



**NORTHERN
LAND COUNCIL**

Submission to the Northern Territory Government

on

**NORTHERN TERRITORY STRATEGIC WATER PLAN
DIRECTIONS PAPER
SEPTEMBER 2021**

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1. About the Northern Land Council

The Northern Land Council (NLC) was established in 1973 and following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory (NT) to acquire and manage their traditional lands and waters. The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the Land Councils as follows:

- Identify relevant Traditional Aboriginal Owners and affected people.
- Ascertain and express the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters.
- Consult with traditional Aboriginal owners and other Aboriginal people affected by proposals.
- Negotiate on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim.
- Assist Aboriginal people carry out commercial activities.
- Obtain Traditional Owners' informed consent, as a group.
- Assist in the protection of sacred sites.
- Direct an Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

In 1994 the NLC became a Native Title Representative Body under the *Native Title Act 1993* (Cth), whose role and functions are set out under Part 11, Division 3 of the Act.

The NLC represents more than 50,000 Aboriginal people and assists its constituents by providing services in output areas including land, sea and water management, land acquisition, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice. Relevant to this submission is a responsibility to protect the rights and interests of Traditional Owners and other Aboriginal people with interests over the area of the NLC region – more than 210,000 square kilometres of land and over 85% of the coastline.

The NLC's vision is for a Territory in which the rights and responsibilities of every Traditional Owner are recognised and in which Aboriginal people benefit economically, socially and culturally from the secure possession of their lands, freshwater, seas and intellectual property. The NLC's mission is to assist Aboriginal people in the northern region of the NT to acquire and manage their traditional lands and seas, through strong leadership, advocacy, industry engagement and management.

This submission is based on the NLC's functions and its long history and experience working with Aboriginal people in the NT, and has been informed by resolutions about freshwater management that were made by NLC Regional Councils throughout 2021.

Within this submission the NLC refers to Aboriginal people who are traditional Aboriginal owners in the NT as defined under the Aboriginal Land Rights Act. Reference to the term Traditional Owner is used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act) and native title holders (as defined in the Native Title Act).

2. Introduction and context

*'The Northern Territory Strategic Water Plan will set the agenda to 2050 to address all aspects of water security in the Territory, from ensuing effective governance, regulation and management of water, to certifying that drinking water is safe and reliable and that water is used efficiently and sustainably to grow the economy and protect the environment.'*¹

The NLC welcomes this opportunity to provide comments on the NT Strategic Water Plan Directions Paper. The NT Government has set an ambitious remit to address all aspects of water security in the NT, and the NLC seeks that Government commits to engaging in meaningful ways with Aboriginal people throughout the development and implementation of the Strategic Water Plan.

Aboriginal people are significant stakeholders in water management. In the NT, Aboriginal people make up more than 30 per cent of the population and hold extensive rights and interests, including freehold tenure over around 50 per cent of the land mass and 85 per cent of the coastline, with much of the remaining land subject to native title. Aboriginal people have significant roles as owners, managers and major investors in policy and programs relevant to their cultural, economic, social and environmental interests for lands and waters throughout the NT.

Of the Aboriginal population in the NT, almost 80 per cent of people live in remote or very remote areas, including in remote communities, homelands and outstations. Areas outside of urban centres are places where major projects that rely on water are most likely be located while the majority of the Aboriginal population are subject to water supply with minimal or no regulatory oversight.

The large proportion of Aboriginal people in the NT, the locations where the majority of the Aboriginal people reside, taken together with the deep and personal ties that Aboriginal people have to their country (encompassing land, water, biodiversity and people) means that Aboriginal people and communities are disproportionately impacted by water management arrangements in the NT.

This submission draws attention to federal and territory obligations for engaging with Aboriginal people, and ensuring their voices are heard in decisions that affect them. To this end, Aboriginal people should not be treated as any other interested party in relation to water management in the NT, but must be front and centre as part of the development of the Strategic Water Plan.

The feedback provided in this submission is based on NLC's long history of engaging with Aboriginal people about water, numerous previous submissions about freshwater management in the NT, and most recently from sessions with NLC Regional Councils held during 2021 where the following principles for freshwater management in the NT were resolved:

1. Aboriginal people retain cultural and kinship responsibilities and obligations under customary law to look after land and water.
2. Responsibilities to maintain and strengthen our distinctive cultural relationship with lands and waters must be supported and maintained for the benefit of future generations.
3. Rights to access and use water for cultural and social practices under Native Title Law must be upheld and any diminution of these rights must be fairly negotiated or compensated.

¹ Source: Northern Territory Strategic Water Plan Directions Paper page 2.

