
Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)

.....
Australian Human Rights Commission

Submission by the Aboriginal and Torres Strait
Islander Social Justice Commissioner to the
Senate Standing Committee on Legal and
Constitutional Affairs

Table of Contents

- 1 Introduction..... 1**
- 2 Recommendations..... 1**
- 3 The Government’s consultation processes 2**
- 4 Governments should prioritise agreement-making..... 4**
 - (a) Advantages of agreement-making..... 4*
 - (b) The proposed future act process could detract from relationship-building and agreement-making..... 5*
 - (c) The proposed future act process could lead to greater disempowerment 6*
 - (d) Governments should focus on improving agreement-making processes.. 6*
- Appendix 1: Key elements of free, prior and informed consent..... 7**
- Appendix 2: Principles for effective consultation and engagement 9**

1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) in its Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth) (the Bill).
2. The Bill proposes to insert a new subdivision (subdivision JA) into the future acts regime of the *Native Title Act 1993* (Cth) (Native Title Act). It is proposed that subdivision JA would provide ‘a process to assist the timely construction of public housing and a limited class of public facilities ... for Aboriginal people and Torres Strait Islanders in communities on Indigenous held land’.¹
3. Everyone has the right to an adequate standard of living, including adequate housing.² The Commission is acutely aware of the chronic housing shortages in Aboriginal and Torres Strait Islander communities and of the impact this situation has on the health and wellbeing of Aboriginal and Torres Strait Islander peoples.³
4. The Commission recognises that the Bill is aimed at alleviating this critical need and at providing other, much-needed public facilities.
5. However, the Commission is concerned about the potential impact of the proposed future act process on the rights of traditional owners, and is particularly concerned that the Bill has been introduced without adequate consultation. The Commission considers that the Government should focus on agreement-making rather than pursuing future act processes.

2 Recommendations

Recommendation 1: That the Australian Government consult and cooperate in good faith with Aboriginal and Torres Strait Islander peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

¹ Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), 2.

² *International Covenant on Economic, Social and Cultural Rights*, 1966, art 11(1). At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 19 November 2009) (ICESCR). See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 21. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 November 2009) (Declaration on the Rights of Indigenous Peoples).

³ For information on the Close the Gap Campaign for Aboriginal and Torres Strait Islander Health Equality, see http://www.humanrights.gov.au/social_justice/health/index.html. The Aboriginal and Torres Strait Islander Social Justice Commissioner is the Chair of the Close the Gap Steering Committee.

Recommendation 2: That the Australian Government explore options for facilitating agreement-making and improving Indigenous Land Use Agreement processes in preference to introducing a new future act regime.

3 The Government's consultation processes

6. The Commission is concerned that this Bill has been introduced into Parliament without adequate consultation with, and the free, prior and informed consent of, Aboriginal and Torres Strait Islander peoples. This is inconsistent with Australia's international human rights obligations.

7. On 3 April 2009, the Australian Government endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).⁴ The Declaration affirms the right of indigenous peoples to self-determination.⁵ Further, article 19 of the Declaration provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

8. Similarly, the Committee on the Elimination of Racial Discrimination has, in its General Recommendation No 23, called upon parties to the *International Convention on the Elimination of All Forms of Racial Discrimination*⁶ to ensure that that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent.⁷

9. Key elements of the standard of free, prior and informed consent are set out in appendix 1 of this submission. These elements include ensuring that sufficient time, funding and information is available to enable indigenous peoples to effectively participate in a consent process. Further principles for effective consultation and engagement are contained in appendix 2.

10. The Attorney-General has stated that he is 'determined to ensure that the way we consult, and the relationships we forge along the way, distinguish

⁴ GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 November 2009); J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009), at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm (viewed 19 November 2009).

⁵ Declaration on the Rights of Indigenous Peoples, above, art 3. See also *International Covenant on Civil and Political Rights*, 1966, art 1. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 19 November 2009); ICESCR, note 2, art 1.

⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965. At <http://www2.ohchr.org/english/law/cerd.htm> (viewed 19 November 2009).

⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples*, UN Doc A/52/18, annex V at 122 (1997), para 4. At <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed 19 November 2009).

this Government's approach to native title'.⁸ The Commission acknowledges that the Government sought to consult with Aboriginal and Torres Strait Islander peoples regarding the proposed amendments. The Attorney General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs released a discussion paper on the proposed amendments on 13 August 2009.⁹ Submissions in response to the discussion paper closed 4 September 2009. Public information sessions to discuss the proposal were held in capital cities and regional centres in late August – early September 2009. The Bill was introduced into Parliament on 21 October 2009.

11. However, Aboriginal and Torres Strait Islander peoples were not afforded the opportunity to fully participate in decision-making processes regarding these amendments. The timeframe for consultations was brief. There was a lack of consultation with communities that are likely to be directly affected by the proposed amendments. Further, the resource constraints faced by Native Title Representative Bodies and Prescribed Bodies Corporate present a significant barrier to participating in such consultations.
12. The deficiencies in the consultation process are particularly concerning in light of the potential far-reaching impacts of these amendments upon the rights of traditional owners. For example, while the Bill provides for the application of the non-extinguishment principle, the long-term nature of the acts contemplated by the Bill suggests that it may be generations before the native title rights and interests will again have full effect.
13. In addition, traditional owners may not be the beneficiaries of the public housing or other public facilities that are built pursuant to the new future act regime. For example, traditional owners may not live on the land on which the housing is built.
14. It is imperative that governments engage in genuine consultation with Aboriginal and Torres Strait Islander peoples in order to obtain their free, prior and informed consent to the introduction of such measures.
15. Given the fundamental importance of ensuring that the rights of Indigenous peoples are protected in the implementation of legislative or administrative measures, it is also disappointing that the Government's discussion paper did not raise for consideration the implications of the proposed amendments in terms of their potentially racially discriminatory effect. The Commission encourages the Government to ensure that any potentially discriminatory impacts of the Bill are fully explored and that Australia's international human

⁸ R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

⁹ Attorney-General's Department & Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009).

rights obligations are explicitly made a key consideration in the development of any future amendments.

4 Governments should prioritise agreement-making

16. The Attorney-General has stated that the 'Government wants to build new partnerships with the Indigenous community by reaching lasting and equitable agreements'.¹⁰
17. The Attorney-General has also emphasised the potential for native title to 'develop positive and enduring relationships between Indigenous and non-Indigenous Australians' and to be 'a vehicle for the reconciliation we all want to achieve'.¹¹
18. The Commission welcomes the Government's commitment to overcoming disadvantage in Aboriginal and Torres Strait Islander communities, including through addressing chronic housing shortages. However, the Commission considers that these objectives can best be pursued through agreement-making and by working in partnership with Aboriginal and Torres Strait Islander peoples, rather than by diminishing the rights of traditional owners through a new future act process.

(a) Advantages of agreement-making

19. The Government states in the Discussion Paper that it:

recognises that strong relationships between governments, communities and service providers increase the capacity to achieve outcomes, and is determined to make engagement with Indigenous communities central to the design and delivery of programs and services. This includes ensuring that native title holders and claimants are involved in considering how, where and what housing and community infrastructure facilities are built in remote Indigenous communities.¹²

20. In the Commission's view, the best way to create 'strong relationships' and to ensure that traditional owners are 'central to the design and delivery of programs and services' is through agreement-making.
21. The need for a new future act process has not been sufficiently demonstrated. Governments do not need a new future acts process to build houses or other public infrastructure on native title lands. Indigenous Land Use Agreements (ILUAs) are already available to parties to negotiate the building of houses, and other essential services, for Indigenous communities.

¹⁰ R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 7. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum (viewed 16 November 2009).

¹¹ McClelland, *Native Title Consultative Forum*, above, para 45.

¹² Attorney-General's Department & Department of Families, Housing, Community Services and Indigenous Affairs, note 9.

