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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on extreme poverty and human rights and the Special Rapporteur on the rights of indigenous peoples.

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extreme poverty and human rights and Special Rapporteur on the rights of indigenous peoples pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/13 and 15/14.

We would very much appreciate if your Excellency's Government could respond about the allegations detailed below in order for us to be able to reflect any comment or clarification received from your Excellency's Government in making public our concerns.

In this context, we wish to bring to the attention of your Excellency's Government information we received regarding a suite of legislation currently before the Australian parliament, which includes the Stronger Futures in the Northern Territory Bill 2012 (Cth) ("Stronger Futures Bill"), the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 ("Consequential and Transitional Provisions Bill") and the Social Security Legislation Amendment Bill 2011 (Cth) ("Social Security Bill") (collectively referred to in this communication as "the Stronger Futures Bills"). These bills have been developed in the context of reforms to the Northern Territory Emergency Response (NTER) legislation of 2007.

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As you are aware, the Special Rapporteur on the Rights of Indigenous Peoples, Mr. James Anaya, has been closely monitoring the effects of the NTER and the process to reform it, in particular in his report on the situation of indigenous people in Australia (A/HRC/15/37/Add.4, Appendix B). In his observations on the NTER, the Special Rapporteur urged your Excellency's Government to "fully purge the NTER of its racially discriminatory character and conform it to relevant international standards, through a process genuinely driven by the voices of the affected indigenous people" (para. 66). The NTER legislation was also the subject of examination by the Committee on the Elimination of Racial Discrimination,[1] the Human Rights Committee,[2] and the Committee on Economic, Social and Cultural Rights.[3] Further, the High Commissioner for Human Rights expressed concern over the NTER measures following her visit to Australia in 2011.

We note that in 2010, the Government of Australia passed legislation to reinstate the Racial Discrimination Act as it relates to the NTER, thereby addressing a major concern expressed by the Special Rapporteur and the United Nations treaty bodies. This legislation also set out to redesign a number of the NTER measures for the long-term, given that the NTER legislation was due to expire in August 2012. We understand that the development of the Stronger Futures Bills involved an effort to engage with affected Aboriginal and Torres Strait Islander communities. Nevertheless, concerns about the bills and about the process of development of the bills remain.

With this context in mind, we would like to draw your Excellency's Government's attention to information received which alleges that **a number of provisions within the Stronger Futures Bills threaten the enjoyment of human rights by Australia's indigenous communities, in particular the principle of equality and non-discrimination.**

According to the information we received:

On 22 June 2011, the Australian Government released the *Stronger Futures in the Northern Territory Discussion Paper*, which was followed by six weeks of consultation on the future of the NTER Act. On 23 November 2011, the Stronger Futures Bills were introduced into Parliament. On 25 November 2011, the Senate referred the Stronger Futures Bill to the Senate Community Affairs Legislation Committee for inquiry and report. The Committee was requested to report back to the Senate by 29 February 2012; that deadline has been extended to 13 March 2012.

The Stronger Futures Bills are directed specifically at Aboriginal communities. The "Stronger Futures in the Northern Territory Bill 2012" is described in its subheading as "A Bill for and Act to build stronger futures for Aboriginal people in the Northern Territory, and for related purposes". Certain measures in the Bills also continue to be

[1] Urgent Action Letter to the Australian Government dated 13 March 2009 in relation to the Northern Territory Emergency Response.
[2] CCPR/C/AUS/CO/5.
[3] E/C.12/AUS/CO/4.

classified as "special measures", although it is unclear whether these are intended to be "special measures" in accordance with the meaning of that term under the Racial Discrimination Act.

With respect to alcohol consumption, the Stronger Futures in the Northern Territory Bill (third reading) extends the uniform alcohol bans and alcohol management regimes within so-called "alcohol protected areas" within Northern Territory communities (Sections 27). The Bill gives the Minister the power to declare an area as an "alcohol protected areas" at the Minister's own discretion. While people living in these areas must be consulted prior to such a declaration, there is no requirement that the Minister take into account the results of these consultations or adapt the alcohol management plans according to the inputs of the communities. The maximum penalty for offences involving bringing into, possessing, controlling, or consuming liquor in an alcohol protected area is, depending on the quantity of the alcohol, between six and 18 months imprisonment (Section 8).