4. Aboriginal people have a right to fair and equitable access to water for livelihoods and economic development.
5. Aboriginal people must be central to planning and decision-making processes about the management of land and water that may affect our communities or country.
6. Aboriginal people must be meaningfully consulted about the development, implementation and evaluation of all water policy, legislation, planning and administrative functions that may affect us, with a consultation process that enshrines the principles of free prior and informed consent.
7. Aboriginal people have the right to determine and develop our own priorities and strategies for the sustainable management or use of water.
8. Decisions about allocation of water must incorporate identification and protection of cultural values and ecosystems dependent on water, applying best practice methodologies. These processes must be consistently applied and legally binding so adequate water remains in systems to ensure cultural values are not compromised now or in the future.
9. The equitable participation of Aboriginal people in management and decision-making processes about water is determined with Aboriginal people, costed and adequately resourced.

These principles form the basis of this submission on the Directions Paper and where relevant, our submission points to other references to support our recommendations. It should be noted that none of the recommendations made in this submission are new ideas. They are all changes that have been called for by Aboriginal people for a number of years, but never afforded meaningful government consideration or commitment. The development and implementation of an NT Strategic Water Plan provides the opportunity to change the way that government works with Aboriginal people and in doing so begin to redress historic inequalities. This opportunity must not be wasted.

As it stands, this Discussion Paper does not reflect a meaningful commitment to, and recognition of Aboriginal Territorians, especially in light of the Government's commitment to institutional reforms under Closing the Gap and Treaty Commissions work to date. It does pose some small scale changes to the ways that government currently manages water in the NT; however, it does not embed the recognition made through the NT Government's Everyone Together Aboriginal Affairs Strategy (2019-2029) that Aboriginal people were the prior owners and occupiers of the waters in the NT, and it lacks a genuine commitment to *'walking beside each other in a partnership approach, based on respectful and productive relationships.'*²

The NT Government has committed to reframing the way that it engages with Aboriginal people,³ and improve in areas that have not worked in the past. For the Strategic Water Plan to be a success and for the aims it sets out to achieve to be realised, the NT government must follow through with these commitments.

The NLC seeks to improve the opportunities for Aboriginal people to have meaningful voices in all aspects of water management across the NT. Our submission poses four questions that are frequently asked by our constituents and provides advice and recommendations to government on each to be considered when developing the Strategic Water Plan:

- Who should make decisions about water?

² Everyone Together – Aboriginal Affairs Strategy 2019-2029. Northern Territory Government.

³ Everyone Together – Aboriginal Affairs Strategy 2019-2029. Northern Territory Government.

- How do we make sure our knowledge, culture and responsibilities are respected and our views heard?
- How do we make sure Aboriginal people have access to safe and secure water?
- Why are Aboriginal water values not respected under NT law?

The following provides a list of recommendations that are included as part of this submission to the NT Government on the NT Strategic Water Plan Directions Paper:

Recommendation 1: That the NT Government establishes an independent NT Water Commission to undertake the functions currently held by the Controller of Water Resources, and that the Government commits to engage in meaningful ways with all stakeholders to determine the operating arrangements for the Commission. The membership must include Aboriginal representatives with the process of determining representation to be agreed in collaboration with Land Councils.

Recommendation 2: That the NT Government establishes multiple integrated catchment management bodies covering the NT to undertake integrated planning and coordination of land, water and biodiversity. These bodies must reflect the local communities they service, with their operation, function and representation co-designed with Aboriginal people, communities and stakeholders.

Recommendation 3: That the NT Government commits to defining a base level of service for all remote Aboriginal communities and that the provision of safe and reliable drinking water is available to all Territorians. The level of service be equitable and ensure that Aboriginal Territorians are afforded the same protections for their water as non-Aboriginal people. The levels of service must be developed in consultation with communities that are directly affected.

Recommendation 4: That the NT Government commits to undertaking a holistic reform of the NT Water Act in accordance with international, national and territory obligations. The process must meet the requirements of the National Agreement on Closing the Gap, and result in water legislation that reflects the unique characteristics of the NT and its people.

3. Priority areas to improve water security in the NT

I. Who should make decisions about water?

‘As Traditional Owners we have an inherent right to make decisions about cultural and natural resource management in north Australia.’⁴

The NLC’s constituents are increasingly concerned that they are being removed from decision-making that affects their cultural and kinship responsibilities to look after water. The Principles from NLC Regional Councils include Principle 1: *‘We retain cultural and kinship responsibilities and obligations under customary law to look after land and water’*. In order to meet these responsibilities, our constituents expect to have a meaningful role in determining how water is managed – Principle 5: *‘We must be central to planning and decision-making processes about the management of land and water that may affect our communities or country’*.

