Joint Northern and Central Land Council

Submission to the Legal and Constitutional Affairs Committee on:

Discussion paper – A process to review bills for their impact on First Nations Territorians

October 2023

About the Land Councils

This submission is made jointly by the Northern Land Council and the Central Land Council (Land Councils), both independent statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act).

The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the Land Councils. A key function of the Land Councils is to express the wishes and protect the interests of Traditional Owners[1] throughout the Northern Territory (NT). The members of the Land Councils are chosen by Aboriginal people living in each Land Council's respective area.

The Land Councils also fulfil the role of Native Title Representative Bodies under the *Native Title Act 1993* (Cth) (Native Title Act).[2]

Through our elected representative Councils, the Land Councils represent the interests and aspirations of approximately 75,000 Traditional Owners and other Aboriginal people resident in our regions.

Within our respective jurisdictions, the Land Councils assist Traditional Owners by providing services in relation to land, sea and water management, land acquisition, minerals and energy, community development, Aboriginal land trust administration, and native title services. We advocate for Aboriginal people on a wide range of land and sea, economic and socio-political issues to ensure they can continue to survive and thrive on their land.

[1] For the purposes of this submission, the term Traditional Owner includes traditional Aboriginal owners (as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), native title holders (as defined in the *Native Title Act 1993* (Cth)) and those with a traditional interest in the lands and waters that make up the Land Councils' respective regions.

[2] In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt.

1. Introduction

The NLC and CLC (the Land Councils) welcome the Legislative Assembly's consideration of a process to review bills for their impact on First Nations Territorians,[3] and strongly support the establishment of such a process.

The development or amendment of policies and legislation presents frequent opportunities to address entrenched discrimination and disadvantage. Yet too often it only serves to increase inequities.

The latest Closing the Gap data, released in July 2023, show that rather than closing the gap, the NT is going backwards on many of the socio-economic targets, including in critical areas such as justice, early childhood development, and employment. The NT continues to have the worst statistics in Australia across many of the Closing the Gap domains. Meanwhile, the recent Productivity Commission Review of the National Agreement on Closing the Gap found that governments are not adequately delivering on their commitments under the agreement. This included the finding that the priority reform of systemic transformation of government agencies to ensure they are responsive to the needs of Aboriginal people has 'barely begun'.[4] The Commission also found that while formal partnerships exist, for the most part, government agencies continue to operate on the assumption that 'governments know best' and shared decision-making is rare.[5]

Clearly, we need to do things differently.

Aboriginal people must be empowered to have a say in policies and legislation that affect them. This principle is the foundation of the National Agreement on Closing the Gap[6] and the NT Aboriginal Affairs Strategy.[7] It is reflected in the commitments of governments across the country, including the legislated Indigenous Voice to Parliament in South Australia, legislated Treaty and Truth telling processes in Victoria and Queensland, and the upcoming referendum to change the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. It is reflected in the NT Government's commitment to a pathway towards Treaty.

Listening to the voices of Aboriginal people should be a priority of all governments and particularly of the NT Government, given more than a third of the people they represent are Aboriginal people.

The importance of ensuring Aboriginal people have a say in the development of policy and legislation in this jurisdiction sits alongside our broader concern that the NT Government has abandoned its commitment to transparency and accountability previously instituted through the Assembly's policy scrutiny committees. The establishment of the Social and Economic Policy Scrutiny Committees (later replaced by the Legislation Scrutiny Committee) facilitated critical stakeholder input. Although advice from stakeholders was not always adhered to, it resulted in improvements to legislation on the occasions when it was followed. The examples provided in this submission demonstrate that scrutiny

[3] We assume that the references to 'First Nations Territorians' in the discussion paper refer to both Aboriginal people and Torres Strait Islander people living in the Northern Territory. Given the Land Councils' work focuses on Aboriginal people whose traditional lands are within the NT, this submission focuses on Aboriginal people in the NT.

