

Submission

Legal and Constitutional Affairs Committee of the Legislative Assembly of the Northern Territory

Inquiry into a Process to Review Bills for their Impact on First Nations Territorians.

Introduction

I wish to make the following submission to the Legal and Constitutional Affairs Committee (LCAC). In doing so I need first to provide some personal background, given that this submission is being made by a person not currently resident in the Northern Territory.

I lived and worked in the Northern Territory in Darwin and Alice Springs from 1974 to 1984, initially as an Education Officer with the Commonwealth Department of Education administering schemes of educational assistance for Aboriginal students and later as an officer of the Department of Aboriginal Affairs (DAA). In these roles I gained substantial relevant experience. Since then I have remained in close contact with the Northern Territory. I later worked in DAA in Canberra and ATSIC in the land rights and native title areas. After leaving the public service I worked as a consultant in policy development and program evaluation, in particular in respect of compliance of programs concerning Indigenous peoples in terms of international law standards.

I have tertiary qualifications in Economics, Education and International Law and a number of relevant publications. Most recently I edited a book on self-determination issues viz “Aboriginal Land Rights and Self-Determination at Hermannsburg 1972-1982” (Adelaide 2022).

Terms of reference

I propose to deal with the terms of reference in reverse order.

Second term of reference:

A requirement for a Statement of Compatibility against prescribed measures of self-determination,...

I strongly support the proposal that such a Statement be prepared for the consideration of the Legislative Assembly in respect of any Bill (or subordinate legislation) that is likely to have significant impact on First Nations communities.

As drafted the Statement will I believe, subject to the following comments, provide the information required for Assembly deliberation. I have two points to make however:

- I doubt that the criterion “is consistent with the Northern Territory Government's commitments to Closing the Gap” is necessary or appropriate. An examination of this requirement may tend to reduce the focus on self-determination, and instead lead the Statement more into areas of social justice. The Statement of Compatibility as drafted has a strong and proper focus on self-determination. A Closing the Gap criterion may dilute that focus. I believe this criterion needs careful consideration as to its exact applicability in this context.

- Secondly, the LCAC Discussion Paper also asks for comments on the inclusion of the requirement of compatibility with the principles underlying the Local Decision Making Policy Framework. I support the inclusion of this requirement in the Statement. These Principles, already in existence and in use, will provide a framework for the mechanisms for ascertaining Indigenous peoples' responses to proposed legislation. The Principles have the potential to assess views directly at the local level and not necessarily rely on existing organisations.

It should be noted that the existence of a requirement to produce a Statement of Compatibility for Bills will not reduce the responsibility on those members proposing legislation to actively and effectively seek Indigenous views. To expect the Statement to be developed *ab initio* would place too large a burden on the mechanism developed to prepare the Statement (see below). Proponents of legislation must also seek early First Nations' responses.

International Instruments

In regard to the list of international instruments that the Bill should be compatible with, I support strongly those listed. Although a Declaration not a Treaty, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is now the accepted standard setter for Indigenous rights, and to a growing extent represents customary international law in respect of Indigenous peoples. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are well established, affirm the right of self-determination, and are directly relevant.

First term of reference

The term of reference, *The preferred body to conduct such a review, such as a statutory body composed of First Nations Territorians, or an Assembly committee advised by First Nations Territorians*, raises some difficult but vital issues.

I do not believe that a statutory body would be the best option. The reasons for this are:

- none of the models surveyed in the Discussion Paper from other States and Territories appear to be a good fit for the Northern Territory situation. The Northern Territory is a unique, large, nuanced and diverse jurisdiction, especially in respect of Indigenous Territorians. Notably, there is a widespread and strong attachment to traditional law, values and ways of making decisions. If consultation and engagement is to be meaningful it has to accommodate this variety and strength of traditional modes of decision-making.

This is well reflected in the Local Decision Making Guiding Principles. However, it would be difficult to accommodate this situation in a statutory body, whether elected or appointed. With the best will in the world statutory bodies tend towards inflexibility. It is difficult to envision a statutory body that could respond to the likely wide range of disparate circumstances that may exist in respect of Bills. For the arrangements for proposed Statements of Compatibility to be meaningful *flexibility* in assessing Aboriginal views, aspirations and concerns will be absolutely essential. Some Bills may be of concern to First Nations people Territory-wide, but others may have significant local or regional impacts.

If the best body is not a statutory body, the question of course is what body?

- A Parliamentary Committee as such would appear to take matters too much out of the hands of First Nations people and communities. Such a Committee may call for information and engagement, but the unsatisfactory history of parliamentary committees ‘consulting’ with Aboriginal people in Australia is well known. There would be too much distance inherent in the task simply being undertaken by a Parliamentary Committee.
- However a hybrid arrangement may work much better. The LCAC Discussion Paper, at paras 2.22 to 2.25, deals with previous examples of such hybrid arrangements. This approach could provide for local, regional, or Territory-wide input depending on the likely impact of the legislation. The additional people added to the Committee would change with the Bills under consideration. There are obvious difficulties in such arrangements, but the Local Decision Making Guiding Principles already set out a path and parameters.

Practicality

Such an arrangement may, although not always or necessarily, slow down the passage of some legislation. However, for a socially cohesive society this would be a worthwhile cost. This approach does not follow a mechanical path, and may involve something of a learning curve, but the opportunity seems to be there for the Northern Territory to show a path forward in genuine dialogue and recognition of self-determination. It will require a degree of trust and good-will on the part of all involved.

However, to avoid this approach proving too cumbersome, it would be useful to restrict the scope of the requirement to provide a Statement of Compatibility to Bills and subordinate legislation that are likely to have significant impact on First Nations communities. Legislation which is largely related to technical matters or which otherwise can be seen to have a very narrow focus or impact could proceed without a Statement of Compatibility.

Presumably the LCAC would make such a decision, reviewable by the Assembly as a whole.

Conclusion.

There are difficulties with any ground-breaking approach. However, the proposal that all Bills (and subordinate legislation) that can reasonably be seen to impact on the lives, welfare and aspirations of Indigenous Territorians should be subject to close scrutiny for compliance with the norm of self-determination, and that a Statement of Compatibility be drawn up for the Assembly’s information, is, in my view, an excellent one. It is innovative and soundly grounded.

Greg Marks