



North Australian Aboriginal Justice Agency

***A Northern Territory Aboriginal and
Torres Strait Islander Voice***

Submission to the Legislative Assembly Northern Territory Legal
and Constitutional Affairs Committee Inquiry into a process to
review Bills for their impact on First Nations Territorians

North Australian Aboriginal Justice Agency

September 2023

Contents

		Page
1	About NAAJA	1
2	Introduction	2
3	Recommendations	3
4	The experience of Aboriginal and Torres Strait Islander peoples in the Northern Territory	6
5	Models in other jurisdictions	11
6	A process to review Bills for their impact on Aboriginal and Torres Strait Islander peoples in the Northern Territory	14

Acknowledgement of Country

The Northern Australian Aboriginal Justice Agency acknowledges and pays our respects to the traditional owners of the lands on which we live and work across the Northern Territory. We recognise the deep expertise and vision of the Aboriginal people and communities we work with.

The term 'Aboriginal' is used respectfully in this submission to refer to all people of Aboriginal and Torres Strait Islander descent who are living in the Northern Territory.

1 About NAAJA

The North Australian Aboriginal Justice Agency (**NAAJA**) provides high quality, culturally appropriate legal aid and justice services to Aboriginal people throughout the Northern Territory. We are the largest single provider of legal services in the Northern Territory and play a leading role in policy and law reform in areas affecting Aboriginal peoples' legal rights and interests.

NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). Since 1 January 2018, NAAJA has provided legal services for the southern and central regions of the Northern Territory, formerly provided by the Central Australian Aboriginal Legal Aid Service (CAALAS). NAAJA and its earlier bodies have been fighting for the rights of Aboriginal people since their establishment.

NAAJA's key vision is to achieve true justice, dignity and respect for Aboriginal people. We represent and assists Aboriginal adults and children throughout the continuum of the justice system. NAAJA's experience in providing legal services informs our approach to law and justice on broader justice issues for Aboriginal people. We speak with authority and credibility on Aboriginal justice issues because we work on the ground alongside Aboriginal people and communities.

NAAJA is a party to the Northern Territory Aboriginal Justice Agreement 2021-2027.

2 Introduction

While NAAJA welcomes this Inquiry into a Process to Review Bills for their Impact on First Nations Territorians, its Terms of Reference do not go far enough.

NAAJA calls for the Northern Territory Government to establish a Northern Territory Aboriginal Voice that will make representations to the Northern Territory Parliament and Executive on all matters relating to Aboriginal peoples.

On 14 October 2023, Australians will vote in a federal referendum which, if successful, will lead to the creation of the Aboriginal and Torres Strait Islander Voice to make representations to the Parliament and Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples across Australia. It is proposed that a function of the Voice will be the making of representations early in the development of proposed laws and policies, not merely once laws are introduced into parliament to be passed.

The Federal Government is not alone in establishing an Aboriginal and Torres Strait Islander Voice. Similar models are in place or being explored in other Australian jurisdictions. In South Australia, the *First Nations Voice Act 2023* (SA) has established a South Australia First Nations Voice, in Victoria, there is the First People's Assembly, in Queensland, a process is underway to develop a model for an Indigenous Voice,¹ and in New South Wales preliminary discussions for Voice models have been occurring.²

Time and time again, NAAJA has seen successive Northern Territory governments pass laws that lead to broken lives and broken promises, that authorise the removal of Aboriginal children from their families, that displace Aboriginal peoples from their lands and water ways and that deny Aboriginal peoples the right to practice their traditional laws and customs. Many of these laws have been made under the guise of the 'protection' or 'in the best interests' of Aboriginal peoples and communities. As a result, many laws have not only been ineffective in improving the health and wellbeing of Aboriginal peoples and their social, political and economic status; they have resulted in the continued control and marginalisation of Aboriginal peoples in the Northern Territory.

Viewed in this context, the Terms of Reference for this Inquiry are unduly narrow in focusing only on a process to review Bills introduced into the Assembly for their impact on First Nations Territorians. The Northern Territory Government has told Territorians that it supports the Uluru Statement from the Heart.³ It is time that the Northern Territory Government hears Aboriginal peoples on matters that directly affect them, through the establishment of a Northern Territory Aboriginal Voice. The Northern Territory should commit to a body that genuinely seeks to hear the voices of Aboriginal peoples in the Northern Territory.

This submission sets out NAAJA's views on the Inquiry's Terms of Reference. However, it is essential that Aboriginal peoples across the Northern Territory are meaningfully engaged in the development of a model. While the recommendations made in this submission address the Inquiry's Terms of Reference, they are equally relevant to the establishment of a Northern Territory Aboriginal Voice.

¹ Queensland Government, *Indigenous Voice*, (Web Page) <<https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation-tracks-treaty/indigenous-voice>>.

² NSW Government, Legislative Assembly 2019-20-21-22, First Session of the Fifty-Seventh Parliament, Questions and Answers, No 172 (18 October 2022) <<https://www.parliament.nsw.gov.au/hp/housepaper/28833/QuestionsAndAnswers-LA-172-20221018-Proof.pdf>>.

³ Northern Territory Government, Office of Aboriginal Affairs, *Treaty in the Northern Territory*, (Fact Sheet) <https://dcm.nt.gov.au/__data/assets/pdf_file/0018/513702/treaty-nt-factsheet-1.pdf>.

3 Recommendations

Recommendation 1

- 1.1 There should be a Northern Territory Aboriginal Voice to make representations to the Northern Territory Parliament and Executive on all matters relating to Aboriginal peoples.
- 1.2 The body's functions should include, but not be limited to, the review of Bills introduced into the Legislative Assembly for their impact on Aboriginal peoples in the Northern Territory.
- 1.3 The body should provide views on the development of proposed laws and policies at the earliest possible stages of the law and policy making processes and well in advance of the introduction of Bills into the Legislative Assembly. This is critical to ensuring that Aboriginal peoples have the genuine opportunity to influence decision-making in relation to the laws and policies that affect them.

