a significant impact on a community's ability for self-representation and leadership, and therefore its ability to effectively engage with government and service".* Further the report then acknowledges *that "where there are existing community strengths, they have not been adequately adopted into leadership and governance structures appropriate to each community."*

Engaging intensely with the cultural Elders and senior law men and women would have assisted greatly re-establishing community representative structures.

The Little Children are Sacred Report indicated (page 50):

The Inquiry's discussions with Aboriginal people revealed that this situation (communities being weakened) *exists due to a combination of the historical and ongoing impact of colonisation and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority, in decision making.*

Extraordinarily, the managers of the Intervention and the consultations overlooked some very basic wisdom in this regard. There is no excuse for this as this information was clearly available to decision makers in the consultations and in the formulation of the Bill.

The Consultancy Report does not suggest any role for the Elders in the future. The report authors and government policy as expressed through this Bill completely ignores the critical and ongoing role that the Elders have. The Government seemingly has no idea that a group of the Elders living under the Intervention meet reasonably regularly without Government support to discuss cross community issues and the Intervention, in fact it is the Intervention that has brought them together. There is no acknowledgement of the leadership these highly respected people are demonstrating in the United Nations Human Rights Commission and before the UN Committee for the Elimination of Racial Discrimination in Geneva.

Question: Why did the Government chose not to engage cultural and senior law Elders living under the Intervention on its Advisory Group, given their critical role in the cultural and spiritual health of communities?

Consultancy findings skewed

The Community Safety Service Provider Survey conducted under the Evaluation was facilitated largely by Government paid employees (Government Business Managers) known to the communities surveyed. This approach would normally skew the results of such a survey. The results on the perception of safety from the Survey not surprisingly differ from results published later in the Report and elsewhere. (Table 5.1 in the Evaluation Report) (http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_evaluation_report_2011.PDF) and at http://equalityrightsalliance.org.au/sites/equalityrightsalliance.org.au/files/docs/readings/income_management_report_v1-4_0.pdf

Question: Why were Government paid employees such as GBMs used to facilitate safety surveys given their influence in the community and their familiarity with the survey respondents?

Question: What proportion of the survey respondents were Government paid employees such as GBMs or members of their extended families?

Question: Why did survey results on safety show different rates of safety perceptions from Police statistics and from the study by the Equality Rights Alliance?

Question: Will the Government release audio transcripts of the consultations to enable the Australian people to know exactly what Aboriginal people said at the consultations?

Consultations

While the consultations leading to the development of the Bill were extensive, as oft quoted by the Government, they need to be genuine to be accepted. Consultations are not valid only because they are extensive. There have been no equivalent consultations

with any mainstream communities who are also affected by drugs, unsafe neighbourhoods, alcohol, income management, pornography, child abuse nor has there been any comparable assessment by Government. This in itself discriminates.

To determine whether the Special Measures proposed in the Bill were genuinely acceptable to Aboriginal people, a relatively cheap and arguably accurate option would have been to hold properly managed plebiscites through the Australian Electoral Commission in each of the prescribed communities. Developing agreed questions for such a poll would not be easy but would nevertheless be possible.

Rather than rely on "extensive consultations" and debatable interpretations, a plebiscite would have been much less divisive.

It makes as much sense to assess whether Aboriginal people agree to the application of discriminatory measures through "extensive" consultations, as it does to cancel the next scheduled Australian Parliamentary elections and to hold national consultations instead.

Further discussion of flaws in the consultative process may be found at
http://www.concernedaustralians.com.au/media/NTER-Evaluation-Opinion-2011.pdf

Question: To what extent was the Aboriginal Benefit Fund used to resource the consultations held by Government in the lead up to the Bill? Were appropriations made in accord with Section 83 of the Constitution?

Special Measures

The consultations and therefore the Bill tragically perpetuate the continuing offence on the Racial Discrimination Act. Special Measures on a number of matters are the basis of an apparent attempt to convince the UN that it is OK to racially discriminate.

The UN requires that racial discrimination is only acceptable provided it is short lived and is agreed to by the people directly affected through prior informed consent. So, there is an admission by Government that the Bill is discriminatory by having to use the Special Measures option, but there is no evidence that the consent of the majority of people affected has been provided. We know from the Elders and other sources that there is no agreement to allow discrimination by the people. The introduction of forced Special Measures makes a mockery of our international obligations and insults all Australians concerned for human rights

Question: Is the Government aware that the use of Special Measures not based on prior informed consent is in contravention to Australia's commitment to universal human rights and in particular to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the UN Convention for the Elimination of all forms of Racial discrimination?

Blanket measures

There is no argument that issues associated with societal dysfunction in some NT communities exist. Many can be dealt with appropriately by Government in genuine and equal partnership with the community and particularly with the Elders. Issues such as serious alcohol abuse do not exist to the same extent in all communities, particularly those in the more remote Homelands. Even if the affected communities had provided prior informed consent as is required by the UNDRIP, there is no basis for the same action in all centres. It is particularly galling for many communities that had their own controls in place well before the Intervention.

