





### Cover image

#### 'The Barunga Statement'

Barunga

Various artists 1988

Parliament House Art Collection, Canberra, ACT

2008 is the 20th anniversary of the 'Barunga Statement', which was presented in June 1988 to Prime Minister R.J.L. Hawke at the Barunga festival. The Barunga Statement calls for Aboriginal self-management, a national system of land rights, compensation for loss of lands, respect for Aboriginal identity, an end to discrimination and the granting of full civil, economic, social and cultural rights for Indigenous Australians.

The Barunga Statement painting combined several clan designs from Yolngu country in northeastern Arnhem Land on the left with a large design featuring traditional Central Desert iconography on the right. It visually affirmed the unified demands of the Aboriginal people of the Northern Territory and the Land Councils that represented the interests of those who had already attained the first measure of self-management promised by the *Land Rights Act (NT) 1976*.

### The Barunga Statement

*We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:*

- *to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;*
- *to permanent control and enjoyment of our ancestral lands;*
- *to compensation for the loss of use of our lands, there having been no extinction of original title;*
- *to protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;*
- *to the return of the remains of our ancestors for burial in accordance with our traditions;*
- *to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;*
- *in accordance with the universal declaration of human rights, the international covenant on economic, social and cultural rights, the international covenant on civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.*

*We call on the Commonwealth to pass laws providing:*

- *a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;*
- *a national system of land rights;*
- *a police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.*

*We call on the Australian Government to support Aborigines in the development of an international declaration of principles for indigenous rights, leading to an international covenant.*

*And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.*

The image and text of the Barunga Statement and the painting are reproduced courtesy of the Central Land Council, Northern Land Council, and the Buku Larngay Mulka Art Centre. Australian Parliament House, where the Barunga Statement currently resides, provided copies of the image for use in this publication.



**Human Rights and Equal  
Opportunity Commission**  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

***Building a sustainable  
National Indigenous  
Representative Body –  
Issues for consideration***

**An Issues Paper prepared by the Aboriginal and  
Torres Strait Islander Social Justice  
Commissioner, in accordance with section  
46C(1)(b) of the *Human Rights and Equal  
Opportunity Commission Act 1986 (Cth)***

## ***EXTRACT***

### ***Budget 2008-09: Ministerial Statement on Closing the gap between Indigenous and non-Indigenous Australians***

#### ***The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs***

##### ***The Policy Challenge***

The Australian Government's reform agenda — both in Aboriginal and Torres Strait Islander affairs and across governments — is to address the structural and systemic problems that are producing appalling outcomes for Aboriginal and Torres Strait Islander people.

A generation of Aboriginal and Torres Strait Islander children — Australian children — is at stake. Time is fast running out. This fact is acknowledged by Indigenous elders and leaders, as well as by government...

Indigenous Australians must be involved in developing and driving solutions. Actions like the National Apology are working to build the trust needed to work together on getting results.

Our 'closing the gap' commitments require effective engagement with Aboriginal and Torres Strait Islander people at all levels. Government needs to involve Indigenous people in the design and delivery of programs locally and regionally, and share responsibility for outcomes. Solutions developed on the ground must be driven by the communities that will ultimately determine their success or failure...

The Government went to the election with a commitment to set up a national representative body to provide an Aboriginal and Torres Strait Islander voice within government. We will soon begin formal discussions with Indigenous people about the role, status and composition of this body.

**May 2008**

## **Note – Use of the terms ‘Aboriginal and Torres Strait Islander peoples’ and ‘Indigenous peoples’**

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

Throughout this issues paper, Aboriginals and Torres Strait Islanders are referred to as ‘peoples’. This recognises that Aboriginals and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods.

Throughout this report, Aboriginal and Torres Strait Islander peoples are also referred to as ‘Indigenous peoples’.

The use of the term ‘Indigenous’ has evolved through international law. It acknowledges a particular relationship of Aboriginal people to the territory from which they originate. The United Nations High Commissioner for Human Rights has explained the basis for recognising this relationship as follows:

Indigenous or aboriginal peoples are so-called because they were living on their lands before settlers came from elsewhere; they are the descendants – according to one definition – of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means... (I)ndigenous peoples have retained social, cultural, economic and political characteristics which are clearly distinct from those of the other segments of the national populations.

Throughout human history, whenever dominant neighbouring peoples have expanded their territories or settlers from far away have acquired new lands by force, the cultures and livelihoods – even the existence – of indigenous peoples have been endangered. The threats to indigenous peoples’ cultures and lands, to their status and other legal rights as distinct groups and as citizens, do not always take the same forms as in previous times. Although some groups have been relatively successful, in most part of the world indigenous peoples are actively seeking recognition of their identities and ways of life.<sup>1</sup>

The Social Justice Commissioner acknowledges that there are differing usages of the terms ‘Aboriginal and Torres Strait Islander’, ‘Aboriginal’ and ‘indigenous’ within government policies and documents. When referring to a government document or policy, we have maintained the government’s language to ensure consistency.

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<sup>1</sup> United Nations High Commissioner for Human Rights, Fact sheet No.9 (Rev.1), The Rights of Indigenous Peoples, [www.unhchr.ch/html/menu6/2/fs9.htm](http://www.unhchr.ch/html/menu6/2/fs9.htm).

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## Introduction

Issues of Indigenous disadvantage and dysfunction are before our eyes more frequently and more prominently than ever before.

Barely a day goes by without another chilling and heartbreaking story of abuse, violence or neglect; or of demonstrations of the impact of entrenched poverty and despair among our communities.

Without proper engagement with Aboriginal and Torres Strait Islander peoples, (Indigenous peoples) governments will struggle in their efforts to make lasting progress in improving the conditions of Indigenous people and in our communities.

A National Indigenous Representative Body is a fundamental component of any future action if we are to achieve positive change.

At present, there is not a transparent, rigorous process for engaging with Indigenous peoples in determining the policy settings and to hold governments accountable for their performance.

The new Australian Government has acknowledged the importance of addressing this. In the Apology speech, the Prime Minister stated that:

Our challenge for the future is to embrace a new partnership between Indigenous and non-Indigenous Australians. The core of this partnership for the future is closing the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on closing the gap will set concrete targets for the future.

In furtherance of this commitment, in March 2008 the Australian Government and federal Opposition also signed a Statement of Intent to work in partnership with Indigenous people and their representative organisations to achieve equality in health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by the year 2030. This statement provides bipartisan support to:

- develop a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non- Indigenous Australians by 2030.
- ensure the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs.
- respect and promote the rights of Aboriginal and Torres Strait Islander peoples... and
- measure, monitor, and report on our joint efforts, in accordance with benchmarks and targets, to ensure that we are progressively realising our shared ambitions.

These are welcome commitments and ‘first steps’ to a new partnership in Indigenous affairs.

It is now time for us to flesh out these commitments to ensure the full participation and input of Indigenous peoples into government decision making at the national level.

And this, ultimately, is what the discussion about a new National Indigenous Representative Body is about.

It is about our place at the table in making the decisions that impact on our communities, on our men, our women and our children.

It is about creating a genuine partnership with government and across society:

- ***With shared ambition***, so we are all working towards the same goals and not at cross purposes.
- ***With mutual respect***, so we are part of the solutions to the needs of our communities instead of being treated solely as the problem.
- ***With joint responsibility***, so that we can proceed with an honesty and an integrity where both governments and Indigenous people accept that we each have a role to play, and where we each accept our responsibilities to achieve the change needed to ensure that our children have an equal life chance to those of other Australians.
- ***With respect for human rights***, that affirms our basic dignity as human beings and provides objective, transparent standards against which to measure our joint efforts.

To this end, in 2007 I initiated research to identify the key considerations that will need to be addressed in establishing a new National Indigenous Representative Body.<sup>2</sup>

This paper sets out the findings of that research. It addresses a series of issues for consideration in the process of establishing a new National Indigenous Representative Body. Namely:

- First, what lessons can be learned from mechanisms for representing Aboriginal and Torres Strait Islander peoples at the national, State/ Territory or regional level that have previously existed or that are currently in place?
- Second, what lessons can be learned from mechanisms for representing Indigenous peoples that have been established in other countries?

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<sup>2</sup> This research was in accordance with the following commitment that I made in the *Social Justice Report 2006*: ‘The Social Justice Commissioner will work with Indigenous organisations and communities to identify sustainable options for establishing a national Indigenous representative body. The Commissioner will conduct research and consultations with non-government organisations domestically and internationally to establish existing models for representative structures that might be able to be adapted to the cultural situation of Indigenous Australians, as well as methods for expediting the establishment of such a body given the urgent and compelling need for such a representative body.’ Quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner 2006, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission, Sydney.