Recommendation 2

The Northern Territory Government must work with Aboriginal peoples in the Northern Territory and Aboriginal organisations such as the Aboriginal Peak Organisations of the Northern Territory (**APO NT**), whose members include NAAJA and Aboriginal Land Councils and community justice agencies, in the design, scope of work, resource needs and membership of the body.

Recommendation 3

- 3.1 The Northern Territory Government should appoint a First Nations Commissioner to lead meaningful community engagement on the development of the body.
- 3.2 The First Nations Commissioner must be independent and properly resourced to undertake engagement with Aboriginal peoples and organisations across the Northern Territory.

NAAJA's recommendations below are subject to the views expressed in the community engagement process in Recommendation 3.

Recommendation 4

Irrespective of the form the body takes, the body must:

- 4.1 recognise the diversity of Aboriginal peoples in the Northern Territory, especially in terms of language, law, culture, beliefs and practices;
- 4.2 include representatives chosen by Aboriginal peoples in the Northern Territory who reflect the diversity of communities across the Northern Territory, including Elders, young people and gender diversity. Representatives chosen by government would be contrary to the spirit of the body;
- 4.3 be genuinely independent from Parliament and its members should not be affiliated with any political party;
- 4.4 be flexible in how it performs its functions, including in how it gathers information, engages with the community and facilitates the communication of views;

4.5 be properly resourced, including:

- (a) for the process of selection of representatives;
- (b) to allow adequate consultation with Aboriginal communities, representatives of Aboriginal community controlled and peak organisations (such as APO NT) and key stakeholders, to call for and consider submissions, undertake inquiries and conduct research and to hold public hearings with Aboriginal communities;
- (c) to provide interpreters, where needed;
- (d) to facilitate and fund agreed modes of meeting, such as face-to-face meetings (and related travel expenses), meeting spaces and rooms and video conferencing equipment (where the body considers that meeting by video conference is appropriate);
- (e) to facilitate executive assistance (for example, to provide information and independent advice, including independent legal advice, about the operation of a proposed Bill) and access to decision-makers;
- (f) to remunerate representatives for their time as well as any related travel and accommodation costs;
- (g) to employ appropriately qualified staff, preferencing Aboriginal peoples, to provide administrative and research capability;

4.6 allow sufficient time for the body to consider proposed Bills, consult stakeholders including Aboriginal community leaders and representatives, obtain information and advice, and communicate their views to the Legislative Assembly;

4.7 publicly report so that the work and views expressed through the body are available to the broader community;

4.8 be governed by clear principles and processes that ensure transparency and fairness;

4.9 be reviewed periodically to implement any improvements that are identified.

Recommendation 5

The preferred body to conduct the reviews is a statutory body composed of Aboriginal peoples in the Northern Territory.

Recommendation 6

The Bills, including subordinate Bills, to be reviewed should be a matter for determination by the statutory body. It is not appropriate for Government to determine the Bills that are of relevance and interest to Aboriginal communities.

Recommendation 7

The body should not be required to provide a Statement of Compatibility, whether against human rights standards and obligations or for consistency with the principles underlying Northern Territory policies and commitments. Statements of Compatibility are the responsibility of government and parliament.

Recommendation 8

The role of the body should include the provision of views on the nature and scope of issues affecting Aboriginal peoples including potential impacts that are raised by the proposed Bills.

Those views *may* include the degree to which the Bill:

- affirms and enhances the rights of Aboriginal peoples in the Northern Territory to respect, practice and benefit from their traditional law, culture and autonomy;
- is consistent with and promotes Aboriginal peoples' self-determination;
- is consistent with and promotes the recognition and respect of Aboriginal peoples laws and customs;
- is consistent with international human rights standards and international law instruments to which Australia is a party including the International Convention on Civil and Political Rights, Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of Persons with Disabilities (**Australia's international human rights obligations**),⁴ the progressive realisation of rights set out in the United Nations Declaration on the Rights of Indigenous Peoples.

Whether and to what extent the body provides views on these matters should be a matter for determination by the body once it is established.

Recommendation 9

While it is ultimately for the body to decide, in NAAJA's view, the role of the body should not include the provision of views on the degree to which the Bill is consistent with the principles underlying the NT Government's Local Decision-Making Policy Framework for communities to have control over their own affairs in order to enhance rights of self-governance or is consistent with the NT Government's commitments to Closing the Gap.

However, it would be appropriate for the body to seek information on these policies and commitments, if it wishes, to help inform its views.

Recommendation 10

The statute or governing document for the body should reflect the intentions of the body by reference to human rights standards, Australia's international human rights obligations, and the United Nations Declaration on the Rights of Indigenous Peoples.

Recommendation 11

The body must have the power and resources to seek information and independent advice, including independent legal advice, that the body determines it needs to provide its views.

At a minimum, information and guidance on human rights standards, Australia's international human rights obligations and the United Nations Declaration on the Rights of Indigenous Peoples should form part of the information and guidance that is provided to the body to assist and inform the body's considerations.

⁴<http://www.austlii.edu.au/au/other/dfat/treaties/1983/9.html><http://www.austlii.edu.au/au/other/dfat/treaties/1989/21.html><http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html><http://www.austlii.edu.au/au/other/dfat/treaties/2008/12.html>

4 The experience of Aboriginal peoples in the Northern Territory

Since the start of the 20th century, laws have been instruments of control, oppression, and inequity for Aboriginal peoples and communities in the Northern Territory.