This type of approach, whereby Aboriginal people and their traditional authorities are central to the management of lands and waters is reflected in the Everyone Together Aboriginal Affairs Strategy.

Through the Strategy, the NT Government commits to respecting *‘traditional authority and governance systems by working with and being guided by local Aboriginal elders and leaders’*. Further, the Strategy recognises there is a need for the Government to improve the way it works with Aboriginal Territorians. It acknowledges that previous methods have not been successful, and there is a promise made to correct how the government works with Aboriginal people to achieve equality.

At a federal level, the Productivity Commission provided advice to the Commonwealth Government, recommending that Aboriginal people’s *‘reverence and cultural responsibility for rivers and groundwater systems, and their desire to participate in all significant water-related processes and decisions’⁵* be included in a renewed National Water Initiative. The National Agreement on Closing the Gap arises from a commitment to a fundamentally new way of developing and implementing policies and programs that impact on the lives of Aboriginal people, including for inland waters.⁶

The approach to making water resource management decisions in the NT is at odds with commitments at territory and federal levels to recognise the importance of Aboriginal people being central to decision-making.

The Directions Paper states that the *‘principal decision-maker for the allocation of water resources, including issuing of water extraction licences’⁷* is the Controller of Water Resources, an individual person who is also the Chief Executive Officer of the Department of the Environment, Parks and Water Security.

In the last eighteen months the NLC has raised a number of concerns about water management and licensing decisions made by the Controller. These have included two review requests to the Minister for Environment under Section 30 of the *Water Act 1992 (NT)* to reconsider water extraction licence decisions made by the Controller of Water Resources. In these requests, the NLC, on behalf of our constituents submitted that the decisions gave inadequate consideration to potential impacts on

⁴ Source: Mary River Statement, 2009

⁵ Source: National Water Reform 2020 Productivity Commission Inquiry Report No. 96, 28 May 2021, page 6.

⁶ National Agreement on Closing the Gap July 2020.

⁷ Source: NT Strategic Water Plan Directions Paper, page 6.

water-dependent cultural values; that the decisions did not adhere to the Aboriginal water reserve legislation and policy; and that there was insufficient investigation into the potential impacts to existing users, including users on land Aboriginal land.

Ultimately one decision was overturned (10,000ML/yr)⁸, while the other was upheld (3,392ML/yr), although as part of the Minister's findings on the latter it was recognised that the decision-making process was flawed⁹. In addition to these reviews, the Central Land Council sought a review of another licence decision on behalf of their constituents (totaling 40,000ML/yr)¹⁰.

That Land Councils and their constituents felt the need to make these water extraction licence decision review requests reflects the concerns held by Aboriginal people that the Controller is making decisions that are not sound. There is a significant lack of trust among our constituents in the Controller and the water licensing and regulation arm of the NT Government where decisions are seen as lacking transparency and accountability.

Water governance and management in the NT must change. The role of the Controller of Water Resources goes against Territory and Federal commitments to Aboriginal people who seek meaningful involvement in water management decisions in the NT. The Controller function is too important to be held by a single individual who also holds significant other roles in the NT bureaucracy. Such an arrangement also exposes the Government to the risk of real or perceived conflicts of interest, further undermining transparency and accountability.

The NT Government, through the Strategic Water Plan, has an opportunity to improve the way that decisions are made about water, and this opportunity cannot be wasted. The Directions Paper acknowledges that *'More meaningful engagement with Aboriginal people about water and around decision-making on water-related rights, interests, services, values and aspirations, is an opportunity for the Northern Territory.'*¹¹

As such, the NLC seeks that the NT Government immediately establishes an independent Water Commission to undertake the functions of the Water Act currently authorised to the Controller of Water Resources.

The Commission must be independent from government, for example established as a statutory authority with independent funding sources and staffing. In order to have trust and transparency in the process, the NT Government must commit to engage in meaningful ways with all stakeholders to determine the operating arrangements for the Commission. It is critical that the Commission has Aboriginal representatives, and that the NT Government works with the Land Councils to establish how appropriate membership should be determined.

Recommendation 1: That the NT Government establishes an independent NT Water Commission to undertake the functions currently held by the Controller of Water Resources, and that the Government commits to engage in meaningful ways with all stakeholders to determine the operating arrangements for the Commission. The membership must include Aboriginal representatives with the process of determining representation to be agreed in collaboration with Land Councils.

⁸ Refer to NT Land Corporation licence decision TLAM10002.

⁹ Refer to North Star Pastoral licence decision TLAM10001.

¹⁰ Further information regarding the review of the water extraction licence issued to Fortune Agribusiness is available from the Central Land Council website.