- And third, what options are there for ensuring that a National Indigenous Representative Body is sustainable?

**The research does not substitute for broad-based consultation with Indigenous communities.** Indeed, the research does not state a preference for a particular model for a National Indigenous Representative Body – it merely identifies the many and varied issues that need to be considered in the formulation of the new Body.

The paper raises challenges for both the federal government and for Indigenous people.

For the government, it will be of critical importance that you articulate what you are not prepared to support in a new National Indigenous Representative Body.

I encourage the Minister for Families, Housing, Community Services and Indigenous Affairs to articulate what the government sees as the major benefits of a national representative body and accordingly, what roles the government hopes it will fulfill.

I am not suggesting that the government should be prescriptive and close off debates that may need to be had. But ultimately, we need to minimise the differences between what the Indigenous community expects of its representative body and what government is prepared to support.

If we don't 'close this gap' between the expectations of government and the Indigenous community, then a new body may face the same credibility difficulties that have beset previous representative bodies. This will limit the ability for the representative body to have influence with government. It may limit the representative body's ability to be an effective agent for change for the Indigenous community.

The responsibilities of a new National Indigenous Representative Body are two way – to government and to Indigenous people.

And for Indigenous people, the challenges that exist in establishing a new National Indigenous Representative Body are many.

We should resist the temptation to slip back into old habits. This is not about reviving ATSIC. The ATSIC Review of 2003 did not recommend the abolition of ATSIC but instead proposed a restructure and close adherence to a series of key principles. I am confident that Indigenous people will draw on the lessons from the ATSIC Review while also looking beyond the ATSIC model when setting out their hopes and expectations for a new National Indigenous Representative Body.

I consider that perhaps the greatest problem that ATSIC faced was that it was 'blamed' for the lack of progress in addressing Indigenous disadvantage, despite the simple fact that it had few responsibilities for service delivery that could contribute to achieving this goal. This was a key finding of the ATSIC Review in 2003.

I see significant benefits for a new National Indigenous Representative Body to not exercise the service delivery responsibilities of government. As for all other Australians, let government be responsible for delivering services to Indigenous

citizens. We don't want to take the blame for second class treatment by government anymore.

Let the new Representative Body set the vision for our people's future, provide the guidance to achieving this and advocate for understanding for the consequences that flow from our status as the First Peoples of this nation.

A new National Indigenous Representative Body will also have to operate in a vastly changed environment from when ATSIC existed. This is one with:

- concrete commitments from government to closing the gap, with a partnership approach at the centre of this process;
- a renewed focus on reconciliation, following from the National Apology to the stolen generations;
- a whole of government system for delivering services to Indigenous people where the primary responsibility resides with mainstream government departments; and
- significant environmental challenges facing all Australians, and where the traditional knowledge, practices and land use of Indigenous peoples will have a significant role to play in preserving the quality of life of all Australians.

A new National Indigenous Representative Body will also be created within the context of rapid advances internationally in the recognition of the rights of Indigenous peoples – developments which the new Australian government has indicated it supports and respects.

It is essential that as Indigenous peoples we have a seat at the table and are involved in the big debates that affect our communities. It is not credible to suggest that we should not have such involvement.

My hope is that we can, in partnership with government, develop a new National Indigenous Representative Body that engages with different sections of the pan-Aboriginal and/ or Torres Strait Islander community – be it women, men, our youth and children, communities in different geographical locations, traditional owners or stolen generations members.

And I hope that a representative body will operate in such a way as to inspire and support our people, while also holding governments accountable for their efforts, so we may ultimately enjoy equal life chances to all other Australians.

The first step on this road is mutual respect and a partnership. A National Indigenous Representative Body is an essential component of achieving the long overdue commitments to closing the gap.

**Tom Calma**

**(signature)**

## Section 1: National Indigenous Representative Bodies in Australia – A History

Indigenous Australians have often organised themselves in an attempt to effect political and social change. Many Indigenous organisations were created as a result of this, particularly over the past century. These organisations were independent of government and were often defined by their specific objectives. Such organisations became focused on particular campaigns rather than systemic issues of Indigenous representation.

When the federal government became heavily involved in Indigenous affairs following the election of the Whitlam government in 1972, more focus was given to how Indigenous peoples could be represented within the mechanisms of government.

**Text Box 1** below provides an overview of developments relating to national Indigenous representative bodies in Australia over the past fifty years.

This section will make brief mention of the activities of the Federal Council for the Advancement of Aborigines & Torres Strait Islanders (FCAATSI) and then focus on the three organisations that have been involved in national Indigenous representation:

- the National Aboriginal Consultative Committee (NACC);
- the National Aboriginal Conference (NAC); and
- the Aboriginal and Torres Strait Islander Commission (ATSIC).

This section describes their structure as well as the problems and challenges that were faced by these organisations during their lifetime. It is fair to say that each new body learnt from the lessons of its predecessor. Many concrete outcomes emerged, not the least of which was the capacity building and advocacy development that emerged amongst the Indigenous polity. This is available to be tapped again in a new National Indigenous Representative Body.

### **Text Box 1 – Overview of national Indigenous representative and advocacy bodies in Australia**

<b>1957</b>	Federal Council for the Advancement of Aborigines & Torres Strait Islanders (FCAATSI) established independently of government.
<b>1973</b>	National Aboriginal Consultative Committee (NACC) established. Begins national consultations on electoral structure.
<b>1975</b>	Hiatt commissioned to review NACC, reports 1976. O'Donoghue submits minority report. Coombs begins own review as part of the Royal Commission on Australian Government Administration, also commissions Rowley to report on NACC.
<b>1977</b>	National Aboriginal Conference (NAC) established.
<b>1983</b>	Coombs commissioned to review the NAC. Reports in 1984.
<b>1984</b>	NAC abolished. O'Donoghue begins national consultation on a replacement body.
<b>1986</b>	O'Donoghue reports on consultations in <i>An Aboriginal and Islander Consultative Organisation Report</i> .

- 1988** Aboriginal Affairs Minister Gerry Hand launches widespread national consultation around his discussion paper *Foundations for the Future*.
- 1988** Senate Select Committee investigates proposed *Aboriginal and Torres Strait Islander Bill*, suggests over 40 amendments most of which are incorporated. Subsequently over 90 amendments made to Bill during its passage through parliament.
- 1989** Aboriginal and Torres Strait Islander Commission (ATSIC) established.
- 1993** ATSIC internal review conducted under s26 of *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
- 1996** Coalition government elected, special audit of ATSIC undertaken.
- 1997** ATSIC Board commissions review of ATSIC's functions, establishes steering committee, conducts national consultations, recommends over 30 changes to the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
- 2003** Aboriginal & Torres Strait Islander Services (ATSIS) established to split ATSIC's administrative functions from its representative functions.
- 2003** Minister Ruddock commissions Hannaford Review of ATSIC's roles and functions. Review recommends internal separation of administrative and representative functions and greater involvement of Regional Councils in national structure.
- 2004** Prime Minister and Minister Vanstone announce abolition of ATSIC. National Indigenous Council (NIC) established, with 14 members appointed by government as experts, with a purely advisory function (i.e. no representative role).
- 2005** Senate Select Committee inquiry into *ATSIC Amendment Bill 2004* which abolishes ATSIC.
- 2007** Labor shadow Minister Macklin announces Labor Party platform at the 44<sup>th</sup> Australian Labor Party National Conference to establish a new National Indigenous Representative body.
- 2007** Following the election of the Rudd Government, Minister Macklin decides not to reappoint NIC members. On expiry of term, the NIC is abolished.
- 2008** Prime Minister Rudd calls for a new partnership with Indigenous peoples to underpin policy development in his Apology speech to Parliament in February 2008.
- 2008** In March 2008, the Government signs a Statement of Intent with the Indigenous health sector for a new partnership to close the gap in life expectancy within a generation.
- 2008** Australian Government allocates funds for commencement of consultations with Indigenous peoples on the establishment of a new National Indigenous Representative Body

## **The Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI)**

Founded in 1957, in its early years the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) was a successful alliance of Indigenous and non-Indigenous organisations.

Its main purpose was to agitate for civil and political rights, the rights of citizenship, equality of pay and conditions, universal education and the retention of existing reserve lands in Aboriginal hands.<sup>3</sup> This led to significant involvement by trade unions. It was able to leverage widespread community support following the 1967 referendum into a groundswell of acceptance for the principle of land rights.

Its membership base was in organisations rather than individuals. Its 1975 constitution allowed for two categories of member organisations. Category 'A' organisations were required to agree to the five basic principles of FCAATSI and were exclusively concerned with Aboriginal affairs, or had a standing committee so concerned.