The first law relating to Aboriginal people in the Northern Territory was the *Northern Territory Aboriginals Act 1910* (SA). That Act established the Northern Territory Aboriginals Department, charged with “the duty of controlling and promoting the welfare of the aboriginals.”⁵ The Chief Protector became the legal guardian of every ‘Aboriginal and half-caste child’ within the territory, notwithstanding that the child had existing parent/s or other living relatives.⁶ The Act empowered the Chief Protector and other prescribed Protectors to authorise the removal of Aboriginal and ‘half-caste’ children from their families, the establishment of Aboriginal reserves⁷ under Government control,⁸ in which any Aboriginal or ‘half-caste’ child could be mandated to live and forcibly moved there.⁹

Since that time, successive laws have continued to govern almost every facet of Aboriginal peoples’ lives in the Northern Territory, restricting their liberty and contributing to the loss of customs, culture and language. It is impossible to address every one of those laws here. However, examples over the last two decades include:

- The *Northern Territory National Emergency Response Act 2007* (Cth),¹⁰ otherwise known as the Intervention. Introduced by Federal Parliament, the Act, and several others that were introduced and passed as part of the Intervention efforts, introduced widespread alcohol restrictions in Aboriginal communities, introduced income management (quarantining welfare income to be used exclusively for food and other government deemed necessities), linked social welfare payments for parents with children to school attendance, introduced compulsory health checks for children aimed at checking for signs of abuse, increased policing, and dismantled existing jobs and replaced them with ‘work for the dole’ programs. The numerous restrictions imposed by the Intervention have detrimentally impacted the liberty, wellbeing and standards of living of Aboriginal and Torres Strait Islander peoples in the Northern Territory, resulting in increased child removals, unemployment, overcrowded housing, poor health outcomes and poverty, and achieved none of the Intervention’s objectives.
- The *Police Administration Act 1978* (NT), which sets a two-month time limit for civil actions against police and contains a non-rebuttable presumption of full indemnity costs against the plaintiff for any unsuccessful actions against the police, and the *Correctional Services Act 2014* (NT), which contain a six-month time limit for civil actions against correctional officers. The limitation period for other torts in the Northern Territory is 3 years. These provisions have a disproportionate impact on Aboriginal peoples in the Northern Territory, effectively preventing them from accessing damages for injuries incurred or wrongs suffered because of Government action.
- Amendments to the *Personal Injuries (Liabilities and Damages Act 2003* (NT) passed in May 2022, which cap damages for all civil actions by incarcerated persons (including torts) to \$15,000. This cap operates as a deterrent to the bringing of claims by Aboriginal peoples in the Northern Territory because any award of damages will be insufficient to cover the legal fees incurred in bringing the claim. The cap also has a disproportionate impact on Aboriginal peoples in the Northern Territory.

⁵ *Northern Territory Aboriginals Act 1910* (SA), s 4.

⁶ *Northern Territory Aboriginals Act 1910* (SA), s 9.

⁷ *Northern Territory Aboriginals Act 1910* (SA), s 13.

⁸ *Northern Territory Aboriginals Act 1910* (SA), 6(5).

⁹ *Northern Territory Aboriginals Act 1910* (SA), s 16.

¹⁰ *Northern Territory National Emergency Response Act 2007* (NT).

- The *Youth Justice Legislation Amendment Bill 2021* (NT), amending the *Youth Justice Act 1992* (NT) in 2021, which amongst other things, removed the presumption of bail for first-time offenders. This 'zero-tolerance' approach to youth offending has resulted in more young people being denied access to diversion, refused bail, and remanded in detention centres, and failed to prevent reoffending. This law has a disproportionate impact on young Aboriginal peoples in the Northern Territory.
- Mandatory sentencing, which for more than two decades, has played a significant role in driving up the Northern Territory's incarceration rates, and which does nothing to address the causes of crime or contribute to community safety. In many respects mandatory sentencing runs counter to key principles and objectives of the *Sentencing Act 1995* (NT), the *Domestic and Family Violence Act 2007* (NT) and the *Misuse of Drugs Act 1990* (NT) and results in harsh, disproportionate and unjust sentences.¹¹ Throughout this time, Aboriginal voices such as NAAJA have decried mandatory sentencing laws and their disproportionate impact on Aboriginal people.¹²
- The *Guardianship of Adults Act 2016* (NT), which has been disproportionately applied to appoint decision-makers and manage money for Aboriginal and Torres Strait Islander peoples. The NT Public Guardian reported in its 2021-2022 Annual Report, that 76% of persons with Public Guardian involvement identify as Aboriginal or Torres Strait Islander.¹³
- The *Trespass Act 2023* (NT), which commenced in May 2023, and widens the scope of persons able to issue directions and trespass notices, expands policing powers and uses averments to make proving these offences easier, placing the onus on those charged to disprove the foundational events rather than on the prosecution. It is NAAJA's firm view that this legislation will lead to the unnecessary criminalisation of more Aboriginal people, including in particular those living with homelessness, disability, mental health and addiction. Prior to the commencement of the Act, NAAJA wrote to the Chief Minister and all Cabinet Ministers to express concern that the proposed Bill is contrary to the Northern Territory Government's commitments to reduce the incarceration rates of Aboriginal adults, young people and children under the National Closing the Gap Agreement. In that letter, NAAJA noted that the Government had consulted Police and the Shop Distribution Association Union in the drafting of the Bill and urged the Government to draw on the expertise of the Aboriginal partnerships available to them when drafting legislation and policy that will impact the lives of Aboriginal Territorians.¹⁴

Unfair, discriminatory, paternalistic laws, laws which disproportionately impact Aboriginal peoples, and laws which fail to protect Aboriginal peoples from discrimination and exploitation, have repeatedly been made in the absence of or without due consideration of the voices of the very people they will impact.