¹¹ Source: NT Strategic Water Plan Directions Paper, page 14.

II. How do we make sure our knowledge, culture and responsibilities are respected and our views heard?

‘Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia. The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and customs. First Nations peoples of the Northern Territory never ceded sovereignty of their lands, seas and waters.’¹²

The Mary River Statement describes the way that land, water and people are inextricably connected, highlights that there must be a unity of land, water and Aboriginal people across Northern Australia, and states that *‘water and land cannot be separated. We look and care for country together not separate...’*¹³ The National Agreement on Closing the Gap also recognises the intrinsic link between Aboriginal people, land and waters – *Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters.*¹⁴

In the NT, we are yet to see the meaningful inclusion of Aboriginal cultural connections, and recognition of the intrinsic link between land, water and people in the ways that government undertakes land and water management, and our catchments are suffering.

For example, the 2016 State of the Environment Biodiversity theme report found that clearing and fragmentation of native vegetation was a significant pressure on biodiversity within the Daly River catchment, while there was evidence of ongoing mammal declines continued to be evident in the Top End of the NT.¹⁵ The Inland Water theme report found that groundwater abstraction and other pressures raise risks for groundwater dependent ecosystems in the Daly catchment, with recognition that full use of the total extraction entitlements in the Daly River would have significant impacts on the fish populations of the system.¹⁶

By its own admission, the NT Government recognises the need to change its approach, and respect the place that Aboriginal people have as prior owners and occupiers of lands, waters and seas of the NT. The Everyone Together Aboriginal Affairs Strategy makes the commitment to *‘Place Aboriginal culture, beliefs and governance at the centre of how government engages with and designs policies, services and programs.’*¹⁷

It is imperative that the NT Government takes the opportunity afforded through the development of the Strategic Water Plan to redefine the way that land, water, people and cultural connections are recognised in the NT, and commit to holistic catchment management across the whole of the NT.

This approach is not entirely new to the NT - holistic catchment management has occurred in the past. The Daly River Management Advisory Committee was established in 2006 to advise the NT Government on ways of achieving the highest standards of management of lands and other resources (including water) across both production and conservation in the Daly River region. The Advisory Committee was an independent community committee with a mandate to bring a diversity

¹² Source: The Barunga Agreement – A Memorandum of Understanding between the Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council and the Northern Territory Government.

¹³ Source: Mary River Statement 2009.

¹⁴ Source: National Agreement on Closing the Gap July 2020, outcome 15. Available at https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf

¹⁵ Refer to State of the Environment 2016 – Biodiversity report.

¹⁶ Refer to State of the Environment 2016 – Inland water report.

¹⁷ Source: Everyone Together – Aboriginal Affairs Strategy 2019-2029 page 6.

of skills, perspectives and opinions to bear on land use, conservation and sustainable use of resources.¹⁸

Along with the Advisory Committee, the Daly River Aboriginal Reference Group was also in operation. However, since these groups were dissolved in 2013¹⁹ there has been no forum for Aboriginal people, community and stakeholders to be involved in holistic consideration of strategic land and water planning and management.

Following the dissolution of groups in the Daly, the NT Government sought to replace the Advisory Group with a single Territory Catchments Advisory Committee.²⁰ This group appears to never have eventuated, and in 2016 the Government replaced a catchment committee approach with the establishment of committees who would focus only on water allocation and management activities for individual water resources.²¹

However, even the water committee process is failing. As part of their assessment into the implementation of the National Water Initiative, the Productivity Commission included examples of inadequate and ineffective practice associated with community partnerships. Of note for the NT is that: *'in 2017 there were a total of 80 people appointed to water advisory committees. As at 1 March 2021 there are 12. As there are no other formal mechanisms for the NT Government to involve community and stakeholders in water allocation planning, the substantial diminishing of water advisory committees since 2017 is of concern to the NLC. (sub. DR134, pp. 13–14).'*²²

The narrow scope of water advisory committees in the NT – *'providing advice to the Controller on the development of water allocation plans'*²³, along with the small geographical coverage and decline in community and stakeholder involvement is not adequate to meet the recognition that the management land and water cannot be separated.

Of critical concern to the NLC is that Government representatives are required to make determinations about acceptable land or water activities, while only considering one component of the development (e.g. land clearing separated from water extraction licensing). These decisions are made in a siloed approach and do not appear to consider relevant expertise on the potential impacts to the ecological systems as a whole.²⁴

This type of issue was described in 1990 as the 'turbulent boundary between water science and water management' – *'A system that puts untrained people in charge of complex ecosystems can only work if those people have access to adequate advice. When they know so little about the*

¹⁸ Further information about the Daly River Management Advisory Committee is available from their strategic plan, available at https://cmsexternal.nt.gov.au/_data/assets/pdf_file/0020/254540/DRMAC-strategic-plan-2012-15-Revised.pdf

¹⁹ An interview with the Chair of the Daly River Management Advisory Committee when the committee was disbanded is available at <https://www.abc.net.au/news/rural/2013-07-31/top-end-valley/4856026>

²⁰ Refer to 2013 ABC News article – New water group to replace Daly and Darwin committees at <https://www.abc.net.au/news/rural/2013-07-31/new-water-committee/4858622>.