Category 'B' organisations were those that supported the objectives of FCAATSI but could not qualify for category 'A' membership. Category 'A' organisations could send up to five delegates to the Annual General Meeting. Category 'B' organisations could send two. Voting for the Executive was limited to the Aboriginal delegates of these organisations, but nomination and election to the Executive committee was open to non-Indigenous peoples.<sup>4</sup>

Debate over the principle of Aboriginal control of the Executive split the Council at its 1970 annual meeting.<sup>5</sup> Debate continued at least until the 1977 meeting, when a revision to its Constitution was proposed, but by that time its representative functions had been taken over by the National Aboriginal Consultative Committee (NACC).

Many of the principles of both equality and particular Indigenous rights that FCAATSI fought for have been widely recognised, with attention now turning to their effective implementation.

In the period since FCAATSI existed, the principle of self-determination has supported national bodies being comprised exclusively of Indigenous members. There are, however, existing organisations which are Indigenous/non-Indigenous alliances. Australians for Native Title and Reconciliation (ANTaR) works with an Indigenous Reference Group. Reconciliation Australia (RA), a not-for-profit corporation, has Indigenous and non-Indigenous people on the Board. Nevertheless, they are widely perceived as non-Indigenous organisations. Their effectiveness could perhaps be enhanced by the existence of a National Indigenous Representative Body that could act as an external point of reference for their programs.

## **National Indigenous Representative Bodies in Australia, 1972 – 2008**

### **1) National Aboriginal Consultative Committee (NACC), 1972 - 1977**

The NACC was the first unified national Indigenous organisation that represented Indigenous views. Prior to the NACC, the Federal Council for the Advancement of

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<sup>3</sup> Hiatt, LR *et al.* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. p9.

<sup>4</sup> Federal Council for the Advancement of Aborigines and Torres Strait Islanders, 1977, *Minutes and Proceedings of the Twentieth Annual Conference* (incorporates 1975 Constitution), 9 and 16 April, Canberra, unpublished proceedings.

<sup>5</sup> Read, P 1990, "Cheeky, Insolent and Anti-White": the FCAATSI Split of Easter 1970', *Australian Journal of Politics and History* 36/1

Aborigines and Torres Strait Islanders (FCAATSI) had evolved as the major organisation promoting Indigenous interests from the 1950s. While FCAATSI played a central role in the success of the 1967 referendum, its leadership was largely non-Indigenous.<sup>6</sup> Following the election of the Whitlam government the Minister for Aboriginal Affairs, Gordon Bryant, created the NACC.

### **Structure**

The NACC was an advisory body made up of 41 nationally elected Aboriginal people who advised the Minister for Aboriginal Affairs on Aboriginal policy.<sup>7</sup> It was envisaged that the structure of the NACC would be detailed by the first elected representatives of the body. There appears to have been little structural development of the organisation before it first met.

The Department of Aboriginal Affairs (DAA), under the leadership of Charles Perkins, held 16 regional consultations to promote the idea of the NACC and to mobilise the Indigenous population to vote in the subsequent NACC elections. To a large extent these consultations were successful, with approximately 78% of Indigenous peoples voting in November 1983.<sup>8</sup> The constitution developed by the NACC gave it executive, or policy-making, and administrative powers, contrary to the government's desire that it remain simply advisory. Throughout its short life, the NACC remained organisationally under-developed.

### **Autonomy, Resilience and Vulnerability**

The NACC was ultimately vulnerable for a variety of reasons.<sup>9</sup> It is helpful to categorise these reasons as both internal and external.

Regarding **external** vulnerabilities, firstly there were major tensions between the NACC, the Department of Aboriginal Affairs (DAA) and the Minister. Minister Bryant often gave preference to the advice of NACC over that of the DAA. This led to hostility between the DAA and the NACC. This situation reversed when Minister Bryant was replaced by Senator Jim Cavanagh as Minister for Aboriginal Affairs. No clear relationship between all stakeholders appears to have been clearly articulated.

Secondly, the NACC desired greater independence and did not wish to simply act as an advisory body. Without the support of the government in this aim for autonomy, the public were unsupportive of such a move.

Regarding **internal** vulnerabilities, firstly the NACC was unable to develop a coherent organisational structure that could deliver for its constituents. This situation was almost certainly at least partly due to the under-resourcing of the organisation by government.

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<sup>6</sup> Weaver, SM 1983, 'Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies Part I', *Oceania*, Vol. 54 No. 1. p1.

<sup>7</sup> *Ibid.* p3.

<sup>8</sup> *Ibid.* p6

<sup>9</sup> Hiatt, LR *et al.* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. pviii. And see generally Weaver, SM 1983, 'Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies Part I', *Oceania*, Vol 54. No. 1.

However, the limited capacity of the organisation was also due, in part, to the lack of clarity members had about their roles, the relative inexperience of the secretariat and a lack of focus by the members on internal structures rather than external advocacy.

Furthermore, the NACC is seen to have lacked cohesion as an organisation. The elected members often failed to agree among themselves on issues of importance. A constant tension was seen to exist between the interests of Aboriginal people living in more rural and remote 'traditional' lifestyles and urban Aboriginal people. This tension was fuelled by the opinions of non-Indigenous advisors to the government at the time.<sup>10</sup>

Ultimately, the NACC did not have the capacity to develop into an independent, agenda-setting policy organisation due to a lack of government support for such a function and the NACC's unmet need to develop coherent policy position regarding its functions and structure.

## **2) National Aboriginal Conference (NAC), 1977 - 1985**

Following the election of the Fraser government in 1975, the new Minister for Aboriginal Affairs, Ian Viner, established an inquiry into the role of the NACC. Reporting in 1976, the inquiry found that the NACC was restricted in its role due to the lack of clarity given by the previous government about its aims and functions and the desire of the NACC to be more than purely a consultative body.<sup>11</sup> As a result, the NACC was effectively abolished, and the NAC was created in 1977, with the first elections held in November of that year.

### **Structure**

The NAC was created as a government consultative body comprising 35 full-time salaried members. The NAC had state branches and territory branches and a national executive of 10 members. The Executive represented these branches and was chosen by the branch representatives rather than a broader national membership. An annual meeting of interested Indigenous constituents was held, to ensure that the elected representatives might be accountable to their constituents. None of the three tiers of the organisation were bound by any decisions of the others. Ultimately, the organisation was a further entrenchment of the government view that a national Indigenous representative body should be merely consultative in nature, without executive authority or guaranteed ministerial access.

### **Autonomy, Resilience and Vulnerability**

The NAC, like the NACC, was unable to consistently develop coherent national policy positions on matters of national importance in Indigenous affairs. Successful positioning was often based on the efforts of particular executive members, a state/territory branch or other Indigenous organisations who were members of the NAC.

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<sup>10</sup> Weaver, SM 1983, 'Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies Part I', *Oceania*, Vol 54. No. 1. p7.

<sup>11</sup> Hiatt, LR *et al.* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. pviii.

The structure of the organisation as created by government also led to what has been characterised as an inherently cautious organisation.<sup>12</sup> This was partly based on the fact that the government's intention that the organisation not be controlled or heavily influenced by urban activists succeeded in limiting the voice of that constituency in the NAC. Tensions between the NAC and the bureaucracy remained as a legacy of the DAA's relationship with the NACC, contributing to the destabilisation of the organisation.

Two reports into a replacement structure for the NAC were commissioned following the election of the Hawke government in 1983. The O'Donoghue report concluded that the NAC produced "politicians" rather than advisors, had not adequately represented the diversity of Indigenous interests and had not realised coherent policy positions. Further, the body was unable to work with other Indigenous organisations or government departments.<sup>13</sup> The report recommended that a more regionalised organisation be created to give greater voice to the broader Indigenous constituency.

The other report, the 1984 Coombs report, suggested that a new organisation be based on regional representative structures and that it make provisions for the representation of existing Indigenous organisations. The Coombs report suggested that a new body should have significant responsibility over Indigenous expenditure.<sup>14</sup>

### **3) The Aboriginal and Torres Strait Islander Commission (ATSIC), 1989 - 2005**

ATSIC was established following the Coombs and O'Donoghue reports on the principle that the new organisation should be built around regional mechanisms. In 1986 the Minister for Aboriginal Affairs, Gerry Hand, recommended that a new organisation replace the NAC. Following the introduction of enabling legislation, major consultations were conducted with the Indigenous community. This significantly changed the basis of the legislation and greatly regionalised its structure. The new organisation, ATSIC, was ultimately created in 1989 and began operation in 1990.

