
“STRONGER FUTURES”

IS DISEMPOWERING, DAMAGING AND DOOMED TO FAIL

by Ben Schokman

INTRODUCTION

Five years after its introduction, the Northern Territory Emergency Response (the ‘Intervention’) continues to divide opinions on the way forward for Indigenous policy in Australia. While much of the evidence points to the ‘Emergency Response’ being a dramatic policy failure, the Federal Government is poised to extend the Intervention for a further 10 years.¹

This article considers the proposed ‘Stronger Futures’ legislation and its compatibility with human rights principles and standards. It concludes that, ultimately, the current approach is likely to cause three significant problems for the Federal Government. First, and most significantly, the proposed Stronger Futures measures will not be successful in fulfilling their intended purpose to address the disadvantage faced by many Aboriginal and Torres Strait Islander communities and individuals. Second, the current approach is likely to further damage an already damaged relationship between the Federal Government and Aboriginal and Torres Strait Islander peoples. And third, in the face of significant and ongoing international criticism, the Federal Government is doing further harm to Australia’s international human rights credentials.

“STRONGER FUTURES” – OR JUST THE INTERVENTION IN DISGUISE?

Since the dramatic introduction of the Intervention, the discourse surrounding Federal Government policy towards Aboriginal and Torres Strait Islander peoples has quietly shifted. In 2007, it began as an ‘Emergency Response’ requiring an immediate and hasty ‘Intervention’. Once the media and public interest dissipated, it became ‘Closing the Gap’ in the Northern Territory (‘NT’). And, as evidence has slowly emerged questioning the effectiveness of the Federal Government’s policy response, the latest suite of legislative measures has been introduced under the guise of ‘Stronger Futures’ for the NT.

During this time, and despite the Federal Government’s change in narrative, very little has actually changed in practice—both in terms of the situation on the ground in Aboriginal communities and also in terms of the Federal

Government’s approach to addressing these issues. What, then, do the proposed Stronger Futures measures look like? And how different are they from the original Intervention measures? In summary, the Stronger Futures legislation:

- expands the School Enrolment and Attendance Measure (SEAM), which removes welfare payments from parents whose children miss school more than five times over two terms;
- continues to prohibit the consideration of Aboriginal customary law and cultural practice in bail and sentencing;
- continues the ‘Star Chamber’ powers held by the Australian Crime Commission to investigate allegations of violence and child abuse in Aboriginal communities, which include removing the right to silence;²
- increases penalties for possession of alcohol on Aboriginal land;
- continues blanket bans on sexually explicit and violent material on Aboriginal land;
- continues the suspension of the operation of the permit system in Aboriginal townships; and,
- continues the licensing of community stores.

SIGNIFICANT AND SUSTAINED INTERNATIONAL CRITICISM

These measures, when first introduced in 2007 under the Intervention, raised many concerns regarding Australia’s international human rights obligations. A number of highly respected, independent United Nations human rights bodies and experts have consistently identified the need for Australia to take urgent action to ensure that the Intervention measures comply with Australia’s international human rights obligations.³

Despite some steps being taken by the Federal Government, including the reinstatement of the operation of the *Racial Discrimination Act 1975* (Cth) and an enhanced effort to engage with affected Aboriginal and Torres Strait Islander communities, the process of development of the Stronger Futures measures, as well as the nature of the measures themselves, continue to raise serious concerns

with Australia's international human rights obligations. Indeed, as outlined in the previous section, many of the measures introduced by the Intervention will continue to operate largely unamended under the proposed Stronger Futures legislation.

HUMAN RIGHTS PRINCIPLES AND STANDARDS

Opposition from voices on the ground in the NT has been loud and persistent. Criticism to date has focused largely on the racially discriminatory aspects of the Intervention and the lack of meaningful consultation with affected Aboriginal communities.

When assessing the proposed Stronger Futures measures, the following human rights standards and principles should frame the analysis.

