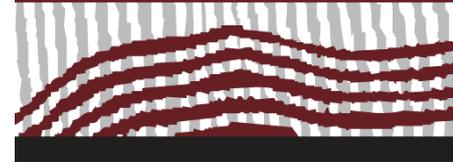


**Land, Rights, Laws: *Issues of Native Title***



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**HOUSING ON NATIVE TITLE LANDS: RESPONSES TO THE HOUSING  
AMENDMENTS OF THE NATIVE TITLE ACT**

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**Abstract**

*In 2009, the Federal Government proposed to amend the Native Title Act 1993 (Cth) to expedite the provision of public housing and infrastructure for remote Indigenous communities. Originally introduced as the Native Title Amendment Bill (No.2) 2009 in October 2009, the amendments were passed into legislation as the Native Title Amendment Act (No.1) 2010 in November 2010. This paper provides a summary of the issues raised in response to the amendments that emerged through the initial parliamentary consultation process and Senate inquiry. The amendments are an attempt to mediate the complexity of public housing provision on native title lands, yet the submissions represented a lack of wider support for the changes. The submissions base their opposition on: a lack of evidence to support the underlying claims; legal uncertainties of the proposed amendments within the broader legal landscape of native title; inadequate provisions for consultation contained in the amendments; the issue of non-extinguishment; issues of racial discrimination; and the exclusion of any criticism of the bureaucratic processes that contribute to delays in public housing provision. The negative responses to the amendments broadly criticise the Federal, State and Territory Governments' continued misinterpretation of the role of native title in supporting Indigenous development and well-being.*

## INTRODUCTION

Shortfalls in the provision of adequate public housing and infrastructure occur in communities throughout Australia. However, Indigenous communities experience the most acute, and on-going, public infrastructure shortages. This has resulted in overcrowding, lack of sanitation, poor standards of living and additional strains upon community cohesion and governance.<sup>1</sup> In 2009, the Federal Government proposed to amend the *Native Title Act 1993* (Cth) ('NTA') to expedite the provision of public housing and infrastructure for remote Indigenous communities. Originally introduced as the Native Title Amendment Bill (No.2) 2009 in October 2009, the amendments were passed into legislation as the *Native Title Amendment Act (No.1) 2010* in November 2010. The amendments were introduced on the basis of a 'universally acknowledged' public housing crisis for Indigenous communities, an issue which has been defined as a 'building block' of the Federal Government's Closing the Gap policy framework.<sup>2</sup> Targeted initiatives such as the Strategic Indigenous Housing and Infrastructure Program ('SIHIP') in the Northern Territory reflect the extent of Federal Government ambition to radically improve housing conditions for Indigenous communities, particularly in remote areas. While the SIHIP targets Indigenous communities in the Northern Territory, the recent amendments of the NTA discussed here will predominantly impact Indigenous communities in Western Australia and Queensland, due to the differing land rights legislation between states and territories.<sup>3</sup> This paper summarises the key issues that were raised during the consultation process for the amendments, highlighting a lack of broader support for the changes.

### 1. THE BILL: CONTEXT AND TIMELINE

In August 2009, the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs ('AGD-FaHCSIA') released a discussion paper, 'Possible Housing and Infrastructure Native Title Amendments' (the 'Discussion Paper') and in November 2009, the Native Title Amendment Bill (No.2) 2009 was introduced into Parliament. In September 2010, following the re-election of the Labor government, the amendments were reintroduced as the Native Title Amendment Bill (No.1) 2010 and passed into legislation as the *Native Title Amendment Act (No.1) 2010* in November 2010. The second bill was almost identical to the first, with the exception being the addition of staff housing to the criteria for public housing.<sup>4</sup>

A parliamentary consultation process occurred in response to the Discussion Paper and a Senate inquiry followed the introduction of the Native Title Amendment Bill (No.2) 2009. When the

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<sup>1</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *National Indigenous housing guide: improving the living environment for safety, health and sustainability*, FaHCSIA, third edition, Canberra, 2007; R Bailie and K Wayte, 'Housing and health in Indigenous communities: key issues for housing and health improvement in remote Aboriginal and Torres Strait Islander communities', *Australian Journal of Rural Health*, vol.14, issue 5, 2006, pp. 178-183.