[4] Productivity Commission 2023, *Review of the National Agreement on Closing the Gap – Draft Report* (weblink).

[5] Ibid. Note the priority reforms of the National Agreement are: Priority Reform 1: Formal partnerships and shared decision-making, Priority Reform 2: Strengthening the community-controlled sector, Priority Reform 3: Transforming government organisations, Priority Reform 4: Aboriginal and Torres Strait Islander-led data (weblink)

[6] See National Agreement on Closing the Gap, paragraph 6 (weblink).

[7] See Aboriginal Affairs Strategy, available at weblink.

supports more robust and effective legislation – and its absence contributes to at best inadequate, and at worst harmful, legislation.

A process to review bills for their impact on Aboriginal people is both an essential safeguard against poor legislation and a valuable means to achieve fair, appropriate and effective legislation. However, it is not a substitute for urgent action to ensure early Aboriginal engagement on policy and legislation. Both reforms are critical.

While the Land Councils strongly support the idea of a review body, we are not yet able to provide advice on an appropriate structure. The timeframe for consultation on the discussion paper did not allow for a thorough consideration of options and it may also be premature to provide advice given the impending national Voice to Parliament referendum. As such, we ask the Legal and Constitutional Affairs Committee to consult further with land councils and other interested Aboriginal organisations to identify an appropriate review model.

The Land Councils give qualified support for the idea of a statement of compatibility. If it is to proceed, both the measures included and the way the statement is to be prepared and considered should be worked out in more detail, in collaboration with Aboriginal organisations.

This submission offers principles for the establishment and operation of a review body and for a statement of compatibility process. Crucially, in order to have a meaningful role in reducing negative impacts on Aboriginal people, these review mechanisms must be set up such that they are capable of putting a halt to poor legislation.

Recommendation 1: Engage further with the Land Councils and other Aboriginal organisations to explore the ideas put forward in the discussion paper.

2. General comments

2.1. Early engagement in developing legislation

While reviewing legislation for its impacts is important and may provide a layer of protection, the easiest and best way to minimise negative outcomes and maximise positive outcomes is to engage with Aboriginal people and organisations when legislation is being drafted.

Both the perils of inadequate engagement with Aboriginal Territorians when drafting legislation and the benefits of early engagement are exemplified by the development of a new NT statutory scheme for burials and cremations.

When the Burial and Cremation Bill 2019 was introduced in Parliament, the NLC and other organisations raised concerns that it did not respect Aboriginal laws and traditions. The NT Government subsequently withdrew the Bill.

The NT Government then worked with land councils and other key stakeholders through each stage of developing a new bill. The result of this collaborative process was legislation (the *Burial and Cremation Act 2022*) that met the needs of government, while respecting Aboriginal rights, laws and traditions. The turnaround from draft legislation that was widely criticised to the passing of an Act with broad support shows what can be achieved through a collaborative approach.

Notably, if the NT Government had worked with land councils and other key stakeholders when drafting the initial bill, significant time and government resources would have been saved.

Recommendation 2: Reviewing legislation for its impacts on Aboriginal people is important, but must not be seen as a substitute for consultation. Aboriginal people or organisations should be involved from the start in developing legislation that affects them.

2.2. Previous NT scrutiny committees

The legislative scrutiny committees introduced by the NT Government in 2016 provided much needed transparency of the legislative process and accountability of legislatures. The subsequent dissolution of these committees in 2020 resulted in a lack of scrutiny that is highly concerning, particularly given the NT has a unicameral Parliament, and does not have a second chamber of Parliament to debate and scrutinise bills.

Since that time, we have also seen reduced consultation in the development of policy and legislation. As a result, in many cases Aboriginal people have had no opportunity to comment on legislation, even when they are disproportionately affected by that legislation. This clearly conflicts with the intent of government commitments under both Closing the Gap and the NT Aboriginal Affairs Strategy (which, for example, promises to 'walk alongside Aboriginal people in policy development and implementation through respectful partnerships').