The approach taken in the Bill implies that these problems are the problems of Aboriginal people in the NT, even though it is well understood that problems with alcohol abuse, for example, are more critical in some mainstream Darwin suburbs than they are in the self managed dry Aboriginal communities. (Some years ago a NT Police officer estimated that 30% of the drivers entering the Darwin CBD on Monday mornings for work were "over the limit" –this comment is entirely anecdotal, but it indicates a possibility that the problem does not only lie in Aboriginal communities) Communities that are dry would have plenty of cause to believe that they have been discriminated against.

Question: Why would the Government take the view that all prescribed communities should be treated in a blanket fashion when some communities have had long term controls in place?

Land Reform

Section 35 in the Bill is the most disturbing aspect of this potential new law. The purpose of this Part is to enable special measures to be developed on land reform. As there is no indication that the Bill includes provision to seek prior informed consent from affected communities, then rights to equality before the law established in Section 10 of the Racial Discrimination Act will be made void as soon as the special measure is declared in the regulations.

It would appear from the Bill that the Australian Government can regulate to modify NT Law relating to the use of land defined as a community living area. This means that there will not be the usual scrutiny applied by the Parliament for a Bill; it will be suffice to table the Regulations. The use of this instrument will destroy any remaining trust between the NT communities and the Government. Disturbingly, the concept introduced through this mechanism could set a precedent for other law impacting on the whole Australian community.

However, before making the Regulations, the Government has to consult the land owner IF the land owner requests to be consulted (subsection (4)).

Before making regulations for the purposes of subsection (1) in relation to a community living area, the Minister must consult with:
(a) the Government of the Northern Territory; and
(b) if the owner of the land that is the community living area requests to be consulted about the making of regulations for the purposes of subsection (1)—the owner

There are 4 issues here:

- Regulations provide for minimal scrutiny by Parliament
- to "consult" can mean to take advice or to take account of advice, that is, it would appear to be essentially meaningless in terms of achieving agreement from communities through prior informed consent as required by UNDRIP
- the land owner has to request consultation before his/her land is used for other purposes through regulation. This presents problems in communication in getting the advice to the land owner that a land use reform is planned. If he/she is unaware of the proposed Regulations then there will be no request for consultation
- Article 19 of UNDRIP (prior informed consent) has been completely ignored.

To cap off this assault on the rights of indigenous people, subsection 5 of this section states that *A failure to comply with subsection (4) does not affect the validity of the regulations.* So no matter whether the Government consults or not, or whether land owners disagree to have their land regulated, there is no impediment to tabling and presumably enforcing the regulations.

So in essence, the Govt can set up any land use regime that it likes without approval of the people in the community and without full Parliamentary scrutiny. This would include mining as the Bill does not specifically prohibit it. This clearly contravenes Article 19 and Article 26 of the UN Declaration on the Rights of Indigenous Peoples

This is a classic Catch 22 situation – a community does not want their land used for any purpose; so they consult with Government, the Government then has the legal right to ignore any views expressed. So much for prior informed consent! There is no requirement in the Bill for the Government to act in accord with community views irrespective of communities' wishes, whether they have been communicated or not.

It is commonly accepted that Aboriginal land is critical to the health of Aboriginal culture. This Bill promises to cut into the heart of the culture; the oldest continuing culture on the planet.

> Question: How does the Government expect to achieve legally acceptable land reforms through the application of Special Measures with no proof of prior informed consent from the land owners?
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> Question: In what way does the application of Section 35(5) in the Bill demonstrate Government commitment to democracy?

Publicly documented requests to the Australian people by Elders living under the Intervention

Kunoth-Monks is a female Aboriginal leader of greater standing than either Price or myself and has been a tireless campaigner for Aboriginal women and children (going back to the anti-grog protests and marches she led in Alice Springs in the late 1980s). If she is saying the intervention did little to protect Aboriginal women and children and psychologically scarred communities (in particular men) by implicitly labelling them as collective moral delinquents, then you can take those words to the bank and cash them.
Marion Scrymgour NT MP and former deputy chief minister SMH April 20 2011

These statements are available to Government but have essentially been ignored. There is no indication in these statements that Aboriginal people want to be disempowered, nor do they want to live under a regime that resembles the Intervention, nor do they want to have their land reformed through Government regulation without their agreement. In general, the Bill fails to recognise these statements from the true leaders in the NT Aboriginal communities, the Elders. The Bill is therefore critically flawed

Statement by 7 Northern Territory Elders (including Rosalie Kunoth-Monks) and Community Representatives 4 November 2011 .
Some points:

