



Queensland
Human Rights
Commission

Review of the National Agreement on Closing the Gap

Submission to the Productivity Commission

6 October 2023

Introduction and background

1. The Queensland Human Rights Commission (**QHRC**) appreciates the opportunity to provide feedback on the Draft Report¹ (**draft report**) by the Productivity Commission (**Commission**) on its Review of the National Agreement on Closing the Gap² (**Agreement**).
2. Parties to the Agreement include:
 - the Commonwealth Government and all Australian state and territory governments, the Australian Local Government Association (**ALGA**), represented by the Prime Minister, First Ministers of each state and territory and the ALGA President (**Government parties**); and
 - the Coalition of Peaks.³
3. The latter are national and state and territory non-government Aboriginal and Torres Strait Islander Peak bodies and certain independent statutory authorities which have responsibility for policies, programs and services related to Closing the Gap. Their governing boards are elected by Aboriginal and Torres Strait Islander communities and/or organisations which are accountable to that membership.⁴
4. The QHRC is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**). It has functions under the Queensland *AD Act* and *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
5. The QHRC deals with complaints of discrimination, sexual harassment, vilification, and other objectionable conduct under the *AD Act*, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the *HR Act*.
6. In responding to the draft report, the QHRC has limited its comments to those relevant to the issues and questions related to its work or which raise particular concern.
7. The terms of reference for the review are to:⁵
 - analyse progress on Closing the Gap against the four Priority Reform outcome areas in the Agreement namely:

¹ Australian Government, Productivity Commission, *Review of the National Agreement on Closing the Gap* (Draft report, July 2023) < <https://www.pc.gov.au/inquiries/current/closing-the-gap-review/draft>>.

² *National Agreement on Closing the Gap* (Web Page, July 2020) <<https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>>.

³ See clauses 10 and 11 in Chapter 2 of the Agreement.

⁴ See clause 12 of the Agreement.

⁵ Australian Government, Productivity Commission, *Review of the National Agreement on Closing the Gap* (Draft report, July 2023) iv.

- Formal partnerships and shared decision-making
 - Building the community-controlled sector
 - Transforming government organisations
 - Shared access to data and information at a regional level
- analyse progress against all of the socioeconomic outcome areas in the Agreement; and
 - examine the factors affecting progress.
8. In conducting the review, the Commission was tasked with providing recommendations, where relevant, to the Joint Council on Closing the Gap on potential changes to the Agreement and its targets, indicators and trajectories, and on data improvements. It was to have regard to all aspects of the Agreement, consider all parties' implementation and annual reports, and draw on evaluations and other relevant evidence.
 9. The Commission was required to consult broadly, particularly with First Nations people, communities, and organisations, and to invite submissions and provide other options for people to engage with the review.
 10. The review process included the public release of a draft report, with a final report due by the end of 2023. The draft report identified a range of issues about which specific information was sought and invited comment in relation to six draft recommendations.
 11. This submission provides information drawn from the QHRC's experience in consulting with First Nations individuals, organisations, and communities in Queensland, and responds to two of the Commission's information requests. Its major focus is on information request 9 that relates to an independent mechanism to drive accountability. The content and principles put forward in this part of the submission have potential application throughout Australia.
 12. The submission also provides brief comment in response to Information Request 8 and on Draft Recommendation 4, which respectively relate to the quality of implementation plans and changes to Cabinet, budget, funding, and contracting arrangements.

Summary and recommendations

13. In broad terms, the QHRC supports all of the Commission's draft recommendations. However, significant structural change to the framework of government and community partnerships within which the Agreement is negotiated is required before real progress on Closing the Gap can be achieved.
14. Existing structures have arisen reactively, rather than being designed proactively with the goal of addressing 'the Gap' and its many causes, particularly the significant power imbalance that exists between government and First Nations communities and organisations. As a result, government and community organisations working towards

Closing the Gap in their various sectors lack the authority and capacity to direct and lead change.