²¹ Refer to 2016 ABC News article – Back to the future for Northern Territory water policy as CLP Government reinstates advisory committees <https://www.abc.net.au/news/rural/2016-05-25/territory-government-policy-reinstates-water-advisory-committees/7445014>

²² Source: National Water Reform 2020 Productivity Commission Inquiry Report Assessment of National Water initiative implementation progress (2017-2020) No. 96, 28 May 2021 page 204.

²³ The functions of water advisory committees is available at <https://depws.nt.gov.au/boards-and-committees/water-advisory-committees/water-advisory-committees>.

²⁴ The NLC has raised concerns of this nature through numerous submission on land clearing applications during 2021.

*systems they manage that they do not even know what they don't know, and if the technical expertise is isolated from such managers, then we have a recipe for disaster.*²⁵

Aboriginal people, as the prior owners and occupiers of the land, seas and waters of the NT are uniquely positioned to inform catchment management approaches at local scales and there has been a shift in the last two decades with the wide-spread acceptance that Aboriginal people have technical expertise based on their traditional laws and customs. The expertise held by Aboriginal people must be incorporated for landscape management practices to be effective in the NT. At a national level, the Royal Commission into National Natural Disaster Arrangements, describes how local knowledge has successfully informed land management for tens of thousands of years, and that local Aboriginal knowledge is no longer solely related to inform fire hazard reduction.²⁶

It is paramount that Aboriginal people now have the opportunity to be meaningfully engaged in all aspects of catchment management, including water resource management – NLC Regional Council Principle 5: *'Aboriginal people must be central to planning and decision-making processes about the management of land and water that may affect our communities or country.'*

The NLC is therefore calling for the establishment of catchment advisory committees and Aboriginal reference groups. These groups must be used to guide all aspects of land and water management, planning and projects within catchments using integrated catchment management approaches, including: seeking the proper balance between humans and impacts that are caused to ecosystems; embedding principles that do not consider land, water and biodiversity management as separate activities; facilitating dialogue between Aboriginal people, scientists, stakeholders and policy makers; supporting the coordination across government and non-government organisations; and regarding the catchment as the critical landscape unit for management.²⁷

Other jurisdictions in Australia have committed to catchment management approaches whereby land and water management is promoted in an integrated way, with government empowering communities to be at the forefront of decision-making. While it can be difficult and lengthy to build cooperative relationships, catchment management outcomes are improved when integration occurs²⁸ and approaches of this nature should be explored by the NT Government.

For example, in Victoria Catchment Management Authorities are responsible for the integrated planning and coordination of land, water and biodiversity management in each catchment and land protection regions. Each Catchment Management Authority is structured to maximise community involvement in decision-making.²⁹ As recently as 2019, the South Australian Government reformed how landscapes are managed by *'putting community at the heart of sustainably managing the state's soil, water, pest plants and animals, and biodiversity.'*³⁰

²⁵ Peter Cullen 1990. The turbulent boundary between water science and water management. *Freshwater Biology* (1990) 24, 201-209.

²⁶ Refer to 2020 Royal Commission into National Natural Disaster Arrangements – Chapter 18: Indigenous land and fire management. Report tabled in Parliament 30 October 2020.

²⁷ Refer to Stewardson et al 2017. *Water for the Environment from Policy and Science to Implementation and Management*. Academic Press.

²⁸ For example, refer to <https://wentworthgroup.org/wp-content/uploads/2014/01/Williams-Catchment-Management.pdf>

²⁹ Further information on Victorian CMAs is available at <https://viccatchments.com.au/about-us/our-cma-regions/>

³⁰ Further information on the South Australian model of catch management is available at <https://www.landscape.sa.gov.au/>

The NLC calls on the NT Government to establish holistic catchment management bodies covering the whole of the NT, and empower these catchment bodies to be responsible for the integrated planning and coordination of land, water and biodiversity specific to each region.

