

# ***Listening but not Hearing***

**A response to the NTER Stronger Futures Consultations  
June to August 2011**

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March 2012

**Acknowledgements and Thanks to:**

Jumbunna Indigenous House of Learning, Research Unit, University of Technology Sydney ('**Jumbunna**');

The Hon Malcolm Fraser, former Prime Minister of Australia, for launching this report;

Concerned Australians who initiated this project;

The writers and the transcribers who have given generously of their time; and

Most of all we wish to thank those members of Northern Territory communities who gave their support to the writing of this report.

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## FOREWORD

by Alastair Nicholson

The effects of the Howard Government's disastrous 2007 Intervention continue to reverberate throughout the Northern Territory. It was a 'solution' imposed by a faltering government for its own political purposes on the Aboriginal people without their involvement and without consultation. As part of it the *Racial Discrimination Act 1975 (Cth)* was suspended, in so far as it related to the Intervention and associated measures. The whole process was deeply insulting to the Aboriginal people and effectively marginalised them as second class citizens.

The tragedy was further compounded by the incoming Rudd Government's adoption of most of the worst features of the Intervention. The Government thus lost a great opportunity to engage with the Aboriginal people in the planning of their future. It was an opportunity that was open to it on the wave of goodwill that followed the then Prime Minister's apology to the Aboriginal people. What should have occurred was the dismantling of the Intervention and a new beginning.

Instead we had the Government's pathetic 2009 'consultations' in an attempt to prop up the remaining features of the Intervention that it wanted to retain as special measures within the meaning of the *Racial Discrimination Act 1975 (Cth)*. There followed its 2010 legislation restoring the *Racial Discrimination Act 1975 (Cth)*, while at the same time retaining those features of the Intervention, coupled with its shameful attempt to cloak income quarantining as non-discriminatory by purporting to have it apply to the white population as well.

We now have had a re-run of the same process with new and more rushed 'consultations' as part of the 'Closing the Gap' project as this report describes. Again we have the spectacle of the Government going through the motions of 'consulting' without really doing so in order to pursue its pre-determined and Canberra driven policies.

There was no attempt to invite elders to share in the planning of an agenda which will affect their lives for years to come. This led to the Rev Dr Djiniyini Gondarra calling for a fresh approach to the rules of engagement. He asked Government to respectfully recognise the true leaders, the elders

and law men and women and engage directly with them in dialogue. He asked Government to recognise its failures and to work with the community leaders towards restoring justice. This statement has received considerable support within the Aboriginal community but it remains unheeded.

The Government's current policies have failed and they will continue to fail for so long as it continues to determine policies without the direct involvement of Aboriginal people in the decision-making process. As so many have pointed out, until Aboriginal people in the Northern Territory are allowed to gain ownership over their future, Government will fail to improve their overall circumstances and they will remain second class citizens of this country.

A truly representative Northern Territory Community Leader's Forum, attended by community-chosen representatives, would go a long way towards assisting Aboriginal leaders, and ultimately Government, in the development of sustainable policies. This will only work where the representatives are true representatives and not appointments by Government.

The consultations described here were superficially an improvement on the previous ones in that there were more interpreters and more apparent effort to make them fit the description of true consultations. We are still left with no real evidence of what Aboriginal opinion is on issues such as school attendance and the proposal to remove welfare payments where there is unsatisfactory school attendance. No doubt there is some support for this as there would be for any other measure, but we are left in the dark as to whether it has majority support overall, or among particular groups or in particular geographical areas.

This was effectively this Government's last chance to achieve real reform in relation to Aboriginal issues. Should it fail and should the Government not be returned at the next election, the future picture may become even darker for Aboriginal people.

## EXECUTIVE SUMMARY

- A. The Stronger Futures consultation process was conducted on a large scale in over 100 Aboriginal communities in the Northern Territory between June and August 2011, culminating in the Stronger Futures Bills currently before the Australian Parliament.
- B. This report evaluates whether the Stronger Futures consultation process complies with Australia's obligations under international law to consult with Aboriginal and Torres Strait Islander Peoples in relation to decisions that affect them.
- C. The report reviews the consultation process in the pre-consultation, consultation and post-consultation stages, including analysis of transcripts of a representative sample of consultation meetings.
- D. Further, the report reviews the consultation process against the applicable criteria for classification of governmental initiatives as 'special measures' and concludes that the criteria are not met.
- E. The report does not deal with the substantive provisions of the proposed legislation but primarily addresses the consultation process itself.

The Report makes the following conclusions:

### ***The Northern Territory Intervention is racially discriminatory***

- F. It is not contentious to observe that the Northern Territory Intervention as originally conceived and implemented was and continues to be racially discriminatory and breaches Australia's human rights obligations. A number of independent human rights monitoring bodies, including the Committee on the Elimination of Racial Discrimination ('**CERD**'), Human Rights Committee, Committee on Economic, Social and Cultural Rights ('**CESCR**') and the Special Rapporteur on the rights of Indigenous Peoples ('**Special Rapporteur**') have called on the Australian Government to urgently amend the Intervention to ensure that it is no longer racially discriminatory and complies with other human rights obligations.

- G. The Government has claimed to address these allegations by purportedly making income management non-discriminatory, by conducting two consultation processes (the NTER Redesign consultations and the Stronger Futures consultations) so as to justify declaring the remaining measures of the Intervention as special measures and by purporting to reinstate the *Racial Discrimination Act 1975* (Cth) ('RDA').
- H. However, the majority of the measures of the Intervention remain unchanged. Income management, although an expanded program, continues to disproportionately apply to Aboriginal people; and the reinstatement of the *RDA* has been argued by numerous legal commentators to be of limited effect.

***The Stronger Futures consultation process does not comply with Australia's obligations to consult with Aboriginal and Torres Strait Islander Peoples***

- I. The duty of states to consult with Aboriginal and Torres Strait Islander peoples in relation to decisions that affect them is unambiguously stated in a number of international instruments, including the United Nations Declaration on the Rights of Indigenous People ('**the Declaration**'), which the Australian Government ('**Government**') has endorsed.
- J. Further, the duty specifically arises in relation to the Stronger Futures legislation, given the Government's claim that the proposed legislative measures are special measures for the purposes of the *RDA* and International Convention on the Elimination of All Forms of Racial Discrimination ('**Convention Against Racial Discrimination**').
- K. It seems that the content and scope of the duty will vary according to the circumstances and the potential impacts of proposed initiatives. Nonetheless, there are two essential features:
- (i) Good faith negotiations with the object of achieving agreement or consent, prior to Government policy decisions being made; and
  - (ii) Confidence building initiatives that will be conducive to achieving consensus. In particular, the consultation process itself should be a product of consensus.



- L. The appropriate standard applied to the Stronger Futures consultation process was that of free, prior and informed consent, for the following reasons:
- (i) The initiatives in the proposed legislation are intended to be special measures; and
  - (ii) The initiatives limit or remove human rights on a differential basis.
- M. The Stronger Futures consultation process did not comply with Australia's obligations to meaningfully consult with Aboriginal and Torres Strait Islander peoples. Among other failings, the process was deficient because it:
- (i) Did not involve the affected Aboriginal people in the design or implementation of the process;
  - (ii) Relied on materials that were dense, complex and were not translated into relevant Aboriginal languages;
  - (iii) Was conducted in very general terms, without reference to specific proposals or potential initiatives, despite the fact that the proposed legislative measures must have been in draft;
  - (iv) Was decidedly partisan and did not acknowledge previous criticisms of Intervention measures or acknowledge successful community led initiatives to address community aspirations;
  - (v) Covered so many themes and asked so many questions that in depth discussion was not possible;
  - (vi) Did not provide any mechanisms for reaching agreement;
  - (vii) Did not include a clear process for feedback to communities to verify records of meetings; and
  - (viii) Gave insufficient time for considered appraisal of the complex proposed legislative measures, especially from remote Aboriginal communities.

***The Stronger Futures consultation process does not justify classification of the measures in the proposed legislation as special measures***

- N. Special measures are forms of favourable or preferential treatment described by the UN Committee on the Elimination of Racial Discrimination ('**CERD**') and international

law experts as 'affirmative measures', 'affirmative action' or 'positive action', intended to ensure the adequate advancement of certain racial groups who require support to enjoy their human rights in full equality.

- O. The *RDA* gives effect to the Convention Against Racial Discrimination in Australian domestic law. Invoking Article 1(4) of the Convention, section 8 of the *RDA* allows for 'special measures', providing for differential treatment that would otherwise breach sections 9 and 10 of the Act.
- P. Special measures are specifically targeted and narrowly focused initiatives that can be clearly justified by State parties on the basis of evidence of need, which is ascertained by reference to the group concerned, rather than by external policy makers purporting to act in the best interests of the group. They are temporary, measurable and goal directed measures that are appropriate, legitimate and necessary, and are carefully tailored for the intended beneficiaries. They require monitoring and evaluation against the measurable objectives that justify their enactment.
- Q. Crucially, special measures are designed and implemented on the basis of prior consultation with and the active participation of the beneficiaries. Arguably, initiatives that remove or curtail rights cannot be special measures but, if such initiatives *could* be characterised as special measures, the informed consent of the beneficiaries would be essential.
- R. The proposed legislative measures do not fulfil the criteria for classification as special measures because:
- (i) They were not the subject of prior consultation with the affected Aboriginal communities;
  - (ii) Evidence of the effectiveness of the specific measures is equivocal, if it exists at all, precluding an assessment of whether they are proportional or necessary;

- (iii) They do not include measurable outcomes, are not goal directed or tailored for particular groups; and
- (iv) There are no criteria for assessment or evaluation or a reporting structure against specific criteria to demonstrate achievement of outcomes.

***The Stronger Futures consultation process and legislative package do not accord with the evidence of what is required for Indigenous peoples to achieve their social, cultural, economic, and political aspirations***

- S. Comprehensive research undertaken in Australia and North America demonstrates that Indigenous self-determination is the most significant factor in achieving socio-economic prosperity and community development for Indigenous peoples. Consequently, effective policy should aim to strengthen the capacity of Aboriginal and Torres Strait Islander peoples to exercise genuine decision-making control.
  
- T. An evidence based policy approach requires much more than token consultation, input into government policy, or the Indigenisation of mainstream services. Instead, it is the strengthening of Indigenous governance systems that is the necessary precondition to 'successful' outcomes – whether measured against Government or Indigenous aspirations.
  
- U. The Stronger Futures consultation process was the antithesis of this approach. The process denied genuine engagement that would lead to real understanding of what communities will face if the legislation is enacted, and precluded Indigenous decision-making authority.

## BACKGROUND

### THE NORTHERN TERRITORY INTERVENTION

1. On 21 June 2007, the Howard Government announced the Commonwealth's response to the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse – *Ampe Akelyernemane Meke Mekarle, 'Little Children are Sacred'*<sup>1</sup> (**'Little Children Are Sacred'**). Describing the report's disturbing allegations as 'Australia's Hurricane Katrina',<sup>2</sup> Prime Minister Howard announced a 'national emergency intervention' into Aboriginal communities in the Northern Territory – the 'Northern Territory Emergency Response' (**'NTER'**), commonly referred to as the 'Intervention'.
2. Within seven weeks of its announcement, the Howard Government passed a legislative package with bi-partisan support, imposing blanket application of non-discretionary measures with profound effects. The Government promoted imagery of a catastrophe justifying the mobilisation of the army, police and volunteer doctors en masse, contending that there was 'nothing less than a war zone in Australia'.<sup>3</sup>
3. The Intervention imposed a comprehensive suite of oppressive measures that disproportionately affect Aboriginal people in the Northern Territory. The measures included:
  - (a) A regime that quarantines 50 percent of social security entitlements for food and other approved goods for purchase in approved stores;
  - (b) The compulsory acquisition and control of specified Aboriginal land and community living areas through five-year leases, on terms favourable to and imposed by the Commonwealth and, initially, no guaranteed compensation;

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<sup>1</sup> Pat Anderson and Rex Wild, *Little Children Are Sacred* (2007).

<sup>2</sup> 'Abuse crisis like 'Hurricane Katrina'', *Sydney Morning Herald* (Sydney) 25 June 2007.

<sup>3</sup> Mal Brough, 'Northern Territory Intervention' (Speech delivered at the Fortieth Alfred Deakin Lecture, Melbourne University, Melbourne, 2 October 2007)

<[http://www.facsia.gov.au/Internet!Minister3.nsf/content!alfred\\_deakin\\_020ct07.htm](http://www.facsia.gov.au/Internet!Minister3.nsf/content!alfred_deakin_020ct07.htm)>.

- (c) The removal of the right to negotiate provided by the *Native Title Act 1993* (Cth);
- (d) The appointment of Commonwealth employees (Government Business Managers) to coordinate services in Aboriginal communities, implement the Northern Territory Intervention and become key liaison and consultation contacts;
- (e) The Commonwealth was vested with broad powers to intervene in the affairs of Aboriginal organisations in order to, for example, direct them to deliver services in a specific way, transfer council-owned assets to the Commonwealth, appoint observers, suspend community councils or appoint managers to run them;
- (f) The abolition of the Community Development Employment Projects program ('CDEP'), which employed Aboriginal people in a wide variety of jobs directed towards meeting local community needs;
- (g) The removal of consideration of Aboriginal customary law and cultural practice in bail applications and sentencing;
- (h) The granting of coercive 'star chamber' powers to the National Indigenous Violence and Child Abuse Intelligence Task Force, including powers to compel people to attend examinations, take oaths or affirmations and answer questions or produce documents; and
- (i) Limitations on review by the Social Security Appeals Tribunal, Administrative Appeals Tribunal, Public Works Committee and other Parliamentary oversight.

4. In response, a group of senior Aboriginal people in the Northern Territory requested urgent action from CERD, alleging that there were numerous violations of the

Convention Against Racial Discrimination and of international human rights law generally under the Northern Territory Intervention.<sup>4</sup>

5. The provisions of the Northern Territory Intervention legislation were targeted directly at Aboriginal people, and the operation of the *RDA* was excluded in respect of all acts or omissions made for the purposes of the Northern Territory Intervention. The legislation also characterised the measures of the Intervention as ‘special measures’.
6. Two of the defining features of the Intervention’s implementation were its lack of consultation with affected Aboriginal communities and the astonishing haste with which the legislation was passed. Such haste was contended to be necessary to avoid ‘red tape’ and ‘talkfests’.<sup>5</sup> As one of the authors of *Little Children Are Sacred* noted, the only consultation that did take place was with the Canberra bureaucracy.<sup>6</sup>
7. It is ironic that the Government would claim that the Intervention had been triggered by *Little Children are Sacred*, given the report’s emphatic demand for radical change in the way that governments and non-government organisations consult, engage with and support Aboriginal people.<sup>7</sup> The Inquiry concluded that previous approaches had left Aboriginal people ‘disempowered, confused, overwhelmed, and disillusioned’, and communities had been weakened by the ‘failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority, in decision making.’<sup>8</sup> Central to all of its 97 recommendations was the critical need for sincere consultation with Aboriginal people in designing initiatives for Aboriginal communities. The repeated emphasis throughout the report was on ‘genuine partnerships’, ‘immediate and ongoing effective dialogue with Aboriginal people’, and ‘genuine consultation in designing initiatives that address child sexual

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<sup>4</sup> Barbara Shaw et al, *Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination* (2009) 9–11 <[http://www.hrlrc.org.au/files/E75QFXXYE7/Request\\_for\\_Urgent\\_Action\\_Cerd.pdf](http://www.hrlrc.org.au/files/E75QFXXYE7/Request_for_Urgent_Action_Cerd.pdf)> at 12 August 2009.

<sup>5</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 18 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

<sup>6</sup> Rex Wild QC, *The First Anniversary of The Report* (26 June 2008) <<http://www.getup.org.au/blogs/view.php?id=1341>>.

<sup>7</sup> Wild and Anderson, *Little Children are Sacred*, above n 1, 50.

<sup>8</sup> *Ibid.*

abuse'.<sup>9</sup> The required approach was not of imparting information or undertaking token consultation, but one of facilitating voluntary engagement and community consent to all future actions.<sup>10</sup>

8. There were divergent views as to the extent to which the situation in the Northern Territory represented a crisis, but what was not contentious was the chronic underfunding of basic services and ongoing government neglect that preceded the Intervention. Many were relieved that the Commonwealth had finally resolved to take decisive action in relation to the longstanding poverty and dysfunction within Aboriginal communities. However, the punitive and arbitrary nature of the measures was at odds with the consultative approach recommended by *Little Children are Sacred*, and the evidence of what had been working to address those problems effectively in Aboriginal communities.
9. It is now uncontroversial to state that the Intervention measures, as originally configured, were racially discriminatory. This is the conclusion drawn by numerous international and domestic human rights bodies including the United Nations Committee on the Elimination of Racial Discrimination,<sup>11</sup> the Human Rights Committee,<sup>12</sup> the Committee on Economic, Social and Cultural Rights,<sup>13</sup> the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (**'Special Rapporteur'**)<sup>14</sup> and the Aboriginal and Torres Strait

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid 52.

<sup>11</sup> UN Committee on the Elimination of Racial Discrimination, *Urgent Action Letters to the Australian Government* (13 March 2009) and (28 September 2009) <<http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>> ('CERD').

<sup>12</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [14].

<sup>13</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [15].

<sup>14</sup> Special Rapporteur, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (4 March 2010) at [16] <<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>>. See also Special Rapporteur, *Preliminary Note On The Situation Of Indigenous Peoples In Australia*, A/HRC/12/34/Add.10 (24 September 2009) <<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>>.

Islander Social Justice Commissioner.<sup>15</sup> The Intervention also arguably violated a range of other human rights obligations under international law.<sup>16</sup>

10. The Special Rapporteur condemned the Intervention in the strongest possible terms for having an overly interventionist architecture, with measures that undermine Indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy.<sup>17</sup> The Special Rapporteur, Professor Anaya, noted reports of indignity and stigmatisation brought about by the scheme, which heightened racist attitudes among the public and media against Aboriginal people, and animated perceptions of Indigenous peoples as somehow being responsible for their disadvantage.
11. The Special Rapporteur concluded that measures of the Intervention, as they were originally configured, were racially discriminatory, unable to qualify as special measures, and neither proportionate to, nor necessary for, any legitimate objectives of the Intervention.<sup>18</sup>

## THE 'REDESIGN' CONSULTATIONS

12. The Rudd Government acknowledged that the suspension of the *RDA*, combined with a lack of prior consultation, left Aboriginal people feeling hurt, betrayed and less worthy than other Australians.<sup>19</sup> It recognised that reinstatement of the *RDA* was a fundamental prerequisite for achieving long-term outcomes and that, in order for

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<sup>15</sup> Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008).

<sup>16</sup> The Special Rapporteur contends that the Intervention violates a range of human rights including rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property, and cultural integrity: Special Rapporteur, above n 14, [16]. While not specifically expressing disagreement with the Special Rapporteur's conclusion that the Intervention is racially discriminatory, the Government disputed that there has been a denial of all of the rights identified by the Special Rapporteur: See Special Rapporteur, above n 14, [58]–[59].

<sup>17</sup> *Ibid* [13].

<sup>18</sup> Special Rapporteur, above n 14, [14]–[29].

<sup>19</sup> Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper* (2009) <[http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/future\\_directions\\_discussion\\_paper/Documents/discussion\\_paper.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Documents/discussion_paper.pdf)>.



these long-term outcomes to be effective, they must be created through meaningful engagement with Indigenous peoples.<sup>20</sup>

13. The Government stated that it would revise the core measures so that they were either non-discriminatory, or more clearly justified as 'special measures' in conformity with the *RDA*.<sup>21</sup> It then released the Future Directions for the Northern Territory Emergency Response Discussion Paper ('Future Directions')<sup>22</sup> that outlined the Government's proposals to amend a number of the measures, and formed the basis for the Redesign Consultation process in 2009.
14. Between June and August 2009, the Government conducted a large-scale consultation process with individuals, families and communities across the Northern Territory.<sup>23</sup> The NTER Redesign Consultation process was extensive, with over 500 meetings conducted in all 73 prescribed areas subject to the Intervention. It involved several thousand people, most of whom were Indigenous.<sup>24</sup> Four tiers of consultation were adopted, ranging from meetings with individuals and families, to community meetings, to intensive workshops.
15. As a 'starting point for discussion' Future Directions set out how the Government intended to meet its commitment to resetting its relationship with Indigenous peoples and reinstating the *RDA*.<sup>25</sup> The Future Directions Discussion Paper highlighted eight Northern Territory Intervention measures, set out proposals for improving the selected measures, and posed a number of questions to be raised during the consultation process. The eight measures chosen were:

- (a) Income management;

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<sup>20</sup> Ibid, Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations* (November, 2009) 5, 7.

<[http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/report\\_nter\\_redesign\\_consultations.aspx](http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx)>.

<sup>21</sup> Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, above n 20, 7; Australian Government, above n 19, 1–3.

<sup>22</sup> Australian Government, above n 19, 3.

<sup>23</sup> Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, above n 20, 7.

<sup>24</sup> Explanatory Memorandum, Social Security and other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, Outline.

<sup>25</sup> Australian Government, above n 19, 3.

- (b) Five-year leases;
- (c) Alcohol restrictions;
- (d) Pornography restrictions;
- (e) Community Store Licensing;
- (f) Controls on use of publicly funded computers;
- (g) Coercive powers of the ACC; and
- (h) Business management area powers.

16. The Government claimed that it was 'committed to real consultation with Aboriginal people in the Northern Territory so the NTER measures can be improved.'<sup>26</sup> However, the content of Future Directions and the conduct of the Redesign Consultations belie this expansive interpretation of the process, with the process more properly described as a forum for comment on the proposed changes, rather than an opportunity for genuine input into policy.<sup>27</sup> Our analysis of the consultation process concluded that serious failings undermined its credibility and rendered reliance on the process unsafe. We identified the following flaws:

- (a) Lack of independence;
- (b) Absence of Aboriginal input into design and implementation;
- (c) Insufficient notice in some communities;
- (d) Absence of interpreters or qualified interpreters at some meetings;
- (e) Consultation limited to existing government proposals;
- (f) Inadequate explanations and description of measures;
- (g) Failure to explain complex legal concepts; and

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<sup>26</sup> Ibid.

<sup>27</sup> The Hon Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michelle Harris, *Will They Be Heard? A Response to the NTER Consultations: June to August 2009* (Report, Jumbunna Indigenous House of Learning, University of Technology Sydney, November 2009), 10 ('*Will They Be Heard?*').

- (h) Concerns about the government's motives in undertaking the consultation<sup>28</sup>
17. Despite the rhetoric and the large number of meetings, the Redesign Consultation process was in fact a mechanism for providing information about decisions already made or in the making. It did not give Indigenous communities a meaningful opportunity to influence the decision-making process. Indeed, the process appears to have been a formality.