#### **Structure**

The ultimate structure of ATSIC resulted from various political compromises which were required to ensure the realisation of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). The Bill was significantly amended to address concerns from the Opposition and minor parties that ATSIC was not adequately accountable, either administratively or financially, to the public or the Minister for Aboriginal Affairs.<sup>15</sup>

As a consequence, the Minister remained at the top of the legislative structure, and retained significant power over decisions made by elected representatives.

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<sup>12</sup> Weaver, SM, 1983, 'Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies Part II', *Oceania*, Vol 54, No. 2. p104

<sup>13</sup> O'Donoghue, L 1986, *An Aboriginal and Islander Consultative Organisation*, Australian Government Publishing Service, Canberra. p27.

<sup>14</sup> Coombs, HC 1984, *The Role of National Aboriginal Conference*, Australian Government Publishing Service, Canberra. p9.

<sup>15</sup> Ivanitz, M 2000, 'The Demise of ATSIC? Accountability and the Coalition Government', *Australian Journal of Public Administration*, Vol. 59, No. 1. p4.

Consequently, there were inevitable tensions between ATSIC's responsibilities to the Minister and its duties to Indigenous constituents. The organisation was given a broad mandate to formulate and implement programs for Indigenous peoples and to monitor the effectiveness of its own and other nominated programs.

Further, ATSIC was empowered to develop policy proposals at all levels, to advise the Minister on all matters and to undertake research necessary to enable it to perform its functions. The Commission controlled and managed a budget to create and implement programs. For the first time, a national Indigenous representative body had the power to both advise government and to fund and deliver programs.

Along with establishing unique functions, the Parliament created a unique organisational structure to deliver ATSIC's mandate. Central to this structure was a separation of power between elected representative and administrative arms.

The elected representative arm consisted of regional councils grouped into regional zones – including, for the first time, Torres Strait Islanders. In each zone, regional councillors would elect one of their own members to the national Board of Commissioners. The Board was legally responsible for determining financial priorities, developing budget estimates and reports, and ensuring the organisation acted in accordance with its powers.

Regional Councils were given the power to formulate a regional plan for the improvement of the economic, cultural and social status of Indigenous peoples and to assist ATSIC and other bodies in its implementation. In addition, regional councils were tasked to prepare budgets for approval by the central organisation, and to act as a local advocate for the views of regional communities.

The administrative arm was staffed by public servants and was given the task of implementing the policy and program priorities determined by the elected representatives.

As the created structure was untested for a statutory authority, the legislation that created ATSIC was subject to regular review.

ATSIC was given the power to review the operation of its own legislation and make recommendations for its amendment. Two reviews conducted in 1993 and 1998 raised somewhat similar concerns. Firstly, both highlighted shortfalls in the legislation itself, stating that while an object of the legislation was to coordinate the formulation and implementation of policies, ATSIC did not have the power to act in a specific co-ordinating role, or enforce the cooperation of the Commonwealth, State and Territory governments.<sup>16</sup>

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<sup>16</sup> Aboriginal and Torres Strait Islander Commission 1993, *Review of the Operation of the Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), Australian Government Publishing Service, Canberra. p9. And Aboriginal and Torres Strait Islander Commission 1998, *Review of the Operation of the Aboriginal and Torres Strait Islander Commission Act (1989)* Cth, Aboriginal and Torres Strait Islander Commission, Woden ACT. p10.

Secondly, the reviews aimed to provide less onerous funding arrangements between ATSIC and State and Territory governments<sup>17</sup> and increase government accountability through an annual monitoring and reporting function for ATSIC.<sup>18</sup>

Unfortunately the majority of recommendations emanating from these reviews were never implemented.

The Howard Government announced the first comprehensive external review of ATSIC in November 2002. In April 2003, it further announced a separation of powers between ATSIC's policy making and service delivery roles as an interim measure to remove the potential for conflicts of interest in decision-making over funding. ATSIC was subsequently stripped of all resources and funding superfluous to administrative requirements ostensibly to free its elected arm to focus on larger policy issues and these were transferred to a new body, the Aboriginal and Torres Strait Islander Services (ATSIS).

The Hannaford review produced its Report in November 2003. Among its terms of reference was consideration of the adequacy of representation and advocacy of Indigenous views, the role of Regional Councils in service and program delivery, and the establishment of a Ministerial veto power over ATSIC's decisions.

After wide national consultation the final Report, titled *In the hands of the regions*, recommended urgent structural reform enabling greater regional control and a permanent division of ATSIC's administrative and elected representative roles (to be achieved through a single body - i.e. by reunifying ATSIS and ATSIC). The national body would then become responsible primarily for developing policy and reviewing a national plan, informed by regional plans and specifically-tasked national committees.

The review team also recommended that ATSIC be given greater ability to develop more effective relationships with State and Territory governments through multilateral agreements.<sup>19</sup>

The then Minister for Indigenous Affairs pledged to consider the issues which were raised in the Report and deliver a reform package in 2005. Before any of these recommendations could be considered, let alone implemented, the organisation was abolished.

An overview of the findings of the Hannaford review of ATSIC is contained in Text Box 2 below.

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<sup>17</sup> Aboriginal and Torres Strait Islander Commission 1993, *Review of the Operation of the Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), Australian Government Publishing Service, Canberra. p16.

<sup>18</sup> Aboriginal and Torres Strait Islander Commission 1998, *Review of the Operation of the Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), Aboriginal and Torres Strait Islander Commission, Woden ACT. p10.

<sup>19</sup> Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. p14.

## **Text Box 2 – Overview of key findings and recommendations of the Hannaford review of ATSIC (2003)**

*In the hands of the regions - a new ATSIC* found that ATSIC was in urgent need of structural change.

The report of the Review Team particularly emphasised the need to improve the connection between ATSIC's regional representative structures and national policy formulation processes. The Review Team state that:

As it currently operates, the review panel sees ATSIC as a top down body. Few, if any, of its policy positions are initiated from community or regional levels. The regional operations of ATSIC are very much focused on program management. To fulfil its charter, engage its constituency and strengthen its credibility, ATSIC must go back to the people. The representative structure must allow for full expression of local, regional and State/Territory based views through regional councils and their views should be the pivot of the national voice.

In terms of capacity building, this identifies a challenge to develop a 'cultural match' between the structures of ATSIC and Indigenous peoples at the local level to ensure that ATSIC is representative and participative.

Significantly, the Review Team note that public perceptions of how ATSIC have performed have been burdened by unrealistic expectations, with the organisation blamed for failures which lie outside its control. They also noted that ATSIC had also not lived up to unrealistic expectations of what it can achieve:

ATSIC was intended to be a supplementary funding body and was never intended, or funded, to be the provider of all programs and services to Aboriginal and Torres Strait Islander people. Its establishment did not absolve mainstream agencies from their responsibility to meet their obligations to Indigenous citizens. The hopes pinned on the organisation - that it could and would effect instant change were not realistic

They state that these unrealistic expectations have also operated to shield governments from being accountable, and that 'this avoidance of accountability and responsibility must be overcome with the new ATSIC.'

The Review Team recommends a revised structure for ATSIC that includes the following features:

- The retention of ATSIC's 35 Regional Councils;
- The replacement of the ATSIC Board, which is currently constituted of 18 zone commissioners, with two new structures - a national body and a national executive;
- The new 'national body' would be the governing body of ATSIC and determine ATSIC policy, primarily through the development of a national plan which would be drawn from ATSIC Regional Council plans and ultimately form the basis of the policies and programs of all governments;

- The 'national body' would meet at least twice every four years;
- The new 'national body' would have 38 members and be comprised of the 35 elected Regional Council chairs, the chair of the Torres Strait Islander Advisory Body and the chair and deputy chair of the new 'national executive';
- The new 'national executive' would be delegated by the 'national body' the role of leading ATSIC and advocating on behalf of ATSIC on a day to day basis;
- The new 'national executive' would have up to 10 members, comprised of 8 people elected by the 'national body' including a chair and deputy chair, as well as up to 2 people appointed by the Minister from elected regional councillors;
- A series of national committees would be established to provide policy input to the 'national body' to ensure the incorporation of regional priorities into national planning, with membership drawn from the 'national body' and 'national executive';
- The Regional Council planning process would be accorded higher status in establishing ATSIC's priorities; and
- The elected and administrative arms of ATSIC (and presently ATSIIS) would be reunified in one organisation with a clear delineation of roles incorporated into the ATSIC Act.

Overall, the ATSIC Review Team made 67 recommendations which broadly address issues of the relationship between ATSIC and Indigenous peoples, the federal government, the States and Territories, and between its elected and administrative arms.

See further: [www.atsicreview.gov.au/ATSIC%20Review%20report.pdf](http://www.atsicreview.gov.au/ATSIC%20Review%20report.pdf).

