THE LAW SOCIETY OF NEW SOUTH WALES
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Human Rights Committee

Submission to the Parliamentary Joint Committee on Human Rights

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Review of the Stronger Futures in the Northern Territory Act 2012 and related legislation

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS
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Review of the Stronger Futures in the Northern Territory Act 2012 and related legislation (collectively **Stronger Futures Legislation**)

Introduction

In response to the Parliamentary Joint Committee on Human Rights' ('the Parliamentary Joint Committee') invitation for submissions on the *Stronger Futures* legislation and related legislation, we, the New South Wales Young Lawyers Human Rights Committee ('the Committee'), provide the following comments in respect of the analysis of the measures and their compatibility with local and international conventions and laws regarding human rights.

New South Wales Young Lawyers is a division of the Law Society of New South Wales. Members include legal practitioners in their first 5 years of practice and/or under the age of 36 and law students. There are currently over 15,000 members.

The Committee is responsible for development and support of members of NSW Young Lawyers who practice in or are interested in Human Rights Law and comprises over 700 members. The Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to Human Rights Law and the development and support of it, and considers the provision of submissions to be an important contribution to the community.

The Committee is drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with Human Rights Law. The combined knowledge base of the Committee is therefore diverse and substantial. The objectives of the Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the Committee share a commitment to effectively promoting and protecting human rights.

The Committee is grateful for the opportunity to make this submission and thanks the Parliamentary Joint Committee for their invitation to do so.

Implementation of legislation – consultation

Right to consultation, Article 1 of each covenant & Self-determination

The Committee reiterates the concerns articulated in the majority report of the Senate Community Affairs Legislation Committee dated 14 March 2012 which noted several submissions expressing concern over the Government's limited consultation with Aboriginal people, before the implementation of the current *Stronger Futures* legislation.

While embarking on consultations with Aboriginal people in developing the *Stronger Futures* legislation, the Government sought to obtain consent to measures which had already been implemented through the *Northern Territory Emergency Response* (NTER) legislation. In essence, this was ultimately a retrospective and therefore invalid method

of consultation. Furthermore, given the substantially similar measures and policy intentions administered by the current *Stronger Futures* legislation, there are questions as to the weight and importance of consultations in the implementation of this legislation.

Indirect discrimination

The Committee acknowledges that the *Stronger Futures* legislation does not suspend the operation of the *Racial Discrimination Act 1975 (Cth)* (RDA) as in the Howard government's NTER legislation. However, the Committee remains extremely concerned that the application of these laws will have a disproportionate effect on Indigenous Australians, and as such, amount to indirect discrimination under section 9 of the RDA. Indirect discrimination occurs where an apparently neutral requirement has the effect of disadvantaging a group with a specific protected attribute (in this case, race) and is not reasonable.

Social impact of the legislation

Whilst the Commonwealth Government's substantial investment in the area of income management is generally welcomed, some of the negative impacts of the policies which were raised in a submission written by the Australian Council of Social Services to the Senate Community Affairs Committee in December 2012 were:

- the financial investment has been blunted by the 'top-down' way in which the NTER was implemented ie the undermining of local governance structures and the negative stereotypes about Indigenous people 'on welfare';
- this negativity was strongly reinforced by measures such as the blanket imposition of income management, the signs at the entrance to communities and media stories implying that Indigenous parents generally fail to care for their children properly;
- the message which these policies sent to the communities was that they had failed to resolve their problems and that government must therefore step in and take control, including control of people's incomes;
- these policies will fail unless governments stop reinforcing negative stereotypes and work with individual communities to implement local solutions to problems owned by the communities;
- the imposition of compulsory income management upon broad categories of people contradicts the government's stated aim – to make it available to communities as 'a tool' to help deal with entrenched social and financial problems;
- when the blanket system of compulsory income management was extended beyond Indigenous communities in the Northern Territory, the negative stereotyping of 'people on welfare' was reinforced for other groups, especially sole parents and unemployed people on income support, despite a lack of evidence that the groups targeted were unable to manage their financial affairs;
- a further problem with both income management and *Improving School Enrolment and Attendance through Welfare Reform Measure* (SEAM) is that there is no consistent hard evidence that they work, at least in the way they have been implemented so far.

Yet, despite the above issues, public investment, policy energy and resources on the ground have been disproportionately devoted to the implementation of the measures supported by the *Stronger Futures* legislation. They have been used as a first rather than a last resort, displacing other strategies including intensive case management and strengthening the relationship between schools and local communities.[i]

Special Measures

When the *Stronger Futures* package was passed, the government asserted that the laws were compatible with the RDA as they constituted "special measures" under section 8, which recognises the need for positive measures to be taken in specific circumstances to address historical disadvantage with the aim of increasing or achieving substantive equality. Essentially, the effect of section 8 of the RDA is that if a measure is a law in an area covered by the RDA and can be categorised as a "special measure", it will not amount to discrimination.