<sup>2</sup> K Magarey, 'Native Title Amendment Bill (No.2) 2009', *Bills Digest*, no. 118, 2009-10, Department of Parliamentary Services, Canberra, 2010; Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap*, FaHCSIA, Canberra. Available at <<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx>>

<sup>3</sup> See, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Lands Trust Act 1966* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Pitjantjatjara Land Rights Act 1981* (SA); see also, K Magarey, above n.2, p.15.

<sup>4</sup> The new Bill adds staff housing to the criteria for public housing, provided it will be in connection to housing or facilities that benefit Aboriginal or Torres Strait Islanders, namely public health, public education, police and emergency facilities. See, K Magarey, 'Native Title Amendment Bill (No.1) 2010', *Bills Digest*, no. 48, 2010-11, Department of Parliamentary Services, Canberra, 2010, p.2.

Native Title Amendment Bill (No.1) 2010 was introduced no further consultation process was entered into. This paper considers the response to these amendments through a summary of the submissions received in the consultation processes (henceforth the Native Title Amendment Bill (No.2) 2009 and the Native Title Amendment Bill (No.1) 2010 will be collectively referred to as 'the Bill').

The amendments were introduced in the Bill as a 'process to assist the timely construction of public housing, staff housing and a limited class of public facilities... on Indigenous held land' that ensures native title holders are 'notified and afforded an opportunity to comment on acts which could affect native title ('future acts')'.<sup>5</sup> The *Bills Digest* provides a succinct summary of the purpose of the Bill:

To amend the *Native Title Act 1993* (the primary Act or the NTA) so that the procedural rights of native title holders are curtailed when land is required for public education and health facilities, for public housing and for a wide range of other public facilities.<sup>6</sup>

The Bill prioritises timely negotiation of outcomes for public service provision in areas subject to the future act regime in the NTA. AGD-FaHCSIA describes the Bill as targeting 'discrete but significant Indigenous communities on Indigenous held land in remote areas'. The National Partnership Agreement on Remote Indigenous Housing ('NPARIH'), a ten year partnership agreed to in 2008 by the Council of Australian Governments ('COAG'), has injected \$5.5 billion into public housing and infrastructure projects, earmarked specifically for remote Indigenous communities.<sup>7</sup> The pressures related to administering this level of funding have been recognised as an impetus for the Bill.<sup>8</sup> While changes to the NTA will have a direct impact upon Indigenous communities currently living on native title lands in remote areas, it will also impact native title holders who are not in remote areas. Additionally, any parties holding registered claimant applications for determinations of native title on their lands are subject to the future acts regime — areas which extend beyond remote regions, covering rural and urban areas.<sup>9</sup>

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<sup>5</sup> The Bill outlines the following: 'The new subdivision in Schedule 1 [the Bill] provides a process to assist the timely construction of public housing, staff housing and a limited class of public facilities by or on behalf of the Crown, a local government body or other statutory authority of the Crown in any of its capacities, for Aboriginal people and Torres Strait Islanders in communities on Indigenous held land. The new process ensures that the representative Aboriginal or Torres Strait Islander body and any registered native title claimants and registered native title bodies corporate in relation to the area of land or waters are notified and afforded an opportunity to comment on acts which could affect native title ('future acts'). In addition, a registered native title claimant or registered native title body corporate may request to be consulted regarding the doing of the proposed future act so far as it affects their registered native title rights and interests.' The Parliament of the Commonwealth of Australia, Native Title Amendment Bill (No.1) 2010: Explanatory Memorandum, 2010, p.2.

<sup>6</sup> K Magarey, above n 2, p.2.

<sup>7</sup> Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, January, 2010; Department of Families, Housing, Community Services and Indigenous Affairs, *COAG National Partnership on Remote Housing*, FaHCSIA, Canberra, 2008. Available at: <<http://www.fahcsia.gov.au/sa/indigenous/progserv/housing/Pages/RemoteIndigenousHousing.aspx>>

<sup>8</sup> Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, January, 2010; K Magarey, above n 2, p.4.

<sup>9</sup> For a detailed national map of claimant applications as at 31 December 2010 see, National Native Title Tribunal, *Claimant Applications as per the register of Native Title Claims*, NNTT. Available at: <[http://www.nntt.gov.au/Publications-And-Research/Maps-and-Spatial-Reports/Documents/Quarterly%20Maps/RNTC\\_map.pdf](http://www.nntt.gov.au/Publications-And-Research/Maps-and-Spatial-Reports/Documents/Quarterly%20Maps/RNTC_map.pdf)>.