### **Autonomy, Resilience and Vulnerability**

Since the demise of ATSIC, there has been much analysis of the problems experienced by the organisation and the weaknesses of its legislatively determined framework. Four organisational structural issues were identified:

- Firstly, there was confusion surrounding ATSIC's broad powers and functions.
- Secondly, tension existed between policy development and program delivery.
- Thirdly, the relationship between regional councils, the Board of Commissioners and the bureaucracy required clearer definition.
- Fourthly, the Parliament failed to define the relationship between ATSIC and the different governments, or grant ATSIC the power to hold these governments accountable.

#### *i) Clarity about powers and functions*

While ATSIC was given a broad mandate, it did not capitalise on its functions and was simultaneously blamed for problems that were the responsibility of other agencies.

ATSIC's function of monitoring the effectiveness of programs required the "active cooperation and involvement" of Commonwealth, State and Territory governments,

who remained the major Indigenous service providers.<sup>20</sup> The legislation that established ATSIC was silent on how this relationship was to be developed and failed to provide ATSIC with executive authority to require effective cooperation.

Instead, public confusion existed, often fuelled by political rhetoric, about the nature and scope of the organisation's powers. The Howard government often blamed the organisation for failing to make major progress in ending Indigenous disadvantage, even though ATSIC administered less than 50% of Indigenous-specific Commonwealth funding.<sup>21</sup> Clearer legislative provisions to give fuller expression as to how ATSIC was to realistically achieve its mandate were required.

ii) *Tension between policy development and program delivery*

Confusion about ATSIC's broad mandate led to a disproportionate focus on program delivery. As the organisation developed, it became increasingly difficult for it to negotiate its dual policy and program roles. Eventually, program delivery became the focus at the expense of policy development. As a result, the organisation became hostage to government grants and funding cycles, increasing financial accountability and constant cycles of reporting, audit and evaluation.<sup>22</sup>

This occurred at the expense of policy development that could have actually informed governments as how to better run the majority of Indigenous programs. This effectively led to a failure to hold government accountable for program delivery.<sup>23</sup>

The desired effective relationship transformed instead into one between the government as 'funder' and ATSIC as the 'contracted service provider'.<sup>24</sup> Under-resourcing of policy development led to a lack of Indigenous participation in government policy and program development. In 2003, the Minister for Indigenous Affairs, Philip Ruddock, split the administrative and funding arm from the representative arm of ATSIC in an attempt to resolve this problem. The abolition of ATSIC occurred soon after, so there was no effective evaluation of this separation.

iii) *Relationship between regional councils, the Board and the bureaucracy*

While it prescribed broad functions, the legislation governing ATSIC failed to define key relationships, leading to tension and conflict between these three key stakeholders. The Chief Executive Officer (CEO) of ATSIC was directly accountable to both the

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<sup>20</sup> Behrendt, L 2005, *Briefing Paper No 5: National Representative Structures*, Ngiya Institute for Indigenous Law, Policy and Practice, Sydney. p9.

<sup>21</sup> Altman, J 2004, 'Practical Reconciliation and the New Mainstreaming: Will it Make a Difference to Indigenous Australians?', *Dialogue*, Vol. 23 No. 2. p42.

<sup>22</sup> Behrendt, L 2005, *Briefing Paper No 5: National Representative Structures*, Ngiya Institute for Indigenous Law, Policy and Practice, Sydney. p9. And Sanders, W 1994 'Reconciling Public Accountability and Aboriginal Self-Discrimination/Self Management: Is ATSIC Succeeding?', *Australian Journal of Public Administration*, Vol. 53, No. 4. p480.

<sup>23</sup> Behrendt, L 2005, *Briefing Paper No 5: National Representative Structures*, Ngiya Institute for Indigenous Law, Policy and Practice, Sydney. p25. And Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. p30.

<sup>24</sup> Westbury, N 2005, 'Shifting Our Thinking – The Future Engagement between Governments and Indigenous Australians Post ATSIC', *Public Administration Today*, Vol. 4. p27.

Board and the Minister. This limited the ability of the bureaucracy to support conflicting agendas between the Board and the government. Recommendations to change the structure of the organisation to allow the Board to appoint the CEO were ignored.

Also, while the Act established the respective functions of the Board of Commissioners and the regional councils, it was to a large extent silent on the interrelationship between the two. While regional councils were given the capacity to advise on national funding priorities, in practical terms they became focused on program management.<sup>25</sup> Instead, a top-down approach resulted regarding funding decisions and policy development, resulting inevitably in the centralisation of power in the national organisation.<sup>26</sup> Indigenous peoples were therefore less able to affect the processes of the organisation.

iv) *Relationship with governments*

ATSIC was further incapacitated by having limited power to compel the Commonwealth, State or Territory governments to act on its policy advice. While the organisation was given the task of monitoring the effectiveness of Indigenous programs, ATSIC had no executive authority to persuade governments to cooperate with its scrutiny. As the organisation focused on program delivery, various governments were able to escape criticisms about their own unproductive Indigenous policies and programs.<sup>27</sup>

This was especially the case for State and Territory governments, who remained responsible for the majority of Indigenous expenditure. The Commonwealth government had the ongoing problem of holding other governments accountable for tied grants, leaving ATSIC unable to track government expenditure on Indigenous programs and forcing them to attempt to plug the gaps in State and Territory services through the capacity of the regional councils.<sup>28</sup>

In a sense this relieved the Commonwealth, State and Territory governments from as stringent accountability as ATSIC necessarily focused more on program delivery. Consequently, ATSIC was hampered in its ability to contribute to long-term policy debate or innovative policy development.

ATSIC's focus on program delivery meant it could not contribute adequately to government policy formulation. Although ATSIC had a monitoring function, the organisation had no coercive power to hold governments accountable or guarantee that they would act on their advice. Consequently, various levels of government and within government acted without Indigenous involvement and were able to escape criticism for their own shortcomings in Indigenous affairs.

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<sup>25</sup> Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. p32.

<sup>26</sup> Wootten, H 2004, 'Self Determination After ATSIC', *Dialogue*, Vol. 23 No. 2. p20.

<sup>27</sup> Behrendt, L 2004, 'Habeas Corpus', *Arena Magazine*, Vol. 73, p26.

<sup>28</sup> Ivanitz, M 2000, 'The Demise of ATSIC? Accountability and the Coalition Government', *Australian Journal of Public Administration*, Vol. 59, No. 1. pp8-9.

## **Lessons learnt from previously existing National Indigenous Representative Bodies**

The strengths and shortcomings of previous representative organisations *created by government* are complex and depend often on the political and social environment of the nation at any given time. However, there are some key and recurring factors as to why representative bodies have not been sustainable and have been hampered in their effective operation – often despite major investments by individuals, groups and Boards.

Firstly, there has been a recurrent failure to adequately define the key relationships between governments, the representative body and other stakeholders in Indigenous affairs. In this regard there was a lack of clarity in the relationships between national representative bodies and State and Territory governmental structures. There were also inadequate links and processes between the national body and other regional structures and processes.

Secondly, there has been a failure to clearly articulate and detail the functions of the representative body in accordance with the stated aspirations of Indigenous Australians. This has manifested as incoherent organisational structures that were unable to meet the multiple objectives of a representative body. There was a lack of clarity both internally within bodies and externally on the roles and functions of the body, and hence there arose competing and unmet expectations of representative bodies. This caused problems particularly where the representative body was not provided the authority and resources to fully undertake functions such as program delivery, but was nonetheless expected to fulfil these functions. There were also tensions that arose from having a single body being responsible for advocacy, policy development, program delivery and evaluation – which created conflicting responsibilities. The lack of clarity was accompanied by inadequate resourcing that limited the capacity of a representative body to fulfil its multiple objectives.

Thirdly, past representative bodies have also been plagued by tensions arising from the need to represent a diversity of Indigenous interests, including interests of both urban and rural/ remote communities as well as interests of specific members of the community including, Indigenous women and youth.

Finally, each organisation has to varying degrees been constrained by government and the bureaucracy in pursuing their own priorities as galvanised from the wishes of its Indigenous constituents. Underlying this has been a lack of government support for a strong independent agenda setting policy organisation, as opposed to a mere advisory body. Therefore, each organisation has been unable to act with sufficient independence from government, a core and repeatedly asserted desire of Indigenous peoples throughout Australia.

These lessons learned from previous mechanisms for national Indigenous representation can help identify what issues need to be discussed when considering the scope of a new National Indigenous Representative Body, particularly in relation to the roles and functions of the body, its level of independence and its relationships with government at the national, State/ Territory and regional levels.