With respect to income management, the Social Security Bill extends measures enabling compulsory income management of Centrelink recipients in certain circumstances (Schedule 1). The Bill also extends the Government's Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) initiative, which allows for the suspension or cancellation of certain categories of Centrelink payments for lack of compliance with a notice relating to school enrolment or attendance. It is worth noting in this connection that the Government's *Northern Territory Emergency Response Evaluation Report 2011*, presented in November 2011, found that the SEAM initiative had no demonstrable impact on school attendance rates from 2007 to 2010.

With respect to land and housing, the Stronger Futures Bill introduces "special measures" to allow the Commonwealth to amend Northern Territory legislation regarding leasing in Aboriginal community living areas and town camps (Part 3). The Bill allows the Commonwealth to modify "any law of the Northern Territory relating to: (a) the use of land; or (b) dealings in land; or (c) planning; or (d) infrastructure; or (e) any matter prescribed by the regulations" within town camps or community living areas (Sections 32, 35). Before making such modifications, the Minister must consult with the lessee or owner of the town camp or community living area, but there is no requirement that the affected Aboriginal peoples' views be taken into account in the Minister's decision.

The Australian Human Rights Commission has made 33 specific recommendations for amendment of the draft Stronger Future Bills that it considers neededin order to bring the Bills in line with human rights standards (The Australian Human Rights Commission – Submission to the Senate Community Affairs Legislation Committee, Stronger Futures in the Northern Territory Bill 2011 and two related bills, 6 February 2012). Further, the National Congress of Australia's First Peoples has made several recommendations for amendments in this regard (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).

In addition to these substantive issues regarding the limitations of rights and freedoms of Aboriginal people, reportedly there have been insufficient consultations with affected indigenous communities throughout the process of drafting the Stronger Futures Bills. As observed by the Australian Human Rights Commission and the National Congress of Australia's First Peoples, time allotted for consultation on the *Stronger Futures in the Northern Territory Discussion Paper* was inadequate given the scope and depth of the issues raised and significant measures, including income management, were not listed for discussion during the consultation process. There was apparently insufficient time to translate the discussion paper into the languages of Northern Territory communities or provide the discussion paper to the interpreters in advance of the consultations. Reportedly, no consultation was conducted in communities in the five new regional areas targeted by the income management measures.

We were also informed that the consultation process was not culturally competent and adaptable adequately to assess and respond to the needs and challenges of Aboriginal communities. Information received suggests that the Government did not put in place sufficient measures to remove the barriers to participation faced by indigenous peoples, such as those related to cross-cultural communication, the physical remoteness of affected communities, and literacy and education deficits. Information received suggests that the Government failed to create environments where indigenous opinions and decisions were respected.

Concerns have been raised that the lack of adequate participation by indigenous communities in the process of drafting and reviewing the Stronger Futures Bills undermines their effectiveness in identifying and responding to the needs of indigenous communities.

The Stronger Futures Bills are being proposed in the context of other legislation that reportedly have the effect of limiting Aboriginal decision-making over their affairs, including the abolition of Aboriginal Community Councils and the concentration of decision-making power in Regional Shire Councils. This issue was a subject of concern for the Special Rapporteur on the Rights of Indigenous Peoples in his 2009 report on the situation of indigenous people in Australia (A/HRC/15/37/Add.4, para. 56).

We welcome the efforts of the Australian Government to improve the social and economic situation of Aboriginal communities in the Northern Territory, but we are concerned that, like the NTER measures, the Stronger Futures Bills could serve to exacerbate discrimination against and stigmatisation of indigenous peoples, and thus further undermine their efforts to improve their situation and overcome the social exclusion that they face. In this connection, it is worth noting that the Government's evaluation of the measures in the *Northern Territory Emergency Response Evaluation Report 2011*, found that certain NTER measures have contributed to Aboriginal people's feeling of a loss of freedom, empowerment and community control.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the applicable international human rights norms and standards.