The Bill alters the NTA future acts regime — specifically sections 24AA, 24AB, 24JAA, 222 and 253—with most changes occurring in Subdivision J with the insertion of section 24JAA (Public Housing). The Bill seeks to achieve reduced timeframes for negotiating public infrastructure development by effectively restricting the operation of certain future act consultative processes where they may delay development. The funding timeframe of ten years for the NPARIH is matched to an operational timeframe of ten years for the new subdivision to the NTA that this Bill proposes. At the end of this period ‘action bodies would need to utilise other subdivisions in the future acts regime’.<sup>10</sup> The amendments were presented for public comment through two short consultative processes, lasting 23 days and 27 days respectively.

## 2. THE SUBMISSIONS

Following the release of the AGD-FaHCSIA Discussion Paper in August 2009, the timeframe for submitting a response was three weeks. The Bill was first introduced into the House of Representatives on 21 October 2009, and was referred to the Senate Standing Committee on Legal and Constitutional Affairs (the ‘Senate Committee’) for inquiry and report on 29 October 2009. The timeframe for submissions to the Senate Committee was three and a half weeks. No further consultation was entered into prior to the introduction of the Native Title Amendment Bill (No.1) 2010. These timeframes for consultation were considered restrictive, particularly considering the administrative restraints, financial barriers and challenges of cross-cultural communication that many native title parties face.<sup>11</sup> The Australian Human Rights Commission (‘AHRC’) raised concern that little attempt was made to consult with the communities who are likely to be directly affected by the proposed amendments.<sup>12</sup>

Submissions were received from land councils, state governments, federal departments, academics, Indigenous corporations, developers, barristers and community groups. The submissions overwhelmingly recognise that housing for remote Indigenous communities is an urgent issue that requires significant investment and policy support from the state and federal governments, yet concerns were raised in many of the submissions that the changes proposed in the Bill are unlikely to achieve a positive outcome. From both stages of consultation, 70% of the submissions were either in clear opposition to the Bill, or did not agree with the Bill in its entirety—supporting the view that further options should be explored in depth before legislating these changes. The remainder of submissions that were in support of the Bill came predominantly from the Federal government, state government departments or developers.

Seven key areas of discussion or contention emerge from the submissions:

- Evidence to support underlying claims
- The future acts regime and Indigenous Land Use Agreements (‘ILUAs’)
- Legal interpretation
- Consultation
- Time constraints and bureaucracy
- Non-extinguishment
- Issues of discrimination

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<sup>10</sup> The Parliament of the Commonwealth of Australia, Native Title Amendment Bill (No.2) 2009: Explanatory Memorandum, 2008-09, p.5.

<sup>11</sup> J Weir, ‘Native title and Governance: the emerging corporate sector prescribed for native title holders’, *Land, Rights, Laws: Issues of Native Title*, vol. 3, no. 9, Native Title Research Unit, AIATSIS, Canberra, 2007; T Bauman and C Ganesharajah, ‘Second National Prescribed Bodies Corporate Meeting: Issues and Outcomes’, *Native Title Research Report*, no. 2, AIATSIS, Canberra, 2009.

<sup>12</sup> Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, November 2009.

## 2.1 Evidence to support underlying claims

The majority of submissions raised as a primary issue the lack of evidence provided in support of the underlying claims of the Bill. Respondents outlined concerns over the lack of analysis of the current practice of negotiating public infrastructure development on native title lands. The Discussion Paper highlights the urgent need to provide housing and resolve current delays, and in their submission to the Senate Committee, AGD-FaHCSIA state, ‘in some States native title has been identified as a barrier to meeting targets under the National Partnership’.<sup>13</sup> This claim appears to form the Bill’s premise. Following requests for more evidence from Indigenous organisations during the Senate Committee hearing, summaries were provided by AGD-FaHCSIA on behalf of the Western Australian Government Department of Housing and Office of Native Title, and the Queensland Government Department of Environment and Resource Management.<sup>14</sup> The summaries were brief and cursory, and no further information was offered to support the Federal Government’s assertions. Professor Jon Altman argues that the Bill does not demonstrate evidence-based policy making, a standard the Federal Government has repeatedly referred to in Indigenous affairs.<sup>15</sup>