15. While governments generally have authority to hold community organisations to account through funding arrangements, the Agreement does not effectively hold governments to the same level of accountability when commitments are not met.
16. This submission suggests ways to improve accountability (and therefore make progress) by changing the framework within which the parties negotiate and hold each other accountable for their performance under the Agreement. However, new legislation may be necessary to establish the proposed framework. The suggestions made here are relevant to all four Priority Reforms.
17. The submission makes suggestions to improve the fundamental framework within which the Agreement is negotiated, implemented, monitored, and evaluated, including:
 - a. establishing new First Nations statutory bodies in each state and territory consisting of members elected by First Nations peoples, whose functions include:
 - negotiating the Agreement on behalf of the Coalition of Peaks
 - monitoring and evaluating progress against the four Priority Reforms and all socio-economic targets set out in the Agreement⁶
 - holding government parties publicly accountable for their actions in the performance of, or failure to comply with, obligations under the Agreement.
 - b. resourcing the new statutory body with:
 - sufficient guaranteed long-term funding to maintain independence and ensure its ability to perform all its functions
 - access to expert advice, including advice on:
 - developing an effective negotiating position and strategy for managing future amendments to the Agreement
 - determining the specific data required to effectively perform its functions, from a suitable qualified statistician, and understanding how best to use that data
 - understanding each of the portfolio areas relevant to the 17 socio-economic targets set out in the Agreement.
 - access to disaggregated, place-based data relating to each of the socio-economic targets in the Agreement in each discrete First Nations community and in urban areas
 - all powers necessary and convenient to perform its functions, including powers to:

⁶ The targets are set out in Table B, which is referred to in Clause 82 of the Agreement.

- conduct hearings into the actions of the parties concerning their performance under the Agreement, and to compel witnesses to appear, give evidence, and produce documents
 - consult with independent agencies, such as the QHRC, the Queensland Ombudsman, Queensland Family and Child Commission and others
 - consult with community-controlled organisations, community councils, and any other organisations with information relevant to its functions.
- c. Shifting overall responsibility for implementation of the Agreement in Queensland to the Department of Premier and Cabinet (**DPC**)
- d. Making changes to the Queensland Government Cabinet Handbook to require all cabinet submissions to identify any anticipated positive or negative impact on Closing the Gap targets.
18. A new statutory body with functions and powers as outlined above may replicate the proposed Voice to Parliament, should the referendum succeed. Overlap with the functions of proposed state and territory representative bodies is also possible, but that risk is not sufficient reason for delay.

Responses to selected information requests

Information request 8 - Quality of implementation plans and annual reports

19. Current administrative arrangements provide that the Department of Treaty, Aboriginal and Torres Strait Islander Partnerships, Communities and the Arts (**DATSIP**) is the lead agency tasked with coordinating the Queensland Government's activities in performance of obligations under the Agreement.
20. The Queensland Government has published Queensland's Closing the Gap 2022 Implementation Plan,⁷ which comprises a collection of policies and programs from government departments and agencies that relate in some way to First Nations people. Many of these policies and programs show little, if any, discernible connection to the achieving the priority reforms or socio-economic targets set out in the Agreement.
21. The draft report acknowledges that the government parties to the Agreement appear to have failed to grasp the scale of change required if the socio-economic targets or priority reforms are to be achieved. Given the gravity of the current circumstances, the QHRC submits that the DPC should have a coordination and leadership role throughout the Queensland Government on all actions and policies associated with performance under the Agreement. DPC has sufficient influence throughout the

⁷ Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Qld), *National Agreement on Closing the Gap—Queensland's 2022 Implementation Plan* (September 2022).

Queensland Government to lend authority to its leadership, thus promoting accountability in all departments and agencies.

Information request 9 - Independent mechanism in the broader landscape

What are the essential features of the independent mechanism?

22. The Commission's draft report noted that new and emerging First Nations bodies, such as the proposed Voice to the Australian Parliament and others, may well have a role to play in being accountable for the parties' actions taken in performance of their obligations under the Agreement. However, as the Commission has also acknowledged, commitments under the Agreement remain, irrespective of whether any of these proposed bodies come to fruition.
23. Given the inadequacy of existing accountability measures under the Agreement and the consequent lack of positive progress in many of the socio-economic target areas, improvement in accountability is both imperative and urgent. States and territories are overwhelmingly the parties with overall responsibility in relation to the main portfolio areas relevant to the socio-economic targets.
24. The QHRC therefore proposes that the independent mechanism be comprised of state and territory-based statutory bodies made up of elected individuals representing First Nations peoples. Ideally, the Commonwealth would take a leadership role in coordinating and resourcing these bodies.⁸
25. The first and most essential feature of an independent mechanism is independence itself. Existing First Nations bodies, while independent by nature in terms of their service delivery, are publicly funded and as such are answerable to government. Ongoing funding is never guaranteed, with the result that community-controlled organisations have structural limitations on their independence, particularly when engaging in activities aimed at calling government to account.
26. The second essential feature of an independent mechanism is that it must have and maintain genuine authority to speak on behalf of the people it represents. For this reason, QHRC believes that it must be subject to regular elections in which First Nations peoples vote in electorates based around discreet communities and in urban areas. Subject to the third essential feature outlined in the following paragraph, there is no reason why individuals who currently hold other leadership positions – for example on community councils, community-controlled organisations, boards, native title bodies, or even the Coalition of Peaks itself – shouldn't be entitled to stand for election.
27. Thirdly, it is essential that the independent mechanism be free of any conflict of interest. Currently, the terms of the Agreement are negotiated between the government parties on one hand and the Coalition of Peaks on the other. The Peaks