COMPLIANCE WITH THE UN *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

In 2009, two years after the introduction of the Intervention, the Australian Government endorsed the UN Declaration on the Rights of Indigenous Peoples (the 'Declaration').⁴ While the Declaration is not a binding treaty, it is a significant instrument that elaborates many human rights that already exist in international law and their specific application to Indigenous peoples. In this respect, the Declaration has 'significant moral force'⁵ and represents an important standard for the treatment of Indigenous peoples. The standards and principles contained in the Declaration should inform the development and operation of law, policy and practice that impacts on Aboriginal and Torres Strait Islander peoples.

In this respect, there are a number of key 'guiding principles' that are central to the Declaration and that underpin the rights contained within it, namely:⁶

- self-determination;
- participation in decision-making and free, prior and informed consent;
- respect for and protection of culture; and,
- non-discrimination and equality.

Regrettably, as explored further below, the Federal Government's approach to addressing Indigenous disadvantage has significantly failed to respect the principles and standards contained in the Declaration.

SELF-DETERMINATION, PARTICIPATION AND THE DUTY TO CONSULT

The development and implementation of the Stronger Futures measures has failed to respect the right of self-determination and the duty of the Government to

consult with affected Aboriginal communities. Both of these principles are recognised in various articles of the Declaration, including Articles 3, 4, 18, 23 and 32, and are affirmed as an overarching principle in Article 19:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The principle of free, prior and informed consent reflects the importance of effective participation. Effective participation is a fundamental element to empowering vulnerable and disadvantaged communities and critical to establishing a relationship of mutual respect.

However, issues with the Federal Government's consultation processes throughout the history of the Intervention—and which continue into the development of the Stronger Futures measures—raise particular concerns in relation to adherence with the standards and principles contained in the Declaration. Concerns about the Federal Government's consultation processes include:

- when introduced in 2007, the Northern Territory Emergency Response legislation was passed without any consultation with Aboriginal and Torres Strait Islander representatives or affected communities;
- in addition, the unprecedented haste with which the Intervention was enacted precluded the crafting of an appropriate community-based response;
- major concerns were expressed in relation to the 'Redesign Consultations' undertaken by the Department of Families, Housing, Community Services and Indigenous Affairs in 2009;⁷
- additional concerns have also been raised about the most recent consultations conducted in the lead up to the introduction of the Stronger Futures measures;⁸ and,
- throughout the history of the Intervention, there has consistently been manifestly inadequate timeframes for community consultation. This is particularly concerning given the significance of the public policy issues involved with the measures and the widespread nature of their application and impact.

The result of the lack of meaningful involvement of affected Aboriginal and Torres Strait Islander communities in the design and implementation of the Intervention is that many of the measures do not have the support of the affected communities. This is highly likely to continue under the Stronger Futures measures. As the UN Special Rapporteur on Indigenous Rights

has observed, without the buy-in of Indigenous peoples at the earliest stages of the development of government initiatives, the effectiveness of such initiatives is significantly compromised and diminished.⁹

NO CREDIBLE EVIDENCE TO JUSTIFY LIMITATIONS ON HUMAN RIGHTS

It is clearly established under international law that limitations on human rights are only permissible in circumstances where such limitations can be demonstrably justified as being reasonable, necessary and proportionate.¹⁰ In this regard:

- any limitation on human rights must fulfil a legitimate and pressing purpose;
- any limitation on human rights must be targeted, proportionate and interfere with rights to the minimal extent possible; and,
- limitations on rights must be demonstrably justified and evidence-based.

The Intervention and Stronger Futures measures engage a large number of human rights, including the right to non-discrimination, the right to social security, the rights of the child and the rights to privacy, family and the home, to name only a few. While the measures contain significant limitations on rights, the Federal Government has continually failed to provide sufficient credible, cogent and compelling evidence that the limitations on relevant human rights imposed by the Stronger Futures measures are necessary and proportionate.

However, there is a clear lack of evidence to demonstrably justify the effectiveness, and thus the necessity, of many of the proposed Stronger Futures measures, particularly compulsory income quarantining and its purported link with improving school enrolment and attendance. This raises major concerns as to whether the measures are therefore justifiable or permissible limitations on human rights.