Impact of a unicameral parliament

The Northern Territory's unicameral system of parliament, with one chamber in which laws are made, provides another justification in support of an expert Aboriginal advisory body in the Northern Territory to review Bills introduced into the legislative assembly.

¹¹ Northern Territory Law Reform Committee Report No 47, *Mandatory Sentencing and Community-Based Sentencing Options Final Report*, (March 2021), p 26 <https://justice.nt.gov.au/_data/assets/pdf_file/0007/1034638/Final-report-Mandatory-sentencing-and-community-based-sentencing-options.pdf>.

¹² See NAAJA's submission to the Northern Territory Law Reform Committee (November 2020), *Mandatory Sentencing and Community Based Sentencing Options* <<http://www.naaja.org.au/wp-content/uploads/2020/12/Submission-on-the-Mandatory-Sentencing-and-Community-%E2%80%93-Based-Sentencing-Options.pdf>>.

¹³ Northern Territory Public Guardian and Trustee, Annual Report, 2021-2022, p 4 <https://publicguardian.nt.gov.au/sites/default/files/2021-22_annual_report_opg.pdf>.

¹⁴ Dr John Paterson, Acting CEO, NAAJA, Letter to Chief Minister and Cabinet Ministers re Proposed Trespass Bill 2023 – Serial 79 (17 March 2023).

Common criticisms of unicameralism are that it is ineffective in ensuring government transparency and accountability (given that it is easy for the party in power to pass laws since they hold the majority of votes, without the benefit of a second chamber to review bills¹⁵), fails to represent a wide range of views and may be susceptible to influence by lobby and special interest groups and the media. Unicameral systems are often seen as the inverse of bicameral systems, where legislature must pass through both houses, resulting in higher levels of scrutiny and helping to moderate factional issues.¹⁶

Many of the limitations of unicameralism can be observed in the Northern Territory. Over many years, NAAJA has observed failures by successive Territory parliaments to pass or retain laws consistent with or in furtherance of key recommendations of seminal Royal Commissions, inquiries and reviews that would have gone a significant way to improving the lives, health and safety of Aboriginal peoples.

The Royal Commission into the Protection and Detention of Children in the Northern Territory identified the cycle that generally follows a change of government, a catastrophic event such as a death in custody, or the reporting of an inquiry:

“The creation of a government-selected advisory body or consultation process predictably follows, which then predictably dies a natural death at the next election where an incoming government continues the cycle and once more commits to resetting the relationship. This circularity of policy and approach has produced a generation who are both cynical and fatigued.”¹⁷

A recent example of this precise issue is the amendments made to the *Youth Justice Act 1992* (NT) referred to earlier in this submission. Those amendments reverse important changes introduced by the Northern Territory in response to the Royal Commission into the Protection and Detention of Children in the Northern Territory. The amendments have led to a flood of Aboriginal young people in detention, many of whom are on remand whilst at the same time there is an escalation in reports of overcrowding, assaults, lockdowns and ongoing staffing issues, all of which were issues of detailed inquiry and recommendation by the Royal Commission.

Legislation Scrutiny Committee

While not a matter within the terms of reference for this Inquiry, we note that the Northern Territory Legislative Assembly's Legislation Scrutiny Committee only inquires into and reports on Bills that are referred to it. Pages 10 to 12 of this Inquiry's Discussion Paper demonstrate that the Northern Territory is an outlier in this regard.

We also note that the current terms of reference for the Legislation Scrutiny Committee do not include scrutiny of Bills against compatibility with human rights standards, Australia's international human rights obligations or the United Nations Declaration on the Rights of Indigenous Peoples, as is the practice in other Australian jurisdictions.

While NAAJA supports the existence of a scrutiny committee in principle (in addition to and separate to an Aboriginal body), it is NAAJA's view that the Legislation Scrutiny Committee should inquire into and report on *all* Bills, not just those that are referred to it. It is also NAAJA's view that the committee (or another committee established for this purpose) should inquire into and report on Bills for their compatibility with human rights standards, Australia's international human rights obligations and the United Nations Declaration on the Rights of Indigenous Peoples.

¹⁵ While the Committee's Discussion Paper outlines a process for the passage of Bills at page 8, including the adjournment of the Bill for at least one month to allow public discussion, a recent example of this process not being followed in the Northern Territory is the *Police Legislation Further Amendment Bill 2023* (NT) which was introduced and passed on the same day (25 July 2023).

¹⁶ Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 1992 *Int'l Rev. L. & Econ.* 145, 151-152

¹⁷ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report, Volume 1*, p 247 <https://rmo.nt.gov.au/__data/assets/pdf_file/0014/731012/Royal-Commission-NT-Final-Report-Volume-1.pdf>

Compounding effect of the absence of domestic and international human rights protections

There is no Charter of Human Rights in the Northern Territory, or federally.

The most comprehensive international statement on the human rights of Indigenous peoples around the world, the United Nations Declaration on the Rights of Indigenous Peoples, was endorsed by Australia in 2009 however is not a direct source of rights for Aboriginal peoples in the Northern Territory.