Fundamental to this model will be authorising communities to have a say in how these bodies operate. In each region it will be imperative that the operation, function and representation of the bodies be reflective of the local communities they service and reflect commitments made through the Everyone Together Aboriginal Affairs Strategy, including the commitment that *'Methods of engagement are place-based to suit local needs, languages, timeframes and cultural protocols.'*³¹

Recommendation 2: That the NT Government establishes multiple integrated catchment management bodies covering the NT to undertake integrated planning and coordination of land, water and biodiversity. These bodies must reflect the local communities they service, with their operation, function and representation co-designed with Aboriginal people, communities and stakeholders.

³¹ Source: Everyone Together – Aboriginal Affairs Strategy 2019-2029 page 6.

III. How do we make sure Aboriginal people have access to safe and secure water?

‘Water use out bush is mostly unregulated and our mob are very worried. Major towns have legal protections under the NT’s Water Act and other laws but the drinking water in most of our communities is not protected. This needs to change. We want urgent action to protect water supply and water quality for all Territorians.’³²

It is encouraging that the NT Government identifies water quality in remote communities as a priority in the Directions Paper. As a signatory to the international agreement, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Australia has committed to achieving universal and equitable access to safe and affordable drinking water by all by 2030 (Sustainable Development Goal 6.1).³³

The Productivity Commission provides a summary of the links between water quality and health outcomes in remote communities as part of its 2020 inquiry report into the National Water Initiative. Included in their summary is the role that water quality plays as a protective factor against infectious diseases; the role that water can play in enabling on-country medical care such as dialysis treatment; and the fundamental consideration of water supply which is linked to the ability to have housing upgrades and new buildings, as required to address overcrowding issues in communities.³⁴

These are all incredibly important considerations for Aboriginal people living in remote areas. However, under current arrangements water supply, and the rules governing safe drinking water vary, with remote Aboriginal communities, outstations and homelands being more likely to have compromised drinking water supplies than other parts of the NT.³⁵ This inequity is aggravated by bureaucratic arrangements that see drinking water regulation and governance fragmented between remote and urban regions.³⁶

The NLC’s constituents are greatly concerned about the volume of water available in communities, and whether the water is safe to drink. Based on the information included in the Productivity Commission’s assessment of the National Water Initiative, health related parameters were met in 62 of 72 remote communities serviced by Power and Water’s subsidiary Indigenous Essential Services.³⁷ This equates to 14% of remote NT communities with a drinking water supply that does not meet Australian drinking water guidelines for health parameters. This is the highest non-compliance level across the nation and is clearly not acceptable.

In addition to the health non-compliance there are also instances where drinking water does not meet Australian guideline levels associated with aesthetic measures. The aesthetic quality of water is concerning for remote residents as it impacts on the ability to provide services in communities. For example, good water quality is required for health services such as dialysis treatments. A number of

³² NLC calls for urgent action on water security for our mob. NLC media release 22 April 2021.

³³ *Transforming Our World: The 2030 Agenda for Sustainable Development* A/RES/70/1. United Nations.

³⁴ Further information is available from the Productivity Commission National Water Reform 2020 Inquiry Report no. 96 Urban water services: regional and remote communities Supporting Paper G (May 2021).

³⁵ The Central Land Council submission to the Productivity Commission on the National Water Initiative highlights the failures of NT Government to provide safe and secure water supply to communities across the NT. The submission is available at online through the Productivity Commission website.

³⁶ Howey and Grealy 2020. Securing supply: governing drinking water in the Northern Territory. *Australian Geographer* (2000) 51:3.

³⁷ The Productivity Commission’s Assessment of National Water initiative implementation progress (2017-2020) Inquiry Report No. 96 (May 2021) provides a summary of water quality compliance on page 170.

remote communities in NLC's jurisdiction wish to access remote dialysis treatments on-country, but are not able to due to the poor water quality in their community.

In 2020, 61 of the 72 (or 85%) remote communities serviced by Indigenous Essential Services had water supplies that did not meet health or aesthetic guideline levels.³⁸ As part of its findings on the National Water Initiative, the Productivity Commission noted: *'It is the Commission's view that the provision of safe and reliable drinking water should be part of the basic level of service across all States and Territories. A renewed [National Water Initiative] should include a commitment to ensure access to safe and reliable drinking water for all Australians³⁹.*'

The Commission determined that state and territory governments should commit to ensuring access to a basic level of safe and reliable water for regional and remote communities, and this will be integral to achievement of many of the health targets in the National Agreement on Closing the Gap.⁴⁰

The NLC echoes the findings of the Productivity Commission and the commitments made under United National Sustainable Development Goal 6.1 that recognises safe and reliable drinking water must be provided as a base level of service to all people.⁴¹ Defining levels of service for remote communities must be done through meaningful consultation with residents and those impacted.⁴²

The National Agreement on Closing the Gap will measure progress toward parity in infrastructure, essential services, and environmental health and conditions (including water).⁴³ While the NLC recognises that securing water to remote communities can be complex and expensive, the Strategic Water Plan must include an identification of the mechanisms that will be implemented to achieve parity.

