

**Department of the Attorney-General
and Justice Submission:**

**Legal and Constitutional Affairs
Committee of the Northern Territory
Legislative Assembly Discussion Paper:
A Process to Review Bills for their
Impact on First Nations Territorians**

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Acronyms	Full form
NT	Northern Territory
AGD	Department of Attorney General and Justice
AJA	Aboriginal Justice Agreement
AJU	Aboriginal Justice Unit
CtG	Closing the Gap
the Committee	Legal and Constitutional Affairs Committee of the Northern Territory Legislative Assembly
LDM	Local Decision Making
RMF	Regulation Making Framework
ToR	Terms of Reference
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

1. Background

On 17 May 2023, the Legislative Assembly referred the matter of a process to review Bills introduced into the Assembly for their impact on First Nations Territorians to the Legal and Constitutional Affairs Committee (Committee) for inquiry and report by May 2024.

The Terms of Reference (ToR) for the inquiry are to consider, but not be limited to:

- 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, and
- A requirement for a Statement of Compatibility against prescribed measures of self-determination, that will indicate the degree to which the Bill:
 - affirms and enhances the right of the First Nations peoples of the Northern Territory to enjoy, practice and benefit from their traditional law, culture and autonomy;
 - is based on consultation, according to First Nation law and custom, and reflects the principle of free, prior and informed consent;
 - consistent with the principles underlying the Northern Territory Government's Local Decision Making (LDM) Policy Framework for communities to have control over their own affairs in order to enhance First Nation people's rights of self-governance;
 - is consistent with the Northern Territory Government's commitments to Closing the Gap (CtG);
 - is compatible with the United Nations Declaration on the Rights of Indigenous Peoples; and other international instruments to which Australia is a party, including the right of self-determination in Article 1 of the International Covenant on Civil and Political Rights, and Article 1 of the International Covenant on Economic, Social and Cultural Rights.

On 31 July 2023, the Committee released a Discussion Paper inviting responses to six questions relating to the main issues for consideration. Those questions are on two broad topics:

Review of Legislation

This topic looks to whether legislation should be considered outside of the 'normal' Legislative Assembly process, and if so, how, posing the following questions:

- *Question 1: What do you consider to be the most appropriate body to review Bills introduced into the Legislative Assembly for their impact on First Nations Territorians?*
- *Question 2: Should all bills be subject to review for their impact on First Nations Territorians?*
- *Question 3: What do you consider to be an appropriate timeframe for the review of Bills?*
- *Question 4: Should subordinate legislation be subject to review for their impact on First Nations Territorians?*

Statements of Compatibility

Separately, the topic of whether statements of compatibility against CtG and LDM considerations would be beneficial, and if so, how, asking:

- *Question 5: Should statements of compatibility with the principles underlying the Northern Territory Government's Local Decision Making Policy Framework and commitments to Closing the Gap be required for Bills?*
- *Question 6: Should statements of compatibility with the principles underlying the Northern Territory Government's Local Decision Making Policy Framework and commitments to Closing the Gap be required for subordinate legislation?*

NOTE: The following is a general discussion of the topic, and does not represent an official position of the Department of the Attorney-General and Justice (AGD), the Attorney-General and Minister for Justice, or the Northern Territory Government.

2. Overview

The AGD offers general support for a scrutiny process that looks specifically to impacts proposed legislation may have on First Nations Territorians, however, AGD is not in a position to offer a preference for either of the proposed models at this present stage.

From a general perspective, the AGD sees potential benefit from the establishment of an independent body, as opposed to an internal government work unit or committee (such as the Regulation Making Framework (RMF)), as such a body could draw on, and coalesce expert contributions from government departments, and where appropriate, external experts (such as peak bodies).. There are, however, factors that would necessarily influence the ability of such a body, regardless of whether it is internal or external to government, to provide the level of evidenced based assessment contemplated by the ToR (and the Discussion Paper generally). Those factors would largely be determined by expectations of the Legislative Assembly, government, and the general public, and would include resourcing, timeframes for delivery of assessments, and perceived level of independence and accountability to name a few factors.

Regardless of the model, the underlying question of whether, or how a legislative proposal could directly or indirectly affect First Nations Territorians would require a robust assessment that had the capacity to pinpoint unexpected consequences, advocate for and against those impacts with the use of practical and local knowledge, and be backed by data to supplement any knowledge gaps that may have been overlooked within the policy development phase. Such an assessment would necessarily incorporate impacts on CtG commitments, influences on LDM capacity, and alignment with the AJA.