The submissions criticise the lack of evidence to support the shift away from ILUAs. The Carpentaria Land Council Aboriginal Corporation (‘CLCAC’), Professor Altman and the National Native Title Council (‘NNTC’) all argue that the current system is adequate, and instead question the validity of the underlying premise of the Bill. The NNTC goes a step further, contending ‘many Native Title Representative Bodies would argue that the delays in housing are manifest in government processes and native title issues have not been relevant’.<sup>16</sup>

## 2.2 Future acts and ILUAs

The future acts regime in the NTA is designed to protect the interests of native title parties where any development or activity is proposed which may affect or impair native title rights. It does this by providing a procedural framework outlining compliance procedures for the approval of future acts—including the implementation of public housing on native title land—and determining whether compensation is liable. The future acts regime has nation-wide application as it is enshrined in Commonwealth legislation—however, various land rights enactments at the state and territory level results in a confined application of the regime to Western Australia and Queensland, with some limited application in the other states and territories.<sup>17</sup> The Law Council of Australia (‘LCA’) states, ‘the only areas the Bill will have any practical application will be in those areas which are freehold, exclusive leasehold or reserved (under s47A), where there has not been a determination of native title’.<sup>18</sup> The Federal Government provided little clarity over the

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<sup>13</sup> AGD-FaHCSIA, above no 8.

<sup>14</sup> AGD-FaHCSIA, above no 8, p.6; Western Australian Government, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, 2010, p.2.

<sup>15</sup> J Altman, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, November 2009.

<sup>16</sup> National Native Title Council, Response to the AGD-FaHCSIA Discussion Paper, September 2009.

<sup>17</sup> See, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Lands Trust Act 1966* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Pitjantjatjara Land Rights Act 1981* (SA).

<sup>18</sup> Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, December 2009.

scope and application of the Bill during the consultation processes, and admitted during the Senate Committee hearing that this 'was probably an oversight'.<sup>19</sup>

The future acts regime makes provision for the use of ILUAs as one means through which native title groups can negotiate and formalise agreements with developers. A favorable element of ILUAs is the fact that they are binding on all parties. However, AGD-FaHCSIA have identified uncertainties around the application of the existing future acts regime have contributed to delays, hence the motivation for the amendments in the Bill. On the other hand, Queensland South Native Title Services ('QSNTS') argues that this uncertainty only contributes to difficulties determining clear connections between the current future act regime and delays in the provision of public infrastructure.<sup>20</sup> In this light, seeking to expedite the provision of public housing by truncating native title parties' procedural rights is therefore illogical. The AHRC raises concern that the need for a new future acts process to assist public infrastructure provision 'has not been sufficiently demonstrated' for the purposes of this Bill.<sup>21</sup>

In effect, the Bill posits a move away from ILUAs as a consultative framework for negotiating future acts. A range of factors may influence the timeframes for ILUA negotiation: intra-Indigenous disputes, bureaucratic delays, geographical remoteness, and the ultimate consensus required for authorisation of an ILUA. For example, during the Senate Committee hearing, NTSCORP asserted that ILUA negotiations in NSW occurred within short timeframes when involving the private sector, and lengthier timeframes when involving state or territory governments.<sup>22</sup> Barrister Daniel Lavery argues that the failure of previous ILUA processes to negotiate public infrastructure outcomes for native title parties are a symptom of state and territory governments' poor ability to 'negotiate generally with Indigenous peoples'.<sup>23</sup> Several submissions espouse the view that ILUA processes are an effective form of consultation<sup>24</sup> and promote benefits including: certainty for all parties; long term predictable relationships between parties; holistic incorporation of issues into the scope of negotiation; and the ability to apply consistency addressing specific matters on a case by case basis.<sup>25</sup> Not all submissions, however, are in favour of the ILUA process, claiming that ILUA registration is time and resource intensive, providing a voice to only a few in the community,<sup>26</sup> that they are not always time and cost efficient for negotiating small scale developments<sup>27</sup> and that delays in negotiating ILUAs can result in compulsory acquisition of native title land<sup>28</sup> or lead to projects being downgraded.<sup>29</sup>

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<sup>19</sup> Amanda Cattermole, Office of Remote Indigenous Housing, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 40.