The former scrutiny committees provided an important avenue for stakeholders to make submissions on draft legislation, raise concerns, and appear in person to elaborate on matters raised. The committees made recommendations on numerous matters relevant to Aboriginal Territorians, including:

- Amendments to the Environment Protection Bill 2019 that strengthened protections and increased accountability.
- Improved protections for sacred sites and the rights of native title holders under the Pastoral Land Legislation Amendment Bill 2017 (unfortunately these recommendations were never implemented).
- The Social Policy Scrutiny Committee approved passage of the Burial and Cremation Bill referenced above, but the committee hearings provided an opportunity for Aboriginal organisations to raise concerns. This resulted in the subsequent withdrawal of the Bill and the later passage of the much-improved Burial and Cremation Act 2022.
- The Economic Policy Scrutiny Committee reviewed proposed amendments to the *Water Act 1992* (Water Act) in 2019; several amendments were then made in accordance with submissions from the Land Councils.

By contrast, the absence of a scrutiny process in recent years has resulted in highly impactful legislation being drafted and passed without any public or stakeholder consultation. Perhaps most notably, the Statute Law Amendment (Territory Economic Reconstruction) Bill, which passed in August 2021, amended a number of acts, including two that were of great concern for the Land Councils and our constituents:

- Changes to the *Territory Parks and Wildlife Conservation Act 1976* had potential to undermine the operation of joint management by excluding joint management boards from involvement in some decisions, and may have been inconsistent with land-holding arrangements in relation to some Territory Parks.
- Changes to the Water Act made it easier for developers to access large water entitlements and broadened the powers of the Water Controller to issue long-term water licences.

A proposed second tranche of amendments to the Water Act that would have substantially weakened protections for the NT's water resources was intended to be introduced later in 2021. Following public criticism, including by the Land Councils, this was put on hold with promises of 'further consultation'.[8] Subsequent amendments in 2023 have weakened water governance and were made without any significant consultation with Land Councils.

With limited, if any, consultation during drafting and no scrutiny process in place, the Land Councils are having to turn to media statements in order to provide comment on legislation that affects our constituents. This is not indicative of a transparent legislative process, nor is it in the spirit of Closing the Gap commitments.

Recommendation 3: A process to scrutinise legislation is essential for accountability and ensuring Aboriginal people have a say on laws that affect them.

3. Process for legislative review

3.1. Body to conduct the review

In the Land Councils' view, several different models could be effective, but, as noted above, additional time and detail is required to evaluate them properly. As such, rather than recommending a specific model, we raise the following considerations that we believe are fundamental for any review body, and should guide the selection of a model:

1. Any review of the impacts of proposed laws on Aboriginal people must be led by Aboriginal people. If a Legislative Assembly committee proves to be the preferred model for a review body, checks need to be put in place to ensure the body remains Aboriginal-led in the event of the Assembly having minimal or no Aboriginal members.
2. The review body must be empowered to have a meaningful impact on the legislative process and on the final content of bills, including recommending changes to proposed laws to reduce negative impacts and increase positive impacts for Aboriginal people.
3. The review body must be adequately resourced and empowered to carry out consultations with Aboriginal people likely to be affected by the bill.
4. Given discussions about a Voice to Parliament and Treaty at Commonwealth and NT levels, consideration needs to be given to how the review body will work alongside existing and possible future Aboriginal representative bodies, including land councils.

[8] https://www.abc.net.au/news/2021-08-05/proposed-nt-water-amendments-delayed/100352154

5. The review body should serve to strengthen Closing the Gap commitments and governance in the NT.
6. The model needs to be sufficiently flexible to accommodate review of bills across a broad range of subjects, with the ability to call in subject matter experts. Consideration of the review body comprising a membership pool with a range of expertise may be appropriate.
7. There must be sufficient opportunity for Aboriginal people and their representative organisations to provide input.
8. Parliament must be required to give proper consideration to all recommendations made by a review body. If the recommendations are not implemented, Parliament must be required to explain why they are not being implemented.