### **STRONGER FUTURES CONSULTATION PROCESS**

18. The 'Stronger Futures' consultation process conducted between June and August 2011 continues the pattern of tokenistic consultation with Aboriginal communities in the Northern Territory relied upon by the Government to support its pre-determined initiatives.
19. On 22 June 2011, the Australian Government published the Stronger Futures in the Northern Territory Discussion Paper ('**Stronger Futures Discussion Paper**'). It was claimed to be a 'starting point for debate and consultation on new approaches and new ideas',<sup>29</sup> and was 'not intended to shape or limit comment.'<sup>30</sup>
20. Again, the Government acknowledged that the introduction of the Intervention had 'caused ongoing anger, fear and distrust among Indigenous people and communities',<sup>31</sup> and sought to differentiate itself, employing the rhetoric of 'partnership' and building on existing foundations.
21. The discussion paper set out eight proposed areas 'for building on the work of the NTER' and identified directions for reform, 'particularly to improve education for children, to expand employment opportunities and tackle alcohol abuse.'<sup>32</sup>

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<sup>28</sup> Ibid 3–36.

<sup>29</sup> Australian Government, *Stronger Futures in the Northern Territory: Discussion Paper June 2011* (June 2011) 3 <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/> ('*Stronger Futures Discussion Paper*').

<sup>30</sup> Australian Government, *Stronger Futures in the Northern Territory: Report on Consultations* (October 2011) 13 <<http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/>> ('*Stronger Futures Government Report*').

<sup>31</sup> Australian Government, above n 29, 1.

<sup>32</sup> Ibid 3.

22. Again, the Government conducted a large-scale consultation process in four tiers. Three hundred and seventy-eight meetings were conducted between individuals, families and small groups with Government Business Managers and Indigenous Engagement Officers (Tier 1); 101 whole of community meetings facilitated by senior FaHCSIA staff were conducted in nearly all of the 73 prescribed areas and in some town camps (Tier 2); five public meetings open to anyone were held in Darwin, Katherine, Nhulunbuy, Tennant Creek and Katherine (Tier 3); and the Minister for Indigenous Affairs and senior FaHCSIA officers held discussions with stakeholders, service providers and advocacy groups (Tier 4).<sup>33</sup>
23. As it had done for the 2009 Redesign consultation process, the Government contracted the Cultural and Indigenous Research Centre Australia ('**CIRCA**') to report on the conduct of the consultations ('**CIRCA Stronger Futures Report**').<sup>34</sup> Unfortunately, CIRCA's report demonstrates the process to be markedly less transparent than that conducted in 2009, rendering the CIRCA report somewhat ambiguous. For example, CIRCA was requested to assess whether the consultations were undertaken in accordance with the Government's internal consultation and communication strategy but, unlike the 2009 report, the elements of that strategy are not detailed. Similarly, an evaluation of the content of consultations was not conducted as it was in 2009.
24. The timing of the Government's own report, *Stronger Futures in the Northern Territory Report on Consultations* ('**Government Stronger Futures Report**'), illustrates the tokenistic nature of the process. The report purported to summarise 450 consultations in 100 communities which had ended only a few weeks earlier. It was followed by three reports, collectively amounting to 700 pages and said to encompass an independent evaluation of the Intervention.<sup>35</sup> The *Stronger Futures in the Northern Territory Bill 2011* and two associated Bills were introduced to Parliament two weeks later.

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<sup>33</sup> Australian Government, above n 30, 14-15.

<sup>34</sup> Cultural & Indigenous Research Centre Australia, *Report on Stronger Futures Consultation 2011: Final Report* (September 2011) <<http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/>> ('*CIRCA Stronger Futures Report*').

<sup>35</sup> Australian Government, above n 30, 5.

25. On 25 November, the Senate referred those Bills to the Senate Standing Committees on Community Affairs for an inquiry. The Committee was initially due to deliver its report on 29 February 2012. The Senate subsequently granted an extension of time for reporting until 13 March 2012.
26. Over the past four years, Aboriginal people in the Northern Territory have consistently demanded that the Commonwealth recalibrate its relationship with them, in the spirit of good will and mutual respect. Meaningful consultation must lie at the heart of any such relationship. Instead, processes have been formulaic and disingenuous.

### **REPORT OVERVIEW**

27. The primary purpose of this report is to provide an objective critique of the 'Stronger Futures' consultation process.
28. The report is structured as follows:
- (a) An analysis of Australia's duty to consult with Aboriginal peoples, as imposed by international and domestic human rights law;
  - (b) An analysis of a representative sample of consultation meetings;
  - (c) An analysis of assessment of consultation meetings by the Cultural and Indigenous Research Centre ('**CIRCA**') and the Government;
  - (d) An analysis of whether the consultation process demonstrated compliance with Australia's duty to consult with Indigenous people; and
  - (e) A summary and analysis of the Government's legislative response, the Stronger Futures Bills; and
  - (f) Conclusions.
29. In forming their analysis, the authors have relied upon transcripts and video footage provided by volunteers, of the following meetings:

- (a) Alice Springs Public Meeting;
- (b) Alice Springs Town Camps Meeting;
- (c) Bagot;
- (d) Darwin;
- (e) Galiwin'ku, Elcho Island;
- (f) Kintore;
- (g) Maningrida;
- (h) Mutitjulu; and
- (i) Yuendumu.

30. The benchmarks used for evaluation in this report are the principles of good practice for community consultations taken from the Government's *Best Practice Regulation Handbook*, reproduced in the Australian Human Rights Commission's *Draft RDA Guidelines for Income Management Measures*.<sup>36</sup>

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<sup>36</sup> Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (11 November 2009)  
<[http://www.hreoc.gov.au/racial\\_discrimination/publications/RDA\\_income\\_management2009\\_draft.html](http://www.hreoc.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html)>.

## DUTY TO CONSULT

### STATES' DUTY TO CONSULT WITH INDIGENOUS PEOPLES

31. The obligation of States to effectively consult with Indigenous peoples on decisions that affect them is 'firmly rooted in international human rights law'.<sup>37</sup> The duty is unambiguously stated in a number of international instruments including articles of the United Nations Declaration on the Rights of Indigenous People (**'the Declaration'**) and ILO Convention No 169, and is fundamental to the core United Nations human rights treaties, the International Convention on the Elimination of All Forms of Racial Discrimination (**'Convention Against Racial Discrimination'**) and the International Covenant on Civil and Political Rights (**'ICCPR'**).<sup>38</sup>
32. It appears that the content and scope of the duty may vary according to the circumstances surrounding the consultation process, and potential impact of the proposal concerned and, in some circumstances, may require informed consent. The content and scope of the duty will be discussed in greater detail below.

### SPECIAL MEASURES

33. The duty of the Australian Government to enter into a meaningful consultation process with Aboriginal communities in the Northern Territory is also necessitated by the Government's assertion that many of the Intervention measures are 'special measures'. Special measures are forms of favourable or preferential treatment described by the UN Committee on the Elimination of Racial Discrimination (**'CERD'**) and international law experts as 'affirmative measures', 'affirmative action' or 'positive action',<sup>39</sup> intended to ensure the adequate advancement of certain racial groups who require support to enjoy their human rights in full equality.

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<sup>37</sup> Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, UN Doc A/HRC/12/34 (15 July 2009) [38]

<<http://www2.ohchr.org/english/issues/indigenous/indigenous/rapporteur/annualreports.htm>>. (*Duty to Consult*).

<sup>38</sup> Ibid [38]-[39].

<sup>39</sup> CERD, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, 75<sup>th</sup> sess, UN Doc CERD/C/GC/32 (24 September 2009) [12] ('General Recommendation 32'). See also Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial*

34. The Convention Against Racial Discrimination embodies the principles of dignity and equality of all human beings, combining 'formal equality before the law and equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights'.<sup>40</sup> To promote the attainment of de facto equality, 'special measures' constitute a form of permissible differentiation under the Convention Against Racial Discrimination. They are permitted under art 1(4) and required 'when the circumstances so warrant' under art 2(2).<sup>41</sup>

35. Article 1.4(1) of the Convention Against Racial Discrimination provides:

*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 have been achieved.*

36. Article 2.2 provides:

*States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial*

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*Discrimination: A Commentary* (1970) 45–6, 51–2; Michael O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998) 171; Alexandra Xanthaki, *Indigenous Peoples and United Nations Standards: Self-determination, Culture, Land* (2007) 16–17; Olivier de Schutter, 'Positive Action' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007) 759–62.

<sup>40</sup> CERD, General Recommendation 32, above n 39, [6].

<sup>41</sup> Note that CERD has clarified that special measures are not an exception to the principle of non-discrimination and that the term 'positive discrimination' should not be used. See General Recommendation 32, above n 39, [12], [20]. Special measures are also permissible under article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women and article 5(4) of the Convention on The Rights of Persons with Disabilities. The Human Rights Committee has also observed that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR: See General Recommendation 18 at [10].



*groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.*

37. The *RDA* gives effect to the Convention Against Racial Discrimination in Australian domestic law.<sup>42</sup> Invoking art 1(4) of the Convention Against Racial Discrimination, s 8 of the *RDA* allows for ‘special measures’, providing for differential treatment that would otherwise breach ss 9 and 10 of the Act.<sup>43</sup>
38. The enactment of the *RDA* incorporates Australia’s international obligations into domestic law. Thus, no distinction needs to be made between obligations in the two jurisdictions. The High Court of Australia has directed that the starting point for analysing special measures under the *RDA* is their meaning under the Convention Against Racial Discrimination. In *Gerhardy v Brown*,<sup>44</sup> the High Court noted that the ‘true meaning of the Act is ascertained by reference to the meaning in international law of the corresponding Convention provisions’.<sup>45</sup> Incorporating the language of art 1(4) and 2(2) of the Convention Against Racial Discrimination, Brennan J listed the following criteria of special measures:

*A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and*

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<sup>42</sup> The Preamble describes the *RDA*, among other things, as making provisions for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, making provision for giving effect to the Convention.

<sup>43</sup> Subsection 8(1) provides: ‘This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).’

<sup>44</sup> *Gerhardy v Brown* (1985) 159 CLR 70.

<sup>45</sup> *Ibid* 124 (Brennan J).

*exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.* <sup>46</sup>

In addition to the above criteria, any proposed initiative ‘must not lead to the maintenance of separate rights for different racial groups’ nor ‘be continued after the objectives for which [it was] taken have been achieved’.<sup>47</sup>

39. The CERD publishes ‘General Recommendations’ as authoritative statements of the interpretation of the rights, duties and standards contained within the Convention. The Convention in conjunction with these general recommendations reveals the content of State party obligations, subsequently incorporated into domestic law through the *RDA*.
40. In 2009, the CERD published General Recommendation 32 to provide guidance to State parties on special measures.<sup>48</sup> The CERD identified a number of specific characteristics that measures must have in order to be considered ‘special’, namely, they must:
- (a) Be designed and implemented on the basis of *prior* consultation with affected communities and the active participation of such communities [emphasis added];<sup>49</sup>
  - (b) Be appropriate to the situation to be remedied, legitimate and necessary in a democratic society;<sup>50</sup>
  - (c) Respect the principles of fairness and proportionality;<sup>51</sup>
  - (d) Be temporary;<sup>52</sup>

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<sup>46</sup> Ibid 133 (Brennan J).

<sup>47</sup> Ibid 139 (Brennan J).

<sup>48</sup> CERD, above n 39.

<sup>49</sup> Ibid [18].

<sup>50</sup> Ibid [16].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

- (e) Be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned;<sup>53</sup>
- (f) Be goal-directed programs which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms;<sup>54</sup>
- (g) Be carefully tailored to meet the particular needs of the groups or individuals concerned;<sup>55</sup> and
- (h) Provide for a continuing system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal.<sup>56</sup>

41. Additionally, CERD identified reporting requirements for governments that purport to implement special measures. Governments should identify articles of the Convention to which the special measures are related and report on specific issues, including:

- (a) Justifications for the measures, including statistical and other data on the situation of beneficiaries, how disparities have arisen and what results are expected;
- (b) Intended beneficiaries;
- (c) Range of consultations undertaken towards the adoption of the measures including consultations **with intended beneficiaries** and with civil society generally [emphasis added];
- (d) Nature of measures and how they promote the advancement, development and protection of affected groups and individuals;
- (e) Envisaged duration of measures;
- (f) Mechanisms for monitoring and evaluating the measures;
- (g) Participation by the targeted groups and individuals in the implementing institutions and in the monitoring and evaluation process; and

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid [22].

<sup>55</sup> Ibid [27].

<sup>56</sup> Ibid [35].

(h) Results, provisional or otherwise, of the application of the measures.<sup>57</sup>

42. In relation to the consultation requirements, CERD emphasises engagement with the intended beneficiaries in relation to the specific initiatives proposed and not reliance on other sources, or more general consultations covering a broader range of issues.

43. In *Gerhardy v Brown*, Brennan J expressed a similar sentiment. Brennan J observed that:

*[t]he wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.*<sup>58</sup>

44. The requirement for consultation as a pre-requisite for characterisation of an initiative as a special measure is somewhat contentious in Australian domestic law. In particular, three Queensland cases<sup>59</sup> have questioned the requirement, seemingly conflating the requirements of consultation and consent. A comprehensive analysis of relevant case law is not possible in this report, but it should be observed that the requirement for prior consultation is well-settled in international law and is the standard to be applied in domestic law. It should be noted that these cases did not have the benefit of General Recommendation 32 as to correct interpretation of the Convention Against Racial Discrimination, nor the Special Rapporteur's comments on the duty to consult to provide guidance.

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<sup>57</sup> Ibid [37].

<sup>58</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 135; Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 52-58.

<sup>59</sup> *Aurukun Shire Council and Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Maloney v Queensland Police Service* [2011] QDC 139; *Morton v Queensland Police Service* [2010] QCA 160.

## WHAT DOES THE DUTY TO CONSULT ENTAIL?

45. As noted above, Australia's obligation to consult with Indigenous peoples about issues that affect them is imposed by a range of international human rights instruments. Relevantly, it has been reiterated by CERD as a fundamental precondition for special measures, which require that they be designed and implemented on the basis of prior consultation with, and the active participation of, affected communities. This section explores the scope and content of the duty to consult, acknowledging that such a duty may vary according to circumstances and the potential impacts of proposed initiatives.
46. The Special Rapporteur has clarified that, as a general rule, decisions of the State should be made through democratic processes in which the public's interests – including Indigenous peoples' interests – are adequately represented.<sup>60</sup> However, special, differentiated consultation procedures are required when State decisions affect Indigenous peoples' particular interests. Such special procedures are justified by the nature of those particular interests, arising as they do from Indigenous peoples' distinctive cultural patterns and histories, and because the normal democratic and representative processes usually do not work adequately to address the concerns that are particular to Indigenous peoples. While it is unrealistic to say that the duty of States to consult directly with Indigenous peoples through special, differentiated procedures applies whenever a State decision may affect them, the duty does apply whenever a State decision may affect Indigenous peoples in ways not felt by others in society, even when those interests do not correspond to a recognised right to land or other legal requirement.<sup>61</sup>

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<sup>60</sup> Special Rapporteur, above n 37 [42].

<sup>61</sup> Ibid [42]-[44].

47. Compliance with the duty to consult not only fulfils Australia's human rights obligations but has the practical benefit of generating effective and positive outcomes. As the Special Rapporteur has observed:

*[W]ithout the buy-in of indigenous peoples, through consultation, at the earliest stages of the development of Government initiatives, the effectiveness of Government programs, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset. Invariably, it appears that a lack of adequate consultation leads to conflictive situations, with indigenous expressions of anger and mistrust.<sup>62</sup>*

48. According to the Special Rapporteur, there are two essential conditions for compliance with the duty to consult:

***Good faith negotiations with the object of achieving agreement or consent.***

This requirement emphasises negotiations towards a mutually acceptable agreement, prior to Government policy decisions being made. This is in contrast to the mere use of mechanisms for imparting information, a process that does not enable Indigenous people to genuinely influence the decision-making process.<sup>63</sup>

***Confidence building initiatives conducive to building a consensus.***

Good faith consultations towards consensual decision-making require a climate of confidence. This is especially relevant to Indigenous peoples, 'given their lack of trust in State institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events'.<sup>64</sup> Additionally, Indigenous people are 'typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education'.<sup>65</sup> The Special Rapporteur

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<sup>62</sup> Ibid [36].

<sup>63</sup> Ibid.

<sup>64</sup> Ibid [50].

<sup>65</sup> Ibid.

has observed that central to the development of a climate of confidence is that the consultation procedure is itself a product of consensus.<sup>66</sup> Further, any power imbalance between the parties must be addressed by ensuring that financial, technical and other assistance is provided to Indigenous people, without using such assistance for leverage, or to influence Indigenous views in the consultations.

## **FREE, PRIOR AND INFORMED CONSENT**

49. Whether the duty to consult with Indigenous people requires their free, prior and informed consent in relation to initiatives that affect them appears to vary, depending on the surrounding circumstances and potential impact of the proposal. Crucially, the duty to consult must never be a mere formality. In some circumstances, consent will be an absolute requirement whilst in others there will be a strong presumption that consent is required. At a minimum, the obligation will be fulfilled through the conduct of a consultation process genuinely aimed at obtaining consent.
50. It has been increasingly accepted over the past two decades that the free, prior and informed consent of Indigenous peoples to executive or legislative action that specifically affects them is a requirement for States. It is enshrined in a range of international instruments including the Declaration, CERD's General Recommendation 23 and ILO Convention 169, and has been affirmed by CERD, the UN Human Rights Committee (which monitors compliance with the ICCPR), the Inter-American Court of Human Rights and is, arguably, emerging as a principle of customary international law.
51. The Declaration, which Australia endorsed on 3 April 2009, prominently states the requirement that States consult to achieve the free, prior and informed consent of affected peoples in a number of Articles (10, 11, 19, 28, 29, 32). The requirement is also captured in the overarching principle in Article 19. It states:

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<sup>66</sup> Ibid [51].

*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.*

52. The Special Rapporteur describes the Declaration as the most authoritative expression of 'existing international consensus regarding the individual and collective rights of Indigenous peoples',<sup>67</sup> explaining:

*Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.*<sup>68</sup>

53. Thus, the Declaration represents a restatement of States' obligations in international law and a framework for action towards the full protection and implementation of these human rights.<sup>69</sup>

54. Similarly, CERD has identified specific obligations of State parties, including Australia, to require free, prior and informed consent of Indigenous peoples to

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<sup>67</sup> Special Rapporteur, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/9/9 (Human Rights Council, Ninth session, Agenda item 3) [43]. (2008 Annual Report)

<sup>68</sup> Ibid [41].

<sup>69</sup> Ibid [43].



decisions that directly affect them in *General Recommendation 23*.<sup>70</sup> Relevantly, States have an obligation to 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 ...*<sup>71</sup>  
(our emphasis)

55. Through its concluding observations and reviews of specific situations under its early warning measures and urgent procedures, CERD has repeatedly reminded State parties, including Australia, of their obligations to meaningfully engage with Indigenous peoples to gain their informed consent.<sup>72</sup> The Human Rights Committee has also referred to the duty to consult in its concluding observations.<sup>73</sup>
56. Notwithstanding these consistent declarations, the standard is treated as contentious by Government and was opposed by the former Coalition Government as 'inconsistent with Australia's democratic system if Parliament's ability to enact and amend legislation was subject to the consent of a particular subgroup of the population.'<sup>74</sup> However, this approach misstates or misunderstands the obligation.
57. The Special Rapporteur has expressed his disappointment that, in many situations, the discussion surrounding the duty to consult and the related principle of free, prior and informed consent has been framed in terms of whether Indigenous people have a 'veto power' that could be wielded to halt development projects.<sup>75</sup> Rather, the

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<sup>70</sup> CERD, *General Recommendation 23: Rights of Indigenous Peoples*, 51<sup>st</sup> sess, [3], UN Doc A/52/18, annex V at 122 (1997).

<sup>71</sup> *Ibid* art 4(d).

<sup>72</sup> See CERD, *Concluding Observations: Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (2005) (11); CERD, *Concluding Observations: Australia*, 56th sess, UN Doc CERD/C/304/Add.101 (2000) [9]; CERD, *Concluding Observations: Australia*, 45<sup>th</sup> sess, [545], UN Doc A/49/18 at [535] (1994).

<sup>73</sup> *Ibid*.

<sup>74</sup> *Comments by the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 16 May 2006, CERD/C/AUS/CO/14/Add.1 [20]  
<<http://www.unhcr.org/refworld/country,,CONCOBSCOMMENTS,AUS,,453779860,0.html>>.

<sup>75</sup> Special Rapporteur, *Duty to Consult*, above n 37, [48].

focus should be on building dialogue towards consensus. Necessarily, the importance of consent will vary according to the circumstances, but there is the possibility it could crystallise into a presumption that proposals should not be advanced without consent.<sup>76</sup>

## CAN MEASURES THAT IMPAIR OR REMOVE RIGHTS EVER BE ‘SPECIAL MEASURES’?

58. To some extent, the above discussion is academic in the context of the measures of the Northern Territory Intervention, as consent is **always** required where the proposal imposes an impairment, limitation or removal of rights.<sup>77</sup>

59. Indeed, it is arguable that measures that remove or impair rights cannot be special measures. The orthodox understanding of special measures is that they are forms of preferential or favourable treatment. As the Special Rapporteur observed:

*... it would be quite extraordinary to find, consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.<sup>78</sup>*

60. Nonetheless, the Government’s position from the outset has been that measures that remove or curtail human rights qualify as special measures, seemingly on the

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<sup>76</sup> Ibid [47].

<sup>77</sup> Aboriginal and Torres Islander Social Justice Commissioner, above n 15, 261; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) at [20] – [21] references omitted; Special Rapporteur, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (4 March 2010) at Appendix B [40] <<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>>.

<sup>78</sup> Special Rapporteur, 2010 Australia Report, above n 14, 50 [21].

basis of balancing positive and negative effects,<sup>79</sup> or by creating a hierarchy of rights (as though rights protected by one international treaty are inconsistent with and to be balanced against rights protected by another). Jonathon Hunyor has observed that there has been a degree of acceptance in Australia of measures that curtail rights as special measures; for example, alcohol bans in Aboriginal communities supported by symbolic 'special measures certificates' issued by the Race Discrimination Commissioner.<sup>80</sup>

61. Alternatively, negative measures can be approached as potentially fulfilling the criteria for limitations on human rights permissible under international law, and not as special measures at all. It is well accepted that limitations on some human rights are permissible, but the justification for such limitations must be extremely robust and in very limited circumstances: they must fulfil a legitimate and pressing purpose; be reasonable, necessary and proportionate; and be demonstrably justified and evidence-based. They will be impermissible if on a discriminatory basis.<sup>81</sup> As the Special Rapporteur clarifies:

*The proscription against racial discrimination is a norm of the highest order in the international human rights system. Even when some human rights are subject to derogation because of exigent circumstances, such derogation must be on a non-discriminatory basis.*<sup>82</sup>

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<sup>79</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 92 (Darryl Melham).