<sup>20</sup> Queensland South Native Title Service, Response to the AGD-FaHCSIA Discussion Paper, September 2009.

<sup>21</sup> AHRC, above n 12.

<sup>22</sup> Mr Warren Mundine, CEO, NTSCORP, *Committee Hansard*, 28 January 2010, p. 3, in Senate Legal and Constitutional Committee, *Senate Report: Native Title Amendment Bill (No.2) 2009*, SLCC, 2010, p.23.

<sup>23</sup> D Lavery, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, November 2009.

<sup>24</sup> Cape York Land Council, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, November 2009; Law Council of Australia, above n 18; Law Society of the Northern Territory, Response to the AGD-FaHCSIA Discussion Paper, September, 2009; Torres Strait Regional Authority, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, December 2009; Carpentaria Land Council Aboriginal Corporation, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, November 2009.

<sup>25</sup> AHRC, above no 12.

<sup>26</sup> Northern Land Council, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, January 2010.

<sup>27</sup> Ergon Energy, Response to the AGD-FaHCSIA Discussion Paper, August 2009.

<sup>28</sup> Local Government Association of Queensland, Response to the AGD-FaHCSIA Discussion Paper, September 2009.

<sup>29</sup> Torres Strait Island Regional Council, Response to the AGD-FaHCSIA Discussion Paper, August 2009.

The submissions from federal and state government departments argue that the ILUA process is not being replaced and that the new process of negotiating public infrastructure will only be applied in urgent cases. Yet it is clear that many respondents—particularly those who are engaging directly in ILUA negotiations—feel that development proponents will favour more expeditious, yet less substantial, negotiation processes.<sup>30</sup> Kevin Smith, Deputy Chair of the National Native Title Council and CEO of Queensland South Native Title Services, argues ‘when you introduce an option like this to expedite a process, why would you go down the ILUA line? Really, this is the reason why they actually want to push through certain matters. I cannot see ILUAs being put on the table. Once you provide a more attractive offer to one party which has the stronger bargaining position why would you go down an ILUA?’<sup>31</sup> The value of ILUAs and their contribution to a process which ensures the validity of public housing and infrastructure<sup>32</sup> is arguably subjugated by the Bill in deference to budgetary pressures.

### 2.3 Legal interpretation

During the first and second submission periods, discussion was generated over the legal uncertainties presented by the Bill. By amending the future acts regime, an area of legislation already suffering from uncertainties of scope and application, the Bill gives rise to yet more questions. The submissions from the NLC and the LCA both raise the issue of whether the acts relevant to the new subdivision (provision of public infrastructure) can be considered future acts.<sup>33</sup> In their submission to the senate inquiry, the NLC concludes that for land subject to native title, and either a statutory scheme or the reservation of Crown land for the benefit of Indigenous people, the grant of leases and the use of land for public infrastructure provision does not affect these existing systems.<sup>34</sup> Therefore, according to the NLC, no future act arises under the current law, and the legal feasibility of this Bill is put in doubt. In their joint submission to the Senate Inquiry, AGD-FaHCSIA address these issues by clarifying the areas of land which will not be subject to these provisions.<sup>35</sup> But queries remained around whether or not future acts apply to areas of land which are subject to the provisions of the Bill. Confusion around the exact scope of the Bill created a difficult foundation for accurate discussion on the predicted impacts and outcomes from the proposed changes.

Barrister Daniel Lavery highlights the complications of intersecting state and territory legislation with the federal provisions of the NTA. He argues, ‘most of the housing and infrastructure to which this amendment is directed is on communal land, and this is usually held under a statutory title... this means governments will still need to negotiate leases irrespective of this amendment’.<sup>36</sup> Governments pursue long-term leases over freehold Indigenous land for the purpose of public infrastructure provision. However, this approach is received poorly by communities who oppose agreeing to long-term leases simply to enjoy public services that the broader community accesses freely.

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<sup>30</sup> Torres Strait Regional Authority, above no 24; Cape York Land Council, above no 24; Carpentaria Land Council Aboriginal Corporation, above no 24.

<sup>31</sup> Kevin Smith, Deputy Chair, National Native Title Council, *Committee Hansard*, 28 January 2010, p. 13, in Senate Legal and Constitutional Committee, *Senate Report: Native Title Amendment Bill (No.2) 2009*, February 2010, p.28.