As you are aware, the Special Rapporteur on the rights of indigenous peoples has carried out an in-depth analysis of the compatibility of the NTER measures with international human rights standards related to indigenous peoples (A/HRC/15/37/Add.4, Appendix 2). This analysis continues to be relevant in the context of the Stronger Futures Bills to the extent that any provisions of these bills contain racially-based measures limiting the rights and freedoms of Aboriginal people.

With regard to the provisions related to income management, the Special Rapporteur on extreme poverty and human rights would like to draw the attention of your Excellency's Government to Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (to which Australia is a party), which enshrines the right of everyone to social security, including social assistance.

According to the Committee on Economic, Social and Cultural Rights article 9 of the ICESCR obliges all States parties to guarantee that those in a situation of need will receive social assistance schemes without discrimination on any of the grounds prohibited under article 2.2 para. 2 of the Covenant.[4] During its monitoring of the implementation of the Covenant, the Committee has consistently expressed its concern that the denial or lack of access to adequate social assistance undermines the realization of other Covenant rights.

The Committee on Economic, Social and Cultural Rights has stated that social benefits must be adequate in amount and duration in order to ensure 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 enshrined in articles 10, 11 and 12 of 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.[5]

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 suspension of benefits must be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law. Benefits should be provided in a timely manner and beneficiaries should have physical access to social services in order to access benefits and information. Participation and access to information about the provision of social benefits must be ensured.[6]

When States impose excessive requirements and conditions on access to public services and social benefits, and severe sanctions for non-compliance, such measures

[4] General Comment No. 19, paras. 4, 23 and 31.
[5] Ibid, para. 22.
[6] General Comment No. 19, paras 23 to 27.

threaten welfare beneficiaries' enjoyment of a number of human rights, including the right to participate in the decisions that directly affect them,[7] and to be free from arbitrary or unlawful State interference in their privacy, family, home or correspondence.[8] The cumulative impact of living in such circumstances threatens the beneficiaries' right to enjoy the highest attainable standard of living.[9] These measures effectively penalize people living in poverty who depend on these services and benefits for their day to day survival. In view of this, we wish to draw the attention of your Excellency's Government to the report of the Special Rapporteur on extreme poverty and human rights on the issue of penalization of people living in poverty, presented to the General Assembly 66th session (A/HRC/66/265). Your Excellency's Government may find it useful in the current circumstances to consult the section of the report focusing on requirements and conditions for access to public services and social benefits.

It is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. We would be grateful for your cooperation and your observations on the following matters:

1. Are the facts summarized above accurate?

2. Are the Stronger Futures Bills intended to be "special measures" for the purposes of application of the Racial Discrimination Act? If so, please explain how they meet the legal criteria for "special measures".

3. 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?

4. Have the Stronger Futures Bills been subjected to Parliamentary scrutiny so as to evaluate their compliance with relevant human rights standards? If so, what was the outcome of such scrutiny and if not, why not?

5. What consideration has been given to the recommendations of the Australian Human Rights Commission and the National Congress of Australia's First Peoples in their respective statements to the Senate Standing Committee on the Stronger Futures Legislation?

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[7] International Covenant on Civil and Political Rights, art. 25.
[8] Universal Declaration of Human Rights, art. 12; International Covenant on Civil and Political Rights, art. 17.
[9] Universal Declaration of Human Rights, art. 25; International Covenant on Economic, Social and Cultural Rights, art. 12. Committee on Economic, Social and Cultural Rights, general comment No. 14.

6. What efforts have been made to consult with affected Aboriginal communities, and to include them in the design and delivery of services under the Stronger Futures Bills, as well as to build upon successful Aboriginal-run programs already in place? Please provide details on measures that have been put in place to ensure access to information on the draft Stronger Futures Bill and participation for potentially affected Aboriginal communities and individuals.