<sup>80</sup> Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 49-52.

<sup>80</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 15, 261; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) [20] – [21] references omitted.

<sup>81</sup> For an overview of permissible limitations on human rights see Human Rights Law Centre, Submission to Community Affairs Legislation Committee  
<[http://www.aph.gov.au/senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sublist.htm)>.

<sup>82</sup> Special Rapporteur, 2010 Australia Report, above n 14, 49 [18].

62. This alternative construction would require the Government to justify its curtailment of the rights of Aboriginal people in the Northern Territory against these stringent criteria.

## **CONTENT OF FREE, PRIOR AND INFORMED CONSENT**

63. Given the complexity around devising processes to obtain informed consent, it is self-evident that there cannot be prescriptive rules, and what is appropriate will vary in differing circumstances, especially when it is argued that competing rights are involved. Consultations where the rights of adults and children may differ, where group rights may contrast with individual rights, or where the rights of one section of a group are curtailed for the protection of another, raise complex issues, but do not negate the need for effective and legitimate consultation. Nor should 'urgency' or the importance of the subject matter of any consultation process impact upon the need to obtain informed consent. As the United Nations Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (**'FPIC Workshop'**) cautioned, 'in the rush to achieve ambitious development targets, Governments might ignore the vital principle of free, prior and informed consent.'<sup>83</sup>
64. Consultation will inevitably reflect a variety of opinions and there will seldom be consensus. This necessitates the involvement of Indigenous people in planning and implementing the process from the outset, and in identifying the mechanisms and procedures to confirm informed consent. The question of consent also inevitably highlights the necessity of effective representative bodies that are considered legitimate by those whom they represent, are an expression of Indigenous self-determination and a vehicle for engagement with governments.

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<sup>83</sup> UN Permanent Forum on Indigenous Issues, Report on the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3 (Fourth session, New York, 16-27 May 2005) [19] <<http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html>> ('FPIC Workshop').

65. The FPIC Workshop developed a comprehensive overview of the elements of free, prior and informed consent as it applies to Indigenous peoples. In summary:
- (a) **'Free'** requires the absence of coercion, intimidation or manipulation;
  - (b) **'Prior'** necessitates respect for Indigenous consultation and consensus processes; and
  - (c) **'Informed'** requires information about scope of, reasons for, duration and likely economic, social, cultural and environmental impact of the proposal.<sup>84</sup>
66. Consent entails, among other things, 'good faith', 'mutual respect', 'full and equitable participation' and 'dialogue allowing for appropriate solutions'. Consultation requires time and an effective system of communication to ensure genuine mutual understanding. The process must include the possibility of withholding consent. Accurate, accessible information is essential, along with procedures and mechanisms that facilitate equal access to financial, human and material resources.<sup>85</sup> Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of 'consent' allegedly given.

## BEST PRACTICE CONSULTATIONS

67. International standards mandate that negotiations between Indigenous people and governments embody good faith, mutual respect and full and equitable participation. Principles that exemplify 'meaningful and effective engagement' with Indigenous people can be summarised as follows:
- (a) Indigenous people should have input into the design and implementation of the consultations procedures;

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<sup>84</sup> Ibid [46].

<sup>85</sup> Ibid [47].

- (b) Consultation processes should be a product of consensus, where governments work with the affected peoples to determine the appropriate nature and level of consultation and agree upon a process;
- (c) Power imbalances must be addressed through adequate provision of resources, where procedures and mechanisms facilitate equal access to financial, human, technical and material resources;
- (d) Consultations should be in the nature of negotiations towards mutually acceptable arrangements **prior** to decisions on proposed measures [emphasis added];
- (e) Consultations need to begin early and should, where necessary, be ongoing, allowing for the opportunity for long-term, positive relationships to develop;
- (f) Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance;
- (g) Consultations should allow Indigenous people to genuinely influence the decision-making rather than being mechanisms for providing them with information about decisions already made;
- (h) Consultations should not be limited to the minor details of a policy when the broad policy direction has been set;
- (i) Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision and should not be coerced or manipulated into giving consent, or the appearance of consent. A 'take it or leave it' approach is unacceptable;
- (j) Adequate timeframes should be built into consultation processes allowing for fully informed responses;
- (k) Consultation processes need to reach the affected communities 'on the ground' and must respect appropriate community protocols;

- (l) Consultation processes need to respect Aboriginal and Torres Strait Islander representative and decision-making structures; and
- (m) Governments must provide all relevant information about all aspects of any proposal and do so in an accessible way.<sup>86</sup>

68. While mindful of the Social Justice Commissioner's caution that 'a rigid consultation 'checklist' would not be conducive to relationship building' and that what is required is effective engagement, not pro-forma consultations,<sup>87</sup> the authors nonetheless decided to use the criteria identified in the Government's own *Best Practice Regulation Handbook*,<sup>88</sup> to assess the Stronger Futures consultation process. These criteria were selected because, firstly, they have been produced by the Australian Government to monitor its own performance and secondly, they provide practical guidance as to what will fulfil Australia's obligations under international and domestic law.

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<sup>86</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010* (2011), 60-66. Special Rapporteur, Duty to Consult, above note 37. FPIC Workshop, above n 83. Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on Indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010), [89] <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf)>.

<sup>87</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 80.

## ANALYSIS OF THE STRONGER FUTURES CONSULTATIONS

### THE PRE-CONSULTATION PHASE

69. The Australian Human Rights Commission's *Draft RDA Guidelines for Income Management Measures* prescribe the following good practice requirements for the pre-consultation phase:
- (a) Involving Aboriginal and Torres Strait Islander people at the outset. Community leaders can provide input into planning the consultation process and provide information on community protocols;
  - (b) Ensuring that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders;
  - (c) Recognising the diversity of Aboriginal and Torres Strait Islander communities;
  - (d) Ensuring that the consultation process is accessible for broad cross-sections of affected communities;
  - (e) The consultation process should aim for a gender balance in relation to overall participant representation; and
  - (f) Ensuring that the conduct of consultations allow affected communities to have control over timeframes.<sup>89</sup>
70. The pre-consultation phase of the Commonwealth's consultations did not comply with many of the above good practice requirements, neither in terms of the content of the negotiations to be undertaken, nor the mechanics of the process. Most crucially, Aboriginal people were not involved at the outset of the pre-consultation phase, which is pivotal to setting the tone for effective consultations. Many became aware of the consultations only after the public launch of the Stronger Futures Discussion Paper<sup>90</sup> on 22 June 2011.

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<sup>89</sup> Australian Human Rights Commission, above n 36, 29.

<sup>90</sup> Australian Government, above n 29.



71. The framework for the consultation process was externally driven. Communities were not consulted on how, where and with whom any consultations should take place, but rather those decisions were made solely by Government.<sup>91</sup> In our representative sample, the authors have identified impediments to Aboriginal participation that could have been avoided if Aboriginal people had been consulted earlier. For example, if Aboriginal input had been sought on an appropriate venue in Alice Springs, it is likely that poor attendance could have been avoided.<sup>92</sup> Aboriginal input may have resulted in the use of an appropriately sized venue in Darwin,<sup>93</sup> and scheduling conflicts with important local events may have been avoided.<sup>94</sup>
72. The timetable for the consultations was entirely externally driven. Only six days elapsed from the public release of the Stronger Futures Discussion Paper on June 22 and the commencement of consultations, with a meeting in Tennant Creek on June 28.
73. This tight timeframe sparked an open letter from Aboriginal leaders and eminent persons, including Rosalie Kunoth-Monks, Dr Djinyini Gondara and former Prime Minister Malcolm Fraser.<sup>95</sup> The letter described the timeframe as ‘unfair and counterproductive’. It also raised concerns that people in remote areas had no means of accessing the discussion paper. Notice of the meetings was not provided sufficiently in advance, to enable communities to reach informed consent in relation to any measures, or to arrive at considered points of difference.
74. The short period between the launch of the Stronger Futures Discussion Paper and the commencement of the consultation phase, and the Commonwealth’s failure to ensure that the discussion paper was readily accessible, denied Aboriginal people

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<sup>91</sup> CIRCA, above n 34, 9.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Letter from Professor Jon Altman et al to the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 27 June 2011, < <http://www.concernedaustralians.com.au/media/Let-A-Nicholson-Stronger-Futures-27-6-11.pdf>>.

any opportunity to have meaningful input into the pre-consultation phase.

75. Complaints in relation to insufficient notice were not limited to the timing of meetings, but extended to inadequate information about the purpose of the meetings. As one person from Maningrida observed:

*... [I]f you seriously want to come and talk to the people of Maningrida about this, its got to be with mutual respect. So come back at any time, stay for two or three days that way we can properly reconcile ... This means to us, its nothing. Its just written up by the government. Its not coming from community perspective, its not the community voice. So for us that is sad day business. The thing is, I only heard about this last week to tell you the truth. I got a weird looking email just saying outstations where the consultation was taking place but no information whatsoever. Why and what purpose? ... so in future, if there is another consultation happening, please, my advice is, give us 6 weeks at least notice because we come from all over the place so.*

76. Finally, the Commonwealth's pre-consultation phase failed to recognise the diversity of Aboriginal communities in the Northern Territory. The Stronger Futures Discussion Paper does not contain any explicit reference to the cultural diversity or very different needs of Aboriginal communities. Localised negotiation over policy implementation is only considered in a small number of areas - namely Alcohol Management Plans and the potentially expanded role of community housing service providers.

### **Stronger Futures Discussion Paper**

77. The discussion paper set out 'priorities for building on the work of the NTER' and identified 'directions for reform,'<sup>96</sup> which were to provide the substance of the consultation process. It was therefore crucial that the discussion paper be

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<sup>96</sup> Australian Government, above n 29.

accessible to Aboriginal people in remote communities, clearly explain any proposals, identify the objectives of the process and what outcomes could be expected. Arguably, the Stronger Futures Discussion Paper fails to achieve any of those purposes. It is a long and densely worded document that was not translated into any Aboriginal languages.

78. CIRCA criticised the **Stronger Futures Consultation Paper** – a summary of the Stronger Futures Discussion Paper in ‘plain language’<sup>97</sup> – as inaccessible to those with limited English skills, as very large, and covering many different themes, making it a challenge to read, and as asking too many questions.<sup>98</sup> It follows that the discussion paper could not be fit for its purpose. Consequently, the Commonwealth neglected to comply with the good practice requirement of ensuring that consultation materials will be accessible to broad cross-sections of affected communities.

79. The Stronger Futures Discussion Paper prescribed eight ‘proposed areas for future action’:

- (a) School attendance and educational achievement;
- (b) Economic development and employment;
- (c) Tackling alcohol abuse;
- (d) Community safety;
- (e) Health;
- (f) Food security;
- (g) Housing; and
- (h) Governance.<sup>99</sup>

However, the focus of the consultations was to be on three of these, namely ‘schooling, jobs and alcohol’.<sup>100</sup>

80. The eight priorities were claimed to have been ‘identified based on discussions with

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<sup>97</sup> Australian Government, above n 30, 16.

<sup>98</sup> CIRCA, above, n 34, 19.

<sup>99</sup> Australian Government, above n 30, 5.

<sup>100</sup> CIRCA, above n 34, 6. See also Australian Government, above n 30, 1, 3 and 9.

Aboriginal people over the last four years'.<sup>101</sup> However, no information was provided as to how this identification occurred – who was consulted, what parameters were used for identification of priorities, how issues were prioritised, etc. The process was clearly not transparent, as such information is not available and many were critical of the absence of input from Aboriginal people in the Northern Territory and their organisations. As one member of the Yuendumu community said:

*Those people never, never ever, ever came to sit down with us and write this paper. All the information that we want all the things that they had in their minds that Aboriginal people they pointed out some points, eight of them, I think it's eight [confirmed by another voice] eight of them. And that eight never once that government ever spoke and came here. Never, never here - everywhere else! They didn't even sit down with us. Nothing. You call that a consultation? No, no, no.*

81. The lack of input by Aboriginal people is reflected by the omission of initiatives developed by communities themselves. For example, the issues flagged for discussion under school attendance and educational achievement suggest a preference for the linking of school attendance to welfare payments.<sup>102</sup> Greater Aboriginal involvement in the design of the school curriculum, with a view to making it more relevant to Aboriginal people, is not raised as an issue for discussion. Likewise, the Stronger Futures Discussion Paper omits reference to bilingual education, a key way that communities were working in partnership with schools. This was a particularly telling omission, given the frequency with which it was raised at the consultation meetings.
82. The discussion paper is written in very general terms, without reference to specific proposals or potential initiatives. Each of the eight priority areas is introduced by an explanation of why it is important, including factual material that concentrated almost

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<sup>101</sup> Australian Government, above n 30, 8.

<sup>102</sup> Ibid 12.

entirely on Aboriginal 'disadvantage' and current Government initiatives to address 'dysfunction'. This is followed by suggestions for 'future directions', many of which are uncontroversial and would be welcome in *any* community in Australia. However, many of the more controversial suggestions that have ultimately appeared in the proposed legislation are not present. In fact, no specific proposals are included. Finally, a list of questions to be posed in consultation meetings is included. While some specific Intervention measures are referred to, there is no explanation of the connection between suggested future improvements and measures introduced under the umbrella of the Intervention.

83. The discussion paper claims that the 'views of people living in the Northern Territory will be at the centre of shaping what [the Government does] next to tackle the unacceptable level of disadvantage still experienced by too many Aboriginal people in the Northern Territory.'<sup>103</sup> However, the discussion paper provides no insight into what decisions will be taken, how community input will feed into any decision-making process or what outcomes are likely to emerge. Rather, the Stronger Futures Discussion Paper claims to be a 'starting point for debate and consultations on **new approaches** and **new ideas**.'<sup>104</sup> [emphasis added].
84. The discussion paper's tone is decidedly partisan. It begins with a section outlining the 'benefits achieved through the NTER and Closing the Gap in the Northern Territory', asserting that the 'lives of many Aboriginal people in the Northern Territory have improved through the work done over the last four years', citing the now familiar refrain that women and children are safer, children are better fed and clothed, and that people receiving social security entitlements feel less pressure to spend money on alcohol, drugs and gambling. However, there is no reference to concrete evidence supporting these assertions.<sup>105</sup>
85. The Stronger Futures Discussion Paper is contradictory at its heart. On the one

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<sup>103</sup> Australian Government, above n 29, 1.

<sup>104</sup> Ibid 3.

<sup>105</sup> Ibid 5-7.

hand, it asserts the Commonwealth's commitment to be substantially guided by the desires of Aboriginal people when developing future policy. On the other, it outlines a clearly defined, pre-determined position on a range of central policy questions. For example, the discussion paper asserts:

*We want to hear from Aboriginal communities about local solutions to alcohol abuse and base our next steps on evidence of what works.*<sup>106</sup>

However, on the next page it reads:

*The Government believes that current alcohol restrictions should remain and will consult and work with communities to develop ways to make them more effective in tackling local alcohol abuse.*<sup>107</sup>

There is no discussion of other options for maintaining the 'dry' status that many communities had implemented prior to the Intervention, on their own initiative. The discussion paper and subsequent consultations do not acknowledge the pre-existing community initiated alcohol restrictions and regulations across Aboriginal land in the Northern Territory, developed over years through the consistent work of traditional owners making applications to the Northern Territory Liquor Commission.

86. We have to believe that the Government is sincerely committed to the approach it has taken, and that it is based on a genuine belief that it is somehow beneficial to Aboriginal people. Any alternative is too awful to contemplate. However, the partisan tone of the Stronger Futures Discussion Paper arguably demonstrates an unwillingness to engage with broader concerns and critical arguments.

Given that the process was supposed to demonstrate a new starting point, the Government's refusal to acknowledge sincere criticism from community leaders and

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<sup>106</sup> Ibid 15.

<sup>107</sup> Ibid 16.

respected persons, demonstrates a lack of respect and brings the motives of the Government into question. The Government's consistent failure to acknowledge significant, unforeseen hardships that have emerged as a result of certain Intervention measures has also led to cynicism and disengagement. Unsurprisingly, CIRCA observed hostility to some value laden questions, such as 'how can we get parents to understand how important education is?'<sup>108</sup>

87. The Stronger Futures Discussion Paper does not refer to pre-existing Commonwealth commitments on a number of subjects that it flags. For example, there is no mention in the discussion paper of the National Indigenous Reform Agreement that has already determined the economic development strategy for remote communities, that restricts investment to a small number of priority communities. The Agreement has significantly informed the Northern Territory Government's *Working Futures* policy on economic development and service delivery, with its focus on 'growth towns'.
88. Finally, the discussion paper does not provide any information in relation to how the imminent meetings may be affected by discrete but related consultations. For example, the Stronger Futures Discussion Paper raises the separate process of consultation currently taking place around the future of remote employment services, which is 'set to have new arrangements in place by 2013,'<sup>109</sup> but it is unclear how this process will be related to the Stronger Futures consultations.

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<sup>108</sup> CIRCA, above n 34, 20.

<sup>109</sup> Ibid 14.

## THE CONSULTATION PHASE

89. The challenges faced in conducting effective consultation with remote communities must be acknowledged. We also acknowledge that the actual consultation phase of the process was undertaken on a large-scale. But in no way did the process comply with the hallmarks of effective and meaningful consultation.
90. The Australian Human Rights Commission's *Draft RDA Guidelines for Income Management Measures* prescribe the following good practice requirements for the consultation phase:
- (a) Using various participatory methods throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation;
  - (b) Ensuring that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure;
  - (c) Where consensus is not attainable, it is important to consult with the broadest cross-section of the affected community, to be able to demonstrate that there has been appropriate and adequate consultation and weigh up diverse views against current evidence;
  - (d) Consultations should be transparent and have clear parameters;
  - (e) Being clear about what outcomes the proposal seeks to achieve and what issues the proposal seeks to address;
  - (f) Being clear about the potential and real risks, costs and benefits of the proposed measure;
  - (g) Identifying how you will accurately collect and record data during consultations;
  - (h) Considering what specific, time bound and verifiable benchmarks and indicators you will use to measure progress; and



- (i) Reaching agreement with communities about how feedback will be provided after the consultation phase is concluded.<sup>110</sup>

## **APPLICATION OF THE GOOD PRACTICE REQUIREMENTS TO THE CONSULTATION PHASE**

91. When measured against best practice guidelines, it is clear that the Government's consultation process was not adequate to fulfil its ambitions of 'looking towards the future, re-setting the relationship with Indigenous communities and [demonstrating] a genuine desire for the consultations to feed into policy development.'<sup>111</sup> Instead, the consultations appear to be more in the nature of an exercise to justify the Government's pre-determined decisions.

### ***Using various participatory methods throughout the consultation process to maximise participation***

92. As described above, there were no prior discussions with relevant communities in relation to the substantive focus of the meetings, outcomes to be achieved, or the conduct of the meetings themselves. Each meeting was facilitated by FaHCSIA staff who had undergone facilitation training and were equipped with scripts, factsheets and power-point presentations.<sup>112</sup> The Stronger Futures Consultation Paper that included the questions to be addressed was available for distribution at most meetings. However, the Consultation Paper was criticised for being too long, inaccessible to people with limited English skills and covering so many themes, with so many questions that people were overwhelmed and confused. So many themes and questions in a two to three hour time frame was 'not conducive to in-depth discussion',<sup>113</sup> resulting in criticism from CIRCA and meeting attendees alike.

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<sup>110</sup> Australian Human Rights Commission, above n 36, 30.

<sup>111</sup> CIRCA, above n 34, 15.

<sup>112</sup> Ibid 15-16.

<sup>113</sup> Ibid 26.

93. CIRCA observed that facilitators were generally respectful and professional, but that the quality of facilitation varied according to the experience of the facilitator, and their ability to be flexible and appropriately respond to the issues raised by meeting participants. It must be noted that these meetings occurred in an inter-cultural environment where the values, insights and norms of the Aboriginal participants may not have been in accord with those of the non-Indigenous public servant facilitator. Such differences were likely to be compounded in an environment where the facilitator and participants literally did not speak the same language. The absence of an Aboriginal perspective, which would have allowed participants to be heard and understood, was a critical omission. When asked about what ideas they had for 'moving forward' an older Aboriginal woman at the Alice Springs public meeting replied:

*I certainly have. Listen, sure...How many Aboriginal people do we have here, put your hands up all the Aboriginal people here put your hands up. And are you going to listen to us? We go back a long way ... and I am not being nasty but I have always said it for years and years until I'm sick and tired of it. That's the reason I sat here all this time until I was pushed to say something because I am thoroughly sick of it. Talk to us, let us tell you what it is, but then say to us we want to do this from your perspective, the Aboriginal perspective, not the white fella perspective . Because... I can tell you something from the Aboriginal perspective and you'll turn around and hear something different, and when you repeat it to me it's different, and that is what ends up getting interpreted, what's different. And what has to happen it has to be from the Aboriginal perspective.*

94. CIRCA observed that the facilitator training would have benefited from a greater focus on the skill of paraphrasing.<sup>114</sup> Our observations of the meetings would support that criticism. Paraphrasing and ensuring that people's comments are

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<sup>114</sup> CIRCA, above n 34, 16.

correctly understood is an important aspect of any meeting. However, it is absolutely essential when one is working in an inter-cultural environment where meaning, emphasis or priority can be easily mistaken. In some cases, a lack of understanding of the issue being raised from an Aboriginal perspective resulted in inaccurate paraphrasing of participants' remarks.

95. In a decided improvement from the Redesign consultation process, interpreters were generally present but, again, their effectiveness varied. The input of community members was not always interpreted for the record, or facilitators' and participants' comments translated into the appropriate Aboriginal language. In some cases, the interpreter repeated the facilitators' comments in English and some interpreters adopted a facilitation role, rather than an orthodox interpretation role. In some cases, community members interpreted for meetings.
96. Notwithstanding facilitators' professionalism, the most significant failing relates to Government control of the entire process. The Government set the agenda, decided which priorities would be discussed, prepared the scripts, asked the questions and set the timelines.
97. From our observations, facilitators often appeared defensive of Commonwealth policies, or evasive when faced with criticism, and occasionally deflected questions they were unable to answer. One participant in Darwin expressed concern about the facilitator's apparent lack of objectivity:

*And another thing I'd like to say is that I really think you're being inappropriate today in how you are presenting and it's no offence. It's, you know, you should just listen but you're trying to defend. I'm sorry but that's, you know, a few people have said that today.*

## **Mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure**

98. Generally, the eight priority areas were addressed during meetings. But because no proposed measures were raised, it follows that no mechanism was outlined to obtain agreement over process or possible outcomes in relation to specific proposals. In fact, as noted above, what was to be gained from the consultation process and how it would impact on policy formation was not clarified. There was enormous frustration that people were coming along to yet another meeting, where there was no real way for their input to be fed into Government decision-making.
99. Rather, meetings frequently occurred as ‘brainstorming’ sessions, where people were encouraged to express their views and opinions. Although the Stronger Futures Discussion Paper was the basis for the consultations, it was rarely referred to at any time other than during the brief introductions by FaHCSIA staff. In Yuendumu, participants expressed concern over the absence of prior consultation in relation to the content of the discussion paper. Their concerns prompted the following comment from the facilitator:

*What’s in there [Stronger Futures Discussion Paper] is what government thinks are important things to talk to you about, but what we want to hear from you today is what Yuendumu thinks are important things to think about.*

## **Consultations should be transparent and have clear parameters**

100. On its face, an opportunity to enter into such broad ranging discussion, unconstrained by particular initiatives, would appear to be positive. However, such discussions, as occurred during these meetings, will almost inevitably cover numerous topics, precluding in-depth discussion and allow the Government to avoid presenting concrete proposals.

