

A Process to Review Bills for their Impact on First Nations Territorians

Submission to the Legal and Constitutional Affairs
Committee, Legislative Assembly of the
Northern Territory

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Legislative Assembly of the Northern Territory's Legal and Constitutional Affairs Committee ('Committee') as part of the Committee's inquiry into a process to review Bills for their impact on First Nations Territorians.
2. **The ALA contends that the establishment of a new body and/or process for reviewing Bills to assess their impact on First Nations Territorians is essential.** First and foremost, this reform aligns with the Northern Territory Government's Closing the Gap commitments.²
3. Further, since the Northern Territory Parliament is unicameral, the ALA submits that additional oversight, consultation and review in relation to the impact on First Nations Territorians is crucial – especially in the absence of cross-party legislative scrutiny committees.³
4. Additionally, ALA members submit that the disparity between the living standards of First Nations peoples and non-Indigenous people is most acutely felt in the Northern Territory, given the significant proportion of the Northern Territory's population who are First Nations (30.8 per cent).⁴ Despite best intentions, it would appear outcomes for First Nations Territorians are going backwards. Examples include:
 - a. The acute levels of poverty experienced within First Nations communities in the Northern Territory, as demonstrated by median personal income statistics;⁵
 - b. Poor health outcomes, including lower life expectancy for First Nations Territorians when measured both against non-Indigenous life expectancy within the Territory and against life expectancy generally across Australia;⁶ and

² See, Northern Territory Government, *Closing the Gap Northern Territory Implementation Plan* (2021) <www.aboriginalaffairs.nt.gov.au>.

³ Kate Ashton, 'Labor Government scraps policy scrutiny committees from NT Parliament', *ABC News* (online 20 October 2020) <www.abc.net.au/news/2020-10-20/nt-government-scraps-legislation-scrutiny-committees/12795142>.

⁴ Department of Treasury and Finance, Northern Territory Government, *Northern Territory Economy: Population* (Web page, 16 June 2023) <www.nteconomy.nt.gov.au/population>.

⁵ Australian Council of Social Service and UNSW, *Rate of poverty by state/territory of residence* (Web Page) <www.povertyandinequality.acoss.org.au/poverty/rate-of-poverty-by-state-territory-of-residence-of-people>.

⁶ Australian Government, 'Life Expectancy', *Closing the Gap Report 2020* (Web Page) <www.ctgreport.niaa.gov.au/life-expectancy>.

- c. The fact that 85 per cent of the Northern Territory's prison population identify as First Nations, as compared to the national rate of 32 per cent.⁷
5. **With regard to all of the above, the ALA supports the Legislative Assembly of the Northern Territory enacting reform to provide a way, or ways, for the review of Bills for their impact on First Nations Territorians.** This reform is warranted to properly ensure future legislation in the Northern Territory either offers positive change for First Nations Territorians, or at the very least does not actively disadvantage them. Long-term, sustainable input from First Nations Territorians may have the effect of ensuring a sensible, evidence-based approach to legislating on matters affecting First Nations peoples in the Northern Territory. In terms of service delivery, the evidence is clear that local and culturally informed decision-making results in improved outcomes for First Nations peoples.
6. The ALA's submission addresses what should be reviewed by First Nations representatives, responds to the proposed models of legislative review and other issues for consideration outlined in the Committee's Discussion Paper dated July 2023,⁸ as well as discussing the need for cultural safety and accessibility within any new body or process established.
7. **The ALA wishes to emphasise that, in recognition of the diversity of cultures, languages and ways of living in the Northern Territory, any future body established and/or any process introduced must be achieved with the involvement of First Nations Members of the Northern Territory's Legislative Assembly and First Nations communities across the Northern Territory.**

What should be reviewed

8. The ALA notes the Committee's question in the Discussion Paper regarding whether subordinate legislation should be subject to review for their impact on first Nations Territorians.⁹

⁷ Tim Dornin, 'NT a world leader in prison rates: report', *The New Daily* (online, 16 September 2022) <www.thenewdaily.com.au/news/state/nt/2022/09/16/nt-a-world-leader-prison-rates-report>.

⁸ Legal and Constitutional Affairs Committee, Legislative Assembly of the Northern Territory, *Discussion Paper: A Process to Review Bills for their Impact on First Nations Territorians* (July 2023). ('Discussion Paper')

⁹ Discussion Paper 14.