Commonwealth and Northern Territory Governments have, to date, failed to seriously engage with and apply the principles of the United Nations Declaration on the Rights of Indigenous Peoples, including recognition and implementation of rights as well as redress for past wrongdoing. In the Australian Human Rights Commission (AHRC) submission for the Third Universal Periodic Review in 2020, the AHRC reported that Australia has not taken steps to audit existing laws, policies and practice for compliance with the United Nations Declaration on the Rights of Indigenous Peoples, to consult with Aboriginal Australians regarding the future application of these fundamental principles in the Australian context or, to otherwise embed these principles into our laws, policies or practices.¹⁸

NAAJA has previously called for the development of a national plan by the Commonwealth, States and Territories for the establishment of a mechanism to scrutinise policies and laws for compliance with the principles set out in the Declaration, and recommended, as part of that mechanism, a Voice to Parliament at both Federal and Territory for Aboriginal people to provide their views.¹⁹

As stated in the Charter of Rights campaign coalition submission, *A Human Rights Charter Benefits Everyone* (July 2023), Charters of Human Rights protect and promote rights of people when dealing with governments, promote transparency in the way that governments and parliaments deal with human rights issues, including to require that human rights are considered when making laws and that new laws are assessed in Parliament against human rights standards.²⁰

The absence of a rights framework is particularly felt in the Northern Territory where Aboriginal peoples have been consistently denied basic rights and protections, or remedies to address which are a patch work of laws which afford only partial protection. The United Nations Committee on the Elimination of Racial Discrimination has recommended that Australia:

“...accelerate its efforts to implement the self-determination demands of indigenous peoples, as set out in the ‘Uluru Statement from the heart’ of May 2017 including by taking steps towards extraconstitutional recognition of indigenous peoples, establishing a meaningful mechanism that enables their effective political participation and entering into good faith treaty negotiation with them.”²¹

In NAAJA’s view, the establishment of an Aboriginal body is an essential step towards self-determination for Aboriginal peoples in the Northern Territory.

¹⁸ Australian Human Rights Commission, *Australia’s Third Universal Periodic Review* (2020), p 8, <https://humanrights.gov.au/sites/default/files/ahrc_upr_submission_2020.pdf>.

¹⁹ NAAJA, *Freedom, Security and Peace? The United Nations Declaration on the Rights of Indigenous Peoples in the Northern Territory*, Submission 47 to the Commonwealth Parliament Senate Standing Committee on the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia <<https://www.aph.gov.au/DocumentStore.ashx?id=cbcf9d91-e38d-4c1b-a1e4-f1005da5cab&subId=720848>>.

²⁰ Daney Faddoul, *A Human Rights Charter Benefits Everyone*, (Submission, July 2023), p 12 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/64a7643ab5770a5a0c94585b/1688691776031/SUB_CharterHumanRights_Preliminary.pdf>.

²¹ UN Committee on Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (2017) [20].

Aboriginal peoples know what their communities need

Issues affecting Aboriginal peoples are too often spoken about and interrogated through a 'deficit' lens. Time and time again, Governments have failed to recognise the expertise and unique insights that Aboriginal peoples have on the issues that affect them, in favour of top-down approaches.

This is despite many recommendations and inquiries recommending that the Commonwealth and Northern Territory Governments genuinely engage with Aboriginal peoples. The Royal Commission into Aboriginal Deaths in Custody recommended that the Aboriginal and Torres Strait Islander Commission (ATSIC), provide an independent Aboriginal perspective and advice on various matters, however ATSIC was subsequently disbanded.²² That Royal Commission also recommended that Aboriginal Justice Advisory Committees be established to provide States and Territories with the views of Aboriginal Peoples on criminal justice matters²³, a recommendation that has never been fully implemented. The *Little Children are Sacred* report, whose primary recommendation that the Commonwealth and Northern Territory governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities was ignored.²⁴

And yet, Aboriginal peoples have consistently demonstrated that they have the vision, expertise and solutions. In the Northern Territory, examples of this include:

- *Fair Work and Strong Communities: Proposal for a Remote Development and Employment Scheme* (May 2017), Aboriginal Peak Organisations NT (**APONT**), which sets out a detailed proposal around skills development and employment for Aboriginal and Torres Strait Islander peoples in the Northern Territory;²⁵
- the response by the National Aboriginal Community Controlled Health Organisation (**NACCHO**), with its Northern Territory member organisations, to the response and management of COVID-19 in Aboriginal and Torres Strait Islander communities across Australia, including in the Northern Territory;²⁶
- *Telling it Like It Is* project, a partnership between the Australian Research Council and the Larrakia Nation Aboriginal Research Corporation, in which Aboriginal participants shared a range of views on how to address issues such as exclusion and structural racism;²⁷ and
- the 2018 Local Decision-Making Agreement between Anindilyakwa Land Council and the Northern Territory Government to empower Anindilyakwa people on Groote Eylandt to determine the service delivery models that work best for their community and region. The following year, the Land Council and the Government developed a plan to confer control over the justice system on Groote Eylandt to the Anindilyakwa people. In 2022, Northern Territory Police Force statistics revealed the rate of crimes committed by young people in the Groote Archipelago had plummeted by 95 per cent since the beginning of the Local Decision-Making Agreement. An analysis by the Australian National University in 2022

²² See Royal Commission into Aboriginal Deaths in Custody Recommendation 189.

²³ Royal Commission into Aboriginal Deaths in Custody Recommendation 2.

²⁴ Rex Wild and Pat Anderson, *Ampe Akelyernemane Meke Mekarle "Little Children are Scared"* (Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007).

²⁵ Aboriginal Peak Organisations NT, *Fair Work and Strong Communities: Proposal for a Remote Development and Employment Scheme* (Report, May 2017), <http://www.amsant.org.au/apont/wp-content/uploads/2017/07/RDES-Report_Online.pdf>. APONT is an alliance of the CLC, NLC, NAAJA and AMSANT.