101. Participants were not informed of any specific proposals, what had already been decided, or what was available for negotiation. It was repeatedly stated by facilitators that the Stronger Futures consultation process was a 'starting point for debate and consultation on new approaches and new ideas', so that Aboriginal people and the Government could 'work in partnership' to 'build stronger futures'.<sup>115</sup> Facilitators encouraged people to raise any issues of concern and the rationale for including so many themes in discussions 'was to ensure the Government did not restrict the topics that could be discussed in meetings.'<sup>116</sup>
102. Meetings seemed to proceed on the basis that everything was up for discussion. In fact, facilitators in the Alice Springs Town Camps meeting suggested that one option was to throw the Intervention away and start again, and to tell the Government to stop interfering. At Maningrida, people were told that the Intervention was coming to an end and they were being provided with an opportunity to talk about what they would like to see changed. Given the Government's continuing commitment to the Intervention measures, any suggestion that Aboriginal communities could opt for the removal of Government control over their lives was deceptive.
103. People were asked to focus on the future and consider how things might move forward. Participants were often told that the consultations were not about the Intervention, but rather, 'the future'. Although participants were told that their meetings were not about the Intervention, some used the consultations to express strong opposition to it. For example, in Maningrida, the following comments were made about the Intervention:

*... the first step we would like to see is to get rid of the Intervention.*

*... the Intervention destroyed us.*

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<sup>115</sup> Australian Government, above n 29, 3.

<sup>116</sup> CIRCA, above n 34, 14.

104. The Commonwealth's position in relation to any of the eight priority areas was never revealed in the meetings. Participants at the Alice Springs Town Camps meeting were told by the facilitator that, 'we [the Commonwealth] don't have any plans.'
105. Given the broad scope of the discussions many issues outside the Commonwealth's jurisdiction were raised, but no explanation of how they would be dealt with was provided. One of the strongest themes to emerge from the transcripts was a belief in the importance of bilingual education. Other issues raised included the media's portrayal of the Intervention, Shires and the abolition of local councils, Government Business Managers and government control. Facilitators often informed participants that such matters would be taken back to 'government' but no information was provided in relation to how their concerns would be relayed to the appropriate decision-maker. For example, participants in Alice Springs were simply informed that such issues would be 'talked about at length with the Northern Territory Government'.
106. Despite this encouragement to imagine the consultation process as the starting point in an ongoing relationship with genuine input into policy formation, within three months of the final consultation, legislation was tabled in the Australian Parliament, without any prior warning to the affected communities. The legislation continues many of the original Intervention measures and will introduce further oppressive measures that were never referred to at all in the consultation process. The frustration and cynicism of many participants in the meetings was wholly justified.

***Being clear about what outcomes(s) the proposal seeks to achieve and what issue(s) the proposal seeks to address***

107. The Stronger Futures Discussion Paper identifies potential future action for each of the eight priority areas, but these are of a general nature. How improvement is to be achieved, or what that improvement would look like, was not addressed. Similarly,

there was no clarity about proposals or potential outcomes arising from the discussions.

108. The lack of identifiable outcomes or even processes for identifying outcomes, enabled specific community concerns to be overlooked, in favour of a generic, one size fits all approach. One woman eloquently described the latter:

*I'm a great believer, a great supporter of this process of talking to people and listening to people and recording what people say and I'm also a great believer of evidence based approaches. But I think we have to be very careful about taking a banana smoothie approach. What I'm concerned about is that after listening on their own situations, to so many people each with their unique take, you can't just take all these ideas and just chuck them together and turn on the blender and come out with something that you can dish out to everybody that will work in every situation because Indigenous cultures are unique, languages are unique, people are unique, communities are unique, families are unique and unless the consultation process means an ongoing conversation with individuals, community groups, families as well as the community as a whole umm I think it runs the risk of being wasted all over again and of nothing that actually responds to what individual people in their individual situations wish to happen will ever happen for them.*

***Being clear about the potential and real risks, costs and benefits of the proposed measure***

109. Given that no proposed measures were discussed, there was no discussion about potential and real risks, costs and benefits in any meetings.

**Identifying how you will accurately collect and record data during consultations**

110. Participants were told that notes would be taken and their accuracy checked with each community before being sent to Canberra. Again, there was no explanation of how or with whom accuracy was to be verified. Given that it was also made clear that note-takers would not be recording the identity of speakers, it is not at all clear how accuracy was to be determined.
111. The Government has since claimed that such verification occurred,<sup>117</sup> but purported verification through third parties and ‘flyers’ is problematic. In our experience, obtaining verification from research participants in order to ensure that we have understood the context of their remarks is a time consuming task of particular sensitivity. This difficulty would be compounded in an open meeting environment, where people for whom English may be a second or third language are speaking in language, and where the quality of facilitators and or interpreters, if present at all, varied.
112. CIRCA reviewed FaHCSIA notes from the meetings and noted that they were generally accurate in relation to content per se, but required significant improvement to correctly represent the nature of the meetings and priorities raised.<sup>118</sup> In particular, Government reporting was criticised for not indicating the ‘priority of topics discussed, the level of participation and the extent to which comments reflected a commonly held view.’<sup>119</sup> Importantly, reports did not indicate whether responses were provided by a small or large number of attendees.<sup>120</sup>
113. CIRCA made a number of specific recommendations to improve the accuracy of reporting, including that reports outline:
- (a) Priorities at a local level and at a broader policy level;

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<sup>117</sup> Australian Government, above n 30, 17.

<sup>118</sup> CIRCA, above n 34, 24-25.

<sup>119</sup> Ibid 24.

<sup>120</sup> Ibid.



- (b) Differences between the men's and women's responses where separate meetings were conducted, and whether issues were raised in one group but not the other, and where priorities between the two groups may vary;
- (c) The level of involvement of the interpreter;
- (d) Whether the lack of an interpreter had an impact on responses; and
- (e) The amount of time spent on each topic.<sup>121</sup>

114. Unfortunately, these criticisms and recommendations mirror those made by CIRCA in 2009, when reporting on the Redesign consultations. In 2009, CIRCA similarly observed that FaHCSIA's records failed to record the extent of support or opposition, whether comments came from many or a few, and whether participants were engaged or the conversations forced, among other things.<sup>122</sup> At that time, CIRCA also criticised the reports as failing to record the level of anger and frustration expressed by meeting participants.<sup>123</sup>

***Provide people with a clear idea of how their input will be included in decision-making processes***

115. As with all other aspects of the consultation process, Aboriginal people were not provided with any specific information concerning the Commonwealth's decision-making processes. As CIRCA noted, 'the facilitators all made it very clear that the Government is interested in hearing from community members, and that the Government will take their comments seriously.'<sup>124</sup> But such 'verbal commitment needs to be supported with a clear process for matters to be actioned.'<sup>125</sup> Commitments made were vague, amounting to no more than an undertaking that information would be collated for input into policy. While participants were commonly told that their comments would be 'fed' into government decision-making, no information was provided in relation to the process by which their comments would

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<sup>121</sup> Ibid 25.

<sup>122</sup> CIRCA, *Report on the NTER Redesign Engagement Strategy and Implementation* (2009) 21-22, [http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/report\\_nter\\_redesign\\_strat\\_implement.aspx](http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_strat_implement.aspx)

<sup>123</sup> Ibid.

<sup>124</sup> CIRCA, above n 34, 25.

<sup>125</sup> Ibid.

inform laws and policies. This omission sparked concern by participants, who spoke of 'self-determination', 'anti-discrimination' and the need for community controlled solutions.

116. This lack of information did not surprise participants who were able to identify the long standing pattern of consultation as panacea. Nonetheless, some of the participants were clearly frustrated with the lack of information about the Commonwealth's decision-making processes:

*It's okay for you to have this consultation, but at the end of the day, is there going to be any changes? Because, I've been over-consulted, I've been poked, I've been probed, I've met (inaudible) I've had ministers in my house for coffee, I've been making scones, you know, I've tried to do all those (inaudible) and the message is not really getting through. So I see this as another way for the government to come in and tell us how to live our lives and how to do what we're going to do whether we like it or not.*

117. Although some of those present had attended the 2009 consultations, they were not provided with any information in relation to how their earlier input had been incorporated into government decision-making. This omission prompted one participant in Darwin to make the following comments:

*The question you're asking about the future, uh, I can recall – was it two years ago? In the hotel next door? We had a two-hour consultation on this very stuff [Woman interrupts: 'Here. It was right here.'] So now we're in the pub next door, and we've got two hours. I'd think that all the submissions that were made at that time – many of which were put on your own website – in terms of particular ideas, are already there.*

***Specific, time bound and verifiable benchmarks and indicators you will use to measure progress***

118. Benchmarks for measuring the progress of specific measures were not discussed, but it was claimed that the Government was working from an evidence based perspective. However, when one participant in Darwin asked about statistical data to ‘show a clear picture’ of what had been achieved by the NTER measures, the evidence was not forthcoming. Instead, the facilitator responded:

*We’re not here, I’m not here, to give you benchmarks or talk about outcomes or anything like that.*

***Reaching agreement with communities about how feedback will be provided after the consultation phase is concluded***

119. The only reference to ‘feedback’ in any of the consultations was the claim that the accuracy of notes taken would be verified with communities before being sent to Canberra. Despite representations that the meetings were only the start of a process no specific information was given to participants in relation to on-going consultations. Nor were Aboriginal people provided with information in relation to the process by which the Commonwealth would keep them informed about future policy developments affecting them.

**THE POST-CONSULTATION PHASE**

120. The Australian Human Rights Commission’s *Draft RDA Guidelines for Income Management Measures* prescribe the following good practice requirements for the post-consultation phase:
- (a) Identifying the best ways to keep communities informed about developments regarding the issue/proposal;

- (b) Explain what, if any options community members have to call for a review of decision-making; and
- (c) Government agencies should publish their consultation protocols.

121. The demonstration of good faith and processes leading to negotiated, mutually agreed outcomes necessarily involves ongoing dialogue. Instead, the post-consultation phase was characterised by the same haste that has characterised the Intervention from the outset.

122. On 24 November 2011, the Government tabled complex and detailed legislation that will continue and even expand some Intervention measures. It is simply not credible to suggest that a considered evaluation of the consultations could have informed the legislation, given the brief period of time that elapsed between the conclusion of the consultation and the tabling of the legislation. Needless to say, the provisions of the Bills and the impact that they will have on affected communities has not been discussed with communities at all.

123. We do not suggest that feedback in and of itself could be an adequate benchmark for meaningful engagement. However, it is the very least that the party that holds all the power in the relationship could be expected to provide. Unfortunately, even the process of providing feedback was flawed. Every facilitator indicated that notes taken by FaHCSIA officers during the meetings would be checked for accuracy. However, no indication of how this was to occur was proposed. Given that the notes did not identify individual speakers, it is not clear how the accuracy could be ascertained without recreating the meeting, which is impossible without some record of who attended.

124. Facilitators commonly claimed that additional meetings would be convened and specific questions answered. Participants in a number of meetings were promised further consultation before the finalisation of policy decisions. For example, at Maningrida, Warren Snowden MP said:

*You'll know well before... No decision will be made without us talking. Jenny is asking me to come back and talk some more. We talk all the time.*

125. At Mutitjulu, one participant asked:

*Are these consultations gunna go back to the government and you gunna come back again and you talk and sort things out, or what's happening? Is this the first and the last consultation?*

The assistant facilitator failed to answer the question directly, but gave assurances:

*... this is the first of a lot of talking and a lot of conversation and hopefully a lot of partnership with communities into the future.*

Counter to such assurances, the Government's report on the consultations made it clear that decisions would be made in the absence of any further 'talking':

*The Australian Government is providing feedback to communities on the outcomes of the consultations through the GBMs and IEOs, and through flyers. The Government will also come back to communities with information on its decisions.<sup>126</sup>*

126. What is clear from the language used by the Government – and in fact from subsequent action – was that the Government intended to make and has made significant decisions affecting Aboriginal communities without any further consultation with those communities. The conversation, it would seem, is over.

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<sup>126</sup> Australian Government, above n 30, 18.

127. The Australian Government is yet to inform Aboriginal people in the Northern Territory of what, if any, options they have to call for a review of decision-making.
128. The Government's report on the consultations reiterates the issues flagged in the Stronger Futures Discussion Paper and provides information concerning the number of meetings and logistics of the consultation process. However, it does not refer to the protocols that were actually applied to the consultations.
129. Finally, people who wished to provide comment on the new legislation were originally given a deadline of 12 January, until the degree of complaint forced the Government to extend the timeline. The authors consider that the practical effect of a manifestly inadequate timeframe is to prevent proper scrutiny of the proposed legislation. The Bills are complicated and reference the previous legislative suite of measures, itself of great scope and complexity. The evidence upon which the Bills are said to be based includes voluminous reports, with conclusions and observations that require testing. Most significantly, the timeframe precludes consultation and genuine engagement with the very communities that will be the subject of the legislation.

## REPORTS ON THE CONSULTATION PROCESS

### THE CIRCA ASSESSMENT: ANALYSIS BY EVA COX

130. The Cultural and Indigenous Research Centre Australia ('**CIRCA**') was contracted to undertake an independent assessment of the Stronger Futures consultations by the Australian Government. The following commentary by Eva Cox on their Report on Stronger Futures Consultation 2011: Final Report (the '**Evaluation**'),<sup>127</sup> also draws on some comments made by Bree Blakeman,<sup>128</sup> a PhD researcher in Anthropology from the School of Archaeology and Anthropology, Australian National University.
131. This is the second time that FaHCSIA has used CIRCA to legitimise their consultation processes in the Northern Territory, the first being in November 2009, resulting in their Report on the NTER Redesign Engagement Strategy and Implementation.<sup>129</sup> Like this previous 'endorsement', the Evaluation agrees that the Government achieved its consultation objectives, noting those objectives were clearly limited. In neither instance did CIRCA's evaluation attempt to measure whether those being 'consulted' by the 'trained facilitators' felt their views were appropriately recorded, or that they were being taken seriously.
132. There are questions to be asked about the purpose of these consultations. If these meetings were intended to inform the decisions to be taken by the Government on the post Intervention options, there needs to be indications that the meetings' input could still influence such decisions. If the process was to seek apparent approval for decisions already taken, then the process and outcomes make more sense. The

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<sup>127</sup> Cultural and Indigenous Research Centre Australia, *Report on Stronger Futures Consultation 2011: Final Report* (2011) [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/circa\\_oct11.aspx](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/circa_oct11.aspx)

<sup>128</sup> The comments used in this report were taken from the AASnet email list of which Bree Blakeman and Eva Cox are members. These comments have been used with permission from the author.

<sup>129</sup> Cultural and Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation* (2009) [http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/report\\_nter\\_redesign\\_strat\\_implementation.aspx](http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_strat_implementation.aspx)

following statement from CIRCA's report suggests the former intent but the latter process:

*These Stronger Futures consultations will be one of the critical sources of information that the Australian Government will review **when developing the future directions** (our emphasis) for Indigenous communities in the NT, and so it is important the consultations are conducted in such a way to ensure there is a high level of engagement, and that a broad range of community members and stakeholders are provided with an opportunity to contribute.<sup>130</sup>*

The limited timeline of the process and lack of evidence that any changes were made post-consultation suggest that all decisions of 'Future Directions' were made before the consultation started and not altered in the final draft. This raises the question of whether the consultations were so approving that there was no need for change or that the Government's views were not affected by what they were told, with CIRCA concluding:

*The broad objectives of the consultation and communication strategy appear to have been met, in that the facilitators clearly articulated the Government's rationale and aims in relation to the consultation, and the majority of consultations provided participants with adequate information and opportunities to provide feedback. Overall, it can be concluded that the majority of Tier 2 consultations observed were undertaken in accordance with the consultation and communication strategy and were open, fair and accountable.<sup>131</sup>*

133. The questions not answered here are fairness and accountability to whom? The description of the process as 'presentation and feedback' does not suggest the

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<sup>130</sup> CIRCA, above n 127, 3.

<sup>131</sup> Ibid 6.



Government seriously wanted to have any genuine engagement. The trained facilitators were described as presenting a script with the eight proposed areas and questions in very similar ways at most of the 12 meetings CIRCA reviewed. This view is not supported by some of the transcripts analysed by Jumbunna. The capacity to raise other issues or questions at some of the consultations was obviously limited and sometimes criticised but not necessarily recorded as such. This approach suggests a more limited intention than the Government's claims to work in partnership on new policies. The complex set of new policies were not distributed in readable forms prior to the meetings nor translated in many cases, indeed, in most, if not all cases, specific policies were never proposed at the meetings.

134. CIRCA 'did not observe any Tier 1 consultations or stakeholder meetings' and was therefore unable to comment on these.<sup>132</sup> Nor did they attend most of the Tier 2 meetings. Blakeman's description that follows outlines some of the problems with the process:

*The meetings began with facilitators expressing 'the Government's desire to hear community views and ideas about what needs to be done to improve things for Indigenous people in the NT' they spoke about the Government's 'aim to improve the relationship with Indigenous communities' and made clear the Government's 'desire to work together to develop future approaches in the NT'.<sup>133</sup> At this stage facilitators also acknowledged that the NTER had made 'some mistakes' and had both 'good and bad' aspects or effects. The CIRCA review notes that 'this type of acknowledgement appeared to be important in the level of community acceptance of the current consultation and was a strategy which had been discussed in the training [of facilitators]'.<sup>134</sup> Facilitators then focused discussion on eight, predetermined themes to be discussed*

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<sup>132</sup> Ibid 4.

<sup>133</sup> Ibid 6.

<sup>134</sup> Ibid 17.

during the course of the meetings. The CIRCA review notes that 'facilitators clearly explained that the purpose of the consultation was to discuss eight predetermined themes'.<sup>135</sup> Facilitators were also provided with a number of 'key prompt questions' to guide discussion for each of these eight themes. The CIRCA review notes that 'the large number of questions attached to each theme also presented a challenge, with many participants appearing to find the number of questions presented confusing and/or overwhelming'.<sup>136</sup> One example of a 'key prompt question' was "How can we get parents to understand how important education is?" The inclusion of questions such led the authors of the CIRCA review to note that 'some of the questions were value laden and caused negative reactions when displayed publicly in the presentation'.<sup>137</sup>

135. Blakeman's summary clearly illustrates the limits of the process, and the agreed attempts to engage the attendees by apparently acknowledging problems which were then not to be followed up. The following, also by Blakeman, criticises CIRCA's process of collecting information which was done by FaHCSIA Officers recording notes, which raises the question of their ability to be objective:

***What data was actually collected and recorded at each meeting?***

*The CIRCA review notes that while a range of people spoke at most consultations, 'feedback was focused on a small number of speakers (generally six to seven people). For example, one initially large meeting only three people provided comments'.<sup>138</sup> This hardly mattered given how little information was actually recorded. 'In most cases the reports provided a list of each point raised in the meeting for each priority*

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<sup>135</sup> Ibid 6.

<sup>136</sup> Ibid 14.

<sup>137</sup> Ibid 20.

<sup>138</sup> Ibid 24.

area'.<sup>139</sup> *Not all of the reports, that is, even recorded a list of points raised.*

136. CIRCA itself confirms these limits. A standard template was used for the Tier 2 consultations, which included eighteen general questions on the meeting (for example:

*“Consultation type; estimated number who attended; interpreters/translators present; meeting format; and opportunity provided to discuss all eight key priority areas). The template had a section for each of the eight priority areas, where the content of the discussions were reported, and ended with two questions on the ‘overall sense of the meeting’, and other issues raised.”<sup>140</sup>*

137. And describing the content of consultations as follows:

*The purpose of the consultation was clearly explained in all locations. The key themes were delivered consistently and generally discussed in the order they appeared in the consultation paper. The themes that tended to occupy the most time were schooling, jobs and housing and these appeared as areas of most importance for participants.<sup>141</sup>*

138. Several facilitators acknowledged that the NTER had made ‘some mistakes’ or ‘brought some good things and some bad things’. This type of acknowledgement appeared to be important for community acceptance of the current consultation and was a strategy discussed in the Darwin training.

139. This approach suggests it would be hard to raise issues that were not in the discussion paper, such as the BasicsCard and broader decision-making processes.

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid 24.

<sup>141</sup> Ibid 13.

The following suggests that the processes of the consultations were controlled by Government employees, not by independent people chosen by communities. The CIRCA report praises the roles of public servants:

*The role of the GBM was often significant in the conduct of the meetings and in encouraging people to attend the meetings. In many cases the GBMs contributed significantly to the effectiveness of the consultations.<sup>142</sup>*

140. The reported acknowledgements of problems with the process and some hostility also suggest that the process may have falsely reassured people that they would be listened to, and that they should speak out. The CIRCA report recognises this partially:

*While overall the observations indicate that the training provided was well matched to the consultation activity, in the future it would be valuable to provide greater emphasis on the skills required to facilitate large group meetings in Indigenous communities, working with interpreters, and managing consultations on issues that may be controversial and emotional.*

141. There was also apparently a lot of marketing material such as posters and slides, which defined the Governments' interests with the *Stronger Futures* paper being criticised by CIRCA as follows:

*The limitations of the consultation paper were: It was not accessible for those with limited English language skills: Each section asked too many questions; one key prompt question would be clearer: The document is*

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<sup>142</sup> Ibid 10.

*very large and covers many different themes making it a challenge to read for many people.<sup>143</sup>*

142. And lastly, the CIRCA report also commented on further omissions in the process and reporting:

*Based on the list of comments included in many of the reports, it is difficult to ascertain a sense of order/priority of the issues raised. It would be helpful if the reports included a section on priorities for action, where the main issues could be summarised, with an indication of the priorities both at a local level (for example, as follow-up issues for the GBM), and at a broader policy level. This would also provide an opportunity to record additional issues that are important, but may be beyond the scope of the consultation. The importance of this was emphasised during the observations, as the facilitators all made it very clear that the Government is interested in hearing from community members, and that the Government will take their comments seriously. This verbal commitment needs to be supported with a clear process for matters to be actioned.<sup>144</sup>*

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<sup>143</sup> Ibid 19.

