

## Supplementary submission

### Legal and Constitutional Affairs Committee

#### *Inquiry into a process to review bills for their impact on First Nations Territorians*

**2 April 2024**

The Central Land Council (CLC) welcomes the opportunity to provide a short supplementary submission to this inquiry. This submission elaborates on matters raised in our joint submission with the Northern Land Council (NLC) in October 2023 and at the Committee's public hearing on 12 March 2024.

The foundational principle that should guide this inquiry is the principle that Aboriginal people must have a say over matters that affect them.

Our input to date has centred on three themes:

1. The need to re-establish a form of parliamentary scrutiny committee or committees to improve the accountability and transparency of the Northern Territory (NT) legislature generally, as part of basic good governance in a unicameral parliament.
2. The need for further consultation with the land councils, other Aboriginal representative bodies and community members to develop options for an appropriate process for reviewing bills for their impact on First Nations Territorians specifically. The design of this process be a shared decision between Aboriginal representative organisations and the government, and should be considered in the context of work to develop an independent mechanism support, monitor, and report on the transformation of government agencies and institutions as part of the National Agreement on Closing the Gap, and work to progress the Treaty in the NT.
3. The recognition that, whatever model is adopted, a process to review bills for their impact on First Nations Territorians is not a substitute for early engagement with Aboriginal people and their representative organisations in the development of policy and legislation – a commitment that has been made by the NT Government under the National Agreement on Closing the Gap, but is rarely upheld.

The Productivity Commission's review of the National Agreement on Closing the Gap has highlighted the fundamental change that is still needed in the way that governments work with Aboriginal people.

To quote the Commissioners:

*"The gap is not a natural phenomenon. It is a direct result of the ways in which governments have used their power over many decades. In particular, it stems from a disregard for Aboriginal and Torres Strait Islander people's knowledges and solutions.*

*Most critically, the Agreement requires government decision-makers to accept that they do not know what is best for Aboriginal and Torres Strait Islander people."*<sup>1</sup>

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<sup>1</sup> Productivity Commission (2024) Review of the National Agreement on Closing the Gap, Study Report Volume 1, p.iii ([weblink](#))



**Legislation continues to be passed to the detriment of Aboriginal people and the rights and interests of traditional owners and native title holders.**

This inquiry is an opportunity to explore mechanisms to ensure that Aboriginal people's voices are heard and their rights upheld, when laws are being made. It is about making sure the NT's laws work to the benefit not the detriment of Aboriginal people.

These matters need to be taken seriously. Time and time again, legislation continues to be passed to the detriment of Aboriginal people and the rights and interest of traditional owners and native title holders. At the public hearing, the CLC provided numerous examples of highly impactful legislation that has:

- Been drafted and passed without any public or stakeholder comment. This includes the *Statute Law Amendment (Territory Economic Reconstruction) Bill* passed in August 2021, and the related changes to the *Territory Parks and Wildlife Conservation Act 1976* and the *Water Act 1992*.
- Involved consultation, but the advice of that consultation has been ignored. Recent examples provided to the Committee were the *Environment Protection Legislation Amendment (Mining) Bill 2023* and *Legacy Mines Remediation Bill 2023*.
- Involved consultation, but for a period that is too brief, with limited information, and/or at a time that makes it effectively impossible for land council to meaningfully consult with traditional owners. Recent examples are the *Livestock and Other Legislation Amendment Bill 2024* and the Territory's Minerals Royalty Scheme.

To these examples we would like to add the recent Water Act amendments. At the time of CLC's appearance before the Committee, and in our original submission, reference to the Water Act 1992 was intended to cover amendments made in the past. However, since our appearance before the Committee, new amendments to the Water Act have been introduced to Parliament. The amendments will impact Aboriginal Territorians, including those who seek to review administrative decisions, a power that native title holders have relied on recently.

