

Opening statement to Senate Community Affairs Legislation Committee inquiry into the NTER (Stronger Futures) Bills

Mick Gooda

1. Thank you Madame Chair for the opportunity to appear before the Committee as representatives of the Australian Human Rights Commission. We have provided a detailed submission with 33 recommendations relating to the Bills and also to their implementation.
2. We note that the Bills, if passed, will result in measures being in place across prescribed communities in the Northern Territory for a further period of 10 years. This will bring the operation of these laws to a total of 15 years, since their inception in 2007.
3. A number of the measures will also apply in different regions across the country, although it is most likely that they will predominately impact on Aboriginal and Torres Strait Islander peoples in these areas as well.
4. This is a lengthy period of time in which to apply such a comprehensive suite of measures that impose restrictions on individuals and communities.
5. For this reason, the Commission has given considerable attention to whether the measures can be justified from a human rights basis and to consider whether there are sufficient safeguards in place to protect people's rights over the next decade.
6. The Commission welcomes the intent of the Australian Government to address the critical situation facing Aboriginal peoples in the Northern Territory and supports the Government's objective to improve the quality of life for Aboriginal peoples living in the Northern Territory.
7. In order to achieve Aboriginal people's social, cultural and economic goals, it is the Commission's view that the proposed Stronger Futures legislation requires the ongoing engagement of the people affected by these measures to ensure that they are able to address the challenges they face and own the solutions. This requires their engagement at all stages of design, development, implementation, monitoring and review of policy, legislation and programs.
8. While the Commission supports the intent of the Stronger Futures Bills, the Commission is of the view that the measures contained within the Stronger Futures Bills are intrusive and limiting of individual freedoms and human rights. Where it is deemed appropriate to design interventions which infringe on individuals' human rights, then that intervention must be the least restrictive on the rights of individuals whilst trying to meet the purpose of the intervention.
9. **As such, the Commission's support for the passage of the Stronger Futures Bills is contingent upon the adoption of the recommendations that we outline in our submission.**

10. Dr Szoke will talk specifically to some of our key human rights concerns about the bills in a moment.
11. I want to focus on two key matters of implementation: the cultural competency of Governments; and the governance and capacity of Aboriginal communities.
12. Without both of these things, these measures will not meet their objectives. At this stage, the Commission has very serious concerns about both.
13. The Commission is concerned that neither the NT nor Australian Government has the necessary cultural competency to effectively and appropriately implement the stronger futures measures.
14. This is of concern as a number of measures in the bills will require consultation with Aboriginal communities prior to their implementation. Much has been said about the inadequacy of the consultation process under the NTER to date, including in the formulation of these Bills.
15. What concerns me particularly is that the consultation requirements into the future for these Bills are in fact, very weak. They indicate that consultation should occur prior to certain actions being taken and as part of the Minister's decision making, but they do not invalidate actions that are undertaken without appropriate consultation.
16. This has the very real potential to result in a less than effective implementation of the proposed measures.
17. For this reason, I would like to highlight **recommendation 4** of our submission, as one of the most critical. That recommendation identifies an audit of cultural competency as a necessary baseline exercise to be conducted. It specifically recommends that the Australian and Northern Territory Governments implement the Stronger Futures measures in a culturally safe and competent manner.
18. Related to this is the capacity of communities. I am on record expressing concern that there has been a significant reduction in community capacity that has resulted from the NTER and other actions that have occurred around the same time – such as the disbanding of community councils and their replacement with regional councils.
19. This is not a sustainable situation. Communities must be engaged in developing the solutions and in their implementation. Simply 'applying' measures to communities will not work into the longer term.
20. Let me provide an example: there are opportunities provided for in the Bills for community tailored measures to be introduced in the place of the 'blanket' provisions that will otherwise apply. Most notably, this relates to voluntary alcohol management plans.
21. We have now had 2 years in which such voluntary plans could be in place, following the 2010 amendments to the legislation. However, there are to my knowledge no such measures operating in the place of the blanket provisions.

22. In the submission, the Commission expresses the concern that so long as blanket bans continue to operate there will be limited incentive for the Government to engage fully with communities in developing and implementing alternative provisions. We face the real prospect that very few communities will end up with more tailored, and more appropriate, solutions being implemented because of this.
23. Ultimately, this goes to both the cultural competency of government to engage and to the capacity of communities to take control of their own destiny.
24. **Recommendation 3** is a critical one in this regard. In relation to alcohol management plans, so is **Recommendation 16**, which goes to ensuring that there is a much more proactive requirement on the Government to seek out community solutions – not if they happen to get around to it, but as a necessity.
25. We also note in the submission that provisions such as the ability for a community to enter into a voluntary alcohol management plan are critical to the Government’s argument that what are otherwise restrictive measures can be characterised as special measures and be seen as consistent with the Racial Discrimination Act. It will be difficult to sustain such an argument the longer time goes without such arrangements actually coming into effect.
26. I now hand over to Dr Szoke, the Race Discrimination Commissioner to finalise our opening remarks.

Helen Szoke

27. Thank you Madame Chair for the opportunity to appear before your committee tonight.
28. To be consistent with human rights standards, the Commission submits that laws and policies should promote Aboriginal and Torres Strait Islander peoples’ choice, participation and control. Aboriginal and Torres Strait Islander peoples should be actively involved in the making of policy and legislative decisions, and actively engaged in the implementation and delivery of the mechanisms that arise from the legislative changes.
29. Furthermore, policies and legislation should be non-discriminatory. Where disadvantage exists, laws and policies should be targeted at alleviating that disadvantage and promoting substantive equality. Substantive equality allows different groups to be treated differently so that they can, in the end, enjoy their human rights equally. Access to financial and technical assistance for Aboriginal and Torres Strait Islander communities from governments should also be available to facilitate the exercise and enjoyment of the rights contained in the UN Declaration on the Rights of Indigenous Peoples. Finally, laws and policies should reflect, promote and value the cultures of Aboriginal and Torres Strait Islander peoples.
30. Mick has outlined some key matters for ensuring this occurs in the practical implementation of the Bills.
31. Throughout our submission, we have also identified where we have concerns about how human rights are affected by the proposed measures in the Bills.