<sup>144</sup> Ibid 25.

## THE GOVERNMENT'S REPORT ON THE CONSULTATION PROCESS

143. Government reporting of the Stronger Futures consultation process (**'Stronger Futures Report'**), launched a few weeks after the final consultation, praised the consultations as being 'another important step in forging a real partnership between the Australian Government and Indigenous Territorians.'<sup>145</sup>
144. Generally the report provides readers with insights into the strong messages conveyed by Aboriginal people throughout the six-week consultation period. Extensive quotes from Aboriginal people make up the bulk of the report. However, the fact that quotes are not attributed to any community renders the transparency of the report questionable.
145. CIRCA's criticisms and recommendations relating to FaHCSIA's recording of notes from the meetings,<sup>146</sup> poses questions about the Government's analysis. In particular, CIRCA's reservations about the recording of communities' priorities and the extent of support for views expressed suggests that some caution should be taken in accepting at face value the Government's reporting of identified priorities and levels of support. Such caution is also merited given our concerns about the lack of a transparent process for verifying FaHCSIA's records of meetings.
146. There are significant and alarming discrepancies between representations made in the report about the sentiments expressed by Aboriginal people and those recorded in the transcripts examined by the authors. By way of example, the report provides that:

*Respondents commented relatively frequently that parents should have part of their welfare or Centrelink payments withheld or their payments reduced if they did not send their children to school. Fewer respondents said parents should not have their payments withheld or be fined. A few*

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<sup>145</sup> Australian Government, above n 30, 5.

<sup>146</sup> CIRCA, above n 34, 24-25.

*said parents should be fined for not sending their children to school.*<sup>147</sup>

147. In a number of remote communities, the question of welfare payments being linked to school attendance was raised by community members. In each of the instances that we are aware of, there were no expressions of support for the measure.
148. Likewise, the Stronger Futures Report suggests that Aboriginal people in the Northern Territory were in favour of expanding the use of township leases in order to overcome barriers to economic development.<sup>148</sup> However, there was no support for the expanded usage of township leases in the transcripts considered for this report. In fact, support for Government leases over Aboriginal land would be an astonishing finding, given the overwhelming opposition to five-year leases reported in previous research, as an unacceptable incursion on Aboriginal land tenure.<sup>149</sup>
149. Given that the focus of the consultations was to be on the issues of schooling, jobs and alcohol, it is unsurprising that the Stronger Futures Report identifies 'school attendance, jobs, reducing alcohol-related harm and improving housing as the top priorities for action to build stronger futures for people and communities.'<sup>150</sup> Unfortunately, the CIRCA Stronger Futures Report does not undertake the same depth of analysis on the content of the consultations as included in CIRCA's 2009 Intervention Redesign Report, so independent analysis has been curtailed. However, from CIRCA's report, it seems that housing was the area of greatest importance for participants.<sup>151</sup>

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<sup>147</sup> Ibid 23.

<sup>148</sup> Ibid 31.

<sup>149</sup> Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities* (2008) <[http://www.clc.org.au/Media/issues/intervention/CLC\\_REPORTweb.pdf](http://www.clc.org.au/Media/issues/intervention/CLC_REPORTweb.pdf)>; Claire Smith and Gary Jackson, *A Community-Based Review of the Northern Territory Emergency Response* (Report, Institute of Advanced Study for Humanity, University of Newcastle, August 2008) 121.

<sup>150</sup> Australian Government, above n 30, 7.

<sup>151</sup> CIRCA, above n 34, 13.

## **DOES THE STRONGER FUTURES CONSULTATION PROCESS COMPLY WITH AUSTRALIA'S DUTY TO CONSULT WITH INDIGENOUS PEOPLES?**

150. We were critical of the 2009 NTER Redesign consultation process on the basis that the Government conducted consultations on decisions that had already been made, or were in the process of being made. In 2009, participants were faced with questions related to specific proposals to amend eight Intervention measures that the Government had asserted to be beneficial. Analysis of that process illustrated that, rather than a genuine opportunity to have input into a policy and program planning process, the consultations merely provided a forum for comment on those proposed changes.<sup>152</sup>
151. The Stronger Futures consultation process, on the other hand, is of an entirely different nature, being a general, undirected discussion around a range of topics with no reference to intended actions. The Stronger Futures consultation process demonstrates some improvements, such as the use of interpreters in the majority of meetings, but a lack of transparency in others, most significantly, the failure to put any proposals to the communities at all. The latter was also a feature in the reporting of the process, including an apparent reduction in CIRCA's terms of reference.
152. A major difficulty in assessing the effectiveness of the consultation process is that it is not at all clear what the consultations were designed to achieve. Different criteria would be applicable to assessment of the post-consultation phase depending on whether the process was designed to inform affected communities of the Government's intentions, to seek input on specific proposals, or to genuinely seek input into possible solutions to identified issues for concern. Nonetheless, it is apparent that once again, the Government's consultation process has fallen short of Australia's obligation to consult with Indigenous peoples in relation to initiatives that affect them. As described at the beginning of this report, appropriate negotiations

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<sup>152</sup> Nicholson et al, above n 27.



complying with international standards exhibit good faith, mutual respect and full and equitable participation towards mutually acceptable outcomes.

153. The standard mandated in numerous international instruments, most relevantly the Declaration and CERD's General Recommendation 23, indicates that Indigenous peoples must give free, prior and informed consent to initiatives that will specifically impact on them. Where obtaining consensus or consent may not be feasible, the requirement is for negotiations that have the object of achieving agreement or consent.
154. The Stronger Futures consultations do not exhibit such features.
155. CIRCA's conclusion that the consultation process was 'fair, open and accountable' is flawed because CIRCA was asked to assess the consultations against the Government's 'consultation and communication strategy',<sup>153</sup> rather than indicators of meaningful and effective engagement. Unfortunately, unlike CIRCA's 2009 report, the Government's communication strategy is not detailed in CIRCA's report, so how the strategy aligns with best practice cannot be determined.
156. It has been demonstrated above that the process does not comply with the Australian Human Rights Commission's *Draft RDA Guidelines for Income Management Measures*. These specific and practical guidelines are helpful indicators of a consultation process that complies with the duty to consult, namely, a process that is conducted:
- (a) In good faith with mutual respect;
  - (b) With full and equitable participation;
  - (c) To genuinely inform government decision-making; and
  - (d) Towards obtaining agreement or consent.

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<sup>153</sup> CIRCA, above n 34, 6.

***Was the process conducted in good faith and with mutual respect?***

157. The list of indicia of poor faith and a lack of respect is comprehensive. In short, the process:
- (a) Did not engage with the Aboriginal communities in design and implementation;
  - (b) Focused on dysfunction and despair, characterising Aboriginal people as the authors of their own misfortune;
  - (c) Ignored successful community led initiatives;
  - (d) Failed to place Aboriginal culture, norms and values at the centre of policies and programs;
  - (e) Identified only mainstream values as the basis of a 'stronger future'; and
  - (f) Effectively excluded the affected communities from both decision-making and from comment on decisions made.

***Did the process provide for full and equitable participation?***

158. Comprehensive and robust research undertaken in Australia resonates with international research findings that Indigenous self-determination is the most significant factor in achieving socio-economic prosperity and community development for Indigenous peoples. Consequently, effective policy should be underpinned by strengthening the capacity of Aboriginal and Torres Strait Islander peoples to exercise genuine decision-making control.
159. We note that an evidence based policy approach requires much more than token consultation, input into government policy, or the Indigenisation of mainstream services. Instead, it is the strengthening of Indigenous governance systems that is the necessary precondition to 'successful' outcomes – whether measured against Government or Indigenous aspirations.
160. The irony of the Government's repeated recognition that the lack of prior consultation with affected Aboriginal communities in relation to the Intervention had resulted in distrust and hostility, cannot be overstated in light of its own failure to

engage with Aboriginal people in the design and implementation of the Stronger Futures consultation process.

161. On numerous occasions during the meetings, anger at this lack of inclusion was reflected in comments over the lack of consultation as to the content of the Stronger Futures Discussion Paper, late notice of meetings, and the separation of community groups into male and female groups, among other issues, all of which could have been resolved by prior consultation with communities.
162. While the difficulties in conducting a consultation process on such a large scale are acknowledged, the requirement is that the process itself should be a product of consensus. Best practice mandates that Indigenous engagement in design is necessary to ensure adequate consideration is given to community norms and protocols, that all relevant stakeholders are identified, and that a region-specific approach can accommodate the diversity of Indigenous communities and maximise accessibility.<sup>154</sup>
163. At a more fundamental level, engagement with communities could have allowed the Government to move away from the deficit model, with its focus on dysfunction and disparity between Indigenous and non-Indigenous peoples against indicators of well-being. While the existence of problems, in some cases dire problems, cannot be denied, the picture of Aboriginal people painted by the discussion paper is one of repeated failure and hopelessness.
164. The only 'improvements' acknowledged in the Stronger Futures Discussion Paper are those that emerge from Government programmes in housing, education, employment, tackling alcohol abuse, etc. The initiatives taken by communities to address such issues are ignored. The absence of such recognition is likely to further undermine relationships between Government and Aboriginal peoples.

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<sup>154</sup> Australian Human Rights Commission, above n 36.

165. Limited engagement with Indigenous people was also reflected in the training of facilitators. CIRCA commented, as it did in its 2009 report on the Redesign consultations,<sup>155</sup> that the ‘opportunity for [Indigenous Engagement Officers] to contribute their cultural perspectives, expertise and experience in relation to consultation and facilitation strategies would have been valuable.’<sup>156</sup>

***Was the process one of negotiation toward mutually acceptable outcomes?***

166. The most egregious failure of the consultation process was the total lack of clarity in relation to the ultimate purpose of the process or expected outcomes. Terms for negotiation between parties can never be agreed when the parameters are not even identified, and when one side entirely controls the process.

167. As Annie Kennedy observes, informed decision-making is underpinned by ‘understanding’. Understanding in terms of what people are being asked to participate in; comprehension of the concepts that sit behind the language; and ability to assess the implications of what people are agreeing to.<sup>157</sup> The Stronger Futures consultation process is incapable of giving such understanding when even the purpose of the consultations is unclear.

168. Interestingly, the Stronger Futures Discussion Paper does not detail the purpose of the consultations at all. As only a marginal improvement, the Government’s report on the Stronger Futures Consultations describes the purpose of the consultations in the most general terms:

*The purpose of the Stronger Futures in the Northern Territory consultations was to invite people in remote Northern Territory communities and across the Northern Territory to talk to government about what needs to be done next to tackle the continuing unacceptable*

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<sup>155</sup> CIRCA, above n 129, 15.

<sup>156</sup> CIRCA, above n 34, 16.

<sup>157</sup> Annie Kennedy, ‘Understanding the ‘understanding’: Preliminary findings on Aboriginal perspectives on engagement with governments’ (Paper presented at the Centre for Remote Health Monthly Seminar Series, Alice Springs, 29 May 2009).

*levels of disadvantage for Aboriginal people in the Northern Territory and help them to build stronger futures for Aboriginal Territorians.*<sup>158</sup>

169. What was missing from the consultation process were any details of how these 'stronger futures' were going to be built: how the eight priorities were chosen, what proposals were being contemplated, how participants' observations and concerns would inform the decision-making process, how such information would be fed back to the community or consent obtained, what timeframes existed, etc.
170. A particularly damning omission from both the Stronger Futures Discussion Paper and the meetings was the failure to disclose any information about the continuation of the Intervention. While reference was made to the Government's 'efforts and investments over the past four years', details about the future of the Intervention were conspicuously absent. Given the extraordinary impact on almost every aspect of the lives of Aboriginal people in the Northern Territory of the Intervention measures, such an omission is both notable and concerning.
171. Arguably, the omission of any dialogue about the continuation of the Intervention was deceptive. As noted above, the implication presented in some meetings was that not continuing the Intervention was an option. This was ludicrous given that the Government tabled legislation in order to continue many Intervention measures, only a few months later.

***Did the process provide for genuine input into Government decision-making?***

172. It is unlikely that preparations in relation to the three Bills now before Parliament were not underway at the time of the consultations, yet no specific proposals were raised at any of the meetings considered by the authors. Ironically, our criticism of the 2009 consultation process for merely providing an opportunity to comment on Government intentions now needs revisiting – at least people were informed, however poorly, of what was coming!

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<sup>158</sup> Australian Government, above n 30, 7.

173. In the Stronger Futures consultation process, the considerations that would normally precede informed decision-making were absent. Without details of specific proposals, identification of benefits proposals were designed to achieve and benchmarks to be used for evaluation, the participants were deprived of the opportunity to make a meaningful contribution to the development of future laws and policies.

174. It is equally apparent that affected communities will be severely constrained from commenting on the Bills now before the Parliament. The Bills are complex and have required painstaking analysis by the authors, some of whom are experienced lawyers, to unravel. The suggestion that Aboriginal people in remote communities, for whom English may be a second or third language, would be able to 'continue giving their feedback and input to government during the committee process',<sup>159</sup> is disingenuous. The Government's earlier criticism of its predecessor's failure to provide an opportunity for scrutiny<sup>160</sup> is hypocritical to say the least.

***Could the process be described as enabling free, prior and informed consent?***

175. It is self-evident that a consultation process that failed to include information about specific policies, programmes or initiatives, but instead was conducted in general terms, could not enable free, prior and informed consent.

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<sup>159</sup> Australian Government, *Stronger Futures in the Northern Territory: Policy Statement* (November 2011) 2 <<http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/>>.

<sup>160</sup> *Ibid.*

## THE GOVERNMENT'S LEGISLATIVE RESPONSE – THE STRONGER FUTURE BILLS

(This section of the report was written by the Hon Alastair Nicholson, but also incorporates material prepared by the Jumbunna Indigenous House of Learning Research Unit.)

176. On 23 November 2011 the Government introduced its Stronger Futures legislative package that will effectively continue the Northern Territory Intervention. What follows in this section is a summary of the main components of those Bills.

### The Bills

177. The legislative suite underpinning the Stronger Futures measures comprises the following:
- (a) Social Security Legislation Amendment Bill 2011 (Cth) ( '**IM Bill**' )
  - (b) Stronger Futures in the Northern Territory Bill 2011 (Cth) ( '**Stronger Futures Bill**' ); and
  - (c) Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) ( '**Transitions Bill**' ) (together the '**Amending Bills**').

### Special Measures

178. The Government has indicated that these measures are intended to be special measures and this intention is reflected in the Amending Bills.<sup>161</sup>

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<sup>161</sup> Stronger Futures in the Northern Territory Bill 2011 (Cth) cls 7, 33, 37, 117.

## SUMMARY OF AMENDING BILLS

### SOCIAL SECURITY LEGISLATION AMENDMENT BILL 2011 (CTH) ('IM BILL')

179. This Bill introduces changes to income management and issues relating to school attendance. In common with the other components of the package, the Bill is extremely difficult to unravel because it requires referral back to earlier legislation, in order to understand it.

#### Income Management

180. The Explanatory Memorandum to the Bill states that income management operates as a tool to support vulnerable individuals and families. It is said to provide stability to people's circumstances by limiting expenditure of income support payments on excluded items, including alcohol, tobacco, pornography and gambling goods and activities.<sup>162</sup>

181. The Explanatory Memorandum further provides that the Bill will facilitate the introduction of targeted place-based income management in five disadvantaged communities across Australia:

- (a) Playford (SA);
- (b) Bankstown (NSW);
- (c) Shepparton (Vic);
- (d) Rockhampton (Qld); and
- (e) Logan (Qld).<sup>163</sup>

182. Neither the Explanatory Memorandum nor the Minister's Second Reading Speech,<sup>164</sup> explain why these communities were selected for place-based income

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<sup>162</sup> Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth) 2.

<sup>163</sup> Ibid.



management, other than to identify them as disadvantaged. We note that of the five areas, only Rockhampton and Shepparton have higher Indigenous population rates than the national average.<sup>165</sup> Of greater significance however, will be the percentage of Indigenous people who are referred to income management, as compared to the rest of the population.

183. From 1 July 2012, income management will apply to vulnerable families and individuals in the five communities, including:

- (a) Parents referred for income management by State or Territory child protection authorities;
- (b) People assessed by Centrelink social workers as being vulnerable to financial crisis, which could include those referred by housing authorities who are at risk of homelessness due to rental arrears; and
- (c) People who volunteer for income management.<sup>166</sup>

184. The Bill amends the *Social Security (Administration) Act 1999* (Cth) (the '**SSA Act**') to provide for deductions of 70 per cent of income support payments and 100 per cent of lump sum payments, subject to a Ministerial discretion to substitute another percentage.<sup>167</sup>

185. The Bill introduces a new broad discretionary power for nominated State and Territory authorities to refer individuals in the Northern Territory to income management. The IM Bill inserts ss123UFAA into the SSA Act, which provides that a person is to be subject to the income management if:

- (a) The person or their partner is an eligible recipient<sup>168</sup> of a category H welfare payment;<sup>169</sup> and

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<sup>164</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13559-13560 (Peter Garrett).

<sup>165</sup> Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Peoples Population* <<http://www.abs.gov.au>>.

<sup>166</sup> Explanatory Memorandum, *Social Security Legislation Amendment Bill 2011* (Cth), 3.

<sup>167</sup> The Bill amends the *Social Security (Administration) Act 1999* (Cth) pt 3B div 5 to insert sub-div DAA.

<sup>168</sup> *Stronger Futures in the Northern Territory Bill* (Cth) s 123TK (definition of eligible recipient).

(b) An officer or employee of a recognised State or Territory authority issues a written notice to the Secretary determining that person should be on income management.

186. The Minister can nominate any specified department, body or agency of a State or Territory as a recognised authority for these purposes. The only such body specifically named in the Explanatory Memorandum is the Northern Territory Alcohol and Other Drug Tribunal.<sup>170</sup>

187. The Bill allows for the sharing of protected personal information between State and federal authorities for the purposes of income management.<sup>171</sup>

188. The Bill vests extraordinary power in the Minister to expand the application of income management, with little provision for parliamentary scrutiny. It will repeal s 123TFA of the SSA Act which provided that the Minister could determine that a specified State or Territory or area was a 'declared income management area'. Clause 6 of Schedule 1 of the IM Bill inserts a new section 123TGAA which provides that the Minister may now 'specify a State or Territory or an area' (emphasis added) for the purposes of s123UCA (vulnerable welfare recipients) s123UCB (disadvantaged youth), and 123UCC (long term welfare recipients) of the SSA Act. The Minister thus has the power to specify the whole of Australia as subject to income management, without reference to the Parliament.

189. The legislation also provides that anyone subject to income management, who was in a declared income management area but who moves to a non-specified area, remains under income management. Consequently, one cannot 'escape' income management by moving away.<sup>172</sup>

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<sup>169</sup> Category H payments includes, inter alia, Social Security benefits or pensions, ABSTUDY payments that include a living allowance, income support payments.

<sup>170</sup> Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth), Outline.

<sup>171</sup> Stronger Futures in the Northern Territory Bill 2011 (Cth) cl 123ZEAA.

<sup>172</sup> Social Security Legislation Amendment Bill 2011 (Cth) s 123UCA(2), 123UCB(3), 123UCC(3), 123UO(3)(b)(ii) and Explanatory Memorandum, of the IM Bill.

190. The practical effect of this provision is to enable the Minister to specify areas under the new legislation, while leaving most of those living in the former declared income management areas as before, that is, they will be still be subject to income management.
191. Despite the benevolent intentions expressed in the Explanatory Memorandum, we believe that another agenda was to further insulate the legislation from attack under the *RDA*, upon the basis that it now includes areas where a significant non-Indigenous population are potentially affected by it.

### **School Enrolment and Attendance**

192. The Improving School Attendance through Welfare Reform Measure(SEAM) links income support payments to satisfactory school attendance. The SEAM commenced in the communities of Katherine, Katherine Town Camps, Hermansburg, Wallace Rockhole, Tiwi Islands and Wadeye in the Northern Territory, and Logan Central, Kingston, Woodridge, Eagleby, Doomadgee and Mornington Island in Queensland, in January 2009.
193. Although the purpose of our report is to analyse the Stronger Futures consultation process, we wish to point that there is little evidence to suggest that the SEAM is an effective tool for improving school attendance and enrolment. We are also concerned that the measure may stigmatise welfare recipients and fail to address the underlying causes of poor school attendance in certain Aboriginal communities.
194. The Government has declared its intention that SEAM is to be extended to the following new areas:

Yirrkala, Maningrida, Galiwin'ku, Ngukurr, Numbulwar, Umbakumba, Angurugu, Gapuwiyak, Gunbalanya, Milingimbi, Lajamanu and Yuendumu, the townships of Alyangula and Nhulunbuy and to Alice Springs, Tennant Creek, and remaining schools in Katherine not currently participating in SEAM.<sup>173</sup>

195. The new laws will apply to a parent or carer of a child whose school attendance is less than what is required by State or Territory law.<sup>174</sup>
196. The legislation will enable a person responsible for a school<sup>175</sup> to require a parent or carer to attend a conference for the purpose of negotiating a school attendance plan ('SAP') and to seek compliance with that plan.
197. The Bill does not limit the kind or type of requirements that may be part of the SAP, requiring only those things that the notifier 'considers appropriate for the purpose of ensuring improved school attendance of one or more children covered by the plan.'<sup>176</sup> There are no criteria requiring the decision maker to apply any principles of natural justice, nor any requirement for the conditions of the SAP to be reasonable, or to relate to the aims of the legislation.
198. Where a person fails to comply with a SAP, or with another notice issued to them (for instance to attend a conference), their social security payments will be suspended unless the Secretary decides otherwise. Where the payment has been suspended for a total, cumulative, period of 13 weeks or more, the Secretary can cancel the payment.<sup>177</sup>

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<sup>173</sup> Australian Government, *Stronger Futures in the Northern Territory: Policy Statement* (November 2011) 5 <<http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory/>>.

<sup>174</sup> Social Security Legislation Amendment Bill 2011 (Cth) cl 124NA.

<sup>175</sup> Ibid cls 124aa, 124A(2). The Government may nominate the person responsible for a school. The appointment of 'truancy officers' has been foreshadowed.

<sup>176</sup> Ibid cl 124NC.

<sup>177</sup> Ibid cl 124NH.

199. Payments may be suspended even where a person has already been fined under State law over the attendance issue. It follows that an individual could be deprived of the only means to pay such a fine, that is, an income support payment.

### **STRONGER FUTURES IN THE NORTHERN TERRITORY BILL 2011 ('STRONGER FUTURES BILL')**

200. This Bill is primarily concerned with alcohol issues, land reform and food security, the latter being a euphemism for licensing of Community Stores.