<sup>32</sup> LCA, above no 18.

<sup>33</sup> LCA, above no 18.

<sup>34</sup> NLC, above n 26.

<sup>35</sup> AGD-FaHCSIA, above no 8.

<sup>36</sup> D Lavery, above no 23.

## 2.4 Consultation

Through its requirements for appropriate consultation, the NTA is beneficial legislation attempting to uphold the rights of traditional owners to participate in decisions about what happens on their country. While the NTA has never met international standards for consultation with Indigenous peoples, the Bill further weakens existing consultation rights. Non-compliance with principles of ‘free, prior and informed consent’ as outlined in the United Nations Declaration on the Rights of Indigenous People (‘UNDRIP’)<sup>37</sup> is continually referenced in the submissions as an indicator of the continued oppression of Indigenous rights.

The Bill claims to incorporate precepts of ‘genuine consultation’, in line with the Federal Government’s commitment to ‘make engagement with Indigenous communities, including any native title holders, central to the design and delivery of programs and services’.<sup>38</sup> However, the consultative process amounts to a right to notification, an opportunity to comment and ‘in addition, a registered native title claimant or registered native title body corporate may request to be consulted regarding the doing of the proposed future act so far as it affects their registered native title rights and interests’.<sup>39</sup> The Bill does not contemplate action to be taken in the event of non-compliance or ensure that sufficient attention and time is given for native title claimants to consult. The AHRC therefore demands compensation for what they argue is an impairment of native title rights through the changes in this Bill.<sup>40</sup>

The Western Australian Government argued that the provision of more extensive consultation would be ‘inconsistent’ with the existing future acts subdivisions of the NTA, and that the heritage legislation in WA adequately accounts for consultative processes.<sup>41</sup> A number of submissions question what constitutes appropriate consultation for native title interests. In their initial Discussion Paper, AGD-FaHCSIA refer to ‘genuine consultation’ but do not define it.<sup>42</sup> The NNTT argues that genuine consultation would reflect an opportunity for native title parties to ‘shape aspects of the delivery of public housing and community infrastructure’.<sup>43</sup> However, following the first round of submissions to the Discussion Paper and the release of the Bill, the wording on consultation appears to have changed, and support for ‘genuine consultation’ subsequently ‘shrunk to an opportunity of comment’.<sup>44</sup>

The elements of ‘genuine’ consultation referred to in the submissions include: adequate/formal notification; early involvement of the community; provision of information; adequate timeframes for native title parties to obtain advice, consult with other members and translate information into culturally accessible forms; and an opportunity to reach and record an agreement. Some submissions also refer to the impaired capacity of native title parties to be involved in the consultative process because of financial constraints on the relevant administrative bodies (namely Native Title Representative Bodies, Native Title Service Providers and Prescribed Bodies Corporate). According to the LCA, the Bill – contrary to its declared intent – therefore

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<sup>37</sup> The Australian Government endorsed the UNDRIP on 3 May 2009, see, United Nations News Centre, *Experts hail Australia’s backing of UN declaration of indigenous peoples’ rights*, United Nations, New York, 2009. Available at: <<http://www.un.org/apps/news/printnewsAr.asp?nid=30382>>.

<sup>38</sup> Attorney-General’s Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Possible housing and infrastructure amendments*, Discussion Paper, August 2009, p.6.

<sup>39</sup> The Parliament of the Commonwealth of Australia, Native Title Amendment Bill (No.2) 2009: Explanatory Memorandum, 2008-09.

<sup>40</sup> AHRC, above n 12.

<sup>41</sup> Office of Native Title, Government of Western Australia, Department of the Attorney General, Response to the AGD-FaHCSIA Discussion Paper, September 2009.

<sup>42</sup> AGD-FaHCSIA, above n 38.

<sup>43</sup> NNTT, above n 16.