We have identified a range of matters where we do not consider that procedural rights are sufficient or where there is not sufficient clarity in the Bills.

32. But allow me focus on a further two matters in these opening remarks.
33. A persistent criticism that has been made since the introduction of the original NTER measures is regarding the compliance of these measures with the *Racial Discrimination Act 1975*.
34. As part of the 2010 amendments, those provisions that had suspended the operation of the RDA were repealed with effect from 31 December 2010. Those amendments also provided for the removal of those provisions that deemed the legislation and actions done under it to be special measures. In their place, the amendments inserted objects clauses in relation to four Parts of the NTER legislation, stating that the object of the Part was 'to enable special measures to be taken' for particular purposes.
35. The Commission welcomed these amendments. However, it also noted that the provisions were not fully effective in reinstating the protections of the RDA as the legislation also authorised the continuation of some measures that had a discriminatory and negative impact upon the rights of Aboriginal and Torres Strait Islander peoples.
36. Primary among those provisions that the Commission considered were incapable of being classified appropriately as special measures were the compulsory 5 year leases. These expire in August this year and the Commission congratulates the Government for not continuing this approach.
37. It removes a major remaining hurdle to the measures being *capable* of complying with the RDA.
38. However, as we outline in the submission there does remain the potential for other measures to be discriminatory in their impact – inconsistent with the indirect discrimination provisions of the RDA.
39. The Commission continues to urge the Government to include a legislative provision in the bills that makes it **unequivocal** that all measures in the Bills must be implemented in a non-discriminatory manner. This would greatly contribute to the acceptance and workability of the legislation. This is particularly so in light of the level of distrust that has existed throughout the life of the NTER due to the initial suspension of the protections of the RDA. It would also provide a legislative translation of the clearly stated intention of the Government that no measures will be racially discriminatory.
40. Recommendation 6 of our submission is the relevant one in this regard, which recommends that the Stronger Futures Bills be amended to include 'notwithstanding' clauses that specify that in the event of ambiguity, the provisions of the RDA are intended to prevail over the provisions of the Stronger Futures legislation and that the Stronger Futures legislation does not authorise conduct that is inconsistent with the provisions of the RDA.

41. Following on from this general issue, one area of the Bills which has the greatest *potential* to impact negatively on human rights is the SEAM provisions.
42. The consequences of the SEAM provisions are very serious when applied to families living in poverty.
43. **Recommendations 11 – 14** identify a range of matters that we consider would improve these provisions and provide adequate safeguards for Aboriginal people in the implementation of the scheme.
44. The issue of school attendance is a serious one, which requires significant improvement. Recommendations 11 and 12 urge that a holistic approach be taken to this issue, as it is clear to the Commission that SEAM is the type of measure that could only be appropriate as a matter of last resort. It is certainly not a substitute for the provision of adequate educational facilities and support in communities.
45. Recommendation 13 is critical if SEAM is to be implemented in a manner consistent with human rights.
46. The Commission is concerned that there is not sufficient involvement of Indigenous communities in the implementation of the SEAM process. It is feasible that SEAM measures could be implemented through processes that are driven at the community level and with the consent of Aboriginal and Torres Strait Islander peoples.
47. Modification of the scheme to ensure that the community is fully engaged in its implementation would go a long way to addressing concerns about its appropriateness from a human rights perspective. Such engagement should be required in the legislation. It could take a number of forms, such as a Family Responsibility Commission style approach as adopted in relation to welfare reforms in the Cape York region.
48. The Commission does not have a preferred model and considers that should the SEAM program be extended, further consultation should be undertaken to explore community led options for its implementation, which will reflect the local priorities and challenges of individual communities.
49. The Commission notes that the proposed amendments to require parents to enter into a school attendance plan may also provide an opportunity for better engagement between schools, parents and communities to help identify and address obstacles to school attendance.
50. Parents who are required to attend a school attendance conference may have previously had limited, or no, engagement with the school system. This interaction could present a potential power imbalance if not addressed. The school should consider options such as encouraging a support person from the community to be in attendance and interpreters should be provided where necessary and/or beneficial.
51. School attendance plans should be developed in full consultation with the parents and child. This means a platform should be provided for the school and parents to identify the obstacles to school attendance and both the school

and parents are aware of their responsibilities under the proposed plan. The plan should identify where the school and/or the Department can address specific issues to encourage the child's attendance, not just the responsibilities of the parents.

52. The school should provide information in an accessible way, including the consequences for failing to adhere to the plan. Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision and adequate timeframes should be built into the process. This may mean multiple conferences are necessary for the parents to make a fully informed decision.
53. Recommendation 14 identifies a range of improvements to the SEAM measures that will improve procedural safeguards.
54. Senators, our submission flags where there is potential for human rights issues to arise over the coming years in the implementation of the Stronger Futures measures. As Mick has flagged, we see issues of cultural competency and community capacity as critical in how this will play out in coming years.
55. We think that a formal review of legislation at 7 years is too far away to address these critical issues. For that reason I conclude by also noting **recommendation 5** of our submission which states that given the potential of some measures to raise human rights concerns as they are implemented, the Commission recommends that the Senate Community Affairs Legislation Committee conduct a follow up inquiry in three years' time into progress in improving Indigenous governance arrangements, cultural security, and progress in developing community led initiatives such as alcohol management plans.
56. Thank you Madame Chair.