#### **Alcohol Management Provisions**

201. The Bill effectively maintains restrictions that have been in place since 2007, while modifying them somewhat to allow communities to develop plans for alcohol management, subject to ministerial approval. The Bill will also increase penalties for minor offences.
202. The main purposes of these provisions are summarised in the Explanatory Memorandum:

*Existing alcohol protections will be preserved in 'alcohol protected areas' with additional provisions that enable the geographic areas covered by these protections to be changed over time and for local solutions to be developed.*

*This Bill includes new provisions for the Commonwealth Minister for Indigenous Affairs to approve alcohol management plans. This allows for communities to play an active role in continuing to reduce alcohol-related harm, and to tailor a solution specific to the community's needs.*

*The Bill provides that any signs relating to alcohol restrictions must be respectful to Aboriginal people.<sup>178</sup>*

203. The main features of the amended regulatory regime include:

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<sup>178</sup> Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth) 2.

- (a) A continuation of the powers of the Minister to declare an area as one in which the possession, consumption or supply of alcohol is an offence;<sup>179</sup>
- (b) Compulsory procedures and requirements for the content of applications made in relation to Alcohol Management Plans.<sup>180</sup>
- (c) A grant of power to the Minister to approve, amend or revoke Alcohol Management Plans ('AMP's) and to exclude an area the subject of an AMP from alcohol restrictions;<sup>181</sup>
- (d) A grant of power to the Minister to require the Northern Territory Government to report on any premises where alcohol can be sold or consumed, and that may be causing substantial alcohol-related harm;<sup>182</sup>
- (e) A grant of power to the Minister to revoke or amend any existing licences or permits under the *Liquor Act* (NT). Those licences are otherwise deemed to continue.<sup>183</sup>
- (f) An increase in the penalties that apply to the possession or consumption of a quantity of alcohol less than 1,350ml, from the issuing of a penalty notice to a maximum penalty of 6 months imprisonment or a fine of \$11,000.<sup>184</sup> For offences involving the supply of a quantity greater than 1,350ml, the maximum penalty is \$74,800 or 18 months imprisonment.<sup>185</sup>
- (g) The creation of an obligation of consultation regarding the placement of signs at prohibited areas;<sup>186</sup> and
- (h) Imposes an obligation on the Government to conduct an independent review of the effectiveness of Commonwealth and Northern Territory alcohol related laws, to be completed within 3 years from the commencement of the Amending Bills.<sup>187</sup>

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<sup>179</sup> Stronger Futures in the Northern Territory Bill 2011 (Cth) cl 27 (1)

<sup>180</sup> *Ibid* cl 16

<sup>181</sup> *Ibid* cl 17, 23, 24 & 27(2).

<sup>182</sup> *Ibid* cl 15.

<sup>183</sup> *Ibid* cl 12 & 13.

<sup>184</sup> *Ibid* cl 75B.

<sup>185</sup> *Ibid* cl 75C(7).

<sup>186</sup> *Ibid* cl 14(5). Note there is no content to this obligation outlined in the Bills.

<sup>187</sup> *Ibid* cl 28.

## Government Area Management Powers

204. The Government Management Area Powers currently exercised by Government Business Managers powers are not continued under the Amending Bills.

## Licensing of Community Stores

205. The Bill sets up an elaborate bureaucratic code for the licensing of Community Stores. The provisions will apply to the whole of the Northern Territory, with the exception of those areas excluded by the Minister.<sup>188</sup> The Government has indicated that exempt areas will be places '*such as Darwin and Alice Springs*'.<sup>189</sup>

206. Under the Stronger Futures Bill;

- (a) The licensing regime will apply to all 'community stores' in the Northern Territory and not only to those stores that accept income managed funds;<sup>190</sup>
- (b) Fines and penalties will apply to anyone operating an unlicensed community store;<sup>191</sup>
- (c) The matters which the Secretary is to consider in deciding whether to grant a licence include:
  - (i) Whether the store will provide a satisfactory range of healthy and good quality food, drink or grocery items;

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<sup>188</sup> Ibid cl 38(2) & 74(1).

<sup>189</sup> Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth) 28.

<sup>190</sup> Stronger Futures in the Northern Territory Bill 2011 (Cth) cl 39(1).

<sup>191</sup> Ibid cl 38. Prior to these amendments, the sanctions for non-compliance were the revocation or refusal of a licence.

- (ii) Whether the store will take reasonable steps to promote good nutrition and healthy products;
  - (iii) Whether the store will satisfactorily address other aspects of its operations including;
  - (iv) The quality of the retail management practices of the manager of the store;
  - (v) Whether the financial practices of the owner and manager of the store support the sustainable operation of the store;
  - (vi) The character of the owner, manager, employees and other persons involved in the store, including whether any of those persons have a criminal history;
  - (vii) The store's business structure, governance practices and employment practices;
  - (viii) The environment of the store's premises, the infrastructure of the store's premises and the equipment available at the store's premises.<sup>192</sup>
- (d) All licences are to be subject to a condition that the owner and manager will allow an authorised officer to enter and inspect the premises and obtain documents.<sup>193</sup> Any person who breaches a condition of a licence can be fined \$2,200.<sup>194</sup>

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<sup>192</sup> Ibid cl 46 and cl 5 (definition of 'circumstances').

<sup>193</sup> Ibid cl 54.

<sup>194</sup> Ibid cl 56.



- (e) An owner or manager of a community store may be required to register under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). A failure to register may attract a civil penalty<sup>195</sup> and/or revocation of the licence.<sup>196</sup>
- (f) The Secretary can obtain documents and compel information for the conduct of assessments under clause 67 of the Bill<sup>197</sup>, including information that is of a commercial nature, is subject to an obligation of confidentiality arising from a commercial relationship or is commercially sensitive.<sup>198</sup> A person may not refuse a notice to compel without a 'reasonable excuse', and the onus of establishing such an excuse is on the defendant.<sup>199</sup>

207. Although the purpose of this report is to provide a critique of the Stronger Futures consultation process, we wish to express our concern that the provisions do not address the high cost of fresh food supplied in community stores. We also suggest that if less was spent on this elaborate bureaucratic structure and more on subsidising fresh food, the people and their children would be much better off.

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<sup>195</sup> *Ibid* cl 61(1).

<sup>196</sup> *Ibid* cl 65.

<sup>197</sup> *Ibid* cls 69-73.

<sup>198</sup> *Ibid* cl 73(4).

<sup>199</sup> *Criminal Code 1999* (Cth) ss 73(4), 13.3(3).

## **STRONGER FUTURES IN THE NORTHERN TERRITORY (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL ('TRANSITIONS BILL')**

208. This Bill will repeal the *Northern Territory National Emergency Response Act 2007* (Cth), but will effectively preserve the legal effect of all that was done under that Act.<sup>200</sup>

### **Customary Law**

209. Schedule 4 of the Transitions Bill continues the prohibition of the consideration of customary law in sentence and bail proceedings, but lists a number of proceedings which are exceptions to that general rule. These exceptions are generally proceedings related to the protection of Aboriginal cultural heritage, sites and objects.<sup>201</sup>

210. While our primary focus is the Stronger Futures consultation process, we wish to express our objection to the racially discriminatory nature of these provisions. We reiterate concerns expressed by Alastair Nicholson in 2007:

*The interference with judicial discretion on sentencing to prevent a sentencing judge taking matters of customary law or practice into account is disgraceful. Such an approach does not apply for example to Jewish or Islamic people or to the people of many nationalities that have come to Australia to live who have come from places where there are different customs and practices. It is utterly unjust and stupid for judges to be prevented from taking these matters into account in determining the degree of criminality of the offender and the appropriate punishment. It is nothing more than a Government over-reaction to media publicity about certain sentences that have been imposed by particular judges and magistrates and is highly discriminatory towards Indigenous people.*<sup>202</sup>

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<sup>200</sup> Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) cl 1.

<sup>201</sup>cf Ibid, sch 4 cls 4, 7.

<sup>202</sup> Alastair Nicholson, 'Australia's Children: Does the Law Offer Them Sufficient Protection?' (Speech delivered at the 21<sup>st</sup> Lionel Murphy Memorial Lecture, Parliament House, Sydney; 28 November 2007)

## Prohibition of Pornography

211. The restrictions on pornography contained in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) will continue as what purports to be a special measure under the RDA.<sup>203</sup> The restrictions will sunset after 10 years.<sup>204</sup>
212. The Explanatory Memorandum provides that the amendments are being enacted to address specific Aboriginal disadvantage and help Aboriginal people enjoy their human rights equally with others in the Australian community.<sup>205</sup> It goes on to provide that the ban was introduced in 2007, with the aim of reducing the risk of children being exposed to sexually explicit and very violent material, as well as the potential risk of child abuse and problem sexual behaviour.<sup>206</sup>
213. It is not our purpose to defend the purveyors or users of pornography but we wish to point out that there is an irony about the Government's approach to this issue. It is difficult to see how the prevention of access to certain material otherwise available to the Australian community achieves the above objects. Underlying this is what can only amount to a racial slur, suggesting that Aboriginal children are at greater risk from Aboriginal carers than are their counterparts in the rest of Australia. This has not surprisingly given deep offence to Aboriginal communities, who have no more enthusiasm for pornography than do most Australians.

## Requirements for publicly funded computers

214. These provisions have not been continued.

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<[http://www.ssps.unimelb.edu.au/data/assets/pdf\\_file/0006/93615/Lionel\\_Murphy\\_Memorial\\_Lecture\\_28\\_Nov\\_2007.pdf](http://www.ssps.unimelb.edu.au/data/assets/pdf_file/0006/93615/Lionel_Murphy_Memorial_Lecture_28_Nov_2007.pdf)>.

<sup>203</sup> Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) sch 3 pt 10.

<sup>204</sup> *Ibid*, cl 116.

<sup>205</sup> Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), 12.

<sup>206</sup> *Ibid*.

## **Five-Year Leases**

215. The Amending Bills do not extend the operation of the 5-year leases.

## **Powers over Aboriginal Town Camps**

216. The Transitions Bill confers upon the Commonwealth a regulation-making power, which allows it to permanently alter Northern Territory land law in relation to Town Camps. This includes the power to alter the purposes of existing leases and the type of acts that may be done under them.<sup>207</sup>

## **Community Living Areas**

217. The Amending Bills empower the Commonwealth to amend Northern Territory laws relating to Community Living Areas. The Commonwealth may amend Northern Territory laws relating to:

- (a) The use of land;
- (b) Dealings in land;
- (c) Planning;
- (d) Infrastructure; and
- (e) Any matter prescribed by the regulations.<sup>208</sup>

218. The legislation is expressed in wide terms and does not limit the Minister's discretion to make regulations affecting land usage in any significant way. Effectively, the Minister will have almost unlimited control over the uses of town camps and

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<sup>207</sup> Stronger Futures in the Northern Territory Bill 2011 (Cth) cl 34(1-7).

<sup>208</sup> Ibid cl 35(1-4).

community living areas and in particular, to enable their development for private purposes.

219. The Minister's obligations to consult are limited. In the case of a town camp they include consultation with the Northern Territory Government, a lessee and anyone that the Minister considers appropriate.<sup>209</sup> The classes are slightly widened in the case of a community living area to include the relevant Land Council and the owner (but only if the owner wants to be consulted), and no mention is made of lessees or inhabitants.<sup>210</sup>
220. If the Minister fails to consult as required, such a failure does not affect the validity of the regulations.
221. There is nothing in the Government's report on the Stronger Futures Consultations to suggest that these particular measures were discussed with the people, although support for measures that enable the development of private enterprises in the nature of small business was apparently expressed by a number of people. We do not know whether these people were residents of town camps or community living areas, or how many of them there were, or whether their views were in any way representative.
222. However, even if the consultation did reveal support for measures of this sort, it clearly did not do so upon the basis that the people most affected would be excluded from the decision-making process, or included only at the whim of the Minister.

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<sup>209</sup> Ibid, cl 34(8).

<sup>210</sup> Ibid, cl 35(4)

223. The provision of a ten year sunset clause in legislation of this kind is also somewhat illusory, because it preserves any action that has been taken under it after the expiration of the relevant period. By that time, most, if not all, of the relevant land would, presumably, have been alienated. This is important in considering whether the measures are special measures because it means that their effect will be a permanent one, despite the presence of a sunset clause.

### **Suspension of the Native Title Act Future Acts Regime**

224. There are no provisions in the Amending Bills limiting the application of the future acts regime under the *Native Title Act 1993* (Cth).

### **Powers of the Australian Crime Commission**

225. The powers of the Australian Crime Commission will continue unabated.

### **Sunset and Review Clauses**

226. The Bill provides for a review of the 'special measures' after a period of seven years.<sup>211</sup> There is also a sunset clause of 10 years.<sup>212</sup>

227. Based on our analysis of the requirements of the Convention Against Racial Discrimination, we believe that a review should be undertaken at an earlier period and that the sunset clause should operate much earlier.

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<sup>211</sup> Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 cl 117.

<sup>212</sup> *Ibid.*

## GENERAL OBSERVATIONS ABOUT THE BILLS

The likely impacts of the Amending Bills include:

228. The significant enlargement of the role of the Commonwealth in the governing of Indigenous communities. The Commonwealth is conferring upon itself greater discretionary and law-making power that it has previously exercised.
229. The continuation of measures that undermine the capacity of communities to exercise self-determination. Of particular concern are the expansion of income management, the continuation of alcohol regulations that undermine community initiatives and the expansion of the SEAM programme.
230. While many of the new provisions require consultation with communities, such consultation extends only to the consideration of community submissions. A failure to consult communities will not affect the validity of the laws passed or determinations made. Consequently, the consultation contemplated by these provisions falls far below the international requirements for characterisation as special measures, identified above.
231. The creation of a 'top-down' legislative schemes that, while broad enough to allow for the possibility for community driven and tailored solutions, could also enable a 'one-size fits all' approach. By way of example:
- (a) The Minister can amend or revoke an AMP;
  - (b) The Minister may approve an AMP but also retain alcohol restrictions over the same area;
  - (c) The Commonwealth has indicated that, in relation to the SEAM expansion, it is likely that 'truancy officers' will have the power to require conferences, determine SAPs and issue compliance notices.<sup>213</sup> There is no legislative

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<sup>213</sup> Explanatory Memorandum, Social Security Legislation A3 amendment Bill 2011 (Cth) 14.

requirement for officers to be aware of the circumstances of the community, parents, children or school. Moreover, the IM Bill does not bind the decision maker to apply the principles of natural justice, nor impose any requirement for conditions to be reasonable.

232. The Government's purported reliance upon the Stronger Futures consultations as informing the content of the legislation is either deeply misguided or deceitful. The consultations analysed in this report revealed 'info sessions' in which numerous issues were raised (indeed, communities were told that nothing was 'off the table'), but there were no discussions about the specific measures contained in the Amending Bills.

233. The Amending Bills are complicated pieces of legislation. The Bills and their Explanatory Memoranda run to over 300 pages, and many of the legislative enactments refer to, and interact with other legislation. It is impossible to claim that the general discussions that were conducted through the consultations could generate such a specific, considered legislative result.

234. At the most generous, it could be said that the consultations may have raised issues which the Government then decided it would address 'in-house' without consultation with communities and now seeks to enact through the Amending Bills. Such an approach neutralises the practical benefits of consultation and fails to fulfil the State's legal obligations under international law.

235. We are also concerned that some of the provisions may operate to exacerbate problems identified by those who participated in the consultations. For example, in spite of the emphasis placed on employment, Indigenous people who have prior criminal convictions may be precluded from obtaining employment in community stores, as a result of the amended community stores licensing regime.

236. Other issues identified during the consultations appear to have been overlooked in the development of the legislation. For example, in spite of the importance of bi-



lingual education to many of those who participated in the meetings, there are no references to bilingual education in the Amending Bills. Another common theme raised in the community consultations was the need to respect Aboriginal cultural traditions and norms, yet the prohibitions on the consideration of customary law in bail and sentence applications remain.

237. Finally, we are concerned by the lack of any requirement within the legislation for the translation of information relating to the imposition of the measures, into Aboriginal languages. This is in spite of the likelihood that a number of new civil and criminal penalty provisions could apply to community members.

## REPORT CONCLUSIONS

238. The Stronger Futures consultation process was wholly inadequate for reasons that include the following:
- (a) Indigenous people were excluded from the design of the consultation process;
  - (b) The consultations were based on the Stronger Futures Discussion Paper and Consultation Paper. Both documents were dense and complex. Crucially, neither document was translated into relevant Aboriginal languages;
  - (c) There was insufficient notice of the meetings, which began within days of the public launch of the Stronger Futures Discussion Paper;
  - (d) Meetings were conducted in very general terms, and resembled 'brainstorming sessions';
  - (e) Participants were not provided with information in relation to specific proposals that were under consideration by the Government;
  - (f) The facilitators, while no doubt sincere, often demonstrated partisanship towards Government policy. This is unsurprising given that the facilitators were employees of FaHCSIA;
  - (g) Neither the materials upon which the Consultations were based, nor those who facilitated the meetings, acknowledged previous criticisms of Intervention measures;
  - (h) The process made no allowance for consideration of successful community led initiatives to address community aspirations;
  - (i) The meetings covered so many themes and asked so many questions that in depth discussion was not possible;
  - (j) The process did not provide any mechanisms for reaching agreement; and
  - (k) There did not appear to be any structured process for feedback to communities to verify records of meetings.
239. It is impossible to claim that the general discussions that constituted the consultations could generate such a specific, considered result as the Amending Bills.

240. Our conclusion that the consultations could not have informed the Amending Bills is based on the following:

- (a) The generality of the meetings compared to the specificity of the Amending Bills;
- (b) The absence of a structured process for verification of the accuracy of meeting notes;
- (c) The brief lapse of time between the conclusion of the consultation meetings in August and the tabling of the Bills in November;
- (d) The complexity of the voluminous legislative package. As noted above, the Amending Bills and their Explanatory Memoranda comprise over three hundred pages in length and cannot be understood in isolation of earlier legislation enacted for the purpose of the Intervention. It beggars belief that the Amending Bills were only conceived after the conclusion of the consultation process, the apparent verification of consultation notes with participants, and due consideration being given to those notes.

241. The consultation process was so flawed at the pre-consultation, consultation and post-consultation stages as to render it incapable of fulfilling the requirement of prior consultation.

### **General Observations about Special Measures**

242. The absence of prior consultation in itself is a sufficient basis to conclude that the measures contained in the Amending Bills cannot be properly categorised as special measures.

243. For the sake of completeness, however, we have advanced additional grounds for concluding that the measures in the Amending Bills cannot be categorised as 'special measures'.

244. As noted above, special measures must be specifically targeted and narrowly focussed initiatives. State parties are requested to report on concrete goals, targets, timetables, reasons for implementing and details of the institution accountable for monitoring and enforcement. By contrast, the objects of the proposed measures are described in very general terms without explanation of what measurable benefit is to be achieved. For example, the object of the proposed legislation is to ‘support Aboriginal people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy.’<sup>214</sup> While this may be a legitimate objective in a global sense, it is more properly characterised as a motherhood statement and provides no indication of benchmarks or concrete indicators, against which living a ‘strong, independent life’ might be assessed. Likewise, the object of the alcohol restrictions – ‘to reduce alcohol-related harm to Aboriginal people in the Northern Territory’<sup>215</sup> – and the object of community store licensing – to promote ‘food security’<sup>216</sup> – are similarly vague and cannot be said to be targeted at achieving clearly defined outcomes.
245. Measures that limit or take away human rights must be justified by evidence that is ‘cogent and persuasive and make[s] clear the consequences of imposing or not imposing the limit.’<sup>217</sup> However, credible evidence that the measures contained in the Amending Bills will achieve the Government’s aims, assuming they can be defined, was almost entirely missing from the consultation process.
246. As noted above, special measures are temporary, existing only while the inequality persists. However, it is also apparent that ‘temporary’ does not necessarily mean ‘short term’, as the process of addressing inequality is assessed against clearly defined objectives and functional results. The measures forming part of the Intervention have already operated for five years and the Amending Bills will extend the period by a further 10 years, but without clarification as to either measurable

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<sup>214</sup> Stronger Futures in the Northern Territory Bill 2011 (Cth) cl 4.

<sup>215</sup> *Ibid* cl 7.

<sup>216</sup> *Ibid* cl 37.

<sup>217</sup> Human Rights Law Centre, Submission No 244 to Senate Community Affairs Committee, Parliament of Australia, *Inquiry into Stronger Futures in the Northern Territory Bill 2011 and two related bills*, February 2012, 7 [24].

goals or mechanisms of measuring successful implementation. Consequently, there is nothing to prevent a future government extending the arbitrary timeframe on an on-going basis. Such an approach makes a mockery of the requirement that these measures be temporary.

247. The tragedy of the Stronger Futures consultation process, like the NTER Redesign consultation process that preceded it, is that they represented a real opportunity for genuine change in the manner with which Government interacts with Aboriginal people. Tragically, once again, that opportunity was not seized by Government.

## APPENDIX ONE - TRANSCRIPTS

### Alice Springs Public Meeting, 2 August 2011

248. The number of participants is unknown. This meeting was facilitated by a FaHCSIA officer and attended by two other FaHCSIA officers.

#### ***Participatory methods***

249. There were two interpreters from the Aboriginal Language Service who introduced themselves at the opening of the meeting and a roving microphone was provided. In his opening, the facilitator expressed a preference for most of the talk to come from the audience. He explained that when the Intervention was first introduced, *'there was no consultation with ... anyone, certainly not with Indigenous people, and government were committed this time around to do some consultations'*
250. Copies of Stronger Futures Discussion Paper were made available at the door. The facilitator noted that it was important that the meeting cover the priority areas identified in the paper. It is unclear as to whether any attempts had been made to distribute the paper prior to the meeting.

#### ***Mechanism for obtaining agreement with communities over the process and desired outcomes***

251. The broad parameters of the meeting were explained by the facilitator at the outset and participants were told they could move outside of these if they had other issues of concern. When asked about what ideas they had for 'moving forward' an older Aboriginal woman replied:

*I certainly have. Listen, sure...How many Aboriginal people do we have here, put your hands up all the Aboriginal people here put your hands up.*

*And are you going to listen to us? We go back a long way ... and I am not being nasty but I have always said it for years and years until I'm sick and tired of it. That's the reason I sat here all this time until I was pushed to say something because I am thoroughly sick of it. Talk to us, let us tell you what it is, but then say to us we want to do this from your perspective, the Aboriginal perspective, not the white fella perspective . Because... I can tell you something from the Aboriginal perspective and you'll turn around and hear something different, and when you repeat it to me it's different, and that is what ends up getting interpreted, what's different. And what has to happen it has to be from the Aboriginal perspective.*

### **Transparency and clear parameters**

252. The facilitator made it clear he would like most of the talk to come from the audience. But he went on to say that it was important to focus on the proposed areas for future action identified in Stronger Futures Discussion Paper and in particular, school attendance, economic development and jobs and reducing harm created by drinking. There were also some slides (presumably up on the stage) that posed some questions. Although the general parameters were clear, there was no real description from the facilitator of each of the proposed areas for future action, or what they entailed.