9. **Consistent with the principles of self-determination, the ALA contends that all Bills and other prospective legislation (including subordinate legislation) should be referred to any body or through any process established by the Legislative Assembly of the Northern Territory.** It should be for the representatives of First Nations Territorians to determine whether legislation will impact on First Nations Territorians, and whether (or not) any comment should be made in relation to a particular Bill or other prospective legislative material.
10. The ALA notes, though, that it is important to balance the need for First Nations' views to be presented to the Northern Territory's Legislative Assembly while not overburdening First Nations communities and their representatives.
11. Further, the ALA acknowledges that the Legislative Assembly of the Northern Territory and government departments/agencies need to be able to operate efficiently. A culturally competent acknowledgement of First Nations' consultative and decision-making processes needs to be balanced against the need for the business of the Legislative Assembly to be conducted in a timely manner.
12. However, any limiting of the Bills or policy areas on which First Nations Territorians' representatives can review and provide advice must be solely directed by First Nations communities' priorities and wishes.

Cultural safety and accessibility of any new body or process

13. **The ALA submits that any future body established and/or any process introduced must be both culturally safe and accessible.** That includes:
 - a. All First Nations languages being welcome, especially in any broader community consultations, with preparations made in advance and funding available for the provision of interpreters when requested;
 - b. Any physical spaces being accessible for those living with a disability;
 - c. Online participation being offered for those who cannot attend any relevant meetings, consultations or hearings in person; and
 - d. Financial support being provided for those who need to:

- i. travel for meetings, consultations or hearings;
 - ii. miss out on work/education for the duration of their time at a meeting, consultation or hearing; and
 - iii. for those who need to arrange care for children, relatives or others in their care for the duration of their time at a meeting, consultation or hearing.
14. Additionally, the ALA notes concerns in the Discussion paper about “consultation fatigue and the capacity for organisations to make submissions and be available to attend public hearings” in a small jurisdiction like the Northern Territory.¹⁰
- a. In response to those challenges, **the ALA contends that the Legislative Assembly of the Northern Territory must commit to sufficiently resourcing this reform initiative, as well as providing fair and culturally-appropriate timeframes for feedback on Bills from First Nations Territorians and their representatives.**

The establishment of an advisory body to review Bills introduced into the Legislative Assembly

15. This section of the ALA’s submission will address options for the Legislative Assembly of the Northern Territory to establish an advisory body to review Bills introduced into the Legislative Assembly.

A statutory body

16. **The ALA supports establishing a statutory body that is composed of First Nations Territorians, who are elected by local First Nations communities and whose purpose is to provide advice to the Legislative Assembly of the Northern Territory on the impact Bills may have on First Nations Territorians.**
17. ALA members submit that the key to successful outcomes arising from future legislation with regard to the impact on First Nations Territorians is for a body providing advice on the Bills that will become law to be removed from politics, including party politics, as much as possible.

¹⁰ Discussion Paper 12.

While any statutory body would be established by the Legislative Assembly of the Northern Territory, its composition and daily operations should be independent from the Legislative Assembly and government departments/agencies.

18. The ALA submits the following example of a First Nations statutory body in another jurisdiction for consideration by the Legislative Assembly of the Northern Territory: South Australia's First Nations Voice to Parliament ('SA First Nations Voice'), which was legislated by South Australia's Parliament in March 2023.¹¹

- a. The SA First Nations Voice is described as "a direct and independent line of communication for First Nations people to South Australia's Parliament and the government" and is part of the Government of South Australia's commitment to implementing the *Uluru Statement from the Heart*.¹²
- b. There are two tiers within the SA First Nations Voice: Local First Nations Voices and the State First Nations Voice. Both tiers are described as "independent of direction or control by the Crown or any Minister or officer of the Crown".¹³
 - i. Local First Nations Voices are elected by First Nations communities and must reflect gender diversity.¹⁴ The inaugural First Nations Voice election will be held on Saturday, 16 March 2024.
 - ii. The State First Nations Voice "consists of the joint presiding members of each Local First Nations Voice".¹⁵
- c. The *First Nations Voice Act 2023* (SA) outlines the requirements for the Local First Nations Voices and the State First Nations Voice,¹⁶ as well as how the State First Nations Voice can interact with the South Australian Government.

¹¹ Australian Associated Press, 'South Australia becomes first state to enact Indigenous voice to parliament', *The Guardian* (online, 26 March 2023) <www.theguardian.com/australia-news/2023/mar/26/south-australia-becomes-first-state-to-enact-indigenous-voice-to-parliament>.

¹² Attorney-General's Department, Government of South Australia, *South Australia is implementing its First Nations Voice to Parliament* (Web Page, 2022) <www.agd.sa.gov.au/first-nations-voice>.

¹³ *First Nations Voice Act 2023* (SA) s 10(3) and 23(3).

¹⁴ *Ibid* s 11.

¹⁵ *Ibid* s 24.

¹⁶ See *First Nations Voice Act 2023* (SA) Parts 2 and 3.