DISCRIMINATORY OPERATION AND IMPACT OF THE STRONGER FUTURES MEASURES

The Stronger Futures measures must respect the right to equality and non-discrimination. The right to equality and non-discrimination is a fundamental tenet of human rights law. The particular meaning and content of the right to equality and non-discrimination as it relates to Indigenous peoples is enshrined in Article 15(2) of the Declaration:

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to

promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Despite the reintroduction of the operation of the *Racial Discrimination Act 1975* (Cth), many of the Intervention measures have continued to impact specifically on Aboriginal and Torres Strait Islander peoples. In the absence of clear evidence to demonstrate their necessity and benefit, these measures continue to raise serious concerns in relation to the right of non-discrimination.

There also continues to be justifiable concern about the categorisation of certain measures as being ‘special measures’. The purpose of special positive measures is to ensure substantive equality.¹¹ Such measures must reflect the aspirations of the peoples concerned and involve their free, prior and informed consent. As such, effective participation of affected communities is essential to protect, maintain and develop their cultures and identities, customs, traditions and institutions. As discussed above, the consultation that has taken place with affected communities is not sufficient to meet the standard required to fulfil the criteria of being a ‘special measure’.

THE IMPACT OF “STRONGER FUTURES”?

Much has been written about the Intervention’s operation, including in particular the lack of meaningful consultation that has taken place with affected Aboriginal communities and the racially discriminatory aspects of its measures and impacts. But what are the consequences of this lack of consultation and racially discriminatory measures?

The current approach, which is largely being continued under the Stronger Futures legislation, will continue to cause three significant problems for the Federal Government.

“STRONGER FUTURES” IS HIGHLY LIKELY TO BE INEFFECTIVE

Firstly, and most significantly, the Stronger Futures measures are highly likely to be ineffective in achieving the Federal Government’s objective of Closing the Gap and improving the lives of Aboriginal peoples. Any measures designed to address Aboriginal disadvantage must have the participation, buy in and support of those communities. This has never been the case with the Intervention, and continues not to be the case under the Stronger Futures measures.

The Senate Community Affairs Legislation Committee recently completed an inquiry into the proposed Stronger Futures legislation.¹² The Committee received more than

450 submissions, the majority of which—including the National Congress of Australia's First Peoples, Amnesty International and the Australian Council of Social Service, among others—opposed the package of laws. The Committee also heard evidence from Aboriginal Elders in the NT about the lack of consultation and the impact that the Intervention has had on their communities.

Policies targeted at addressing Aboriginal disadvantage will only be effective if Aboriginal people are directly involved in their design and implementation. The only way to develop responsibility is to give people responsibility and to empower communities. However, flawed consultations that have the effect of further alienating and silencing Aboriginal voices mean that the continued operation of the Intervention measures will continue to be met with resistance and frustration. As a consequence, the measures themselves are highly unlikely to be successful in addressing Aboriginal disadvantage and fostering a new relationship based on respect, trust and cooperation.

If the Government is genuinely committed to 'stronger futures' for Aboriginal communities, they must respect and empower communities, not impose pre-determined solutions.

DAMAGING AN ALREADY DAMAGED RELATIONSHIP

Second, in addition to being incapable of fulfilling its intended purpose, the proposed legislation is also likely to further damage the Government's relationship with Aboriginal and Torres Strait Islander peoples. The draconian measures adopted under the Intervention have already led to affected Aboriginal communities and people expressing their feelings of hurt, anger, betrayal and disbelief.¹³ The Federal Government's continued exclusion of Aboriginal people from any meaningful decision-making processes will only serve to exacerbate such feelings and is therefore highly likely to further damage and undermine the relationship between the Federal Government and Aboriginal Australians.

This is particularly disappointing at a time when, as a nation, we are considering recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The proposed legislation runs counter to the idea of resetting our relationship with Aboriginal and Torres Strait Islander peoples.