3. Review of Legislation

The ToR pose two alternative models for a body to review Bills introduced into the Legislative Assembly:

- a statutory body composed of First Nations Territorians to consider any possible impacts on First Nations Territorians; or
- an assembly committee advised by First Nations Territorians (similar to former scrutiny committees).

The following provides a general discussion of both options, followed by specific responses to the Committee's questions.

3.1.1. Statutory body

The first model raised in the ToR involves the establishment of a statutory body, comprised of First Nations Territorians, that would provide advice to the Legislative Assembly as a whole.

The establishment of a statutory body would require development and passage/enactment of a discrete enabling Act. That enabling Act would need to contain provisions that clearly set out membership eligibility, and processes guiding what, and how, the body will consider, and how it would present its findings (and to whom). A broader policy base would need to be developed to support the body, and the Act. Those policies would necessarily entail consideration of how membership would be determined, to ensure proper and full representation of First Nations Territorians, along with the nature, scope, and support mechanisms that would underpin the review process.

Given its legislative basis, a statutory body provides a high level of certainty and validity, however that status equally influences the ability to refine its role and functions, or to explore alternative options for its ongoing involvement.

A statutory body also requires ongoing resourcing to cater for base administrative requirements, including secretariat functions, as well as the dedicated research and investigatory expertise required to review proposed legislation and develop evidence based recommendations. While it is not possible to quantify such resource requirements, those resources would be proportionate to the level of engagement expected of the statutory body. To that end, the resourcing of current statutory bodies, commensurate with their functions, may provide a base insight.

As a guide for further exploration of the above considerations, AGD would offer the following points to help guide the Committee's investigation:

- the authority of the body, including its level of independence (i.e. is it statute based, semi-autonomous business unit within an agency, etc.);
- the composition of the body, including membership qualifications, nomination and appointment processes (including whether membership is determined by the responsible minister or the Administrator);
- the advisory role of the body, including the nature of the advice/recommendations to be offered, processes for developing and providing that evidence based advice/recommendations; and rules on whether the Legislative Assembly will be bound by recommendations;
- determination processes on what legislation should be considered by the body, and associated circumstances (e.g. just criminal laws, any legislative proposal (be it a Bill or draft regulations), potential exclusions (e.g. urgent or sensitive (such as domestic security issues)));
- the processes of the body, and whether it will have similar processes to Legislative Assembly scrutiny committees, or internal government assessment panels such as the RMF; and
- resource and capacity requirements/implications.

As not every Bill would have a direct impact on First Nations Territorians, consideration could be given to whether such a body could undertake an initial assessment of legislation prior to its introduction to the Legislative Assembly, and similar to existing processes under the RMF, grant an exemption certificate so that the proposed legislation could then proceeding to debate in the Legislative Assembly without further consideration.

3.1.2. Assembly committee advised by First Nations Territorians

The main difference between this option, and that of a statutory body, is the absence of a legislative framework providing the advisory body with solid, visible imprimatur. Aside from that, the above considerations around composition, scope, accountability and resourcing, would generally be the same for both a statutory body, or some other arrangement for an advisory body. Consideration would also have to be given to the 'next stage', in terms of whether, and how, the need for a formal Legislative Assembly committee inquiry would be determined, as well as options for proceeding to debate in the Legislative Assembly without further assessment, where no discernible impacts on First Nations Territorians have been identified.

The primary distinction between the two options, is, therefore, the degree of formality surrounding the body's establishment and operation, including the body's influence (perceived or actual), and the ability to refine the body's composition, role, and functions, which is ultimately a policy preference for the Legislative Assembly. At the base level, resource and capacity requirements/implications would tend to mirror those for a statutory authority, particularly in relation to research and investigative capacity, though the less formal structure may influence costs associated with 'back room' functions, where those functions are managed by a host agency.

3.1.3. Committee questions

Question 1: What do you consider to be the most appropriate body to review Bills introduced into the Legislative Assembly for their impact on First Nations Territorians?

Both options have resourcing implications to enable effective provision of advice and recommendations to the Legislative Assembly. While the format of any advisory body is ultimately a policy decision for the Legislative Assembly, the nature of the body, and its capacity to meet its charter, will influence its perceived standing within the community, and thus its contribution to the Legislative Assembly's consideration of legislative impacts on First Nations Territorians.

Question 2: Should all bills be subject to review for their impact on First Nations Territorians?