(1) Further analysis of what constitutes Special Measures

(a) Article 1(4) of the *International Convention of the Elimination of All Forms of Racial Discrimination* (ICERD) defines "special measures" as:

- 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 to have been achieved.[ii]

(b) In General *Recommendation No 32, the Committee on the Elimination of Racial Discrimination* defined special measures as:

- 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.[iii]

(c) In Gerhardy v Brown (1985)[iv], the HCA held that to constitute 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; and
- the measure must not have already achieved its objectives.[v]

(2) Meeting the test for Special Measures

Elements of the *Stronger Futures* legislation, including addressing alcohol abuse, food security and land reform have been identified by the government as constituting "special measures" under section 8 of the RDA. However, the government's assertion of such, is yet to be proven on the facts against both international and domestic law as outlined below.

(i) International Perspective

In response to criticism and concern about the manner in which the *Stronger Futures* legislation was implemented and claims regarding the infringement of human rights the United Nations Special Rapporteur on extreme poverty and the Special Rapporteur on the rights of Indigenous people wrote a letter to the Commonwealth Government, dated 9 March 2012. Amongst other things the letter addressed the government's assertion, that the *Stronger Futures* legislative measures were "special measures" within the meaning of RDA, was flawed and provided their reasons and analysis as follows (with reference to the Bills which had not at that time passed both houses of Parliament, but which are now Acts):

- 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 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*;
- The *Stronger Futures* legislation gives the Minister the power to declare an area as an "Alcohol Protected Area" 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. This undermines the ability for communities to make decisions about matters that affect them; and
- 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.[vi]

In addition, the Committee notes that the above concerns are yet to be satisfactorily addressed by the government as pointed out by the Parliamentary Joint Committee in their Eleventh Report of 2013 (Eleventh Report of 2013)[vii].

(ii) Local Operation

The *Stronger Futures* legislation extends the operation of the *Liquor Act* (NT) to create offences within "Alcohol Protected Areas (APA)". An APA is not expressly defined in the *Stronger Futures* Legislation under section 27. However, the *Stronger Futures (Consequential and Transitional Provisions) Bill 2011* makes areas previously declared as "prescribed areas" under the NTER, as "Alcohol Protected Areas" and these include:

- all Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*;
- all community living areas granted under the *Lands Acquisition Act* (*NT);*
- town camps declared by the Commonwealth Minister; and
- any other area of the NT declared by the Commonwealth Minister.

Clearly the *Stronger Futures* legislation has specific application to areas of land belonging to, and inhabited by, Aboriginal people. Extending the application of the criminal law to these areas of land means it is predominantly Aboriginal people who are targeted. The consequence is indirect discrimination against Aboriginal people which undermines the purpose of special measures within the RDA.

Practical effects of the legislation

The 'real life' or practical effect of the legislation on persons and communities can be significant, as evidenced in issues relating to criminal charges or convictions for offences relating to APAs as summarised below:

- Part 8 of the *Stronger Futures* legislation imports Division 1AA into the *Liquor Act (NT)* (the Act), which creates offences for bringing liquor into an APA or control, supply, possess or consume liquor in an APA;
- under section 95(2)(b) of the Act, police have the ability to seize a car connected with an offence under Division 1AA. In deciding whether to seize a vehicle, consideration must be given to whether the vehicle benefits the community as a whole and whether seizure would cause hardship, see section 95A *Stronger Futures* legislation. An example would be a car that belongs to a community centre or organisation;
- an individual who has had their car seized have 60 days to apply to the Commissioner of Police or the Local Court for the return of their car. An order to return a vehicle will only be made if the Commissioner of Police or Court are satisfied that the person 'did not know or could not reasonably have known about the commission of the offence' as per section 97(5) and section 98(4) of the Act;
- a person cannot have their car returned by the Commissioner of Police if they have been charged with a Division 1AA offence per section 97(3)(c) of the Act, or returned by the Court if they been found guilty of an offence under Division 1AA as per section 98(1)(c)(ii) of the Act.

Remote Aboriginal communities are often hundreds of kilometres away from the nearest towns. There is no public transport system and often the only means of transport is by way of a private vehicle. The long distance and cost of fuel means it is usually

economical to travel with more than one person in the car. The seizure of an individual's car not only affects that person, but family members and other persons in the community who may rely on the car for transport. This places significant burden on that person and their family who often do not have the financial capacity to purchase a new car. This example falls outside the exception created by section 95A of the *Stronger Futures* legislation and has an adverse impact on Aboriginal people in the Northern Territory, especially those in remote communities.