22. An ILUA can provide certainty for all parties, including certainty around future developments and the long term relationship between the parties. ILUAs ensure that there is an ongoing and predictable relationship between the parties.
23. In addition, an ILUA can be holistic, covering a range of issues. It can allow for issues concerning compensation to be dealt with up front, avoiding the need for protracted legal proceedings. An ILUA can also be tailored to the circumstances of the specific community, including traditional laws and customs.
24. By its very nature, an ILUA requires *consent* and *agreement* between the parties. This is consistent with the standard of free, prior and informed consent and the rights of indigenous peoples to:
- determine and develop priorities and strategies for the development or use of their lands or territories and other resources¹³
 - determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions.¹⁴

(b) *The proposed future act process could detract from relationship-building and agreement-making*

25. The new future act process proposed by the Bill has the potential to detract from the Government's goal of building new partnerships and stronger relationships with Aboriginal and Torres Strait Islander peoples.
26. Rather than promote agreement-making and the standard of free, prior and informed consent, the Bill
- places the onus upon registered native title claimants or registered native title bodies corporate to request consultation – this is a particular concern given the resourcing problems faced by such parties
 - restricts the right to request consultation about the doing of the act to registered native title claimants or registered bodies corporate
 - establishes inflexible timelines for 'consultation periods',¹⁵ which may not be sufficient to allow genuine consultation to take place
 - requires the 'action body' to provide a written consultation report to the Minister, but does not require the Minister to make the report public or include any other guarantees of transparency in the consultation process.

¹³ Declaration on the Rights of Indigenous Peoples, note 4, art 32(1).

¹⁴ Declaration on the Rights of Indigenous Peoples, above, art 23.

¹⁵ If no claimant or body corporate requests to be consulted, the consultation period ends 2 months after the specified notification day. If there is such a request, the consultation period ends 4 months after the specified notification day. Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, proposed s 24JAA(19).

27. The Bill does not exclude the ILUA process but does nothing to encourage its use. There are no safeguards within the Bill to ensure that the proposed future act process will be used only as a measure of last resort. At the very least, governments should be required to negotiate in good faith in an attempt to reach an ILUA before the future act processes are available to them.

28. The availability of a 'fast track' future act process may in fact discourage governments from seeking to negotiate and enter into agreements with Aboriginal and Torres Strait Islander communities regarding the provision of public housing. The new process may even jeopardise ILUA negotiations currently under way, and reduce goodwill among the parties to negotiate broader settlements.

(c) *The proposed future act process could lead to greater disempowerment*

29. The Commission is also concerned about the potential of the Bill to undermine traditional law, governance and land ownership structures. If decisions regarding development and public housing are not controlled by the community, this can lead to greater disempowerment. It can also contribute to divisions within communities. For example, the Bill does not acknowledge that there may be distinctions between the traditional owners and the community that live on the land and receive the benefit of public housing.

(d) *Governments should focus on improving agreement-making processes*

30. If the Government is concerned that delays in agreement-making processes have impeded the construction of housing and other public facilities, the Commission recommends that the Government should explore reforms to improve the efficiency of agreement-making processes instead of introducing a new future act process.

31. Such reforms could include requiring governments to provide tenure information early in negotiating processes and to adequately fund the native title parties to participate in negotiations. Governments should also explore the potential to work with representative bodies to develop template ILUAs, possibly targeted specifically at the development of public housing and other infrastructure, to facilitate agreement-making.

32. It is by no means clear that options for improving agreement-making processes have been exhausted such that the proposed future act process is necessary.

Appendix 1: Key elements of free, prior and informed consent¹⁶

WHAT?

Free – should imply no coercion, intimidation or manipulation.

Prior – should imply consent has been sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of indigenous consultation / consensus processes.

Informed – should imply that information is provided that covers (at least) the following aspects:

- a. The nature, size, pace, reversibility and scope of any proposed project or activity
- b. The reason(s) or purpose of the project and / or activity
- c. The duration of the above
- d. The locality of areas that will be affected
- e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle
- f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
- g. Procedures that the project may entail.

Consent - Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

The inclusion of a gender perspective and the participation of Indigenous women are essential, as is the participation of children and youth as appropriate. This process may include the option of withholding consent.

¹⁶ United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3 (2005), paras 46 – 48. At http://www.humanrights.gov.au/social_justice/conference/engaging_communities/report_of_the_international_workshop_on_fpic.pdf (viewed 23 November 2009). See also United Nations Commission on Human Rights, *Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 (2005). At <http://www2.ohchr.org/english/issues/indigenous/docs/wqip23/WP1.doc> (viewed 23 November 2009).