- i. There is flexibility, however, for the Local First Nations Voices “to decide how it will engage with communities as well as the government agencies the State Voice wants to connect with and the matters they wish to engage on”.¹⁷
- ii. The State First Nations Voice is to be notified of the introduction of Bills into South Australia’s Parliament,¹⁸ and is entitled to address Parliament in relation to those Bills.¹⁹

d. In relation to reporting and accountability: The State First Nations Voice is required to deliver an annual report to Parliament summarising its operations for the previous year,²⁰ and the First Nations Voice legislation will be reviewed after three years of operation by a First Nations person or organisation.²¹

19. While it may not be necessary for a First Nations statutory body in the Northern Territory to have South Australia’s two-tiered Voice structure (a Local First Nations Voice and a State First Nations Voice) or to have as broad a remit, the ALA submits that a First Nations statutory body would be appropriate for reviewing Bills before the Legislative Assembly of the Northern Territory and providing advice on the impact on First Nations Territorians.

A governance committee

20. The ALA acknowledges, however, that the establishment of an additional statutory body is significant in a small jurisdiction like the Northern Territory. The creation of a new bureaucracy may overlap with the roles already assigned to public sector departments and entities.

21. As such, ALA members are also interested in exploring establishing a governance committee, or expanding the remit of an existing governance committee, to provide advice on and review Bills before the Legislative Assembly.

¹⁷ Attorney-General’s Department, Government of South Australia, *First Nations Voice requirements* (Web Page, 2022) <www.agd.sa.gov.au/first-nations-voice/requirements-and-responsibilities>.

¹⁸ *First Nations Voice Act 2023 (SA)* s 39.

¹⁹ *Ibid* s 40.

²⁰ *Ibid* s 38.

²¹ *Ibid* s 50.

22. For example, as part of the Aboriginal Justice Agreement (AJA), the Northern Territory Aboriginal Justice Agreement Governance Committee (NTAJAGC) has been convened to monitor implementation of the AJA which, presumably, includes scrutiny of legislation for aspects that will detract from, or hinder the goals of the AJA. While not democratically elected, the NTAJAGC receives advice from local Law and Justice Groups representative of major communities and regions. The AJA is overseen by the Aboriginal Justice Unit (AJU) within the Department of the Attorney-General and Justice. The ALA submits that it would be suitable for the AJU to be the lead agency in facilitating advice from First Nations Territorians to the Legislative Assembly.

A requirement to produce Statements of Compatibility

23. The Discussion Paper discusses Statements of Compatibility and a possible requirement that a Member of Parliament introducing a Bill would need to provide a statement on whether the Bill is compatible with First Nations Territorians' rights and, if it is not, the justification for the incompatibility, as well as the extent to which the Bill is consistent with the principles underlying the Northern Territory Government's *Local Decision Making Policy Framework* and its commitments to Closing the Gap.²²

24. **The ALA supports Statements of Compatibility being produced** – either by the Member of Parliament introducing a Bill or by a Legislative Assembly Committee. The latter, we note, would provide a greater role for First Nations Members of Northern Territory's Legislative Assembly.

25. **The ALA thus submits that it would be appropriate to both establish a statutory/advisory body (as above) but also require the production of Statements of Compatibility to assess the impact on First Nations Territorians.** Those processes involve different skills sets and contributors – that is, those making representations through a representative and advisory body will provide wide-ranging perspectives from all First Nations communities across the Northern Territory, while those producing Statements of Compatibility would be solely focused on legal and policy perspectives. There will, of course, be some overlap between the experiences and priorities of the people within both those processes, but it is important that

²² Discussion Paper 8–10; 15–16.

all perspectives are reflected in the analysis of all Bills for their impact on First Nations Territorians.

26. The ALA notes, however, that Statements of Compatibility in other jurisdictions operate with reference to a specific framework against which analysis of prospective legislation can be measured. For example, Queensland (another unicameral jurisdiction) has the *Human Rights Act 2019* (Qld).
27. **The ALA submits that, in the absence of a legislative human rights act/charter in the Northern Territory, a set of rights and expectations would need to be produced against which Bills could be assessed for the production of Statements of Compatibility.** That set of rights and expectations must be produced in consultation with First Nations Territorians, and must include: principles from the *United Nations Declaration on the Rights of Indigenous Peoples*; principles from international law and covenants; rights derived from Australia's common law and judicial determinations; and the Northern Territory's Closing the Gap commitments.
28. **However, if a dual review process is not preferred by the Legal and Constitutional Affairs Committee, then the ALA reiterates and prioritises our recommendations above regarding a First Nations body to review Bills for their impact on First Nations Territorians.**

Conclusion

29. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Legal and Constitutional Affairs Committee's inquiry into a process to review Bills for their impact on First Nations Territorians
30. The ALA is available to provide further assistance to the Legal and Constitutional Affairs Committee on the issues raised in this submission.



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