To assist in clarifying these issues, this paper reproduces at Text Box 2 the proposed principles and vision for a representative body as articulated by the 2003 Hannaford Review of ATSIC. Due to the abolition of ATSIC there was not an opportunity at the time to consider the usefulness of these principles assisting to define the key features of a new National Indigenous Representative Body.

## **Section 2: Current mechanisms for representing Indigenous peoples at the national, State/ Territory and regional levels**

Despite the absence of a National Indigenous Representative Body, there exists a range of organisations that advocate for the interests of Indigenous peoples. This includes through:

- an extensive array of national peak bodies that represent the different sectoral interests of Indigenous service delivery organisations;
- land councils, native title representative bodies and prescribed bodies corporate established through the native title and land rights and native title systems;
- regional mechanisms for representing Indigenous people that exist in some parts of the country; and
- mechanisms established by State or Territory governments to represent Indigenous peoples in policy making processes.

Some of these organisations or mechanisms are representative of different communities or sectors of Indigenous peoples, whereas others base their advocacy on their service delivery role.

This section of the paper identifies the key features of a range of different organisations and mechanisms that currently exist across Australia. While none of these organisations or mechanisms is capable of addressing the sheer breadth of issues required from a National Indigenous Representative Body, they do provide a substantial base on which to build.

Each of these organisations or mechanisms, therefore, has a role to play either in contributing to the operations of, or through their relationship with, a new National Indigenous Representative Body.

This section of the paper concludes by considering what issues are raised for the operation of a new National Indigenous Representative Body in light of these existing mechanisms, as well as in relation to the post-ATSIC arrangements for delivery of services to Indigenous peoples at the federal level, which have substantially changed the operating landscape for Indigenous Affairs.

Any National Indigenous Representative Body will need to be alert to how it can effectively work with the regional and State/ Territory representative bodies, and the current administration arrangements in place for Indigenous affairs.

### **National Indigenous Peak Bodies**

There exists an extensive array of national Indigenous peak bodies. A critical issue in the development of a new National Indigenous Representative Body will be deciding how these peak bodies will interact and inform the work and decision making of the new National Indigenous Representative Body.

Generally speaking, existing Indigenous peak bodies represent the different sectoral interests of Indigenous service delivery organisations. In other words, they deal with a

particular professional area or service delivery role. This differentiates the role of these peak bodies from those of a National Indigenous Representative Body. The National Body would need to consider all different perspectives in developing a clear vision of how to advance the overall wellbeing and priorities for indigenous peoples at a national level.

Many of these peak bodies are also elected, some with direct representation from the community level. Peak Indigenous bodies offer significant expertise and experience that should be drawn on by the new National Indigenous Representative Body.

**Text Box 3** below provides an overview of a number of existing national Indigenous peak bodies and how they are constituted.<sup>29</sup>

**Text Box 3 – Overview of existing National Indigenous Peak Bodies**

Organisation	Function & Structure (purpose and elections/composition)
Aboriginal Tourism Australia (ATA)	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Provide leadership and a focus for the development of Aboriginal tourism, consistent with Aboriginal economic, cultural and environmental values.</li> <li>• Promote cultural integrity and authenticity across the tourism industry and provides education on Indigenous protocols to the broader tourism industry.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• ATA is an industry organisation formed by Indigenous tourism operators with a national membership. It is a Company Limited by Guarantee registered under the Australian Securities and Investment Commission (ASIC). It is a not for profit and a non government organisation.</li> </ul>
Australian Indigenous Doctor’s Association (AIDA)	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Dedicated to the pursuit of leadership, partnership &amp; scholarship in Aboriginal and Torres Strait Islander health, education and workforce.</li> <li>• Advocate for improvements in Indigenous health in Australia and equitable health and life outcomes for Aboriginal and Torres Strait Islander people</li> <li>• Encourage Aboriginal and Torres Strait Islander people to work in medicine by supporting Indigenous students and doctors.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• A representative organisation for Aboriginal and Torres Strait Islander practitioners</li> <li>• A not-for-profit, non-government organisation</li> </ul>

<sup>29</sup> Please note: this list does not include state and territory level bodies, such as state-based education communities.

Organisation	Function & Structure (purpose and elections/composition)
<p>Congress of Aboriginal and Torres Strait Islander Nurses  (CATSIN)</p>	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Increase the recruitment and retention of Aboriginal and Torres Strait Islander peoples into nursing.</li> <li>• Setting the agenda for, and advising on, a range of health related issues.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• CATSIN is a Professional Nursing Organisation that formally represents Indigenous nurses. It is an independent organisation with links to other professional bodies, and provides advice to these organisations.</li> </ul>
<p>Federation for Aboriginal and Torres Strait Islander Languages (FATSIL)</p>	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Promote the maintenance, retrieval and revival of Indigenous languages, through the support of community based language programs.</li> <li>• Have Indigenous languages recognised as core elements in the development of all policy and legislation relevant to Aboriginal and Torres Strait Islander people in Australia.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• FATSIL is the national peak body for community based language organisations</li> <li>• It acts in an advisory role on issues relating to Indigenous languages to government and relevant non-government agencies, and provides a communication network to support information sharing between all target groups involved with Indigenous languages in Australia.</li> </ul>
<p>Indigenous APS Employees Network (IAPSEN)</p>	<p style="text-align: center;"><u>Primary Objective</u></p> <ul style="list-style-type: none"> <li>• Support Indigenous employees to share information and experiences and promote cultural awareness and respect in the wider APS.</li> <li>• Help Indigenous Australians improve their employment opportunities within the Australian Public Service.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• IAPSEN membership is open to any Aboriginal and Torres Strait Islander employee of a Commonwealth Government Agency.</li> <li>• IAPSEN has networks in Townsville, Brisbane, Sydney, Melbourne, Adelaide, Perth and the ACT.</li> <li>• The Chairs' Forum brings together the Chairs of all the regional IAPSENs to exchange information, discuss regional issues and provide regional perspectives on Indigenous Employment in the APS. The IAPSEN Chairs usually meet bi-yearly.</li> </ul>
<p>Indigenous Dentist's Association of Australia (IDAA)</p>	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Promote good oral health for Indigenous Australians and provides support for Indigenous dentists and dental students</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• The Association receives no government funding and is entirely dependent upon donations</li> </ul>
<p>National Aboriginal Community Controlled Health Organisation</p>	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• NACCHO represents local Aboriginal community controlled health organisations at a national level to ensure that Aboriginal people have greater access to effective health care across Australia.</li> <li>• NACCHO provide a coordinated holistic response from the community</li> </ul>

Organisation	Function & Structure (purpose and elections/composition)
(NACCHO)	<p>sector, advocating for culturally respectful and needs based approaches to improving health and well being outcomes through Aboriginal health organisations.</p> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• A national peak Aboriginal health body representing Aboriginal Community Controlled Health Services throughout Australia.</li> <li>• Its membership is composed of member organisations of a State or Territory peak Aboriginal community controlled health body affiliated with NACCHO.</li> <li>• The Executive Committee is elected by the members at an AGM.</li> </ul>
National Aboriginal Justice Advisory Committee (NAJAC)	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• To independently monitor the Commonwealth, State and Territory Governments' responses to Recommendations of the Royal Commission Inquiry into Aboriginal Deaths in Custody. This would ensure a continued national focus on those Recommendations.</li> <li>• To address the over-representation of indigenous people in the criminal justice system through the development of justice plans by State and Territory Governments and the indigenous community.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• A representative body consisting of the Chairpersons of the AJACs from each State/Territory, and serviced by a secretariat to be supported by the Commonwealth Attorney-General's Department.</li> </ul> <p>Note: NAJAC was intended to consist of the Chair of each state and territory AJAC. However, as a result of changes in the state and territory based AJACs in recent years, along with administrative changes in Indigenous affairs more broadly, the Australian Government is considering the establishment of a different type of expert advisory group in Indigenous law and justice. The Government is proposing that it comprise a group of high profile experts in a variety of fields, able to comment across key issues relevant to Indigenous law and justice. The Government is planning a consultation process to engage Indigenous Australians and organisations in the establishment of the peak advisory body in the near future.</p>
National Aboriginal and Torres Strait Islander Ecumenical Commission (NATSIEC)	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Work with the churches for a fair deal for Aboriginal and Torres Strait Islander Australians, and for the healing of our nation.</li> <li>• Provide a forum for Aboriginal and Torres Strait Islander peoples to speak and take action on issues of faith, mission and evangelism; of Aboriginal and Torres Strait Islander spirituality and theology; of social justice and land rights.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• NATSIEC is the peak ecumenical Indigenous body in Australia.</li> <li>• It is a part of the National Council of Churches and is comprised of Aboriginal and Torres Strait Islander peoples that represent a cross-section of church-related Aboriginal and Torres Strait Islander groups.</li> </ul>

