Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011

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Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011

Date introduced: 23 November 2011

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Commencement: The formal provisions on Royal Assent and the operative schedules at the same time as section 3 of the Stronger Futures in the Northern Territory Act 2011 (on Proclamation or within six months of Royal Assent).

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

This Bill accompanies the Stronger Futures in the Northern Territory Bill 2011 (the Principle Bill) and repeals the Northern Territory National Emergency Response Act 2007 while containing savings and transitional provisions for a number of that Act’s arrangements; makes consequential amendments to the Aboriginal Land Rights (Northern Territory) Act 1976; amends the Classification (Publications, Films and Computer Games) Act 1995 to add a sunset and review date to the relevant Part; amends the Crimes Act 1914 to recognize some exceptions to the current rule that customary law or cultural practices may not be considered in bail and sentencing matters; and makes other consequential amendments.

Background

There is significant background provided in the Bills Digest for the Principle Bill. The third Bill in this package is the Social Security Legislation Amendment Bill 2011, which also has a Bills Digest with significant background information. More recently the Parliamentary Library has published a paper

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1. Elements of this ‘Purpose’ draw on material provided by the Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011.

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looking specifically at income management and the Racial Discrimination Act,\(^4\) which specifically examines the Australian Human Rights Commission’s Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act and is also useful in considering the provisions of the package.\(^5\)

Since the initial Bills Digest for the Principle Bill was issued, the Senate Community Affairs Legislation Committee (the Committee) has reported on the three Bills.\(^6\) While it’s not possible to cover the Committee’s Report in depth, this Digest will highlight a few of the issues which the Committee examined or recommended on.

As a procedural and policy issue the number and variety of disparate topics that are dealt with through the Northern Territory Emergency Response (NTER or the ‘Intervention’) can create difficulties for those involved in the issues. ‘Consequential and Transitional’ Bills usually contain more technical or less significant provisions, although obviously in itself the repeal of the NTER Act is significant. However, there are other significant provisions of this Bill, for instance Schedule 4, which deals with customary law and the criminal law, and this Schedule is neither insignificant nor technical. Nor are the provisions of Schedule 4 dealt with in any substantive accompanying Bill.

It is one of the difficulties of dealing with legislation which has been inherited from the Northern Territory Intervention that there are so many important yet distinct issues dealt with in the one legislative package. Just as an illustration of this issue; the Parliament is currently considering two, other and distinct, Bills which amend the Classification (Publications, Films and Computer Games) Act 1995 (as does the Stronger Future Bills in Schedule 3). Both these Bills will be considered individually by the Parliament and it would be extremely unusual for these Bills to include provisions which also significantly amend liquor law, real property law, criminal law, social security law and the law regulating communities stores. While the Stronger Futures legislative package is broken into three Bills it is being dealt with as one endeavour (however diffuse). The variety of issues legislated in the one package can mean that the necessary individual attention for the various measures is lost or spread too thin. It might also be of assistance if this collection of measures, devised in response to what was seen as an emergency, is ‘unpacked’ or ‘decoupled’, allowing individual measures to be evaluated independently according to the usual legislative approach.

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Financial implications

According to the Explanatory Memorandum this Bill has no financial impact.\(^7\)

Main issues and key provisions

Rather than confining this Digest’s attention to the provisions of the current Bill, having had the benefit of the Senate Committee’s examination of the issues, the Digest will predominantly examine the provisions of the legislative package as illuminated by the Committee.\(^8\)

The Report identified six specific issues that were of particular concern:

(a) The alcohol management provisions – Part 2 of the Stronger Futures in the Northern Territory Bill 2011.

(b) The land reform provisions – Part 3 of the Stronger Futures in the Northern Territory Bill 2011.

(c) The food security provisions – Part 4 of the Stronger Futures in the Northern Territory Bill 2011.


Finally there was a significant Chapter of the Report which focussed on ‘broader’ issues, in particular the issue of consultation. This Digest will briefly examine each of these issues.

Alcohol Management

Evidence to the Committee indicated there was widespread concern that the punitive provisions involving fines and particularly imprisonment were inappropriate. The Committee quotes the Principal Legal Officer of the Northern Australian Aboriginal Justice Agency, who in the context of the over-representation of indigenous people in incarceration, spoke of the significant costs that imprisonment involves. He argued that

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8. The term ‘the Committee’ is used in this Bills Digest to refer to the Majority Report of the Committee.