The NLC is calling for the NT government to commit to the provision of safe and reliable drinking water to be available to all Territorians as part of the Strategic Water Plan. As part of this, there must be equity in the level of service provided to Aboriginal and non-Aboriginal Territorians including the requirement to legislate safe drinking water for all.⁴⁴

Further, in order to achieve safe and secure water for all, Aboriginal people including remote community representatives, must be central to decision-making, consistent with the NT Governments implementation plan for Closing the Gap, which is *'centred on the belief that when Aboriginal people have a genuine say in the design and delivery of services that affect them, better life outcomes are achieved.'*⁴⁵

³⁸ The Northern Land Council submission to the Productivity Commission is available through the Commission website.

³⁹ Source: Productivity Commission National Water Reform 2020 Inquiry Report no. 96 Urban water services: regional and remote communities Supporting Paper G (May 2021) page 24.

⁴⁰ Source: Productivity Commission National Water Reform 2020 Inquiry Report no. 96 Urban water services: regional and remote communities Supporting Paper G (May 2021) page 5.

⁴¹ Transforming Our World: The 2030 Agenda for Sustainable Development A/RES/70/1. United Nations.

⁴² Source: Productivity Commission National Water Reform 2020 Inquiry Report no. 96 Urban water services: regional and remote communities Supporting Paper G (May 2021) page 22.

⁴³ National Agreement on Closing the Gap July 2020. Available at

https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf

⁴⁴ In July 2020, Land Councils called for political parties to commit to enacting a safe drinking water act. Refer to <https://www.clc.org.au/nt-election-must-be-a-watershed-for-protection-of-remote-drinking-supply/>

⁴⁵ Source: Closing the Gap Northern Territory Implementation Plan page 5. Available at [Closing the Gap - Northern Territory Implementation Plan](#)

Recommendation 3: That the NT Government commits to defining a base level of service for all remote Aboriginal communities and that the provision of safe and reliable drinking water is available to all Territorians. The level of service be equitable and ensure that Aboriginal Territorians are afforded the same protections for their water as non-Aboriginal people. The levels of service must be developed in consultation with communities that are directly affected.

IV. Why are Aboriginal water values not respected under NT law?

*'The legal system organises how people can access, value and protect water across the country. For too long, that system excluded or marginalised First Nations. Unlike laws relating to Indigenous rights in land, First Nations' laws and culture have rarely been recognised in water laws.'*⁴⁶

Water law and governance in the NT has been described as amongst the poorest in Australia,⁴⁷ and the Water Act does not adequately reflect current obligations to Aboriginal people, or recognise their traditional laws and culture in the NT.

The Water Act was enacted in 1992. Since that time, the operating environment, both within the NT and across Australia, has changed substantially and legislation must change in response.

In 1993 the *Native Title Act 1993* was enacted by the Commonwealth which allows for recognition and protection of native title. Under the Act, a future act is a proposed activity on land or water that may affect native title rights and interest, and where an act affect native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.⁴⁸ Section 24(HA) of the Act considers the management or regulation of water, including the making, amendment or repeal of legislation in relation to the management or regulation of surface and subterranean water, or living aquatic resources. It also applies to future acts consisting of the grant of a lease, licence, permit or authority under legislation that relates to the management or regulation of surface and subterranean water or living aquatic resources.

The NLC maintains that, in accordance with S24(HA) of the Native Title Act, water management and regulation in the NT that affects native title rights is a future act.⁴⁹ With over 17 per cent of the land and water in the NT subject to recognised native title,⁵⁰ the NT Government must accept its responsibilities under the Native Title Act and ensure that activities undertaken in accordance with the NT Water Act are compliant with native title legislation.

In addition to the introduction of native title legislation, the Productivity Commission's renewal advice on the National Water Initiative discussed two key developments of relevance to Traditional Owners' access to water that have occurred over the last 15 years – Australia endorsing the United Nations (UN) Declaration on the Rights of Indigenous Peoples in 2009, and state and territory governments signing the National Agreement on Closing the Gap in 2020.⁵¹

The UN Declaration on the Rights of Indigenous Peoples has a number of articles that relate to including Aboriginal people in decisions that affect them, including Article 19: *'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.'*⁵² Article 26 requires that

⁴⁶ Source: The National Cultural Flows Project - reforming water law and policy.

⁴⁷ Refer to the assessment undertaken by the Environment Defenders Office and available at [Deficiencies-Water-Law-NT.pdf \(edo.org.au\)](#)

⁴⁸ AIATSIS Native Title Information Handbook Northern Territory 2016.