Recommendation 4: A review body should be Aboriginal-led, empowered to generate change, be compatible with other relevant bodies, and be adequately resourced.

Recommendation 5: The review process must allow for appropriate engagement with Aboriginal people and organisations.

3.2. Legislation subject to review

The Land Councils recommend a two-stage review process. All bills and subordinate legislation should be subject to initial consideration by the review body as to whether they may directly or indirectly have an impact on Aboriginal people or their country.

Bills and subordinate legislation that are assessed as having a potential impact would be referred for a full review, and those that are assessed as not having any such impacts would not need to be referred for full review.

Examples of legislation that would ordinarily not need to be reviewed include:

- Bills affecting policy areas where Aboriginal people, as a group, are not significantly interested or disadvantaged (examples could include current bills before the Assembly involving regulation of architects, fuel price disclosure, and the Independent Commissioner Against Corruption)
- Bills making purely technical amendments with no impact on Aboriginal people's interests
- Bills to amend legislation for consistency, as a consequence of the passage of other legislation.

The Land Councils support a model that empowers the review body to also comment on the policy objectives of the legislation, which as the discussion paper notes exists in some other jurisdictions.

Recommendation 6: All bills and subordinate legislation should be subject to an initial review, and potentially referred for a full review. Any review should include consideration of the policy objectives of the legislation.

3.3. Timeframe

The appropriate timeframe for the review of bills will depend on the nature of the review process that is ultimately settled on. The timeframe must allow enough time to conduct a meaningful review. The Land Councils would support a process where the review body is empowered to conduct a detailed review (as occurs in Queensland), including receiving submissions, holding hearings, and engaging experts, as well as targeted consultations with Aboriginal people and relevant organisations.

The discussion paper indicates other jurisdictions have timeframes of between six weeks and six months. In principle, this would seem to be a reasonable range. The length of time the review body will require will vary, depending on both the subject matter of the legislation and the degree of consultation that was involved in its development. There needs to be flexibility to accommodate this and allow the review body to extend or reduce the timeframe accordingly.

Recommendation 7: The timeframe must be sufficient to support a meaningful review process, including enabling the review body to engage with Aboriginal people, other stakeholders and subject matter experts.

4. Statement of compatibility

There is potential value in a statement of compatibility; however, there is a risk it could become a meaningless 'tick the box' exercise, creating more bureaucracy with no positive outcomes. To avoid this, there must be well-thought-out guidelines on the preparation of the statement, and the review body must be set up in such a way that it can effectively consider and assess the statement against those guidelines. The Land Councils would support a statement of compatibility in principle if it were established as outlined in this section.

4.1. Developing a statement of compatibility

The preliminary view of the Land Councils is that a statement of compatibility should be prepared by the government staff involved in drafting the legislation, as they will be best placed to assess compatibility, and then provided to the review body for consideration and comment.

The statement should refer to process and impact

It is unclear from the discussion paper whether a statement of compatibility is intended to refer to the process of developing the legislation or the impact of the legislation, or both. If the statement is introduced, it should refer to both.

For example, the statement might address whether the legislation was co-designed with Aboriginal stakeholders 'from the very beginning' (as per principle 4 of the Local Decision Making Guiding Principles Framework), as well as considering whether clauses in the Bill potentially limit human rights (e.g. assessing compatibility with the United Nations Declaration on the Rights of Indigenous Peoples).

The statement should guide the development of legislation

For the statement of compatibility to make a genuine contribution to Closing the Gap commitments, it would need to guide the development of the legislation, with government staff considering the requirements of the statement at the start of the process of developing the legislation. Best practice would involve planning appropriate consultation and considering the possible impacts of the proposed

legislation on Aboriginal people from the outset. Legislative drafting processes should engage with the statement of compatibility, and there should be a standing obligation on drafters to minimise impacts on Aboriginal people's human rights and self-determination. When the statement of compatibility is presented with a bill, the review body should consider if this has occurred or if the statement has been prepared as an afterthought.