Organisation	Function & Structure (purpose and elections/composition)
National Coalition of Aboriginal and Torres Strait Islander Social Workers Association (NCATSISWA)	<p style="text-align: center;"><u>Primary Objective</u></p> <ul style="list-style-type: none"> <li>• Bring together Aboriginal and Torres Strait Islander social workers as a professional body, to exchange information, ideas, and to network for the benefit of our communities.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• NCATSISWA is an independent and not for profit organisation that offers full memberships to indigenous people and associate non-indigenous people as well as those from interested government and community organisations</li> </ul>
National Indigenous Higher Education Network (NIHEN)	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Achieve parity for Aboriginal and Torres Strait Islander peoples in higher education; provide a forum for the staff of the Indigenous higher education sector to pursue common goals and objectives for Aboriginal and Torres Strait Islander peoples.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• NIHEN is a cohort of professional bodies, established to provide a representative voice for Indigenous higher education knowledge networks. Membership of NIHEN is open to each of the Indigenous Higher Education Centres within Australian public Universities, the Indigenous Faculty and Schools of Aboriginal and Islander/Indigenous Australian Studies, Indigenous Research Centres of Excellence and the Bachelor Institute of Indigenous Education.</li> </ul>
National Indigenous Postgraduate Association Aboriginal Corporation (NIPAAC)	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Provide a network for Indigenous postgraduate students; Advocate for and to represent the interests of Indigenous postgraduate students at a national level; Promote research into Indigenous issues and the training of Indigenous researchers; Educate researchers on appropriate protocols when dealing with issues of cultural and social significance to Indigenous peoples.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• An association for Indigenous scholars and leaders since 1989.</li> <li>• Membership of NIPAAC is open to all indigenous-Australian postgraduate students, Elders and ex-postgraduate students. There is also non-voting membership for non-Indigenous Australian postgraduate students.</li> <li>• The Association is an incorporated Association under the Aboriginal Corporations Act</li> </ul>
National Indigenous Youth Movement of Australia (NIYMA)	<p style="text-align: center;"><u>Primary objectives</u></p> <ul style="list-style-type: none"> <li>• Engage other young indigenous peoples with life.</li> <li>• Support young Indigenous peoples in life and career pursuits.</li> <li>• Celebrate all successes among the membership.</li> <li>• Promote self-awareness, healing and wellness among the membership and our communities.</li> <li>• Contribute to the revival of Indigenous cultural and spiritual values, beliefs and practices for today's world.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• NIYMA is a not for profit organisation founded and run by Indigenous</li> </ul>

Organisation	Function & Structure (purpose and elections/composition)
	<p>young people from the ages of 18-30 years of age.</p> <ul style="list-style-type: none"> <li>• NIYMA's executive structure is comprised of 6 indigenous young people.</li> </ul>
National Native Title Council	<p style="text-align: center;"><u>Primary Objectives</u></p> <ul style="list-style-type: none"> <li>• Committed to forging strong and collaborative partnerships with key stakeholders in native title as well as Indigenous affairs policy;</li> <li>• The main focus is on promoting the development of better solutions for resolving native title and securing adequate resources for Native Title Representative Bodies (NTRBs) and Native Title Service providers (NTSs);</li> <li>• Seeks to maximise the significant contribution that native title makes to achieving and improving the economic, social and cultural participation of Indigenous people.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• Comprised of Native Title Representative Bodies and Native Title Service providers across Australia;</li> <li>• Voluntary membership, incorporated as an autonomous public company;</li> <li>• Chief Executive Officers of NTRBs and NTSs participate in the Council, and elect a Chairperson and Deputy Chairperson.</li> </ul>
National Sorry Day Committee (NSDC)	<p style="text-align: center;"><u>Primary Objective</u></p> <ul style="list-style-type: none"> <li>• Work in unity with its members, the Stolen Generations, Aboriginal and Torres Strait Islander communities, government, social justice and community organisations, so that the 54 recommendations of the <i>Bringing Them Home</i> Report are finally achieved.</li> </ul> <p style="text-align: center;"><u>Structural organisation</u></p> <ul style="list-style-type: none"> <li>• The NSDC is made up of a variety of indigenous and non-indigenous members, including members of the Stolen Generation networks.</li> <li>• Each State and Territory has established affiliated Sorry Day Committees/Networks. The names of these affiliated bodies today reflect the broad spectrum of groups that the National Sorry Day Committee membership consists of (i.e. Journey of Healing, Bringing Them Home, Sorry Day, Stolen Generations or Link Up).</li> <li>• The NSDC has a mandate from the Stolen Generations, through its affiliated Regional/ State/Territory bodies.</li> <li>• NSDC is presided over by an executive committee, comprised of indigenous and on-indigenous people.</li> </ul>
Ngalaya Aboriginal Corporation	<p style="text-align: center;"><u>Primary objective</u></p> <ul style="list-style-type: none"> <li>• Comprised of Indigenous lawyers and law students nationally</li> <li>• Seeks to cooperate and collaborate to achieve an equality of justice for all Australians.</li> <li>• provide assistance to Indigenous law students and Indigenous law graduates</li> <li>• ensure Indigenous law students attain the same graduation and work place participation rates as those attained by other students.</li> </ul> <p style="text-align: center;"><u>Structure</u></p> <ul style="list-style-type: none"> <li>• An Indigenous Corporation under the <i>Aboriginal Councils and Associations Act 1976</i>.</li> </ul>
Positive Aboriginal Torres Strait Islander Network (PAT SIN)	<p style="text-align: center;"><u>Primary Objective</u></p> <ul style="list-style-type: none"> <li>• Work within Indigenous communities and with government and service providers to represent the interests of Indigenous Australians</li> </ul> <p style="text-align: center;"><u>Structural organisation</u></p>

Organisation	Function & Structure (purpose and elections/composition)
	<ul style="list-style-type: none"> <li>• A national membership-based network of Indigenous people living with HIV/AIDS.</li> <li>• The network is auspiced by National Association of people Living with HIV/AIDS</li> </ul>
Secretariat of National Aboriginal and Torres Strait Islander Child Care (SNAICC)	<p style="text-align: center;"><u>Primary Objective</u></p> <ul style="list-style-type: none"> <li>• Provide a strong voice for Aboriginal and Torres Strait Islander children and families through a national body which represents Aboriginal and Torres Strait Islander children’s services and promotes the rights, needs and aspirations of Aboriginal and Torres Strait Islander children and families.</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• A national non-government peak body in Australia representing the interests of Aboriginal and Torres Strait Islander children and families.</li> <li>• SNAICC operates from a membership base of Aboriginal and Torres Strait Islander community-based child care agencies, Aboriginal Children’s Services, family support services, foster care agencies, link up and family reunification services, family group homes, community groups and voluntary associations, long day care child care services, pre schools, early childhood education services and services for young people at risk.</li> <li>• SNAICC is governed by a National Executive made up of Aboriginal and Torres Strait Islander community-controlled children’s and families’ services. The National Executive is elected directly through postal ballot by SNAICC’s full members, who are Aboriginal and Torres Strait Islander community-controlled children’s and families’ services, for a two year term.</li> </ul>
Stolen Generations Alliance	<p style="text-align: center;"><u>Primary Objective</u></p> <ul style="list-style-type: none"> <li>• Work for healing, truth and justice</li> </ul> <p style="text-align: center;"><u>Structural Organisation</u></p> <ul style="list-style-type: none"> <li>• Its members are comprised of indigenous and non-Indigenous people who have been active in the Journey of Healing, since the release of the Bringing Them Home Report.</li> <li>• It has an executive comprised of Indigenous and non-Indigenous members from all States and territories of Australia.</li> </ul>

## Land Councils and Native Title Representative Bodies

Nationwide, there are 17 Native Title Representative Bodies (NTRBs) and Native Title Services (NTSs), established under the *Native Title Act 1993* (Cth). NTSs do not have a representative role. Many NTRBs emerged out of local ‘land councils’, which were established under State and Territory land rights legislation which predated the native title system. Many of these land councils have a long history of representing Indigenous interests at a regional or State/Territory-wide level.

The first land councils were established in the Northern Territory under the *Aboriginal Land Rights Act 1976* (Cth) with a range of responsibilities to run land claims and manage existing land trusts by taking instruction from traditional owners on development issues. Since the introduction of the *Native Title Act 1993* (Cth), these land councils effectively operate under two statutes and as a result have two sets of operational responsibilities.

New South Wales also has a land rights system, which is established under the *Aboriginal Land Rights Act 1983* (NSW). The NSW Aboriginal Land Council network operates as a two –tiered structure, comprising the peak statutory authority – the New South Wales Aboriginal Land Council (NSWALC) – and 121 Local Aboriginal Land Councils (LALCs). The objectives of both NSWALC and the LALCs is generally to “improve, protect and foster the best interests of Aboriginal persons” within their respective jurisdictions.