The Water Act amendments are packaged into the *Parks and Water Legislation Amendment Bill 2024*. Not only were stakeholders like the CLC not consulted about the Water Act amendments, but in a version of the bill provided to the CLC (to enable comment on the proposed Parks amendments) all references to amendment of the Water Act were deleted. The file was called "*DEPWS Legislation Amendment Bill 2023 FINAL (Parks amendments only).PDF*". That active step to hide proposed amendments suggests a deliberate decision not to allow comment by Aboriginal stakeholders. This is extremely concerning.

In an environment where the right of Aboriginal people to have a say on laws that affect them is so frequently and deliberately disregarded, the re-introduction of some form of scrutiny committee or committees into NT Parliament would act as an essential safeguard. It would provide a routine means of ensuring that Aboriginal people and their representative organisations – along with other members of the public – can have input into the legislative process.



A number of times during the Committee's hearings, members of the Committee asked whether a scrutiny process would delay the passage of bills. In the CLC's view, ensuring that bills are subject to public debate and scrutiny would ultimately increase the efficiency of the legislative process by contributing to fairer, more appropriate and effective legislation. The expertise of land councils, and other representative Aboriginal organisations, is an asset, not a hindrance, to the legislative process.

We would also like to emphasise that the absence of a scrutiny process in the NT legislative is out of step with other jurisdictions. As highlighted in the discussion paper for this inquiry, each of the other unicameral parliaments in our region (Queensland, the Australian Capital Territory and New Zealand) have a consultative inquiry approach to all bills by default. It is basic good governance.

However, as we have highlighted throughout our contributions to this inquiry, the opportunity to comment on bills before parliament is not a substitute for early engagement with Aboriginal people and their representative organisations.

**Early engagement with Aboriginal people and their representative organisations to inform the design of policy and legislation is essential – and consistent with the Northern Territory Government's commitments under the National Agreement on Closing the Gap.**

Early engagement not only respects the statutory consultative and representative functions of the land councils, but it has been agreed to by the NT Government under the National Agreement on Closing the Gap.

Under the agreement, governments have committed to improving outcomes for Aboriginal and Torres Strait Islander people across a range of domains.<sup>2</sup> Critically, in the context of this inquiry, governments have agreed that progress can only be made if they change their way of working with Aboriginal people. For this reason, the agreement includes four priority reforms. They are:

1. Formal partnerships and shared decision-making (*emphasis added*)
2. Building the Aboriginal community-controlled sector
3. Transforming mainstream organisations
4. Data and information sharing.<sup>3</sup>

The Productivity Commission has recently released its 3-year review of the agreement. It has found that governments are falling well-short of their commitments and that *"Governments have not fully grasped the scale of change required to their systems, culture, operations and ways of working to deliver the unprecedented shift they have committed to in the Agreement."*<sup>4</sup>

Two themes of the Commission's recommendations are highly pertinent to this inquiry. The first is that power needs to be shared, and the second, is that mainstream government systems and culture need to be fundamentally re-thought.<sup>5</sup> These themes accord with the CLC's experience of Closing the Gap in the NT.

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<sup>2</sup> See Closing the Gap socio-economic targets and outcomes ([weblink](#))

<sup>3</sup> See Closing the Gap Priority Reforms ([weblink](#))

<sup>4</sup> Productivity Commission (2024), p.3

<sup>5</sup> Ibid.



## **Substantial improvements are needed in the governance of Closing the Gap in the NT.**

The CLC commits significant time to participating in Closing the Gap processes. We believe the agreement has the potential to provide a robust framework for advancing self-determination for Aboriginal people. However we continue to be let down by the lack of whole-of-government buy-in and accountability to the process.