Discrimination: Can the objectives be achieved?

The Committee recognises that differential treatment under the *Stronger Futures* legislation may be justified on either one of two grounds:

1. if the legislation falls within the meaning of special measures, it cannot be discriminatory under section 8 of the RDA; or
2. even if the legislation does not fall within the meaning of special measures, it cannot be discriminatory if differential treatment is "proportional and necessary to advance valid objectives", meaning that measures must "actually be achieving the intended results"[viii].

However, the Committee submits that differential treatment under the *Stronger Futures* legislation cannot be justified on these grounds:

1. The Committee queries whether the legislation can be legitimately viewed as "special measures" under international law because compelling evidence suggests that the objectives of the legislation are more likely to be achieved if the proposed measures are replaced or combined with a range of other measures outlined below; and
2. since the measures are less likely to "actually be achieving the intended results", the Committee also queries whether these measures are "proportional and necessary to advance valid objectives" and thus whether the legislation's differential treatment can be justified.

If the legislation does not achieve its objectives, it may further disadvantage Indigenous communities over non-Indigenous people. For example, while the government acknowledges that the tackling alcohol abuse measure may restrict rights, it maintains that this limitation is reasonable, necessary and proportionate given the alcohol related harms that may arise.

However, if the tackling alcohol abuse strategy does not achieve its objectives, it will unreasonably, unnecessarily and disproportionately restrict rights. Even if the tackling alcohol abuse strategy does benefit Indigenous communities, without achieving its objectives non-Indigenous people would also be discriminated against.

The Committee's view is that the measures infringe human rights. Accordingly, we submit that replacing or combining them with alternative measures to ensure that the *Stronger Futures* legislation is consistent with human rights. Our reasoning as to why the alcohol abuse strategy measures are unmaintainable and at odds with human rights are as follows:

Tackling the Alcohol Abuse Strategy

- The measures only focus on reducing the supply of alcohol in Indigenous communities by implementing restrictions. Sources confirm that while these

measures may reduce alcohol related harm, any such reduction would probably be temporary and thus marginal in the long run.[ix] When the supply of alcohol has been reduced in selected Indigenous communities, drinkers have accessed alcohol through a black market (sly-grogging) and in unregulated communities nearby.

- While the measures address the first of these issues by imposing higher penalties, they do not address the second that, when drinkers' access alcohol in nearby unregulated communities, the drinking problem is effectively being displaced and the children of drinkers may be left abandoned.
- In fact, a one-year review of restrictions in Fitzroy Crossing found evidence suggesting that drinkers in this community may have relocated to Broome, Derby and Halls Creek. If the alcohol problem remains displaced after restrictions are lifted in the belief that objectives of the legislation have been achieved, the legitimacy of whether the objectives have been achieved is questionable.
- Further, drinkers may simply relocate back to their communities and cause alcohol problems again. It is submitted that in order to prevent the displacement of the alcohol problem and legitimately achieve the objectives of the legislation, police outside APAs may need to be conferred authority similar to police within APAs.
- To more effectively reduce alcohol related harms in Indigenous communities, the government must also work to reduce the demand for alcohol. While demand may be reduced by rehabilitation laws, an important means of reducing demand is education concerning alcoholism, especially greater awareness of alcohol related harms. Studies have shown that such education is effective in reducing alcohol related harms among non-Indigenous drinkers[x]. Greater awareness of alcoholism, brought to contention in a culturally sensitive manner, can prevent potential drinkers and may even encourage those accessing alcohol in unregulated communities nearby to stop drinking.
- Thus it is submitted that both demand and supply must be reduced to increase the likelihood of achieving the legislation's objectives. Education concerning alcoholism will also help Indigenous people understand the policies directed at them, thereby helping to increase individual agency and achieve self-determination as well.
- Education concerning alcoholism should be a priority in alcohol management plans and must be brought to contention in a culturally sensitive manner. It is also important to target certain groups when raising awareness of alcoholism. Neurological studies have shown that teaching children about matters such as alcohol related harms can have a greater bearing on their decision-making as adults.[xi] Another group that needs to be targeted is pregnant women, for the prevention of fetal alcohol syndrome is vital in avoiding learning difficulties, anger management issues and even future alcohol abuse among the children born.[xii] A key requirement of educating this group on alcoholism is ensuring that quality medical advice on the issue of fetal alcohol syndrome is available as well.