Consent to any agreement should be interpreted as Indigenous peoples have reasonably understood it.

2. WHEN?

Free, prior and informed consent (FPIC) should be sought sufficiently in advance of commencement or authorisation of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

3. WHO?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN organisations and governments should ensure a gender balance and take into account the views of children and youth as relevant.

4. HOW?

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

5. PROCEDURE AND MECHANISMS

Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms.

As a core principle of FPIC, all sides of an FPIC process must have equal opportunity to debate any proposed agreement / development / project.

'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s) as appropriate, or through any other agreed means, on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples, or an impact on their rights to their territories and / or natural resources.

FPIC could be strengthened by establishing procedures to challenge and independently review these processes. Determination that the elements of FPIC have not been respected may lead to the revocation of consent given.

Appendix 2: Principles for effective consultation and engagement¹⁷

1 Guidelines for engaging with Indigenous communities

1.1 *A human rights-based approach to development*

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognise the cultural distinctiveness and diversity of indigenous peoples.
- Governments should consider the introduction of constitutional and or legislative provisions recognising indigenous rights.
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives.
- Such participation shall be based on the principle of free, prior and informed consent, which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand.
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution.

1.2 *Mechanisms for representation and engagement*

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities.
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision-making structures through which they engage with other sectors of society.

¹⁷ The following guidelines are adapted from: Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the Marginalised: Partnerships between indigenous peoples, governments and civil society*, 15 August 2005 (2005), at http://www.humanrights.gov.au/social_justice/conference/engaging_communities/index.html#link2 (viewed 23 November 2009); Australian Human Rights Commission, *Draft guidelines for ensuring income management are compliant with the Racial Discrimination Act* (2009), at http://www.humanrights.gov.au/word/race_discrim/RDA_income_management2009_draft.doc (viewed 23 November 2009); Parshuram Tamang, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, UN Doc PFII/2004/WS.2/8 (2005), at http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc (viewed 23 November 2009); Australian Government, *Best Practice Regulation Handbook* (2007), at <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 23 November 2009).

1.3 *Design, negotiation, implementation, monitoring and evaluation*

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes.
- Indigenous peoples and communities should be invited to participate in identifying and prioritising objectives, as well as in establishing targets and benchmarks (in the short and long term).
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation.
- In engaging with indigenous communities, governments and the private sector should adopt a long-term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights, the changing needs and the aspirations of indigenous communities.

1.4 *Capacity-building*

- There is a need for governments, the private sector, civil society and international organisations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights, so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them.
- Similarly, there is a need to build the capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights-based approach to development so that they are able to effectively engage with indigenous communities.
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants.
- There is a need for human rights education on a systemic basis and at all levels of society.

2 Principles for consultation

The consultation process should be proportionate to the potential impacts of the proposed measure.

2.1 *Initial Considerations*

- Enter consultations in good faith and with a view towards establishing or improving **long term working relationships** with Aboriginal communities.
- **Recognise the diversity of Aboriginal and Torres Strait Islander**

communities. Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.

- Be mindful that well coordinated consultation processes are **time and resource intensive.**
- Do not assume that communities are familiar with your agency or that they understand your mandate or business.
- Be aware that there may be **misinformation** and / or a lack of understanding of the most basic issues related to your consultation topic.
- Make every effort to understand, acknowledge and **respond sensitively** to the alienation that community members may feel from government and government processes.

2.2 Effective engagement

- **Involve Aboriginal and Torres Strait Islander people at the outset.** Community leaders (for example traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.
- Respectfully **acknowledge** the involvement that participants have had historically in addressing the issue that is being discussed.
- **Identify the best ways to promote community consultation sessions.** This may involve advertisements in local newspapers, written notices on community notice boards or announcements on community radio.
- **Ensure that the conduct of consultations allow affected communities to have control over timeframes.** It is important to respect a community's right to choose the timing and location of consultations. It is also important to adopt a flexible approach to the consultation process. Be mindful that cultural events or religious priorities and family and work responsibilities may impact on the availability of community members.
- **Ensure that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting: traditional land owners, the Prescribed Body Corporate (PBC), local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital.
- **Ensure that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.
- **Have a prior understanding of and respect for local dispute resolution and decision-making processes.** Where difficulties arise in relation to reaching agreement between various communities or groups during consultations, do not get involved. However, you may have to request assistance from, or resource, an independent person or body to facilitate

resolution of the dispute.