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Surely there are better ways to be spending that money on ...—that is, rehabilitation, culturally appropriate services and culturally relevant treatment. That is where we think we should be putting the energy and resources, not on increasing the potential for people to go to jail.\(^9\)

On the other hand there was also evidence before the Committee from Commonwealth officials that the penalties provided are ‘maximum amounts not default amounts.’ The Committee was concerned that there may be an increase in Aboriginal imprisonment and recommended that the Principle Bill be amended ‘to allow infringement notices to be issued in relation to minor alcohol offences and to make it clear that infringement notices may be issued relating to the possession and supply of liquor.’\(^10\)

The Committee did not, however, endorse a suggestion to amend the Principle Bill to render the language and application of the Bill ‘race neutral’. A Northern Territory Minister can refer licensed premises for review if there’s evidence of substantial alcohol-related harm being caused to ‘Aboriginal people’. It was suggested that this expression be amended to refer to ‘the community’, thereby ensuring that alcohol-related harm could be responded to wherever it occurs. The logic behind the Committee’s decision is not apparent, with the Report simply noting that there is a serious matter in the NT with excessive alcohol consumption leading to alcohol-related harm. (See below for the Coalition’s additional comments).

The Committee also observed, as with many other issues, ‘that more does need to be done, particularly in the areas of alcohol education and rehabilitation.’\(^11\) There was no specific recommendation on this issue, but the Committee looked to the review which is to be conducted in three years.

**Land Reform**

While there were many submissions arguing against the government’s continuation of the Land Reform measures of the NTER, the Committee did not, on reflection, make any such recommendations. It did, however, make a recommendation on the current provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976*. These provisions specify that the statutory function of assisting Aboriginal associations or corporations which own community living areas (when requested to do so) must be undertaken at the Land Council’s own expense. The Committee made a definite recommendation for an amendment to be made to remove the words ‘at the Land Council’s expense’\(^12\) seemingly accepting the evidence of the Central Land Council that funding arrangements are a matter for negotiation and that it is not appropriate to have such a clause embedded into statutory provisions.

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\(^9\) Quoted in the Senate Committee’s Report, op. cit., p. 13.
\(^10\) Ibid., p. 16.
\(^11\) Ibid., p. 21.
\(^12\) Ibid., p. 25.
Food Security

Once again the Committee made no specific recommendations on this topic. The Committee did, however, reflect on the fact that more needs to be done in the area of guaranteeing food security in remote communities. In particular, the committee agrees that there is a need for ongoing work with the communities regarding the issues identified in relation to the freight and delivery costs associated with getting healthy food into communities. Ensuring healthy food is available in communities at an affordable cost is essential and should remain on the agenda for future action.  

Customary Law

Sections 90 and 91 of the *Northern Territory National Emergency Response Act 2007* currently provide that no regard should be had to customary law in bail applications and in sentencing. Section 90, for example provides:

Matters to which court is to have regard when passing sentence etc.

In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.

At the time these provisions were introduced there were concerns with their compatibility with recommendations from the Australian Law Reform Commission’s work in the field. The conclusion of the Report on the Recognition of Aboriginal Customary Laws suggested that “… Aboriginal people must have the final say in the negotiation and consultation surrounding the recognition of customary law.”

The current Bill proposes to retain the same framework as the original Intervention legislation, inserting into the Crimes Act a **new section 16AA** which has identical provisions. However the new provision also provides an exception to this exclusion in the case of ‘cultural heritage, including sacred sites or cultural heritage object.’ This would mean that in those cases it is allowable for the court to have regard to customary law or cultural practices.

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13. Ibid., p. 33.

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The Principle Legal Officer of the Northern Australian Aboriginal Justice Agency provided what the Committee referred to as ‘compelling evidence of how the exclusion of customary law and cultural practice results in unjust outcomes for Aboriginal people.’ He argued that members of the judiciary regularly take into account cultural practices and it would be illegitimate to deprive Indigenous peoples of this natural right. He illustrated the issue by pointing to a hypothetical case in which a misappropriation of funds is made at Christmas time in order to fund the purchase of a gift to a person’s child. This cultural practice could well be taken into account in a criminal case, and to preclude Aboriginal customary law from consideration is ‘clearly discriminatory, because we are trying to target one set of cultural practices and not another’. 16

The Attorney-General’s Department officer responded by arguing that the judiciary will be able to distinguish between legitimate and illegitimate uses of customary law considerations. She argued that if a 2009 precedent 17 is followed, the preclusion of customary law would have a more limited effect. 18 Her evidence could, however, be seen as implicitly conceding that the legislation leaves the matter insufficiently addressed.