⁴⁹ Section 227 of the Native Title Act states that an act 'affects' native title if it extinguishes native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

⁵⁰ AIATSIS Native Title Information Handbook Northern Territory 2016.

⁵¹ Refer to the Productivity Commission National Water Reform 2020 Inquiry Report no. 96 (May 2021).

⁵² Source: United Nations Declaration on the Rights of Indigenous Peoples. [UNDRIP_E_web.pdf](#)

*'States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'*⁵³

The Mary River Statement from 2009 also highlighted the UN Declaration, with delegates calling for it to be used as *'the benchmark for establishing and building a new legal and cultural framework for doing business between governments, enterprises and north Australian Indigenous people'*⁵⁴.

In July 2020 all state and territory governments signed the National Agreement on Closing the Gap - *'a commitment from all Parties to set out a future where policy making that impacts on the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership'*⁵⁵.

The priority reform areas under the Agreement transform the ways that policy and governance affecting Aboriginal people are negotiated. Agreement parties have also committed to undertaking actions to ensure that *'Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters'*.⁵⁶

Despite these transformational requirements, Aboriginal people were ignored by NT Government when they introduced amendments to the Water Act in 2021. Included in the proposed amendments were components that could have an impact on the rights of Aboriginal people to access water for economic development, as well modifying approaches to how stakeholders are able to engage with water management and licensing decisions. The legislative amendments were developed by NT Government and introduced to Parliament in the absence of engagement with Aboriginal people.⁵⁷ Concern from the NLC and other stakeholders resulted in the NT Government pulling parts of the proposed amendments and pledging to engage further.⁵⁸

The NLC's Regional Councils have resolved that: *Aboriginal people must be meaningfully consulted about the development, implementation and evaluation of all water policy, legislation, planning and administrative functions that may affect us, with a consultation process that enshrines the principles of free prior and informed consent (Principle 6).*

The NLC calls on the NT Government to learn from the mistakes made in 2021 (and those made by previous political parties), and commit to a meaningful process to reform the Water Act in an open and transparent way, recognising the requirements of Closing the Gap. The current legislation does not provide sufficient legal protections for Aboriginal lands and resources, in accordance with the UN Declaration. It is not inclusive of Aboriginal culture, laws or customs; does not adequately support Aboriginal economic development; and does not provide legal protection of drinking water. All these components are now expected as part of modern legislation.

⁵³ Source: United Nations Declaration on the Rights of Indigenous Peoples. [UNDRIP E web.pdf](#)

⁵⁴ Source: Mary River Statement, 2009. North Australian Indigenous Land and Sea Management Alliance

⁵⁵ Source: National Agreement on Closing the Gap July 2020 page 4. Available at https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf

⁵⁶ Source: National Agreement on Closing the Gap July 2020 page 34. Available at https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf

⁵⁷ The NLC media release 'NLC condemns water access change as a betrayal of the interests of all Territorians' is available at <https://www.nlc.org.au/media-publications/northern-land-council-condemns-water-access-changes-as-a-betrayal-of-the-interests-of-all-territorians>. Examples of other media from the time are available at <https://www.katherinetimes.com.au/story/7370892/clc-demands-withdrawal-of-proposed-water-licence-laws/> and https://www.alec.org.au/what_the_terc_bill_means_for_our_water.

⁵⁸ Refer to <https://www.abc.net.au/news/2021-08-05/proposed-nt-water-amendments-delayed/100352154>

In recent years the NT Government has made numerous amendments to the legislation, presumably in recognition that many provisions were outdated. However, this appears to have been done without the required level of oversight or planning. The NLC seeks that a new Water Act be developed in a way that adheres to international, national and territory obligations for consultation with Aboriginal people. The Strategic Water Plan presents an opportunity for the NT be at the forefront of progressive water legislation nationally, with a Water Act that ensures long-term water security and reflects the unique characteristics of the NT and its people.

The Directions Paper recognises the importance of water governance, highlighting that *'Good governance is at the heart of ensuring water security for Territorians, through modern and efficient institutions working together under appropriate legislation, policies and processes.'*⁵⁹ The only way of achieving good governance and ensuring legislation, policies and processes are appropriate for all Territorians is to commit to undertaking holistic water law reform through the Strategic Water Plan.

Recommendation 4: That the NT Government commits to undertaking a holistic reform of the NT Water Act in accordance with international, national and territory obligations. The process must meet the requirements of the National Agreement on Closing the Gap, and result in water legislation that reflects the unique characteristics of the NT and its people.

⁵⁹ Source: NT Strategic Water Plan Directions Paper, page 6.