253. The meeting followed the structure outlined above and although extra topics were discussed briefly, the main topics were the proposed areas for future action identified in the Discussion Paper. After the final area, governance, was discussed the facilitator said:

*Ok obviously...(?)...governance was the last priority area that they wanted us to cover off on. I know it's getting late. Um but I'd just like to cover off on this and then I'm happy to discuss other issues if that's what*

*you want or just call it a day and Uncle wants to start off again. Is that ok?*

***Being clear about what outcomes and issues the proposal seeks to achieve***

254. The facilitator provided no specific detail about what outcomes were to be achieved and discussion mostly revolved around the Stronger Futures Discussion Paper's priorities. While allowing for deviation the facilitator ensured that the meeting 'stayed on track', asking participants what their views were on specific issues, thanking them for their response and moving on.

***Being clear about the risks, costs and benefits of the proposed measure***

255. The facilitator did not make any direct reference to the risks or costs of measures, but was keen to acknowledge any benefits of measures that arose during the discussions.

***Accurate collection and recording of data***

256. At the start of the meeting the facilitator informed participants that the meeting would be recorded, but individuals would not be identified. Notes taken would not be attributed to any particular person. Participants were alerted to a film crew from Channel 4 in the UK being present and that they could choose not to be filmed. There was no explanation of why they were filming or what it was being used for.

***Providing people with a clear idea of how their input will be included in decision making processes***

257. At the beginning of the meeting, participants were told that the conversations and notes taken would later be 'fed back to government' to inform further policy



decisions. This was reiterated throughout the meeting, but there was no explanation of how this might happen.

258. In relation to the consultation process, one participant made the following comment:

*I'd just like to say something that I think is very important about the consultation process and what happens afterwards because I'm a great believer, a great supporter of this process of talking to people and listening to people and recording what people say and I'm also a great believer of evidence based approaches. But I think we have to be very careful about taking a banana smoothie approach. What I'm concerned about is that after listening on their own situations, to so many people each with their unique take, you can't just take all these ideas and just chuck them together and turn on the blender and come out with something that you can dish out to everybody that will work in every situation because Indigenous cultures are unique, languages are unique, people are unique, communities are unique, families are unique and unless the consultation process means an ongoing conversation with individuals, community groups, families as well as the community as a whole umm I think it runs the risk of being wasted all over again and of nothing that actually responds to what individual people in their individual situations wish to happen will ever happen for them.*

### **Benchmarks to measure progress**

259. As noted, the facilitator did not make any direct references to benchmarks. The facilitator did however, make a self-serving comment, when he described *Stronger Futures* as:

*[talking] about starting from an evidence based platform and ...(?)  
certainly Minister Macklin's committed to... and there is some evidence*

*out there about what does work and what doesn't so that's a good base line start.*

***Reaching agreement with communities about how feedback will be provided***

260. Participants were told throughout the meeting that their views would be taken to government. Although the *Stronger Futures* consultation process did not call for formal submissions, there was nothing stopping people from writing to the Minister or going to visit their local FaHCSIA officer or Indigenous Coordination Centre. Participants were not told whether they should expect any feedback from the Government on the meeting.
261. The facilitator explained that things that were raised that were within the responsibility of the Northern Territory would be, *'[talked about] at length with the Northern Territory Government'*.

**Alice Springs Town Camps Meeting, 14 July 2011**

***Participatory Methods***

262. The meeting was facilitated by an officer of FaHCSIA, who was assisted by a number of unidentified FaHCSIA staff and observers. Four or five interpreters were present. The audience was divided into language groups and interpreters were spread throughout the room. Participants provided comments by way of roving microphones. The number of participants in the audience is unknown. The facilitator acknowledged that 'a lot of people aren't here today' and emphasised that the meeting would not be the 'only chance' for Aboriginal people to express their concerns.

### ***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

263. At the beginning of the meeting, the facilitator told the audience that the purpose of the meeting was to talk about the future beyond the NTER. He briefly referred to *Stronger Futures*, but suggested that the discussion paper was '*just about generating conversation*'. He was not going to tell the audience the Commonwealth's plans for their future, saying '*we don't actually have any plans*'.
264. As the Commonwealth's position in relation to particular measures was not revealed to the audience, there was no need for a mechanism to obtain any agreement between the participants and the Commonwealth. This was not so much a consultation in relation to specific laws and policies, but rather, a one-sided mechanism for soliciting the audience's ideas. How the government would respond to those ideas was never revealed.

### ***Transparency and Clear Parameters***

265. At the outset, the audience was told that the Commonwealth had '*no plans*' for the future of the NTER measures. They were subsequently informed that the Minister would '*really like to be able to get some ideas from you*' about the eight proposed areas for future action described in *Stronger Futures*. In relation to the NTER measures, the facilitator said, '*Do you want to throw the whole lot away and start again? Do you want to tell the government just to go away and not to be interfering in people's business?*' In light of the Gillard Government's consistent support for the NTER measures, it is difficult to believe that the Commonwealth would just 'go away' and stop 'interfering'. While those comments could have been made solely for the purpose of generating discussion, they suggest a lack of transparency. The audience was entitled to be informed of any decisions that had already been made in relation to particular measures and whether or not those decisions were up for negotiation.

***Being clear about what outcomes and issues the proposal seeks to achieve***

266. The participants were not given a clear idea in relation to the objectives sought to be achieved. Instead, they were given a nebulous brief to discuss any issues of concern to them and their community. Consequently, much of the discussion revolved around local issues, such as racism and safety concerns for homeless people in Alice Springs. Many issues fell within the responsibility of the Northern Territory and Alice Springs Council. The process for relaying those concerns to the appropriate level of government was not discussed. By way of example, some participants were concerned about bilingual education and transport for school students who live on outstations. While the facilitator thanked them for their comments, he neglected to discuss how such input would be relayed to the relevant Northern Territory department.

267. Throughout the meeting, the facilitator informed the participants that the Minister had certain priorities, and in particular, alcohol management. However, the participants were not provided with any information in relation to the kind of measures that the Commonwealth would be willing to fund to address alcoholism, or whether or not the Minister already had a position in relation to certain measures. In the absence of such information, the meeting proceeded as a one-sided brainstorming session, as opposed to an informative and inclusive consultation.

268. Some of the participants were clearly dissatisfied with the lack of information about the Commonwealth's decision making processes:

*It's okay for you to have this consultation, but at the end of the day, is there going to be any changes? Because, I've been over-consulted, I've been poked, I've been probed, I've met (inaudible) I've had ministers in my house for coffee, I've been making scones, you know, I've tried to do all those (inaudible) and the message is not really getting through. So I*

*see this as another way for the government to come in and tell us how to live our lives and how to do what we're going to do whether we like it or not.*

***Being clear about the risks, costs and benefits of the proposed measure***

269. There was no discussion about the risks, costs or benefits of any particular measures.

***Accurate collection and recording of data***

270. At the beginning of the meeting, the participants were informed that officers from FaHCSIA were taking notes of the discussions for the purpose of sending:

*your ideas and feedback ... to Canberra and that they can go through to the minister and our department in Canberra so that that will be fed into the policies and the ideas what will happen after the NTER.*

271. At the conclusion of the meeting the facilitator informed that participants that:

*... we will be writing these comments down. We will have the capacity to be able to come back to you and show you what we've written up and make sure what we've got is an accurate reflection of the comments.*

***Providing people with a clear idea of how their input will be included in decision making processes***

272. The facilitator responded to prescient suggestions by summarising them and assuring the audience that, *'we're writing all this down, putting – taking all this back*

[to Canberra].’ However, there was no discussion about the process of feeding the audience’s input into actual decision-making.

### ***Benchmarks to measure progress***

273. There were no references to bench marks in order to measure the progress of any particular measures.

### ***Reaching agreement with communities about how feedback will be provided***

274. There was no discussion in relation to whether or not anyone would provide feedback in relation to the participants’ input.

## **Bagot Meeting, 13 July 2011**

### ***Participatory Methods***

275. The President of the Bagot Council opened the meeting. The Government Business Manager then introduced the nine Australian Government officers from FaHCSIA, including the FaHCSIA facilitator. Also present were two interpreters, observers from the Aboriginal Interpreter Service and the Anti-Discrimination Commissioner. There was no discussion about authority for decision-making and it seems there was no formal representation from other organisations such as the Northern Land Council.

### ***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

276. At the beginning of the meeting a broad agenda was set around determining the ‘future relationship’ between the Australian Government and community. The

facilitator stated that they would be reporting back to the Government on the 'community's behalf'. Yet there was no explanation of the formal process for the meeting, the means of participation, or what the expected outcomes were. Indeed there is no direct mention of any terms of reference within any opening statements of the Government.

277. There were no clear mechanisms for obtaining agreement from community members in this meeting. The facilitator did not discuss protocols and process with the group and instead created a very informal environment to discuss fundamentally important policy matters.

### ***Transparency and Clear Parameters***

278. The facilitator did not provide a transparent agenda or establish clear parameters for the discussion. His process became clearer when he started to tell the group exactly what he planned to talk about, that is: community and safety, health services and nutrition, employment, housing and governance. Furthermore, the facilitator did not refer to Stronger Futures Discussion Paper, raising questions as to whether there was a real intention to genuinely consult about the issues raised in the paper.

### ***Being clear about what outcomes and issues the proposal seeks to achieve***

279. As there was no clear agenda set, or formal procedure set out for the meeting, it is difficult to gauge whether the meeting was clear about what outcomes and issues that were sought to be addressed. There were also signs of confusion in relation to representation and the responsibilities of the Commonwealth and Northern Territory Governments.

***Being clear about the risks, costs and benefits of the proposed measure***

280. There was no discussion specifically on the risks and costs associated with any proposed measure.

***Accurate collection and recording of data***

281. The facilitator stated that Government scribes were recording all of the meeting's discussion. One of the interpreters noted at the beginning of the meeting that they were only interpreting and not taking sides.

*We're not going to take sides for Yolgnu and for this one. We keep in the middle. They are, we are passing a message from government to us and we'll be interpreting that message from the government to you mob and so that will be what we are doing.*

282. This raises two issues. Firstly, there was no clear process outlined for how those translations were completed and recorded and verified. Given that the interpreters were often talking, it would have been impossible for them to write down the participants' statements simultaneously. Secondly, the language group for the Bagot is not Yolgnu and there is no indication of what other languages (apart from Creole) were used or able to be interpreted.

283. It was clear from the beginning of the meeting that the role of the interpreter was to repeat what the facilitator was saying in a way that the community could understand, but not necessarily in language.

Facilitator: *We want to understand what is working and what isn't working.*

Interpreter: *Then we know what we want to know what is working better for us mob and what is not working, proper thing, for us mob.*



***Providing people with a clear idea of how their input will be included in decision-making processes***

284. The facilitator stated that the recorded conversations from the meeting would be reported back to *'government, to our Minister and other Ministers both in the Australian Government and the Northern Territory Government'*. The way in which this reporting process works was not articulated.

***Benchmarks to measure progress***

285. There were no benchmarks highlighted for discussion in this meeting.

***Reaching agreement with communities about how feedback will be provided***

286. At the end of the meeting the facilitator told the participants that he would return with the *'notes that are typed up today...just to make sure it is a true thing you know of what you all said today'*. Further information would be helpful as to who, if anyone, received feedback and how it was delivered.

**Darwin Public Meeting, 28 July 2011**

***Participatory Methods***

287. The meeting was facilitated by an officer of FaHCSIA. A number of other officers from FaHCSIA attended, but they did not contribute to the discussion. An interpreter was also in attendance. The number of community members in attendance is unknown.

288. The facilitator's role was problematic. On the one hand, he solicited comments from participants with a view to finding out 'what works'. But on the other hand, the facilitator often responded defensively to criticisms of the Commonwealth. At least one participant found this troubling:

*And another thing I'd like to say is that I really think you're being inappropriate today in how you are presenting and it's no offence. It's, you know, you should just listen but you're trying to defend. I'm sorry but that's, you know, a few people have said that today.*

289. Some of the participants expressed concern that the two hours allocated for the meeting was inadequate:

*You need another round, so tell your Prime Minister or whoever's pulling her chain, you need another round, and sit down with people, not for two hours, because that's all your consultation is ... and how many people in here, 100? You can't listen to everybody. Go out to those communities and sit there for a week with us.*

***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

290. Participants were asked for ideas in relation to how 'Government' could 'move forward'. Their suggestions were usually met with the assurance that their ideas would be collated and 'fed' into government decision making. There was no need for a discussion concerning a process for reaching agreement with the Commonwealth over any proposed measure, because the Commonwealth's position in relation to any specific measure was never canvassed by the facilitator.

***Transparency and Clear Parameters***

291. While community participants provided frank and detailed opinions on what services were needed and how governments should engage with communities, the facilitator omitted to provide any information in relation to the parameters of the Commonwealth's commitment. Suggestions concerning housing, education and employment were met with a standard response that they would be noted and taken back to 'government'.

292. The facilitator was unable to provide answers for questions about topical issues that were pressing. So when a participant raised concerns about the use of Aboriginals Benefit Account funds for township leases, the facilitator responded:

*I continue to hear a lot about the issues and that's fine but we're really interested in hearing about what we do to move forward, and there's been some ideas, that's been great. But I'd just like to encourage people to ... give us some more ideas about moving forward.*

Later, the facilitator was more frank, telling one participant that he was 'not here to answer questions.'

293. Suggestions that were at variance with current policy, such as compulsory income management, were met with a similarly defensive response. There did not appear to be any process for further negotiations, with a view to achieving a meaningful agreement between the Commonwealth and the participants in relation to any specific measure.

***Being clear about what outcomes and issues the proposal seeks to achieve***

294. At the beginning of the meeting, the facilitator explained that the Australian Government wanted to work with Aboriginal people in relation to the 'future of the NT Emergency Response'. After stating that some of the measures would end next year, the facilitator said that the purpose of the meeting was to hear the participants' views on how to 'move forward':

*Whilst we can talk about what's happened in the past, and quite often in these meetings people bring up issues about what's happened in the past, what we'd really like to hear from people today is what can we do in the future? How can we build on initiatives and measures that are*

*already there? What can we do in the future how can we make things better?*

295. While the participants responded with a range of suggestions, there did not appear to be any mechanism for them to be informed of the Commonwealth's objectives. It was not revealed if the Commonwealth had decided to continue any particular measures. Furthermore, there was no mechanism for the respondents to be informed in the event that the Commonwealth rejected their proposals. Essentially, the meeting was in the nature of a 'brainstorming' session, rather than a negotiation over the fate of specific measures.
296. Many of the participants' suggestions fell within the responsibility of the Northern Territory Government and, in particular, those about education. Some of the participants were concerned that schools in remote areas were inadequately funded. There was also opposition to the 'First Four Hours' policy. However, there was no discussion in relation to a process for relaying those concerns to the Northern Territory Government.

***Being clear about the risks, costs and benefits of the proposed measure***

297. There was no discussion about the risks, costs or benefits of any of the proposed measures.

***Accurate collection and recording of data***

298. While the facilitator frequently referred to 'noting' the participants' comments, the participants were not provided with information about the recording of data.

***Providing people with a clear idea of how their input will be included in decision making processes***

299. Participants were frequently reminded that their input would be 'fed' into government decision-making, but they were not given any details about the process. Indeed, they were not even provided with information in relation to how their input into the 2009 consultations had been 'fed' into government decision-making over the last two years. Of the 2009 consultations, one participant made the following comments:

*The question you're asking about the future, uh, I can recall – was it two years ago? In the hotel next door? We had a two-hour consultation on this very same stuff [Woman interrupts: 'Here. It was right here.'] So now we're in the pub next door, and we've got two hours. I'd think that all the submissions that were made at that time – many of which were put on your own website – in terms of particular ideas, are already there.*

300. One participant suggested that prior to implementing any changes, there should be a second round of consultations in order to ensure that communities consented to any proposed changes to laws and policies:

*Once it's all been fed in and the policy makers come up with their proposals is that proposal going to be brought back for a second round of consultations, so the people can say yes, you heard us that's what we want or no, you made a mistake before it goes into law? 'Cos what's happened in the past is these consultations have happened then something's become law and everybody's said that they didn't listen to us ... are you going to come back and let those people whose lives it's going to affect say it's ok before it becomes law?*

To which the facilitator responded:

*Yeah, as I say there will be a feedback process of some sort. I can't answer than because I don't know exactly how it's going to work and when, but we'll certainly note that down that that's what someone brought up here and that should occur and we'll feed that in.*

301. Participants were also concerned that their input would be represented inaccurately in the media:

*...Jenny Macklin says that everyone loves income management and dah, dah, dah .... why is that so many people like income management, when I know for a fact that it's highly unpopular. So why are we getting all this? Is it just spin? Why? If you're consulting properly, why are you only hearing one voice?*

Once again, the facilitator was unable to provide any information in relation to how the participants' input would be used to inform government decision-making:

*As I've said, whatever people bring up, like income management, like a number issues that have been brought up, we'll note them down and get back to government so we don't hear selectively, we hear what's said to us (interjections) and we feed that back through the government (interjections). I'm not gonna, I'm not gonna have a debate about particular ... (interjections) You know, we're listening to what you're saying recording it and it gets back to government.*

### **Benchmarks to measure progress**

302. The participants were not provided with information in relation to benchmarks. A member of the audience did ask the facilitator for statistical data to show a 'very clear picture' of the benchmarks achieved by the NTER measures. The facilitator responded with the following:

*We're not here, I'm not here, to give you benchmarks or talk about outcomes or anything like that.*

303. Later in the meeting, the facilitator informed the participants that the NTER measures were being evaluated, but he did not provide any information in relation to who was conducting the evaluation, or if those present would be able to contribute to it:

*I also just wanted to say that the Northern Territory Emergency Response is being evaluated. And so, in the future, that data and that information will be available around, you know, what outcomes has it achieved, and, you know, has it worked, has it not worked, what measures are doing ok and what haven't. And it's about saying, today, you know, what do we do for the future.*

### ***Reaching agreement with communities about how feedback will be provided***

304. The facilitator stated that feedback would be provided, but there was no discussion in relation to the process to be adopted:

*There will be a feedback process out of all of this, when and how it's going to be done and we'll determine in the future, but there will be a feedback process.*

### **Galiwin'ku, Elcho Island Meeting, 18 August 2011**

#### ***Participatory Methods***

305. The meeting was facilitated by a representative of the Australian Government and attended by officers from FaHCSIA, the Department of Health and Ageing and the

Department of Employment and Workplace Relations. Two translators were in attendance. The number of the participants from Galiwin'ku is unknown. At some point prior the meeting had been cancelled, due to a death the night before. No information has been provided as to why the meeting still proceeded or how many members of the community were unable to attend due to their recent loss.

306. At the beginning of the meeting, the facilitator described Stronger Futures Discussion Paper as '*a paper that we've been handing out*' suggesting that at least some of the participants had not had prior access to the paper. The facilitator omitted to explain the importance of the Discussion Paper, that is, that it was intended to provide a reference point for the consultations. At no time did the facilitator ask the participants whether they had read the discussion paper or whether there were any ambiguities within it that required further explanation. That none of the participants referred to the paper during the meeting suggests that at least some of them may not have understood its relevance.

***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

307. There did not appear to be any mechanism for obtaining agreement over either how the discussions would proceed or the outcomes to be achieved from the meeting. Perhaps, this is because the meeting was more of a 'brainstorming' session, rather than a negotiation over specific measures. The facilitator explained the purpose of the meeting in the following terms:

*We're here today to talk about Stronger Futures, which is a paper that ah we've been handing out, but also to ask and talk to you about issues that your community want to talk to us about.*

308. Not only did the facilitator omit to explain the relevance of *Stronger Futures*, but he failed to provide any further reference to the discussion paper during the meeting, preferring to '*listen to what the community thinks is important*'.



309. Throughout the meeting, participants were advised that their ideas would be relayed to 'government':

*We'll be writing down your ideas and thoughts and they will go along with every other community's ideas and thoughts to government so that we can work out a better way of doing business.*

310. Perhaps, the generality of the meeting would have been appropriate if it was the beginning of a dialogue that would eventually culminate in clearly defined objectives and a robust negotiation process. However, on its own, the meeting was deficient. There were no detailed discussions about specific measures, or a process for the participants' concerns about those measures to be fed into government decision making.

### ***Transparency and Clear Parameters***

311. At the beginning of the meeting, the facilitator informed the participants that he didn't intend to 'talk to you about lots of things, I'd prefer to listen to what the community thinks is important'. While a willingness to listen is commendable, Aboriginal people also have the right to be informed about any aspects of proposals that have already been decided upon, how those decisions were made and whether or not such decisions are amenable to negotiation.

312. The meeting proceeded on the basis that everything was up for discussion. The facilitator encouraged an open slather approach, with the following:

*The question is ah, we'd like to hear from you about what is important in this community about how you do business, how government does business, what do you think you'd like to see changed?*

313. Because of such comments, the participants discussed a range of issues, some of which did not readily fall within any of the eight proposed areas for future action identified in *Stronger Futures*. For example, one of the participants raised the issue of achieving comity between balanda law and yolngu law. At no time did the facilitator explain how concerns that fell outside of the parameters of Stronger Futures Discussion Paper would be dealt with.

***Being clear about what outcomes and issues the proposal seeks to achieve***

314. Neither the objectives to be achieved, nor the issues sought to be addressed were clear. Discussions appeared to be fluid, encompassing the Intervention, the eight proposed areas for future action identified in Stronger Futures Discussion Paper, issues that fell within the responsibility of the Northern Territory Government and the Shires and general criticisms of government decision-making. To some extent, such overlaps are unavoidable. For example, one of the most consistent messages from participants was the need for Aboriginal people to work in partnership with governments. This message often flowed from conversations about the proposed areas for future action, such as employment and housing.

315. In contrast, other matters were clearly a Northern Territory concern, such as bilingual education:

*... why did the government stop bi-lingual education? What you're getting to work for the area, a child needs to be bilingual. They learn to read both in yolngu matha and balanda matha (clapping).*

The facilitator responded:

*Um, that is a message I've got in every single community I've gone to. Ah that bilingual education is really important to support families in getting kids to school and kids learning properly about culture and about*

*language. It's a strong message and we'll send it back from this community as well. Thank you.*

316. However, no information was provided in relation to whom this 'strong message' would be sent. Would FaHCSIA relay the audience's input to the Northern Territory Department of Education? If so, what kind of response could the community expect from the Department and when? Who in the Department would be responsible for further liaison with the community? In the absence of detailed information concerning the processes to follow the consultations, the outcomes sought are vague, if not meaningless.