As such, the Committee submits that on the basis of available evidence, alcohol related harms are more likely to be reduced if measures are combined with education concerning alcoholism and rehabilitation services in addition to the restrictions. This is important because, if the measures are not likely to achieve the objectives of the legislation, any differential treatment will constitute discrimination. In particular, the importance of educating Indigenous communities on alcoholism and alcohol related harms is emphasised.

Furthermore the government is encouraged to seek to address the underlying causes of alcoholism in remote Indigenous communities through targeted policies concerning isolation, boredom, cycles of disadvantage and so forth.

Inconsistency of laws

It is of particular concern that in the event of ambiguity, it is not clear on the face of the legislation that the protections enshrined in the RDA are intended to prevail over any inconsistency in the provisions of the *Stronger Futures* legislation.

Given the particular difficulty identified in reconciling the *Stronger Futures* legislation and "special measures" under the RDA, it is likely that the measures which purport to be "special measures" would be unlawful and a breach of human rights.

Conclusion

The NSW Young Lawyers Human Rights Committee thanks the Parliamentary Joint Committee for the opportunity to be heard in this review and encourages the Commonwealth government to formally benchmark, the success or otherwise of the *Stronger Futures* legislation.

The Committee agrees with many of the conclusions in the Eleventh Report of 2013. Of particular concern is the Parliamentary Joint Committee's view[xiii] that the legislation cannot be properly characterised as "special measures" under ICERD or other relevant human rights treaties. The Committee agrees that the government's assertion is inadequate justification in the absence of a detailed legitimate explanation of why the legislation in fact meets the required criteria.

As set out in this submission, the *Stronger Futures* legislation involves the curtailment of and limitations[xiv] upon human rights and intrusion into the freedom and autonomy of individuals to make their own decisions about their own and their family lives[xv], within those communities[xvi] affected by the legislation. Accordingly, the Committee submits that such measures should only continue for a limited time, if at all[xvii]. There should be proper and ongoing monitoring[xviii] and community consultation[xix] and the *Stronger Futures* measures should be used only where other policy measures which do not infringe on human rights cannot be employed in their place. In addition, the Committee acknowledges the difficulties and complexities in evaluating[xx] the effect of the policies but agree that it is for the government to clearly demonstrate the measures are reasonable and proportionate and therefore not discriminatory or that they are a justifiable limitation upon an individual's rights.[xxi]

The Committee would be pleased to provide further information or comment in this review. To this end, Mr Thomas Spohr, President of New South Wales Young Lawyers and Ms Nicole D'Souza, Chair of the NSW Young Lawyers Human Rights Committee can be contacted via the details below and are interested and willing to appear at any hearings being conducted as part of this review.

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[i] Australian Council of Social Services submission to Senate Community Affairs Committee: Social Security Legislation Amendment Bill 2011, December 2012. Available at: http://acoss.org.au/images/uploads/Submission_on_Social_Security_Legislation_Amendment_Bill_2011.pdf

[ii] International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art 1(4). Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (accessed 23 September 2014).

[iii] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32. Available at: http://www.refworld.org/docid/4adc30382.html (accessed 23 September 2014).

[iv] 159 CLR 70.

[v] Ibid, 133 per Brennan J.

[vi] Letter from the United Nations Special Rapporteur on extreme poverty and the Special Rapporteur on the rights of Indigenous People to the Australian Government (9 March 2012)., available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures/additionalinfo/~/media/Committees/Senate/committee/humanrights_ctte/activity/stronger_futures/additional_info/addino_ncafp_090812.ashx

[vii] 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 (2013), [1.127]. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/112013/index

[viii] Ibid [1.94]

[ix] Sara Hudson, Policy Monograph: Alcohol Restrictions on Indigenous Communities and Frontier (2011), The Centre for Independent for Studies, http://www.cis.org.au/publications/policy-monographs/article/2782-alcohol-restrictions-in-indigenous-communities-and-frontier-towns.

[x] Wilson M, Stearne A, Gray D, Sherry S (2010) *The harmful use of alcohol amongst Indigenous Australians.* Australian Indigenous Health*InfoNet,* http://www.healthinfonet.ecu.edu.au/alcoholuse_review.

[xi] Lopez, Barbara, et al. "Adolescent neurological development and its implications for adolescent substance use prevention." *The journal of primary prevention* 29.1 (2008): 5-35.

[xii] Ibid.

[xiii] Above, n vii Ibid [1.98], [1.99], [1.100]

[xiv] Ibid [1.276]

[xv] Ibid [1.215]

[xvi] Ibid [1.22], [1.217]

[xvii] Ibid [1.159]

[xviii] Ibid [1.162] [1.269]

[xix] Ibid [1.122], [1.123], [1.218], [1.269], [1.275]

[xx] Ibid [1.278]

[xxi] Ibid [1.223], [1.277]