We would appreciate a response within sixty days. We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

s47F - personal privacy

Maria Magdalena Sepúlveda Carmona
Special Rapporteur on extreme poverty and human rights

s47F - personal privacy

James Anaya
Special Rapporteur on the rights of indigenous peoples

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REFERENCE:

28 March 2012

Excellency,

I am writing to you about the Stronger Futures legislation currently under consideration by the Parliament. I greatly appreciated the opportunity to discuss issues addressed in this legislation with you during my visit to Australia last May and to meet with indigenous community representatives in the Northern Territory.

I welcome the Government's efforts over the past several years to improve the lives of indigenous peoples. I also commend your personal commitment to invest in indigenous communities. I am aware that your Government has taken measures to ensure consultation with the Australian people, including many indigenous communities, on review and follow-up legislation concerning the Northern Territory upon the expiry of the Northern Territory Emergency Response legislation in 2012. However, I wish to flag a number of concerns regarding the proposed legislation.

As you are aware, during my visit last year, I encouraged you and other authorities to ensure that the principles of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Australia has endorsed, are carefully taken into account in developing policies and programmes affecting indigenous peoples. In particular, I noted that the right to self-determination and the Declaration's principle of free, prior and informed consent are very important guiding principles in the Australian context. Any legislation that aims at empowering and improving the situation of indigenous peoples should be based on extensive consultation with indigenous communities regarding policies, and encourage them to take control of decision-making about their own development goals.

I am concerned that the consultations with affected indigenous communities may not have been sufficient to elicit meaningful participation of indigenous communities in the review and devising of the new legislation. In particular, the National Congress for Australia's First Peoples, which is meant to be the representative body for Australia's indigenous peoples, has expressed its deep concern about the legislation and the time given for consultation on such a complex and technical package.

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Without the genuine participation and support of indigenous communities, and the alignment with principles set out in the UNDRIP as well as human rights standards outlined in the International Covenant on Civil and Political Rights, the International Covenant for Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, the measures contained in the legislation may not achieve their full potential to improve the lives of indigenous peoples in Australia.

I remain concerned that certain measures from the previous Northern Territory Emergency Response legislation – which the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, as well as the Committee on Racial Discrimination and the Special Rapporteur on the Rights of Indigenous Peoples have all expressed concerns about – will remain in place. Some of them may have a disproportionate and discriminatory impact on indigenous communities, while I am sure you would agree that the right to equality and non-discrimination is one of the most fundamental tenets of international human rights law. I understand also that the National Congress expressed similar concerns. In this regard, I would very much welcome additional studies and credible evidence regarding the impact of the education policies, alcohol management and mandatory income management policies under the NTER on indigenous communities living in the Northern Territories. While I do realize that the Stronger Futures legislation aims to improve and rectify some of the problems of the previous legislation, it appears that many measures and provisions are similar to those found in the NTER. In particular, the education measures in the bill seem to be of a punitive nature as funding would be withdrawn from entire families if just one child in the household is not attending school as required. In addition, to be fully in line with principles set out in UNDRIP, indigenous communities' diverse culture and a possibility of bilingual education should be incorporated in school curricula.

Finally, I very much welcome the new legislation the Government has passed on Parliamentary Scrutiny. I regret, however, that the Stronger Futures legislation was submitted just prior to the dates when the legislation for human rights conformity came into effect. I would, therefore, strongly encourage the Government to submit the legislation to the Parliamentary Scrutiny process, nonetheless, and to prepare a "Statement of compatibility with Human Rights", to ascertain whether all of Australia's human rights obligations are met in the legislation.

I trust you will find these comments useful. We remain committed to assist your Government in addressing these important concerns to the benefit of Aboriginal and Torres Strait Islander peoples in Australia.

Please accept, Excellency, assurances of my highest consideration.

s47F - personal privacy

(Ms)

Navanethem Pillay
High Commissioner for Human Rights