⁸ The Commonwealth has previously legislated criteria for state and territory bodies to be recognised under a national scheme. An example of this may be found in sections 207A and 207B of the *Native Title Act 1993*.

are made up of national, state, and territory non-government First Nations peak bodies and certain independent statutory authorities that have responsibility for policies, programs, and services related to Closing the Gap. While they are ultimately accountable to their membership, their dependence on regularly reviewed government funding imposes a consequent obligation on their leaders to answer to government and maintain their funding.

What levers should the independent mechanism have to enable it to hold governments to account?

28. While 'supporting, monitoring, and reporting' are all essential to improving progress on Closing the Gap, without genuine accountability improvement in the current inadequate progress and reversal of negative progress is unlikely. The power to conduct public hearings and compel witnesses, such as responsible ministers and government officials, to attend and give evidence is essential if the independent mechanism is to effectively drive accountability. Proceedings should be recorded, and the transcripts tabled in parliament, to ensure that evidence given can be relied on to formulate solutions to identified problems and promote transparency – another essential feature of an effective accountability measure.
29. If public hearings are to genuinely address barriers to progress, the independent mechanism will require access to information relevant to those matters. Without this, hearings are unlikely to reveal specific inadequacies and failures in performance, or problems in existing programs that are intended to Close the Gap, much less allow for the development of solutions.
30. In order to find the right answers, one must ask the right questions. Formulating the right questions necessitates the independent mechanism having access to the right information. This is a necessary pre-requisite for the conduct of comprehensive, thorough, and ultimately successful hearings.
31. The work of numerous independent statutory bodies and other organisations necessarily brings barriers to progress on various aspects of Closing the Gap to their attention, often on a daily basis. The QHRC is one such organisation. If the independent mechanism is to be armed with the specific information required to ensure that hearings uncover failures in the system and bring to light the information needed to formulate solutions, they must have the authority to consult widely with all relevant organisations.
32. Finally, the independent mechanism must have the expertise, or access to the expertise, required to identify reasons for inadequate or negative progress and to develop solutions in partnership with the Coalition of Peaks and other relevant organisations. Such expertise would include expertise in all fields relevant to the socio-economic targets listed in the Agreement, but not be limited to these fields. To enable thorough understanding of what the barriers to progress are, how they arise, and how to overcome them, knowledge and expertise in statistics and data analysis is imperative.

Should the independent mechanism have a broader role – beyond Priority Reform 3 – so that it can drive accountability for progress towards all of the Priority Reforms in the Agreement?

33. The QHRC submits that the role of the independent mechanism should not be limited to Priority Reform 3. As is clear from the draft report, Priority Reform 3 is not the only area in which progress and accountability have been inadequate.
34. For this reason, the QHRC supports the broadening of the independent mechanism's role to supporting, monitoring, reporting, evaluating, and driving accountability in relation to all four Priority Reforms and all socio-economic targets included in the Agreement.
35. In addition to these aspects of the role, the QHRC supports the independent mechanism taking on the role of supporting the Coalition of Peaks to negotiate future amendments to the Agreement. The existing framework within which the Agreement is negotiated lacks the essential features of an independent mechanism as outlined above. For the same reasons that these features are imperative to the body tasked with driving accountability, they are also essential to negotiating an effective Agreement with specific provisions likely to achieve the goal of Closing the Gap.
36. No doubt the performance of its role as monitor and driver of accountability as outlined above will equip the independent mechanism with the information and knowledge essential to formulating a cogent and widely supported, and therefore powerful, negotiating position. This knowledge will only grow over time as the independent mechanism gathers experience in the performance of its role.
37. The QHRC also anticipates that the independent mechanism and Coalition of Peaks will benefit from expert advice in the development of an agreed negotiating position and strategy. The need for such expert advice may diminish over time as the independent mechanism gains experience, but the complexity and history of Australia's efforts to Close the Gap suggest that such expert advice and assistance on these matters would be beneficial on an ongoing basis.