- No commitment to Bilingual learning by Government
- Blanket measures have caused distress
- Want respectful discussion with the Elders
- Aboriginal people are the sovereign people of Australia
- Now is the time to negotiate a treaty with the sovereign peoples
- Recognition of customary law
- Government must hand back control of communities to the communities
- Inadequate funding of councils
- Want genuine consultation
- Want bilingual education
- Rewards for attendance at school rather than punishment for non attendance
- More Aboriginal teachers
- More focus on traditional values in schools

http://www.concernedaustralians.com.au/media/Statement-4-11-11.pdf

But I think governments persist in thinking you can direct from Canberra, you can direct from Perth or Sydney or Melbourne, that you can have programs that run out into communities that aren't owned by those communities, that aren't locally controlled and managed, and I think surely that is a thing we should know doesn't work. Fred Chaney (Former Minister for Indigenous Affairs, ABC's 7.30 Report, 19 April 2007)

Central Land Council Statement, Kalkaringi, 26 August 2011

Main points:

- Need to be empowered to control own futures
- No more Intervention
- Return of the Permit system.
- Any change to Land Rights must be through informed consent
- Want Aboriginal control not Shire control
- Homelands demand equal funding as the "growth towns"
- Re-instatement of Bilingual education programs
- Want culturally appropriate housing
- Return of CDEP
- Need support for community initiated alcohol programs

http://www.concernedaustralians.com.au/media/Kalkarindji_statement_2011.pdf

So I am very much in favour of a model which I suppose builds local control in communities as the best of those Native Title agreements do... Not central bureaucracies trying to run things in Aboriginal communities. That doesn't work.
Fred Chaney (Former Minister for Indigenous Affairs, ABC's 7.30 Report, 19 April 2007)

Elders Statement 7 February 2011

Main points:

- Dispossession is continuing
- The people are being shamed
- The Intervention took our rights as humans
- There is a threat to our languages, culture and heritage
- Control of our communities has been removed from us
- Lands have been compulsorily taken
- The law under which we live is discriminatory and in breach of international law
- We are no longer equal to the rest of the Australians
- Want support to develop our economic enterprises
- Want all Australians to walk with the Aboriginal people

http://www.concernedaustralians.com.au/media/Elders-statement-7-2-11.pdf

The great thing about the education projects in which I'm involved is that we can manage locally for the outcomes that we want to achieve locally. Once you try and do it by remote control, through visiting ministers and visiting bureaucrats fly in, fly out – forget it.
Fred Chaney (Former Minister for Indigenous Affairs, ABC's 7.30 Report, 19 April 2007)

Question: Given that the common theme is about empowerment and self management in the statements made by Elders, and that these statements are available to Government, why were they essentially ignored?

International Conventions and Declarations

Recognising that the Stronger Futures in the Northern Territory Bill 2011 is based on an incorrect assumption that indigenous people in the NT want to give up self management,

Noting that the Elders consistently call for empowerment through self management and genuine partnership,

Recognising that no Elders who live under the day to day constraints of the Intervention were invited to sit on the Consultation Evaluation Advisory Group,

Recognising that there is no evidence that the majority of Aboriginal people living under the Intervention have provided prior informed consent to the various Special Measures referred to in the Bill,

Noting in particular that there is no evidence that Aboriginal people would agree to regulations that enact Special Measures that in turn enable Aboriginal Land to be used for purposes decided by Government,

Recognising that subsection 5 of Section 35 that allows Government to make regulations with no input from Aboriginal land owners and allows Government to not consult on land reform matters if it so chooses,

Noting further that Government has made no attempt to call a plebiscite to seek approval to have Special Measures made that impact on daily living and on land ownership,

Recognising that Elders have written statements that they have not provided prior informed consent to introduce Special Measures,

Recognising that the impact of implementing Special Measures into the Racial Discrimination Act without the prior informed consent of Aboriginal people invalidates the RDA,

Recognising that the public statements by the Elders have not been addressed by Government,

Recognising that the Elders have called for a reinstatement of bilingual education,

The measures incorporated in the Bill contravene or apparently contravene the following human rights Pacts:

International Covenant on Civil and Political Rights

Article 1 (1). All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

International Covenant on Economic, Social and Cultural Rights

Article 1(1). All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Committee on the Elimination of Racial Discrimination General Recommendation No. 23: Indigenous Peoples

4. The Committee calls in particular upon States parties to:
(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.
5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources

United Nations Declaration on the Rights of Indigenous Peoples

Article 1
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights(4) and international human rights law.
Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Article 4
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
Article 8
2. States shall provide effective mechanisms for prevention of, and redress for:
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 14
1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

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 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.

Article 26
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands,

territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

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Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Question: Is the Government certain that prior informed consent was obtained before preparing Special Measures that will enable discrimination

Question: In preparing section 35 of the Bill, did the Government take account of Articles 19 and 26 of the UN Declaration on the Rights of Indigenous Peoples?

"Freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed." Martin Luther King

Question: Does the Government agreed that its endorsement of the UN Declaration on the Rights of Aboriginal Peoples is consistent with Section 35 (5) of the Bill?

Digby Habel
27 January 2012

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