²⁶ The success of which was reported by Forbes in William A Haseltine, *Protecting Indigenous Populations From Covid-19: The Australian Example*, 5 May 2021. Accessed at <<https://www.forbes.com/sites/williamhaseltine/2021/05/05/protecting-indigenous-populations-from-covid-19-the-australian-example/?sh=14edf84c801f>>

²⁷ Larrakia Nation & UTAS, *Telling It Like It Is: Aboriginal Perspectives on Race and Race Relations (Early Findings) Report*, (August 2016).

noted a trend towards reduction in adult and youth offending, and a virtual abolition of youth detention.²⁸

The issues with a purely top-down approach were highlighted by NAAJA and the Human Rights Law Centre in their joint submission to the Senate Finance and Public Administration Legislation Committee's inquiry into the Social Security Legislation Amendment (Remote Engagement Program) Bill 2021 (NT)²⁹ and highlighted by the issues raised by Aboriginal and Torres Strait Islander communities prior to the recent lapsing of liquor laws.

5 Models in other jurisdictions

This Inquiry is occurring at a time of historical significance, in which similar bodies are being explored and established in other Australian jurisdictions. A Northern Territory body has the potential to complement these other bodies, as well as lead a uniquely Top End approach. At the same time, the Northern Territory can derive lessons from the approaches taken in other jurisdictions.

Federal Voice

The Uluru Statement from the Heart invited non-Indigenous Australians to support a constitutionally enshrined Aboriginal Voice to Parliament. On 14 October 2023, all Australians will vote in a referendum to alter the Constitution to establish this voice as a body which has the power to make representations and provide expert advice to both parliament and the executive government on laws and policies affecting Aboriginal and Torres Strait Islander peoples. The body's composition and structure will be decided through legislature however several guiding principals have been identified by the Federal Government, including that the Voice will:

- be independent from Parliament and Government;
- be accountable and transparent;
- work alongside existing organisations and traditional structures;
- be chosen by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities;
- be representative of Aboriginal and Torres Strait Islander communities, gender balanced and include youth;
- be empowering, community-led, inclusive, respectful and culturally informed.³⁰

South Australian Voice

1. *For millennia Aboriginal people thrived as the custodians of the land and waters of this State.*
2. *Since colonisation Aboriginal and Torres Strait Islander people have faced unacceptable levels of disadvantage.*
3. *It is now intended that there be a platform for Aboriginal and Torres Strait Islander people to be better heard by government so that they have more of a say in the decisions that effect their lives.*

²⁸ A more detailed examination of this example can be found in NAAJA's Submission (157) to the Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum (April 2023) < <https://www.aph.gov.au/DocumentStore.ashx?id=07125261-e789-437e-9c66-099fa9bb99d5&subId=740428>>.

²⁹ NAAJA and HRLC, *Real Jobs and Fair Pay for Remote Communities: Submission on the Social Security Legislation Amendment (Remote Engagement) Bill 2021* (20 September 2021).

³⁰ Australian Government, *What would the Aboriginal and Torres Strait Islander Voice do?*, (Web Page), <<https://voice.gov.au/>>.

In March of this year, South Australia established a First Nations Voice through statute, the *First Nations Voice Act 2023* (SA). Prior to passing the Bill, the South Australian Government appointed a Commissioner for First Nations Voice, Dale Agius, a Kurna, Narungga, Ngadjuri and Ngarrindjeri person with connection to communities and Country across South Australia.

The Commissioner led an initial community engagement between August and October 2022, meeting with community groups in seven metropolitan and outer metropolitan locations and with 17 regional and remote communities. The Commissioner reported on that engagement in November 2022 at the same time as the South Australian Government released its draft Bill.³¹ The Commissioner then led a second community engagement between November 2022 and January 2023, seeking feedback on the proposed model, which led to a second report and changes to the draft Bill.³²

The Act establishes six local First Nations Voices to represent views within regions alongside a State First Nations Voice and amends the South Australian *Constitution Act 1934* (SA) to insert the following recognition:

- (1) The Parliament of South Australia recognises the importance of listening to the voices of First Nations people if there is to be a fair and truthful relationship between the First Nations and non-First Nations people of South Australia.
- (2) The Parliament acknowledges that the voice of First Nations people has not always been heard in Parliament, and intends that, through the *First Nations Voice Act 2023*, that voice will be heard, and will make a unique and irreplaceable contribution to South Australia that benefits all Australians.³³

The Local First Nations Voices (the regional voices) will be independent body corporates composed of seven elected representatives (eleven in the central region).³⁴ The State First Nations Voice will be an independent body corporate composed of two representatives from each Local First Nations Voice.³⁵

The State First Nations Voice will be notified of the introduction of Bills to parliament,³⁶ is entitled to address Parliament in relation to Bills,³⁷ and must deliver an annual address to Parliament.³⁸ The State First Nations Voice must also establish³⁹ and has the power to create additional committees.⁴⁰ The State First Nations Voice will meet with cabinet at least twice each year,⁴¹ brief the Premier at least twice each year⁴² and meetings with other relevant ministers and chief executives as identified by members of the State First Nations Voice.⁴³

The functions of the Local First Nations Voices include:

³¹ SA Commissioner for First Nations Voice to the South Australian Parliament, *Engagement Report August to October 2022*, <https://www.agd.sa.gov.au/first-nations-voice/commissioner-for-first-nations-voice/FNV-Engagement-Report_v3.3-web.pdf>.

³² SA Commissioner for First Nations Voice to the South Australian Parliament, *Second Engagement Note November 2022 to January 2023*, <<https://www.agd.sa.gov.au/first-nations-voice/commissioner-for-first-nations-voice/FNV-Engagement-Report-Stage-2.pdf>>.

³³ *First Nations Voice Act 2023* (SA), Part 2, s 2.

³⁴ *First Nations Voice Regulations 2023* (SA), r 5.

³⁵ *First Nations Voice Act 2023* (SA), s 25.

³⁶ *First Nations Voice Act 2023* (SA), s 39.