FAILURE TO RESPECT FUNDAMENTAL HUMAN RIGHTS

Finally, the Federal Government's disregard for the fundamental human rights of Aboriginal peoples is in

breach of a number of Australia's international obligations. In addition to concerns about their racially discriminatory impacts, the Stronger Futures measures raise very serious concerns in relation to the right of self-determination and participation in decision-making, the best interests of the child and respect for culture, to name just a few. Indeed, as referred to above, since the introduction of the Intervention, concern has been highlighted by a number of highly respected, independent international human rights bodies and experts. The issue has also been raised by the UN High Commissioner for Human Rights, Navi Pillay, during her recent country visit to Australia and during Australia's Universal Periodic Review in Geneva in 2011. The world is watching Australia's treatment of its Indigenous peoples and sharp criticism from respected United Nations bodies is damaging Australia's international reputation and legitimacy as a principled human rights leader.

RESPECTING THE RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Working with Aboriginal and Torres Strait Islander peoples requires appropriate strategies that ensure their effective participation in decision-making processes for all matters that affect them. The Declaration provides a framework for adopting a human rights-based and culturally suitable approach to addressing the specific situation of Indigenous peoples.

In particular, the principles and standards contained in the Declaration regarding the participation of Indigenous people must be fully respected in order for government policies and initiatives to be effective. Continuing to fail to meaningfully engage Aboriginal and Torres Strait Islander communities in processes that affect them continues to fail to promote the realisation of the right of self-determination and continues to deny them their rights to culture and identity. This failure in turn has a significant impact on the realisation of other fundamental human rights. The effective participation of Aboriginal and Torres Strait Islander peoples and their representatives is essential to ensuring that their rights are respected, promoted and strengthened.

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1 At the time of writing, the suite of legislation known as the 'Stronger Futures' Bills had passed through the House of

- Representatives and looked set to pass the Senate in late June, 2012.
- 2 Since the Intervention's introduction five years ago amid allegations of 'paedophile rings' operating throughout Aboriginal communities, not one person has been prosecuted for child sex abuse.
 - 3 These bodies and experts include the Committee on the Elimination of Racial Discrimination (both in response to a Request for Urgent Action in 2009 from residents in the Northern Territory and also in its 2010 review of Australia's compliance with the *Convention on the Elimination of All Forms of Racial Discrimination*), the Human Rights Committee during its review in 2009 of Australia's compliance with the *International Covenant on Civil and Political Rights*, the Committee on Economic, Social and Cultural Rights during its review in 2009 of Australia's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people following his country visit to Australia in 2009; the Special Rapporteur on the Right to Health following his country visit to Australia in 2010 and, most recently, the Committee on the Rights of the Child during its review of Australia's compliance with the *Convention on the Rights of the Child* in June, 2012.
 - 4 UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).
 - 5 Megan Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55.
 - 6 These principles have been identified by the Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner in his *Social Justice Report 2011* <http://www.hreoc.gov.au/social_justice/sj_report/sjreport11/index.html>.
 - 7 See the submission of the Human Rights Law Centre to the Senate Committee's Inquiry into the Reinstatement of Racial Discrimination Act Bills <<http://www.hrlc.org.au/content/topics/equality/indigenous-rights-proposed-amendments-to-the-northern-territory-intervention/>>.
 - 8 These concerns have been expressed by organisations including Aboriginal Peak Organisations Northern Territory, the Australian Council of Social Service, Jumbunna Indigenous House of Learning and concerned Australians, among others.
 - 9 James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), [36].
 - 10 See, eg, *R v Oakes* [1986] 1 SCR 103.
 - 11 See generally Committee on Elimination of Racial Discrimination, *General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, Seventy-fifth session (August 2009).
 - 12 Details of the Senate Committee inquiry are available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/report/index.htm>.
 - 13 See Northern Territory Emergency Response Review Board, *Report of the Northern Territory Emergency Response Review Board* (2008), 12 <<http://www.nterreview.gov.au/report.htm>>.

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Wayne 'Liwingu' McGinness

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