- Consultations must be based on **mutually agreed processes** and utilise **local knowledge** in order to achieve sustainable outcomes in Aboriginal and Torres Strait Islander communities. Provide people with a clear idea of **how their input** will be included in decision-making processes.
- Consider how you will structure your sessions to answer your consultation questions and **maximise the quality of input from participants**.
- Be clear about **likely barriers** to stakeholder participation. You should also consider how you will interact with target groups including young people, older people, people with disabilities, mothers etc.
- Keep consultations **focused, interactive and deliberative**. Creating an environment where people are comfortable with sharing their views may improve the quality of attention and information received from participants.
- **Where you need to consult with large numbers of people, providing for small group engagement is preferable to ensure that all people have an opportunity to give and receive information.** In some cases, communities or groups may demonstrate preferences for separate meetings based on age, gender or elder status.
- **Where possible, ensure that engagement is structured in a way to provide an incremental skills building process for participants.** For example, community members could develop a more comprehensive understanding of community development practices.
- Use various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation.
- It is important that government officers check for **participant understanding** periodically during the course of any consultation session.
- If necessary, consultation sessions should be **small and targeted** around specific stakeholder groups to protect privacy and confidentiality.
- The consultation should aim for a **gender balance** in relation to overall participant representation.
- Reach agreement with communities about **how feedback will be provided** after the consultation phase is concluded.
- Identify the best ways to **keep communities informed** about developments regarding the issue / proposal.

2.3 Minimum standard of information and transparency

- Be clear about what **outcome(s)** the proposal seeks to achieve and what **issue(s)** the proposal seeks to address.
- Be clear about the potential and real **risks, costs** and **benefits** of the proposed measure.
- Be clear about what **aspects of the proposed measure** Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern.

- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with a particular activity, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.
- **Notice of proposed measure(s) must be given sufficiently in advance of its authorisation in order to give time for the community to reach informed consent or to arrive at considered points of difference.** Adequate resourcing should be provided to communities and specific stakeholder groups to support them in their discussions and decision making, prior to a formal consultation process. It is important to be respectful of Aboriginal and Torres Strait Islander peoples' timeframes to ensure inclusiveness around issues. Timeframes may be subject to cultural ceremonies and law, climatic and geographic conditions.
- **Government officers should provide full information regarding the parameters of the consultation, including what options are being considered as part of the consultation.** It is important that you have clear parameters around your consultation process, for example measuring the benefit and effectiveness of a specific measure. However your consultation process should be sufficiently open-ended so that community members have an opportunity to discuss concerns or propose alternative methods that, in their view, may achieve the same or enhanced outcomes. These views should be formally noted. Participants should have an opportunity to fully communicate their wishes and aspirations as they relate to the future of their communities.

2.4 Implementation, monitoring and evaluation

- Provide **feedback** to communities as agreed at the front end of the process, including how decision-making was influenced by the consultation process.
- Explain to community members the **likely timeframes** for the first phase of implementation.
- Identify how you will **accurately collect** and **record data** during consultations.
- Consider what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures.
- Notify communities in a timely manner when **outcomes** are announced.
- Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.
- To ensure that there is **transparency** around the consultation process and that consultation findings correspond to decision making, government agencies may like to appoint an independent observer or request the assistance of the Commonwealth Ombudsman.
- Explain what, if any, options community members have to call for a **review of decision-making**.

- **Government agencies should publish their consultation protocols.** This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate / not feasible.
- **Regular monitoring** should be undertaken to ensure that actions taken for the purposes of the legislation are aligned with its core objectives.
- Government agencies should **evaluate** and **continuously improve** their consultation processes.
- Be **approachable, contactable** and meet the **commitments** you make to individuals and organisations throughout the consultation process.
- Remember that consent is NOT valid if it is obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with **ALL** of the information relevant to a proposed measure.