³⁷ *First Nations Voice Act 2023* (SA), s 40.

³⁸ *First Nations Voice Act 2023* (SA), s 38.

³⁹ *First Nations Voice Act 2023* (SA), s 30-33.

⁴⁰ *First Nations Voice Act 2023* (SA), s 34.

⁴¹ *First Nations Voice Act 2023* (SA), s 43(1).

⁴² *First Nations Voice Act 2023* (SA), s 45.

⁴³ *First Nations Voice Act 2023* (SA), s 46.

- to consider and discuss matters of interest to First Nations people in its region;
- to promote, encourage and assist First Nations people in its region to communicate their views on matters of interest;
- to receive the views of First Nations people in its region and pass those views on to the State First Nations Voice;
- to liaise and collaborate with the State First Nations Voice on matters of interest to First Nations people in its region;
- at the discretion of the Local First Nations Voice, to collaborate with and assist public sector agencies and other organisations in the development of policies and procedures that affect First Nations people in its region;
- at the discretion of the Local First Nations Voice, to engage with local government and with other organisations on matters of interest to First Nations people in its region.⁴⁴

The functions of the State First Nations Voice include:

- to represent the diversity of First Nations people in South Australia;
- to liaise with the Local First Nations Voices to ascertain their views in relation to matters of interest and to present those views to the South Australian Parliament and the South Australian Government and other bodies;
- to engage with and provide advice to the South Australian Parliament and the South Australian Government on matters of interest to First Nations people;
- at the discretion of the State First Nations Voice, to engage with and provide advice to other levels of government and other organisations (including, to avoid doubt, the Commonwealth and other States and Territories) on policy and procedures that relate to matters of interest to First Nations people.⁴⁵

The first elections for the local voice representatives will be held on 16 March 2024.

Queensland Voice

The Queensland Government says that it “strongly supports the need to provide Aboriginal and Torres Strait Islander Queenslanders with a greater voice on the issues that impact them and their lives.”⁴⁶

On 7 July 2022 the Queensland Government established a First Nations Consultative Committee “to develop and Indigenous Voice preferred model for Queensland...The Committee will represent First Nations communities in eight regions - Cape York Peninsula, Far North Queensland, Gulf and West Queensland, North Queensland, Central Queensland, South West Queensland, South East Queensland, and the Torres Strait...”⁴⁷

⁴⁴ *First Nations Voice Act 2023* (SA), s 15(1).

⁴⁵ *First Nations Voice Act 2023* (SA), s 28(1).

⁴⁶ Queensland Government, Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, *Indigenous Voice*, (Web Page), <<https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation-tracks-treaty/indigenous-voice>>. See also Queensland Government, *Response – Indigenous Voice Co-design process Interim Report*, May 2021.

⁴⁷ Queensland Government, Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, *Indigenous Voice*, (Web Page), <<https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation-tracks-treaty/indigenous-voice>>.

The Committee is due to report its findings in 2023.

New Zealand Waitangi Tribunal

The *Treaty of Waitangi Act 1975* sets out the role of the Waitangi Tribunal, comprised of up to 20 members appointed by the Governor-General on the recommendation of the Minister for Māori development.

The role of the Waitangi Tribunal includes to inquire and make recommendations on land claims and to examine and report on proposed legislation and regulations that is referred to it by the House of Representatives or Minister of the Crown as to whether in the Tribunal's opinion, their provisions are contrary to the principles of New Zealand's founding document, the Treaty of Waitangi.⁴⁸ The Waitangi Tribunal has held inquiries on a range of issues affecting Māori communities including more recently on Covid-19 and housing and homelessness.⁴⁹

In addition, New Zealand has dedicated Māori seats in parliament.

6 A process to review Bills for their impact on Aboriginal and Torres Strait Islander peoples in the Northern Territory

In NAAJA's view, there should be a body to review Bills introduced into the Legislative Assembly for their impact on Aboriginal peoples in the Northern Territory. That body should provide views on policy issues and on proposed law reform at the earliest possible stages of the law-making process and well in advance of the introduction of Bills into the Legislative Assembly. This is critical to ensuring that Aboriginal peoples are not merely heard in relation to Bills introduced into the Legislative Assembly but have the genuine opportunity to influence decision-making in relation to those Bills.

The Northern Territory Government must meaningfully engage Aboriginal peoples and organisations across the Northern Territory in the development of the body, design, scope of work, resource needs and membership. The Northern Territory Government should appoint a First Nations Commissioner to lead this engagement, similar to what occurred in South Australia. That First Nations Commissioner must be independent and properly resourced to undertake the engagement.

NAAJA's views below are subject to a meaningful process of engagement with Aboriginal peoples and organisations in the Northern Territory occurring.

The body must:

- recognise the diversity of Aboriginal peoples in the Northern Territory, especially in terms of language, law, culture, beliefs and practices;
- include representatives chosen by Aboriginal peoples in the Northern Territory who reflect the diversity of communities across the Northern Territory, including gender diversity and young people as well as Elders. Representatives chosen by government would be contrary to the spirit of the body;
- be genuinely independent from Parliament and its members should not be affiliated with any political party;
- be flexible in how it performs its functions, including in how it gathers information, engages with the community and facilitates the communication of views;

⁴⁸ *Treaty of Waitangi Act 1975*, s 5(1)(b) and s 8(2).

⁴⁹ The reports of these and other inquiries can be accessed at <https://www.waitangitribunal.govt.nz/publications-and-resources/waitangi-tribunal-reports/>.