<sup>44</sup> D Lavery, above n 23.

places native title holders and applicants ‘in a poor position to bargain for undertakings to ameliorate adverse consequences for native title interests’.<sup>45</sup>

## 2.5 Time constraints and bureaucracy

Although the Bill argues for improved processes to facilitate more effective timeframes in the provision of public services, it extends no consideration to any initiative to improve state and federal government processes. Instead, it focuses exclusively on amending processes within the native title framework. In response, many submissions redirect the focus toward government, and heavily criticize what they argue to be bureaucratic failures. The CLCAC, for example, calls for reform of state bureaucratic practices as a necessary part of improving public infrastructure provision.<sup>46</sup>

A pattern of ‘chronic neglect’ from federal, state and territory governments is attributed to the housing crisis.<sup>47</sup> A number of submissions variously refer to bureaucratic ‘bungling’,<sup>48</sup> ‘failure’,<sup>49</sup> ‘incompetence’<sup>50</sup> and ‘ineptitude’.<sup>51</sup> The CLCAC argues that the Bill seeks to disguise and ‘reward bureaucratic failures and incompetence’<sup>52</sup> with a removal and or weakening of native title rights.

Several submissions recommend significant improvements could be made in the consultative process if native title holders and applicants were involved in the decision making process from day one.<sup>53</sup> When government programs are initiated with minimal consultation it is not until the later stages of program delivery that communities are able to provide input and criticism through their consultative rights as outlined in the NTA. This is likely to impair the appropriateness of programs, which may itself result in delays and ineffectiveness in program delivery.<sup>54</sup> In terms of public housing and infrastructure, delays can occur when the design or placement is modeled without consultation, and the ability to make comments on culturally appropriate decisions—which is often relevant to the location and placement of housing—are only offered at the later stages of program delivery.

## 2.6 Non-extinguishment

Extinguishment is a legal construct equating to permanent removal of native title rights for a given area of land. Government provision of public housing and infrastructure under the current model involves affected land becoming controlled by the Federal Government, who will then lease the housing back to community members. The Bill incorporates the principle of ‘non-extinguishment’, whereby native title rights are suspended—but not extinguished—for the applicable period of time. But if public housing is built and issued on a forty-year lease, the result, as argued by Australians for Native Title and Reconciliation (‘ANTaR’) and the QSNTS, will be ‘effective’—if not legally determined—extinguishment of native title rights for a generation.<sup>55</sup>

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<sup>45</sup> LCA, above n 18.

<sup>46</sup> CLCAC, above n 24.

<sup>47</sup> K Magarey, above n 2.

<sup>48</sup> CYLC, above n 24.

<sup>49</sup> CYLC, above n 24.

<sup>50</sup> CLCAC, above n 24.

<sup>51</sup> D Lavery, above n 23.

<sup>52</sup> CLCAC, above n 24.

<sup>53</sup> NNTT, above n 16.

<sup>54</sup> NNTT, above n 16.

<sup>55</sup> Australians for Native Title and Reconciliation, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, November 2009; QSNTS, above n 20.

As public housing and infrastructure is generally permanent, the non-extinguishment period has been characterised as ‘near perpetual’,<sup>56</sup> ‘perpetual’<sup>57</sup> and ‘100%’<sup>58</sup> suppression of native title rights. The QSNTS argues, the erosion of negotiation rights through the non-extinguishment principle results in traditional owners having reduced opportunity to achieve broader land settlement agreements.<sup>59</sup>

Predicting the outcomes of applying the non-extinguishment principle for public infrastructure, both the LCA and the Cape York Land Council (‘CYLC’) argue that the result is comparable to a form of de facto compulsory acquisition.<sup>60</sup> As the impact upon native title holders’ rights is more significant than perhaps this Bill recognises, both Barrister Michael O’Donnell and the Law Society of the Northern Territory (‘LSNT’) argue that the long term effect of these changes increase the need for further consultation with Indigenous communities.<sup>61</sup>

## 2.7 Issues of discrimination

The submissions raise issues of discrimination present in the Bill, particularly in reference to the rights afforded non-Indigenous Australians in the provision of public housing and infrastructure. As ANTaR highlights, no other Australians are forced into the position of exchanging the ‘capacity to effectively exercise their valuable property rights’ for the provision of public housing and infrastructure.<sup>62</sup> For the North Queensland Law Council (‘NQLC’), the Bill is inherently discriminatory:

It appears that the government takes the view that because a project may be of benefit to a given community it is acceptable to ignore that [sic] legitimate interests of Traditional Owners. The government would never countenance such an approach in relation to the property rights of non-aboriginal Australians.<sup>63</sup>