At a base level, yes, however it is questionable from a utility perspective whether the costs associated with a Legislative Assembly committee scrutinising every legislative instrument would yield benefits to First Nations Territorians. Arguably, better utility would be gained through preliminary assessment of the potential impact on First Nation Territorians by a body that has the ability to obtain and assess the views of subject matter experts (both internal and, where appropriate, external to government) and authoritatively recommend whether further assessment by the Legislative Assembly committee is warranted.

Question 3: What do you consider to be an appropriate timeframe for the review of Bills?

As the Discussion Paper notes, the review committee process established by the 13th Assembly resulted in an average review timeframe of eight weeks. From the AGD's experience, that timeframe generated mixed results, equally delaying passage of Bills, while adding to the Department's workload. That is not to say there is no benefit from a scrutiny committee process. The AGD generally welcomed and engaged in the process as it promoted accountable government. If a committee process were considered, the AGD would tend to favour a more nuanced approach that factored the complexity of the matter under consideration against the competing legislative priorities and resource capacity of government.

Question 4: Should subordinate legislation be subject to review for their impact on First Nations Territorians?

Yes, in principle. It is generally known that legislative detail is increasingly being delegated to subordinate legislation, and in particular, regulations¹. The implication is that this trend shifts the location, and thus scrutiny of, the substantive elements of the law away from the parliament. As the Discussion Paper notes, while the Committee conducts reviews of legislative and administrative instruments, that function is limited to validity against the parent Act. There is a certain argument that enquiries should incorporate delegated legislation, however the need to explore delegated legislation in such detail is minimised where there is sufficient examination of the head power, and its implications.

4. Statements of Compatibility

As the Discussion Paper noted, Statements of Compatibility with human rights accompanied Bills introduced in the Legislative Assembly during its 13th Assembly. While that requirement is not present for the current 14th Assembly, the measure provided a useful impetus in policy development, which continues through Bills presented to this current Assembly. The development of Statements of Compatibility, is equally informed by, and further informs the work associated with, developing the actual proposal. Best practice would arguably see this work undertaken regardless of a formal requirement to develop a statement.

That said, mandating a Statement of Compatibility would institutionalise a level of assurance that the principles underlying LDM, CtG and the AJA have been considered. Such a mandate will require Government and public servants to understand and properly contemplate the requirements of LDM, CtG and the AJA and provide evidence that appropriate matters have been considered.

As with the processes of the 13th Assembly, Statements could be tabled for transparency, and would address to some extent the concerns raised in the Productivity Commission's 2023 draft report on its *Review of the National Agreement on Closing the Gap*, that that most jurisdictions were fairly uncoordinated in the transformation type commitments under CtG, amongst other things. Additional government resources, including training and skills development would, however, be required for Statements of Compatibility of the like contemplated by the ToR, to properly capture LDM, CtG and AJA implications.

The Discussion Paper is also correct in noting that the compatibility requirement did not incorporate consideration of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) per se. Regardless, such matters were routinely considered by AGD when developing legislative proposals, and continue to be so. In stating that, it is noted that the UNDRIP does not displace the general rights to personal safety and freedom from violence under the United Nations Declaration of Human Rights, or general civil, political, and economic rights afforded under other Conventions, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). There are times where human rights provide contested interests and positions, such that care and skill are required to assess whether a legislative proposal not only affirms and enhances the right of the First Nations Territorians to enjoy, practice and benefit from their traditional law, culture and autonomy, but also has regard to other competing human rights.

¹ See for example:

<https://www.parliament.nsw.gov.au/lcdocs/submissions/67678/0001%20Associate%20Professor%20Lorne%20Neudorf.pdf>

4.1.1. Committee questions

Question 5: Should statements of compatibility with the principles underlying the Northern Territory Government's Local Decision Making Policy Framework and commitments to Closing the Gap be required for Bills?

In principle, yes. Such statements should also outline alignment with the AJA.

Question 6: Should statements of compatibility with the principles underlying the Northern Territory Government's Local Decision Making Policy Framework and commitments to Closing the Gap be required for subordinate legislation?

Having regard to the discussion on subordinate legislation at Question 4 above, in principle, yes. Such statements should also outline alignment with the AJA.

5. Concluding statement

The AGD is generally supportive of the concept of additional scrutiny mechanisms for legislative proposals that give particular focus to potential impacts (both negative and positive) on First Nations Territorians, however notes that there will necessarily be resource implications for AGD, government more broadly, and the Legislative Assembly, regardless of the model ultimately chosen.

The AGD is nevertheless happy to provide the Committee with any further assistance it may require while considering this very important topic, and in so offering notes the specialist skills that the AJU has in this field through its development of the AJA, and its participation in the roll out of the LDM framework.