- be properly resourced, including:
 - for the process of selection of representatives;
 - to allow adequate consultation with Aboriginal communities, representatives of Aboriginal community controlled and peak organisations (such as APO NT) and key stakeholders, to call for and consider submissions, undertake inquiries and conduct research and to hold public hearings with Aboriginal communities;
 - to provide interpreters, where needed;
 - to facilitate and fund agreed modes of meeting, such as face-to-face meetings (and related travel expenses), meeting spaces and rooms and video conferencing equipment (where the body considers that meeting by video conference is appropriate);
 - to facilitate executive assistance (for example, to provide information and independent advice, including independent legal advice, about the operation of a proposed Bill) and access to decision-makers.

The body must have the power and resources to seek the information and independent advice that it determines it needs to provide its views. At a minimum, information and guidance on human rights standards, Australia's international human rights obligations and the United Nations Declaration on the Rights of Indigenous Peoples should form part of the information and guidance that is provided to the body to assist and inform the body's considerations;

- to remunerate representatives for their time as well as any related travel and accommodation costs;
- to employ appropriately qualified staff, preferencing Aboriginal peoples, to provide administrative and research capability;
- allow sufficient time for the body to consider proposed Bills, consult stakeholders including Aboriginal community leaders and representatives, obtain information and advice, and communicate their views to the Legislative Assembly;
- publicly report so that the work and reviews expressed through the body are available to the broader community;
- be governed by clear principles and processes that ensure transparency and fairness;
- be reviewed periodically to implement any improvements that are identified.

The appropriate body to conduct reviews of Bills

In NAAJA's view, the preferred approach is a statutory body composed of First Nations Territorians, not an Assembly committee advised by First Nations Territorians.

By their nature, committees tend to operate for the life of each Parliament. While committees are easy to establish, they are also easy to dismantle and their terms of references and processes too easily subject to change.

In comparison, although statutes can be amended or indeed repealed, the process to do so should ideally be subject to safeguards such as public debate and community consultation. A statute that is workable does not need to be renewed with each Parliament.

However the most critical difference between the two options is that a statutory body means that Aboriginal peoples can speak directly to Parliament, which is not the case with an Assembly committee advised by Aboriginal peoples. This risks dilution and/or misinterpretation of the views expressed.

Which Bills should be reviewed

The Bills, including subordinate Bills, to be reviewed should be a matter for determination by the body. It is not appropriate for Government to determine that Bills that are of relevance and interest to Aboriginal communities.

By way of example, the Commissioner for the First Nations Voice to the South Australian Parliament stated in his Second Engagement Note (November 2022 to January 2023) that options suggested during his consultation of South Australian communities included:

- the body is advised of all new Bills and decides for itself which Bills it considers. This would require appropriate resourcing to avoid representatives being inundated with Bills; or
- the body provides a list of matters of interest and legislative issues they wish to engage on.

A further suggestion was that Aboriginal 'clerks' are resourced and trained to provide support with either option.

Timeframes to review Bills

Again, the appropriate timeframe to review Bills should be a matter for determination as part of the broader process of establishing the body.

However, it is essential that the body is given enough time for representatives to obtain information and advice, consult, and provide their views. If sufficient time is not provided, there is a risk that the body would be tokenistic, and not have the genuine opportunity to influence decision-making in relation to Bills and the policies underlying those Bills. Influence, not merely being heard, is essential to the self-determination of Aboriginal peoples and the success of any Indigenous Voice to Parliament.

Timeframes are likely to be more manageable if the body is able to provide views on policy issues and proposed laws at the earliest possible stages of the law-making process, well in advance of the introduction of Bills into the Legislative Assembly.

Statements of Compatibility

There should not be a requirement for the body to provide a Statement of Compatibility against human rights standards and obligations nor for consistency with the principles underlying Northern Territory policies and commitments (a question raised by the Inquiry's Terms of Reference).

To impose this on the body would unduly burden and restrain the core function of the body in providing views on issues affecting Aboriginal peoples that are raised by the proposed Bills.

It would also be inappropriate for the body to have this function when measured against the practices in other Australian jurisdictions. In NAAJA's view, Statements of Compatibility are more appropriately undertaken by government. As discussed earlier, this should be the role of the Legislative Scrutiny Committee (or another committee established for this purpose), as is the case in other Australian jurisdictions. One option is that Statements of Compatibility against human rights standards, Australia's international human rights obligations and the United Nations Declaration on the Rights of Indigenous Peoples are provided by the Legislative Scrutiny Committee (or other committee established for this purpose) after the body has provided its views to the Legislative Assembly, so that those views are considered as part of the committee's inquiry and reporting.

However, in providing *views* on issues affecting Aboriginal peoples across the Northern Territory that are raised by the proposed Bills, those views *may* include views as to the degree to which the Bill:

- affirms and enhances the rights of Aboriginal peoples in the Northern Territory to enjoy, practice and benefit from their traditional law, culture and autonomy;
- is based on consultation, according to the laws and customs of Aboriginal peoples in the Northern Territory, and reflects the principle of free, prior and informed consent;
- is compatible with human rights standards, Australia's international human rights obligations, and the United Nations Declaration on the Rights of Indigenous Peoples.

Whether and to what extent the body provides views on these matters should be a matter for determination by the body once it is established.

While it is ultimately for the body to decide, in NAAJA's view, the role of the body should not include the provision of views on the degree to which the Bill is consistent with the principles underlying the NT Government's Local Decision-Making Policy Framework for communities to have control over their own affairs in order to enhance rights of self-governance or is consistent with the NT Government's commitments to Closing the Gap.

However, it would be appropriate for the body to seek information on these policies and commitments, to help inform its views.

Human rights should be reflected in the statute creating the body

The statute creating the body should reflect the intentions of the body by reference to human rights standards, Australia's international human rights obligations, and the United Nations Declaration on the Rights of Indigenous Peoples.