Despite the hard work of the Office of the Aboriginal Affairs, Closing the Gap too often remains sidelined as the business of government charges on. To provide just some examples of the weakness in the current governance of Closing the Gap in the NT:

- The primary governance forum for Closing the Gap in the NT, the *NT Executive Council on Aboriginal Affairs* (NTECAA), does not have whole-of-government representation. The Minister for Aboriginal Affairs is the only Minister represented on NTECAA. The Chief Minister is not a member, nor are any of the other Ministers whose portfolios relate directly to the Closing the Gap targets. Senior executives from portfolio departments only attend on a rotating basis. NTECAA itself only meets twice a year.
- Two implementation plans have been drafted, but the majority of actions are still unfunded and many actions are still incomplete. As far as CLC is aware, the second implementation plan – comprising more 100 actions – was submitted to Cabinet in late 2023 with no associated budget bid.
- The resourcing of the Office of Aboriginal Affairs (including only 4 policy staff) does not reflect the scale and importance their work.
- There are no forums for the Aboriginal community-controlled organisations to hold Ministers accountable for the contribution of their portfolios to Closing the Gap.

There are obvious improvements that could be made that would demonstrate to us, as the Aboriginal community-controlled sector, that the NT Government is serious about Closing the Gap.

## **The NT Government must work with the Aboriginal community-controlled sector to develop an independent mechanism to promote accountability by government for Closing the Gap.**

The National Agreement on Closing the Gap requires all government parties to identify, develop or strengthen an independent mechanism, or mechanisms, that will support, monitor, and report on the transformation of mainstream agencies and institutions.<sup>6</sup>

Although it was originally envisaged that this mechanism or mechanisms would oversee the implementation of Priority Reform 3 (*Transforming mainstream organisations*), the Productivity Commission has suggested that to be most effective, the mechanism(s) should have a broader remit, “covering all Priority Reforms and all aspects of governments’ relationships with Aboriginal and Torres Strait Islander people.”<sup>7</sup>

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<sup>6</sup> Clause 67, National Agreement on Closing the Gap 2020 ([weblink](#))

<sup>7</sup> Subject to the role and remit of other Aboriginal and Torres Strait Islander bodies. Productivity Commission (2024), p.23



Under the National Agreement, all jurisdictions were required to fully implement an independent mechanism or mechanisms by 2023. None have done so. In the NT, there has only been preliminary consultation with the Closing the Gap Partnership Working Group, although we understand further discussion will take place at the NTECAA meeting in April 2024. The Productivity Commission has said that this work needs to progress (in all jurisdictions) without delay.<sup>8</sup>

The Commission has outlined a number of features that would support the effectiveness of the mechanisms. These are that they must:

- a) **Be governed and led by Aboriginal and Torres Strait Islander people**, chosen with input from Aboriginal and Torres Strait Islander people and communities.
- b) Have a **legislative basis** to help guarantee its ongoing existence and the power behind its functions.
- c) Have **sufficient guaranteed funding** so that it can build and maintain organisational capabilities, and determine its priorities without undue influence from governments.
- d) Have a **broad remit** covering all Priority Reforms and all aspects of governments' relationships with Aboriginal and Torres Strait Islander people (subject to the role and remit of other Aboriginal and Torres Strait Islander bodies, such as elected bodies or truth-telling commissions).
- e) Have **full control of its work program**, so it can initiate its own inquiries, conduct its own research, benchmark performance, and review all relevant documents (such as Closing the Gap implementation plans and annual reports).
- f) **Be able to require government organisations to provide information** (with powers akin to those of auditors).
- g) **Be able to intervene in real time** to support Aboriginal and Torres Strait Islander organisations that have concerns about the way in which government actions or decisions are affecting Aboriginal and Torres Strait Islander people or organisations.
- h) **Operate with transparency**, including freedom to hold public hearings and to publish its own reports and findings at a time of its choosing.
- i) **Not engage in program delivery and not administer funding or programs**, so that it is never in a position of needing to pass judgement on its own actions or inaction.<sup>9</sup>

There is clearly a degree of alignment between the scope and functions of an independent mechanism envisaged by the Productivity Commission and a potential process to review bills for their impact on First Nations Territorians.

The CLC will be seeking to work with the NT Government, as a member of NTECAA, to develop a robust independent mechanism for the NT.

Once again, the CLC thanks the Committee for the opportunity to participate in this inquiry. We hope that the conversation continues.

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<sup>8</sup> Ibid, p.22

<sup>9</sup> Ibid, p.22-23