How could the independent mechanism improve the timeliness of accountability?

38. The QHRC acknowledges that the establishment of a new independent mechanism as outlined above will require new legislation in every state and territory, which requires political will and leadership. Those things will inevitably take time, as will the proposed elections and induction of elected members.
39. However, once established, the QHRC expects that the independent mechanism would adopt an annual cycle of activity to complement the annual publication of Closing the Gap data. In this way, government parties and individuals with responsibilities for specific programs will have an understanding and expectation that their actions, or inaction, will be subject to regular public scrutiny. An environment in which transparency prevails will ultimately promote ongoing higher standards and better performance than has been evidenced to date.

How should the independent mechanism be situated with respect to the new and emerging Aboriginal and Torres Strait Islander bodies (such as the proposed Voice to the Australian Parliament and others)? Is a stand-alone independent mechanism still required?

40. Responsibilities and commitments under the Agreement are independent of the outcome of the referendum. Evidence is clear that the progress expected by the Agreement is not being achieved. Accordingly, whether or not the Voice or other representative body become a reality, an urgent need for genuine accountability for performance under the Agreement will continue.
41. The QHRC acknowledges that the proposed new mechanism has potential to replicate the functions of the Voice to Parliament, the subject of the upcoming referendum. Duplication and overlap in functions may also arise at a state or territory level in jurisdictions where similar representative bodies are proposed or already exist.
42. However, at the time of writing, the outcome of the federal referendum on the Voice remains unknown. Even if the referendum succeeds in securing Constitutional change, the establishment of the Voice is likely to take significant time, given that it will require potentially contentious legislation, and until legislation is passed, the extent of any potential overlap between the functions of the Voice and the proposed independent mechanism are mere speculation.
43. Given the urgency and gravity of the current circumstances, the QHRC submits that any further delay in establishing an effective accountability mechanism and implementing an effective framework within which the Agreement is negotiated, monitored, evaluated, and improved is not an acceptable option. The independent mechanism proposed should proceed without delay and, in the event that the Voice or other relevant representative body comes into existence, any duplication or overlap in functions could be addressed if and when it arises.

What role should the independent mechanism play in reviewing and/or approving Closing the Gap implementation plans and annual reports?

44. As discussed above, the QHRC proposes that the independent mechanism has a role to play at every point throughout the cycle of the Agreement from negotiating its terms, monitoring performance to identify good and bad practice, and in promoting transparency and accountability for successes and failures.
45. The QHRC expects that the independent mechanism would necessarily be involved in reviewing implementation plans and annual reports. The conduct of its public hearings to investigate and reveal good and bad practice will also involve endorsing or declining to endorse implementation plans.
46. For the sake of clarity, the QHRC confirms that it does not anticipate that these functions would include an enforcement power, or the power to impose consequences for failure to comply with commitments under implementation plans. Nor would it involve any power to dictate the content of implementation plans. Those functions are appropriately the responsibility of the public sector leadership.

Draft recommendation 4 - Central agencies leading changes to Cabinet, budget, funding and contracting processes

47. Existing processes that regulate the form and content of Cabinet submissions in Queensland are contained in the *Cabinet Handbook*. The handbook outlines minimum requirements for submissions put to Cabinet. In the QHRC's submission, one small change to the handbook has potential to achieve substantive improvement to policy development that relates to Closing the Gap.
48. The QHRC recommends amendment of the *Cabinet Handbook* to require the inclusion of a statement, perhaps described as a 'Closing the Gap Impact Statement' addressing any anticipated positive or negative impact on progress towards Closing the Gap in any Cabinet submission.
49. Closing the Gap Impact Statements would work in a similar way to Statements of Compatibility under section 38 of the HR Act. While these statements do not guarantee substantive outcomes, making them mandatory serves to ensure that the potential for positive and negative impacts are considered prior to Cabinet submissions becoming policy. Negative impacts could still occur, but accidental occurrence due to neglect is far less likely. Moreover, mandatory consideration and written reference to anticipated positive impacts should serve as encouragement to improve policy wherever possible.

Conclusion

50. The QHRC supports all draft recommendations set out in the draft report and submits that further recommendations in line with those outlined at paragraph 17 in the summary of this submission be considered for inclusion in the Commission's final report.
51. The QHRC appreciates the opportunity to make submissions in response to the Commission's draft report.