The Committee made no recommendation to amend the extant provisions of the Bill, however they did recommend administrative measures designed to ‘build understanding of customary law provisions’, and that this matter be reviewed in five years. 19

**Income Management**

The Committee documented a wide variety of views on the utility of income management and in particular a number of welfare agencies who argued it was not a useful policy. Given their view that the community was divided on the issue, they made just the one recommendation, which had been the subject of extensive submissions:

...that the government amend the Social Security Legislation Amendment Bill to require that only agencies that have in place appropriate internal and external review and appeal processes be approved by the Minister to make income management referrals.

The background to this issue, and in particular the significance of the review process, can be found both in the relevant Bills Digest 20 and also in the paper on income management and the Racial Discrimination Act. 21

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16. Ibid., p. 35.  
18. Senate Community Affairs Committee, op. cit., p. 36.  
19. Ibid., p. 38, Recommendations 4 and 5.  

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School Attendance

The Committee identifies several issues in this area, including a confusion between the Commonwealth Scheme and the NT Government’s scheme. Both schemes penalise parents for failing to ensure that their children are attending school, however the package proposes to soften the punitive approach at a Commonwealth level by inserting preliminary steps which should be taken before a penalty is applied (compliance notices and school attendance plans). The Committee recommended that greater clarity regarding the interaction of the Commonwealth and NT scheme should be provided. Another concern was the lack of evidence supporting these punitive measures as an effective way to address the issue.

Consultation and ‘Other Issues’

Finally the Committee made several recommendations for dealing with what it referred to as ‘a high degree of confusion amongst people in the communities who will be most affected by the measures in the package.’ This confusion has been compounded due to the nature of the Bills as amending measures, with the result that ‘there continues to be great confusion between the previous Emergency Response and the new process…’. The Committee made two recommendations that were designed to achieve for the Commonwealth a ‘culturally competent workforce,’ and in particular to ensure that consultation processes are conducted through ‘meaningful and effective processes’ that are ‘culturally safe, secure and appropriate.’

Once again there were significant representations on this issue made to the Committee. One of the more significant submissions on these matters came from the Elders and Community of Ramingining, NE Arnhemland, who said

Yoju culture is like this: when you talk to someone you have to listen to each other, not taking one side. We respect each other’s dhwu (message) and we value each other’s sayings and decisions. But we feel that Balanda are not listening. Government doesn’t listen to Yoju .. has no second thought. They hear, they ignore, forget, go back home, write what they think. Our messages are not going into their thinking. There is a middle place between the good and bad, and we expect Government to listen to us and value our messages to the Government.

23. Ibid., p. 59.

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The intervention has been here for 5 years and what did it do? We got fences on our houses, but no new houses. Not for Yolŋu, only Balanda. No extra jobs. What do those Centerlink and ITEC people do? It costs a huge amount of money to send them here but there are still few jobs.  

The Committee emphasised the need for cultural competence and training, however it is possible that more than cultural competence is needed. This Digest referred above to the difficulties of the legislative arrangements involved in this package. It may be that if the citizens of a mainstream inner-city suburb were to be consulted on a proposed Bill which was to amend their real property rights, modify their social security access and change the criminal law, while also affecting their access to alcohol and pornography and penalising them for allowing their children to be inexplicably absent from school for more than three days then there may well be confusion and subsequent difficulties, irrespective of any cultural differences. Allowing due consideration of individual legislative changes might be a useful element in ensuring effective consultation. 

The Committee’s final recommendation was to continue with the reviews of the legislation already announced and to ensure that any National Partnership Agreement is ‘the subject of an independent and public review and evaluation after five years.’  

Additional comments 

The Coalition Senators made additional comments and (three) recommendations. In particular they accepted the proposal for non-discriminatory provisions to be included in the Principle Bill. This recommendation would affect the provisions whereby the Minister can appoint an assessor based on the reasonable believe that licensed premises are causing harm in the community (as opposed to causing harm only to Aboriginal people). 

The Coalition also picked up the need to strengthen the administrative procedures regulating a referral for compulsory income management. They argued that before a referral can be made by an authority the Minister should be satisfied that ‘an internal and external review mechanism exists for any decision made by that authority’. This issue of review mechanisms is examined in more depth in the Parliamentary Library’s Background Note on Income management and the Racial Discrimination Act. 