The prescribed measures should not be limited to principles of self-determination

The Terms of Reference for this inquiry contemplate assessing compatibility against 'prescribed measures of self-determination' that will indicate the degree to which the Bill is, among other things, complying with particular frameworks and commitments. While it is important to include measures of self-determination, limiting the statement to these measures may mean that certain bills that have a substantial impact on Aboriginal Territorians – but do not directly relate to principles of self-determination – would not be appropriately assessed.

For example, the NT Government recently passed the *Food Amendment Act 2023* as part of a new regime to licence and regulate stores in remote Aboriginal communities. Such legislation should be subject to the review process, but may not be easily assessed as compatible or incompatible with 'prescribed measures of self-determination'.

To capture such issues, the Land Councils suggest any statement of compatibility should also assess whether a bill is compatible with the human rights of Aboriginal people.

The prescribed measures should be clearly drafted and guided by existing frameworks

If the requirement for a statement of compatibility is introduced, it is suggested that the drafting of the 'prescribed measures' be guided by the rights contained within:

- The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth);
- The *Native Title Act 1993* (Cth);
- The *Aboriginal Land Act 1976* (NT);
- The United Nations Universal Declaration of Human Rights; and
- The United Nations Declaration on the Rights of Indigenous Peoples.

The prescribed measures should also reflect the Local Decision Making Guiding Principles and Closing the Gap commitments – both priority reforms and any relevant socio-economic targets, to ensure impacts on Aboriginal Territorians are comprehensively captured.

There should be guidelines to assist in the assessment of compatibility

To assist government officers, the statement should be accompanied by guidelines outlining how to assess compatibility. This should include specific indicators, particularly for high level measures such as the Local Decision Making principles and Closing the Gap priority reforms. For example, a measure about consultation should require a detailed description of the consultation undertaken, not simply a statement that consultation was undertaken. The guidelines should also assist the review body in assessing the statement.

Recommendation 8: Any statement of compatibility should address the process of drafting the legislation and impact of the legislation. . The statement should assess consistency with policies and compatibility with human rights.

Recommendation 9: Guidelines for assessing compatibility should be developed, including specific measures.

4.2. Reviewing a statement of compatibility

Statements of compatibility can only be effective if subjected to a scrutiny process to assess: (1) whether the statement accurately reflects the development of the bill and its contents, and (2) to what extent the statement addresses the measures.

The Land Councils maintain that if a statement of compatibility is introduced, the process of assessment should involve:

- The relevant government department preparing a draft statement, in accordance with guidelines.
- The review body undertaking a comprehensive critical assessment of the statement against the guidelines.
- Appropriate expertise being called in. For example, for measures relating to consultation or free, prior and informed consent, the body could seek advice from land councils.
- Aboriginal people and organisations having the opportunity to comment on the statement of compatibility. For example, a statement of compatibility might claim that the government has consulted on legislative reform in accordance with the prescribed measures of self-determination, but stakeholders feel that the government did not provide enough information or adequate time to respond to a proposed reform.
- As part of its report on the proposed legislation, the review body making a public statement whether it agrees with the draft statement, and making recommendations as to any further work required to meet the measures.

Recommendation 10: Statements of compatibility must be subject to a thorough assessment process, including facilitating adequate opportunities for Aboriginal people and organisations to provide comment.

5. Evaluation

The land councils recommend that any processes that are established are subject to evaluation after an appropriate timeframe to determine what impact they are having, identify any unintended consequences, and inform any necessary improvements. The objectives, scope and timing of the evaluation should be determined in consultation with the land councils and other relevant stakeholders.

Recommendation 11: Any processes that are established should be subject to evaluation after an appropriate timeframe.

6. Conclusion

We thank the Committee for the opportunity to contribute to this important inquiry and look forward to the opportunity for further consultation as the inquiry progresses.