The NLC argues that native title holders are subject to significant delays and financial burdens through negotiation processes before benefiting from agreements relating to their land, and this complex situation is not faced by non-Indigenous property owners in securing their property rights.<sup>64</sup> The level of rights that this Bill proposes regarding native title parties’ property interests is contrasted with the protections afforded by the freehold test. The CLCAC is of the view that if native title parties’ rights are reduced to a right to comment, without any change to the rights of ordinary freeholders, then the Bill is ‘racially discriminatory and contrary to international law’.<sup>65</sup> The AHRC raises concern at the lack of consideration by the Government of the racially discriminatory implications of this Bill, and encourages the Government to ensure that any potentially discriminatory impacts of the Bill are fully explored and that Australia’s international human rights obligations are explicitly made a key consideration in the development of any future

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<sup>56</sup> Law Society of the Northern Territory, Response to the AGD-FaHCSIA Discussion Paper, September 2009.

<sup>57</sup> M O’Donnell, Response to the AGD-FaHCSIA Discussion Paper, September 2009.

<sup>58</sup> M O’Donnell, above n 57.

<sup>59</sup> QSNTS, above n 20.

<sup>60</sup> CYLC, above n 24; LCA, above n 18.

<sup>61</sup> M O’Donnell, above n 57; LSNT, above n 56.

<sup>62</sup> ANTaR, above n 55.

<sup>63</sup> North Queensland Land Council, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, January 2010.

<sup>64</sup> NLC, above n 26.

<sup>65</sup> CLCAC, above n 24.

amendments.<sup>66</sup> As ANTaR notes, ‘any extension to the ambit of the future act regime contained in the NTA is inconsistent with the Racial Discrimination Act 1975’ (‘RDA’).<sup>67</sup>

The Federal Government counters that as the NTA is a special measure under the RDA, the provisions of the Bill equally classify as a special measure through providing a beneficial objective with the aim of advancing certain racial groups, specifically through the improvement in public housing and infrastructure provision.<sup>68</sup> The NQLC, however, argues that following the application of the RDA in the Northern Territory through the Federal Government Northern Territory Emergency Response (also known as the ‘Intervention’), the continued use of discriminatory acts reflects an ‘inconsistent and short sighted approach the government is exhibiting towards all issues in the Indigenous Affairs portfolio’.<sup>69</sup> The CYLC goes further, submitting that the suspension of the RDA in the Northern Territory is the only reason this Bill can be introduced without requiring its own exclusive suspension.<sup>70</sup> During the debate surrounding the *Wik* case, the Labor Party opposition referred to the use of constitutional powers to pass a racially discriminatory Bill in question in that matter as ‘morally repugnant, socially divisive and would endanger the process of reconciliation’.<sup>71</sup> The majority of submissions, particularly those submitted to the Senate Inquiry, identify the provisions of the Bill as racially discriminatory, clearly at odds with the aims of the Federal Government’s Closing the Gap objectives.

## CONCLUSION

The *Native Title Amendment Act (No.1) 2010* emerged from the general consensus that housing for remote Indigenous communities is in crisis. The Federal Government proposed a solution by amending the rights of native title parties under the NTA. During the consultation process for the Bill, all parties expressed their support for further action to alleviate public housing crises throughout Indigenous communities in Australia. However, there was little support for the amendments based upon: a lack of evidence to support the changes; legal uncertainties; inadequate provisions for consultation; the impact of ‘effective’ extinguishment; racial discrimination; and the exclusion of any criticism of the bureaucratic processes that contribute to delays in public housing provision. The submissions called for further exploration of alternative measures to alleviate the timeframes relevant to public housing and infrastructure provision before weakening the rights of native title holders and applicants through these amendments.

The NTA is fundamentally beneficial legislation; however, the changes enacted in the *Native Title Amendment Act (No.1) 2010* have failed to garner widespread support from those the NTA aims to benefit. The submissions argue these changes reflect governments’ continued reductionist approach to native title as a simplistic system of property rights, rather than as a broader, holistic tool for supporting and enhancing the rights, capacity and well being of Indigenous people in Australia.

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<sup>66</sup> AHRC, above n 12.

<sup>67</sup> ANTaR, above n 55.

<sup>68</sup> AGD-FaHCSIA, above n 8.

<sup>69</sup> NQLC, above n 63, p.7.

<sup>70</sup> CYLC, above n 24.

<sup>71</sup> CYLC, above n 24.

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