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26. Ibid., p. 65. 
27. Senate Community Affairs Legislation Committee, Additional Comments by Coalition Senators, Recommendation 1, p. 67. 
28. Ibid., Recommendation 2, p. 68. 

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Finally on the question of review and assessment of the legislation the Coalition argue that, while ‘long term change will require long term strategic investment and involvement...’ this will also require what is missing – ‘a degree of leadership and monitoring’. They comment that

A lengthy 10 year timeframe for the specific measures contained in the stronger futures legislation is considered counterproductive to achieving the necessary outcome of empowering individuals and communities to take control of their lives and of the management of their communities as soon as possible. The proposed legislation has also encouraged the emotive criticism that the government is embarking on a further 10 year intervention into the lives of Aboriginal people in the Northern Territory.  

After commenting that there needs to be continual monitoring of programs and policies of the measures in the Principle Bill they make a clear recommendation that:

The Stronger Futures in the Northern Territory Bill 2011, the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill be formally reviewed after 3 years and lapse after 5 years from the date of assent.

Dissenting Report

In their Dissenting Report the Greens provide an extensive analysis and call into question the entire approach of the Intervention, suggesting the entire package should be opposed, and arguing that the whole approach has undermined and disempowered Aboriginal people. In the alternative they make numerous recommendations for amending all three Bills.

The Greens join the Coalition in recommending that the sunset provision for the Principle Bill and this Bill should be after five years rather than ten, and also with respect to the Coalition’s support for the proposal to replace ‘Aboriginal people’ with ‘the community’ in the provisions giving the Minister power to refer licensed premises when they are causing problems, thereby rendering the provision non-discriminatory on its face. The Greens also support the Majority’s recommendations on alcohol with respect to the need to ensure that applications for an alcohol management plan are dealt with in 30 days while arguing that the harsher penalties being used are inappropriate. They reject the use of penalty provisions, but if the Bill’s measures are to be passed they support the proposed infringement notices in the alternative. The final recommendation they make on alcohol is that it should be subject to a mandated floor prices, with possible take-away free days.

There is a recommendation that the government explore ways to address food costs in the NT, which is one of the few recommendations made on food security by any party. On the question of

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30. Senate Community Affairs Legislation Committee, Additional Comments by Coalition Senators, p. 69.
31. Ibid., Recommendation 3, p. 69.
34. Ibid., p. 83.
35. Ibid., Recommendation 5, p. 84. This proposal is also explored in the Digest for the Principle Bill.

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cultural issues constituting a legitimate part of sentencing or bail provisions the Greens are very strong that to ignore this issue would undermine Aboriginal culture and would clearly be discriminatory. In the alternative they suggest an independent review of these provisions three years after commencement.

In another recommendation which is unique amongst Committee members the Greens recommend that the Government pursue the option of repealing the permit system amendments made in 2008. This issue has not been dealt with by the Bills nor, therefore, the enquiry, although there is a submission suggesting it would be helpful to do so.

On the issue of compulsory income management this is firmly rejected by the Greens, although there is also the suggestion that they would support a voluntary scheme. They also reject the proposal that state and territory authorities should have the power to refer people for income management along with the Coalition and the Majority. Similarly the Greens are clear that they do not support the School Enrolment and Attendance through Welfare Reform Measure, arguing that it is not working and there is insufficient evidence to support its expansion. They go on to document extensive proposals for methods of encouraging attendance, including the return of bilingual education, sporting programs and specialised teacher training to work in Indigenous communities. They also go on to make recommendations based on these and other alternative methods of encouraging school attendance.

Like the majority of the committee they also are concerned by the consultative processes, and critique the approaches used by the Government according to ‘a comprehensive analysis of the consultation process by Jumbunna House of Learning, based out of the University of Technology in Sydney.’

**Concluding comments**

It seems that all contributors to the Report are unhappy with elements of the consultative arrangements made by the current Principle Bill, with the Coalition and Greens both recommending an earlier timeframe for a sunset provision and critiquing the current direction of the Intervention. The Majority Report also documents extensive concerns regarding the consultative approaches being made by the Government. As outlined above, a preliminary move which might improve these issues of nearly universal concern would be to cease the omnibus approach of the Intervention. This approach would be taxing on any community and all the more so in communities already facing many challenges.

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36. Ibid., Recommendation 7, p. 89.
37. Ibid.
38. Aboriginal Peak Organisations Northern Territory.
40. Ibid., pp. 94-95, quoting the St Vincent de Paul Society.
41. Ibid., p. 75. They also explore this issue in Recommendation 12ff, p. 98.