***Being clear about the risks, costs and benefits of the proposed measure***

317. There was no discussion about the risks, costs or benefits of any proposed measure.

***Accurate collection and recording of data***

318. At the commencement of the meeting, officers from FaHCSIA informed the participants that they were taking notes of the meeting.

***Providing people with a clear idea of how their input will be included in decision-making processes***

319. Participants were not provided with a clear idea of how their input would be fed into the Commonwealth's decision-making processes. The facilitator frequently responded with broad comments that, no doubt were sincere, but so general as to be incapable of giving rise to any meaningful obligations. The following response was typical:

*Um it is a message that I'm getting from every single community that I'm going to that communities want to sit down and have real solid yarn and they want to work together with government and they're bit sick of being told what to do. And so thank you for that it's very powerful words.*

### **Benchmarks to measure progress**

320. There were no references to benchmarks to measure the progress of any particular measures.

### **Reaching agreement with communities about how feedback will be provided**

321. Participants were not provided with anything greater than a general assurance that their ideas would be taken back to 'government'. There was no discussion in relation to feedback that they should be able to expect from 'government'.

## **Kintore Meeting, August 2011**

### **Participatory Methods**

322. The meeting was facilitated by a male representative from FaHCSIA. Reference was made to at least two other FaHCSIA staff being present. It is estimated that 40 people attended the Kintore meeting. Ten men and nine women made comments throughout the meeting.
323. An interpreter was present. The facilitator described the interpreter's role in the following terms: *'If anyone is not understanding what I'm saying, put your hand up and [the interpreter] will give me a hit on the shoulder and he will just help me out'*. The main role played by the interpreter was to translate statements made in English during the meeting into language, mostly messages from the facilitator, but also

statements made by other community members in English. Most, though not all, comments made in language by community members were translated into English so they could be understood by the facilitator and other officials.

***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

324. There were no attempts made by the facilitator to explain *Stronger Futures* or any of the proposals that it puts forward. There were two mechanisms described as being ways the community could influence future government policy. Firstly, assurances were given that everything said in the meeting would be ‘written down’ and taken to the government. Secondly, future meetings were promised. It was unclear whether these meetings would take place before or after the ideas from the Kintore consultation meeting were sent to the government:

*[Official] will come back again and talk about it and tell you that the information has gone up and just to clarify that what we have written up is exactly what you have told us.*

325. Towards the end of the meeting, promises were made that the facilitator would make immediate inquiries with Shire management to ‘sort out’ a few specific problems around Shire administration of night patrol and road maintenance. An assurance was also given that the status of funding for ranger programs in Kintore would be immediately investigated.

***Transparency and Clear Parameters***

326. There was some attempt to put parameters around discussion, though no parameters were put around policy being considered by government. At the beginning of the meeting facilitator said, ‘*We are going to talk about seven areas today*’ and listed those areas.

327. A booklet had been distributed in the crowd, described as 'the book'. This provided an illustrated summary of *Stronger Futures*. However, no reference was made to *Stronger Futures* itself, or how 'the book' related to it. Before the discussion began, people were asked to 'look through the book' and a commitment was made that, 'we will follow through with the book and you guys can read along and if I miss something out then you just let me know'. However, from this point on, neither 'the book', nor *Stronger Futures*, was referred to. There was an attempt by the facilitator to focus discussion on some of the proposed areas for future action, though there was also encouragement given to people to speak on any topic that came into their minds.

328. The facilitator did not indicate whether any concrete proposals or policies were under consideration by the Commonwealth. In some areas, an impression was given about the nature of policies under consideration, though no specific detail was given. For example, on schooling, an impression was given that the government's primary consideration was how to provide better facilities and opportunities in school:

*Governments provide some things, but there may be more things that you can think of. Other things, better opportunities, we need to hear from you today what things you think will be better at school.*

329. Community residents raised many concerns and suggestions in this area, including lack of resourcing, particularly the lack of both an Internet connection and a bus. There were also many points made about the need to involve Elders and incorporate land management and Aboriginal language into the education system. A teacher implored community members to send their children to school. All these suggestions were encouraged by the facilitator.

330. Despite the lack of articulation of specific policies by the facilitator, a number of community members demonstrated knowledge about government intentions for future policy and raised objection to these policies or requested clarification of the

government's position. For example, on the question of governance, one participant said:

*There is another question. The government wants to keep the Shire council. They are talking about new ways to involve Aboriginal people, but they don't want to bring back the community council. They want the GBM and government control.*

This question was not answered.

331. Another participant raised concerns about linking welfare payments to school attendance:

*The government is blaming Aboriginal people for their attendance rate at school. They are going to start cutting people's Centrelink payments if their children don't go to school.*

A number of concerns were raised about this policy through the meeting. In response to a question about whether cultural matters such as sorry business would be considered when making policies about school attendance, the facilitator said:

*They are strong questions which need to be answered and we are going to take them back and try to get answers for you.*

***Being clear about what outcomes and issues the proposal seeks to achieve***

332. As mentioned, there was an impression given that the government was interested in both improving employment opportunities and creating more opportunities and programmes within the school system in Kintore. But there was no clarity about any proposal being put forward by the Commonwealth to achieve these aims.

***Being clear about the risks, costs and benefits of the proposed measure***

333. There was no discussion concerning the risks, costs or benefits of any measure.

***Accurate collection and recording of data***

334. The facilitator mentioned on a number of occasions that a 'lady' was keeping a record of what was being said and that this would be delivered to Ministers in Canberra.

335. The facilitator made a commitment that a detailed statement read out on behalf of the community containing commentary about Intervention measures and community aspirations would be included in the report that was sent to government.

***Providing people with a clear idea of how their input will be included in decision-making processes***

336. On a number of occasions, the facilitator acknowledged cynicism within the community about a lack of inclusion in previous decision-making processes and gave assurances that community views would be considered this time around. For example, in his opening statement the facilitator said:

*I know some people who think nothing will get back to the government, so they can be sure that what we write down will to our Ministers and we look at everything we write down. And ... will come back and talk to you about it.*

337. Throughout the consultation there was considerable frustration expressed by a number of participants that previous consultation meetings had not seen the wishes of community members acted upon.



*What ... is saying is that he sick and tired of sending someone over and over talking about same situation that haven't been done... sick and tired about talking about education, about jobs, it didn't happen.*

### ***Benchmarks to measure progress***

338. No benchmarks were discussed in terms of measuring the progress of any current or future measures.

### ***Reaching agreement with communities about how feedback will be provided***

339. In response to criticism about the meeting being rushed, the consultation meeting was represented as being the start of a process which would substantially influence the direction of government policy:

*We have to start somewhere and it would be very very unfair to start next year and that's why we are starting now. You need to be thinking about what you want and we are not going to rush you.*

However, there was no discussion of an ongoing process the community could engage in to influence policy development.

### **Maningrida Meeting, 12 July 2011**

340. This meeting was attended by Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, and Warren Snowdon, Member for Lingiari and Minister for Indigenous Health. The meeting was also attended by Marion Scrymgour, the local member for Arafura, and Malarndirri McCarthy, Northern Territory Minister for Local Government, Regional Development,

Indigenous Development, Tourism, Women's Policy and Statehood. The number of community participants is unknown.

### ***Participatory methods***

341. At the beginning of the meeting, Minister Macklin acknowledged that the way things had been done in the past upset many people and said that things would be done differently. She explained the proceedings for the two hour meeting, noting there were three interpreters; one for the short meeting at the beginning, and one each for the men's and women's groups to follow.
342. A community member raised concern about the two hour duration of the meeting and the 13 language groups that exist in Maningrida; a large community of around 3000 people. Although some participants spoke in language it appears from the transcript that no interpreting was done during the men's group and for the women's group, the interpreter was not identified at the beginning of the meeting and no facilitation took place.
343. Some male participants expressed concern that they were not informed about the meeting breaking into groups along gender lines and felt this reflected badly on them:

*The division between the male and the female sexes was a little bit inappropriate and a little bit offensive to us males because from the start of the Little Children are Sacred Report till now we are still looked upon as being those deviant male Indigenous men in Indigenous communities which really erodes at what we are feeling. It really hits hard at our hearts. When you have these old men up here talking about culture and ceremony and so on which is a really strong part of this community and right across the top end, they are actually. To have the constant belief*

*that we are the wrong, we're the false, we're the bad, is just really degrading.*

344. It was also stated by one man that they had not received any prior information about the purpose of the consultations, only a venue and time a week before via email. He made this suggestion:

*Therefore if you seriously want to come and talk to the people of Maningrida about this, its got to be with mutual respect. So come back at any time, stay for two or three days that way we can properly reconcile ... This means to us, its nothing. Its just written up by the government Its not coming from community perspective, its not the community voice. So for us that is sad day business. The thing is, I only heard about this last week to tell you the truth. I got a weird looking email just saying outstations where the consultation was taking place but no information whatsoever. Why and what purpose? ... so in future, if there is another consultation happening, please, my advice is, give us 6 weeks at least notice because we come from all over the place so.*

***Ensuring that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure***

345. There was no discussion about or explanation of *Stronger Futures* during the introduction. Participants were told only that the Intervention would be finishing next year and the meeting was an opportunity for community members to talk about what they would like to see changed.

346. Several participants were critical of Intervention measures. One participant said that *'the first step we would like to see is to get rid of the intervention'* and comparisons made to former protection regimes. Another stated *'the Intervention destroyed us'* and further:

*'When the Intervention came in that nothing happened here. The only thing happened was Centrelink. New houses. What else happened here. What else the government put in here? Some of the funding were cut off.'*

347. There was a degree of scepticism among the participants that their input would be used to inform future policy:

*How many times have we visits from you mob, the government people? Promises of a better future? How many times have you heard that? Changes to the intervention. The intervention taking another form, another face? What business have we achieved from the intervention? Five areas of action: health, housing, schools, community safety and protection of children? What about roads and street lights, issues we talk about between government and community. (Camera on speaker) Same story from not just our community but from other communities as well. You say, I hear you, I am listening to you. The question is how well are you listening?*

**Consultations should be transparent and have clear parameters**

348. Little information concerning the Commonwealth's position on actual measures was provided to participants and as such the parameters of the discussions were vague.

***Being clear about what outcomes and issues the proposal seeks to achieve***

349. The words 'future' and 'listening' were emphasised often in the initial meeting and Minister Macklin spoke of the need for education and jobs. However, the Minister did not discuss specific measures or outcomes sought to be achieved from the consultations. There was also some confusion over whether specific matters were a Commonwealth or Northern Territory responsibility. For example, the Member for Arafura said that the removal of CDEP was a lost opportunity for organisations to create enterprise and claimed to have spoken to Minister Macklin about it a number of times. However, Minister Macklin provided no response.

350. It is unclear what information the community was provided with prior to the meeting if any. Participants are asked if they had seen *Stronger Futures*, but the transcript did not record a response. One participant found the absence of an agenda '*quite disappointing*'.

351. Although questions were asked around the 'infrastructure' of the Intervention and what would happen when it ended, there were not many answers. In response to a question about whether government business managers and Indigenous engagement officers would retain their positions after the Intervention, Minister Macklin responded: '*So it sounds from what you are saying to me, the GBM and IEO are really useful?*'

***Being clear about the risks, costs and benefits of the proposed measure***

352. Specific budget measures or risks and benefits were not discussed aside from the promise of \$245 000 for a ranger vessel. However, the lack of necessary funding for basics such as housing and maintenance was raised by a number of participants.

### ***Accurate collection and recording of data***

353. It appears there was a range of media at the meeting due to prominent attendees and participants were advised they could refuse to be filmed. Participants were also told that the Government would keep a record of the meeting, but names would not be recorded.

### ***Providing people with a clear idea of how their input will be included in decision making processes***

354. There was no clear indication given on how this was to be done and further matters relevant to this are raised in the section related to feedback below.

### ***Benchmarks to measure progress***

355. Benchmarks to measure the progress of measures were not discussed.

### ***Reaching agreement with communities about how feedback will be provided***

356. One participant complained about the lack of feedback at the end of earlier consultations:

*We're only people here we're wasting our voice. Talking, to bring about everything. We don't get any report from that end. Nothing. Ever since I was talking, talking, talking anything coming to get issues from Maningrida. No report from them.*

357. Participants were informed that they would be given notes recording what was said at the meeting and what issues were raised. At the conclusion of the men's meeting there was an arrangement made for Marion Scrymgour to return in a fortnight. Minister Snowdon was also going to return and report back to Minister Macklin.

## Mutitjulu meeting, undated.

### ***Participatory Methods***

358. The meeting was facilitated by an officer of FaHCSIA, assisted by a number of other FaHCSIA staff. The role of the translators was never formally introduced or discussed. Two men played a translation role. One translated most statements from facilitators and kept a distance from the discussion. Another translated more informally, passing on comments from the crowd and significantly contributing to discussion.
359. It is unknown how many people from Mutitjulu attended the consultation, however video footage shows that more than 35 people are present at the beginning of the meetings and it is estimated that approximately ten more people joined the meeting as it progressed. One participant suggested that significant members of the community were absent:

*Look around you... is anyone from the clinic here, is anyone from the respite centre here, is anyone from the childcare here? Is anyone from all the other service providers here? No. And that's how divided the community is.*

### ***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

360. There was no attempt by the facilitator to explain *Stronger Futures*, or any of the proposals that it put forward. No mechanisms were proposed for obtaining 'agreement' with the community on future initiatives, though the facilitator made a promise that all the community's concerns about the Intervention and ideas for the future would be written down and sent to the Government for consideration.

361. A number of participants were very forthcoming with opinions about the Intervention and other recent changes in the community, as well as ideas for the future. One man came with a prepared statement. The facilitator largely played the role of answering questions, or promising to seek answers to questions, rather than prompting discussion.

### ***Transparency and Clear Parameters***

362. No information was provided in relation to the policies that will operate after the expiry of most of the NTER measures in 2012. One participant raised concerns about the Commonwealth's lack of disclosure:

*What are the second phase you looking at with all these consultation process? Is it going to be Intervention number 2?*

The facilitator responded:

*What comes next is about us working with communities as we're doing now. Working out what works and what doesn't work.*

363. It was suggested by the FaHCSIA officers on a number of occasions that there were no parameters around government policy under consideration. For example;

*The current laws around the Intervention and the current funding for the Intervention finish next year, so we want to hear from you what needs to be done when that all finishes next year, if anything.*

364. Responses by FaHCSIA's officers to some of the questions concerning specific policies were often vague and on occasion, misleading. For example, in response to questions about new housing, the facilitator said that the Commonwealth had allocated;



*\$1.7 million for new houses (at Mutitjulu) but there's still some work going on between Parks and the NT government to sort out the leasing arrangements for that and there's a CLC meeting this Thursday to start the discussion with you about that'.*

Ten minutes later in the meeting, the assistant facilitator corrected this statement, saying:

*and .... (a community member) just reminded me that when I talk about that money for housing, that's not new houses, that's only for the refurbishments on current houses.*

This correction does not appear to have been translated. A community member responded, *'there's a trick in them words'*.

***Being clear about what outcomes and issues the proposal seeks to achieve***

365. No policy proposals were put forward by the facilitator as being under consideration by the Commonwealth so there was no discussion about potential outcomes from proposals. The facilitator repeatedly informed participants that the Government was trying to achieve a better working relationship with the community, though no specific policies were discussed.

***Being clear about the risks, costs and benefits of the proposed measure***

366. As no specific measures were proposed, there was no discussion about their risks, costs or benefits. Some participants raised potential changes to leasing arrangements as part of a housing program as an emerging concern. There was no discussion from the facilitators about the risks, costs or benefits of these

arrangements.

***Accurate collection and recording of data***

367. The participants were told that notes were being taken and that the government business manager would, '*be bringing the notes back from the meeting to you, to make sure we are accurate*'. One community member read out a detailed series of demands calling for an end to the Intervention, self-determination for Aboriginal people and requesting a range of government investment priorities. It was unclear how or if this written statement would be incorporated into the report from the consultation.

***Providing people with a clear idea of how their input will be included in decision-making processes***

368. One community member specifically requested information about the process that would follow the consultation:

*Are these consultations gunna go back to the government and you gunna come back again and you talk and sort things out, or what's happening? Is this the first and the last consultation?*

The assistant facilitator answered:

*The consultation is going directly to government for consideration of where to next. The Intervention finishes next August and this is about the future relationship... so this is the first of a lot of talking and a lot of conversation and hopefully a lot of partnership with communities into the future.*

369. There was a strong degree of cynicism from some community members about the process, given past disappointments with earlier consultations:

*She's sick of talking. She wants to do something for the kids, but there's no source of funding that comes through. So she's sick and tired of talking, talking - when are you mob going to start listening?*

One man said of the 2008 review into the NTER:

*Are you looking for the same answers what he (Peter Yu) already give the government, or are we talking all over again?*

370. On some specific complaints about local issues, such as the youth-worker program and lack of night-patrol services, the facilitator made promises that they would be followed up in the immediate term.

### ***Benchmarks to measure progress***

371. The facilitators put forward no clear benchmarks to measure the progress of the Intervention measures, or potential benchmarks for future initiatives. There was a general acknowledgement that the Intervention 'hurt a lot of people' and the facilitator said '*we know that the Intervention brought a range of things to communities - some good, some bad.*'
372. Reading from his prepared statement, one community member listed a range of statistics to demonstrate his point that the Intervention had been a 'failure', including a 35 per cent increase in incarceration, declining rates of school attendance in many communities and increases in suicide and self-harm.

### ***Reaching agreement with communities about how feedback will be provided***

373. As noted above, FaHCSIA officers made no specific references to future processes that would allow for community input into decision-making, or for community members to receive feedback from the Commonwealth in relation to their specific concerns. There were general commitments to 'work together' into the future and a promise that the government business manager would be available for small group consultations if requested.

#### **Yuendumu Meeting, 5 July 2011**

374. **Note:** The following observations are made in relation to a community meeting including both men and women. During this meeting, the facilitator, an officer of FaHCSIA, stated that it was their intention to hold subsequent meetings with men and women respectively for approximately half an hour. The transcripts and video provided to the researchers did not include any information on whether these meetings were in fact conducted, and if they were, what was discussed in those meetings.

### ***Participatory Methods***

375. An officer from FaHCSIA facilitated the meeting. There were three other FaHCSIA employees, one representative from the Commonwealth Department of Health and Ageing and Department of Employment and Workplace Relations respectively, the government business manager of Yuendumu and a community member who appeared to have been employed by the Commonwealth for the purpose of the consultation. An interpreter was present, however the meeting was conducted throughout in English and language and the interpreter's role was very limited. The video indicates approximately 20 – 25 people in attendance at the meeting, though the people in attendance changed over the course of the meeting.

376. At the outset of the meeting, protest was made by one of the community members over the absence of any consultation with the community prior to the production of *Stronger Futures*. The facilitator described *Stronger Futures* as a 'starting point' for conversations, stating:

*What's in there is what government thinks are important things to talk to you about, but what we want to hear from you today is what Yuendumu thinks are important things to talk about.*

377. At the beginning of the meeting one of the community members raised concerns over the way in which the meeting had been arranged, asking that another consultation be conducted in the community because:

*...we've told you how we feel that there was not enough notice given to us, very short notice when this booklet was let out with the statement and when the announcement was made by the Prime Minister and the Minister, very, very short notice and you cannot – we're not supermen, super people...*

***Mechanism for obtaining agreement with the communities over the process and desired outcomes***

378. There were no mechanisms for obtaining agreement over the process or desired outcomes. The meeting was characterised by Government officials as a 'starting point' and was conducted like a brainstorming session. The community was told they could raise any issues that they liked, and numerous issues were raised that fell outside the scope of the *Stronger Futures*, including the media's portrayal of the community in the lead-up to the Intervention.

379. Given the way that the meeting was conducted, there was no scope for the negotiation of other desired outcomes. The community was told at the outset that the issues raised would be written down and 'taken back' or 'sent back' to Canberra,

but there was no discussion of any outcomes sought by the community, or mechanisms by which the community could indicate the outcomes sought by them from the process. This was of relevance because a number of specific outcomes were raised by the community through their general discussions, such as an apology from the Government for the Intervention, the appointment of an Indigenous Corrective Services officer and the establishment of jobs and housing in the community, however the meetings were conducted in such a manner as to limit the possible outcomes to a general raising of issues by the community.

### ***Transparency and Clear Parameters***

380. Parameters were established but those parameters were themselves vague, being referred to as a 'starting point' for a conversation. There were no issues that were 'off the table' and the session was, as mentioned above, approached as a general brainstorming session. As a result, there was not a single Commonwealth policy actually tabled for the consideration of the community. Furthermore, there was no consideration of how the issues raised, many of which were outside the scope of both *Stronger Futures* and Commonwealth jurisdiction, would inform future consultations, policy or legislation.

### ***Being clear about what outcomes and issues the proposal seeks to achieve***

381. The scope of the consultation did not go beyond the creation of a list of important issues and there was no discussion about what outcomes were sought by the Government.

382. There were numerous issues raised by the community relating to policy areas for which the Northern Territory has responsibility. Participants raised the need for jobs within the community for community members, bilingual education, respect for culture and the need for the community to have a dedicated Aboriginal Corrective

Services officer. Whilst these issues were written down on the whiteboard by the facilitator, there was no discussion about how the issues would be communicated to and addressed by either the Commonwealth or the Northern Territory.

***Being clear about the risks, costs and benefits of the proposed measure***

383. There was no discussion about the risks, costs or benefits of any proposed measure.

***Accurate collection and recording of data***

384. One of the concerns raised by participants was the lack of consultation that preceded the Intervention:

*My point at the beginning, when you guys started with the Intervention, the same things that we heard: You are going to be heard. That never never never happened. What's going to happen to the Intervention?...Without a consultation with our people, government went straight out, they just put the Intervention and, you know, they didn't really contact with us.*

385. In response to such concerns, the facilitator undertook to return to the community, to ensure that the notes taken accurately reflected the comments of the participants:

*And we are more than happy when we write it down to bring it back to Yuendumu to make sure that we got it right. So that you fellas actually can say, yes, eh, you listened to us and we understand.*

***Providing people with a clear idea of how their input will be included in decision making processes***

386. There was limited information provided to the community as to how their comments were to be incorporated into Government decision-making. There was no discussion as to the role that the community would be entitled to play in the development of policy. This was a clear concern that was raised on numerous occasions by community participants, who spoke of 'self-determination', 'anti-discrimination' and the need for community controlled solutions.

387. The facilitator suggested that the community would have control over the policies implemented after the expiry of most of the measures of the original Intervention in August 2012:

*... so...what we're here today to talk about is you can keep some of it [the Intervention], you can keep none of it, but we want to hear your ideas about what should happen after June next year.*

In light of the Commonwealth's preferences for certain measures as expressed in *Stronger Futures*, it is unlikely that the community would enjoy such a degree of autonomy.

***Benchmarks to measure progress***

388. Benchmarks were not discussed during the meeting. Likewise, no suggestions were made of ways in which progress would be measured in the future.