Both the NSWALC and LALCs are governed by elected Boards. The 9 Councillors that make up the NSWALC Board are elected to represent each of the regions that the 121 LALCs are grouped into across the state.

Although native title advocacy, agreements, claims and determinations are a central focus of NTRBs, NTSs and land councils under State and Territory land rights legislation, these bodies increasingly undertake roles in related areas of land management, community development and employment and training programs. Land management units have developed into significant resource centres receiving support from a range of government and non-government agencies to run programs from ranger groups to Indigenous ecological knowledge maintenance.

The range of support services and programs, their structure and election procedures and the increased regionalisation of some land councils or NTRBs have contributed to imbuing these institutions with some degree of representativeness for Indigenous communities in certain parts of Australia.

However, their legitimacy, authority, resources and effectiveness is not uniform. They are usually governed by a membership that has achieved land rights grants, or has achieved or asserts native title. They are not usually representative of those Indigenous groups that cannot demonstrate traditional ownership of areas covered by the land council or NTRB, nor do they always have close ties to existing Indigenous community service organisations. They are, nevertheless, important bodies in the wider landscape of Indigenous representation, particularly at the local and regional level.

There are a further range of organisations that are beginning to operate through the native title system. These are Prescribed Bodies Corporate (PBC). The prime object of prescribed bodies corporate is to hold the native title rights and interests granted by a determination of native title on trust or as an agent for native title holders. Once the determination is made a PBC is then registered on the National Native Title Register as a Registered Native Title Body Corporate (RNTBC). The primary roles of PBCs are to:

- Protect and manage determined native title, in accordance with the native title holders’ wishes; and
- Provide a legal entity through which native title holders can conduct business with government, and others, interested in accessing or regulating native title lands and waters.

As at 30 June 2008, there were 57 RNTBCs, and 12 determinations of native title currently awaiting determination to become Registered Native Title Body Corporates. While funding support is limited for such bodies, and they are differently constituted, they are emerging as a new organisational structure that has representative

responsibilities in relation to traditional owners who have had their native title recognised.

There are a further 12 determinations of native title currently awaiting determination of a Prescribed Body Corporate, to become the Registered Native Title Body Corporate.

## **Regional Authorities – Torres Strait Regional Authority (TSRA)**

The Torres Strait Regional Authority (TSRA) began as an ATSIC Regional Council in 1990 and became an independent statutory authority by amendment to the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) in 1994.

It consists of two parts: a Board of 20 Indigenous elected members resident in the region and an Administration staffed by Australian government public servants headed by a General Manager appointed by the Minister for Indigenous Affairs.

The Board includes 18 representatives from the island communities of the Torres Strait plus two more elected under the *Aboriginal and Torres Strait Islander Act 2005* (Cth), that replaced the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). Considered to be the political arm of the TSRA, the Board determines budget allocations and policy, sometimes within the parameters of portfolios.

Unified regional Indigenous governance structures have existed in the Torres Strait for decades.<sup>30</sup> The TSRA is currently the principal Commonwealth agency co-ordinating Indigenous affairs in the region. Its predecessor was the Torres Strait Regional Council (TSRC) that existed in the late 1980s, and which drew its membership predominantly from another regional representative Islander body, the Island Co-ordinating Council<sup>31</sup> (ICC). The councils have powerful responsibilities under the *Community Services (Torres Strait) Act 1984* (Qld) which establishes 17 Island Councils and the *Local Government Act 1993* (Qld) which establishes the Torres Shire Council, both of which come together in the Island Coordinating Council (ICC).

As well as being responsible for formulating, administering and monitoring the effectiveness of programs to individuals, councils and community organisations in key development areas (such as economic, employment and training, housing and environmental, social and cultural, policy co-ordination), the TSRA is the regional representative body for native title and land and sea management. It advises the Minister for Indigenous Affairs on matters relating to Torres Strait Islander and Aboriginal Affairs in the Torres Strait.

The TSRA therefore combines representative, policy-making and administrative elements within the one body.

The current functions of the TSRA include:

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<sup>30</sup> Sanders, W 2002, 'Good Governance for Indigenous Communities and Regions: More diverse than unified, as much process as structure.' Indigenous Governance Conference 3-5 April, Canberra. p5.

<sup>31</sup> Sanders, W 1995, 'Reshaping governance in Torres Strait: the Torres Strait Regional Authority and beyond', *Australian Journal of Political Science*, Vol. 30 No. 3.

- Recognising and maintaining the special and unique *Ailan Kastom* of Torres Strait Islanders living in the Torres Strait;
- Formulating and developing programs for Torres Strait Islanders and Aboriginal people living in the Torres Strait, and monitoring the effectiveness of its own and other bodies' programs for them in the region;
- Developing policy proposals to meet their national, State/ Territory and regional needs and priorities;
- Assisting, advising and cooperating with their communities, organisations and individuals at these levels;
- Advising the Minister for Families, Community Services and Indigenous Affairs on matters related to Torres Strait Islander and Aboriginal affairs in the area;
- Taking necessary action to protect sacred or significant Torres Strait Islander or Aboriginal cultural material and information; and
- Collecting and publishing statistical information as requested by the Australian Bureau of Statistics (*Aboriginal and Torres Strait Islander Act 2005* (Cth) s142A).

Elections are held every four years. While voting is open to both Indigenous and non-Indigenous residents, there are fewer of the latter in most island communities. All prospective candidates must, *inter alia*, reside for at least two years prior to an election within the ward they wish to represent and be Indigenous peoples. It should be noted that Torres Strait Islanders living in the Torres Strait are outnumbered by those resident on mainland Australia, who nonetheless share a “common sense of history and identity”.<sup>32</sup>

Chairs of Community Councils contribute 17 Board members. One elected ICC member represents five constituencies on Thursday Island on the Board (Tamwoy, Rosehill, Aplin, Waiben and Quarantine [TRAWQ]) and the remaining two members represent Port Kennedy (Thursday Island), as well as Horn and Prince of Wales Islands.

The Queensland government is currently amalgamating the Islander Councils into a single local government structure with the existing jurisdictions becoming the responsibility of Community Boards.<sup>33</sup>

### **Regional Indigenous representative arrangements post-ATSIC (2005 - current)**

Following the abolition of ATSIC, the then Commonwealth government committed to the establishment of regional arrangements for the representation of Indigenous peoples. This was to be based on the negotiation of Regional Partnership Agreements (RPAs) and Shared Responsibility Agreements (SRAs) with Indigenous communities, families or clans. The government had also committed to supporting the development of regional Indigenous representative structures in the place of ATSIC Regional Councils.

<sup>32</sup> Arthur, W and Sanders, W 2001, ‘Autonomy rights in Torres Strait: From whom, for whom, for or over what?’, Centre for Aboriginal Economic Policy Research, Discussion Paper No. 215. p11.

<sup>33</sup> MacDonald, E 2007, ‘The Torres Strait Regional Authority: Is it the Answer to Regional Governance for Indigenous Peoples?’, *Australian Indigenous Law Reporter*, Vol. 11 No. 3. pp43-54.

In 2005, consultations were undertaken nationally with Indigenous peoples on the type of representative structures that should be supported in each region. The outcomes of these consultations are discussed in the *Social Justice Report 2005*.<sup>34</sup> It reveals a mix of different models that were proposed by Indigenous communities.

Since 2005 however, only two such regional representative structures have been supported through the signing of RPAs or SRAs. These are:

- the Ngaanyatjarra Council in Western Australia; and
- the Murdi Paaki Regional Assembly in Northern New South Wales.

The Social Justice Commissioner has identified the absence of regional representative arrangements (with the exception of these two arrangements) as the most significant problem with the operation of the post-ATSIC arrangements for Indigenous affairs. In the *Social Justice Report 2006* he stated:

Policy is being developed in a vacuum at the national level, with no connection to Indigenous experiences at the local and regional level ... what this ... demonstrate(s) is the lack of coherence between the different levels of service delivery and policy...

In practice the new arrangements are a top down imposition – with policy set centrally and unilaterally by government, confirmed in bilateral processes with State and Territory governments (again without Indigenous input) and then applied to Indigenous peoples. The absence of regional mechanisms for engagement with Indigenous peoples is a critical problem...<sup>35</sup>

#### **a) Ngaanyatjarra Regional Partnership Agreement**

The Ngaanyatjarra Regional Partnership Agreement (RPA) in Western Australia was signed on 12 August 2005.<sup>36</sup> The agreement relates to 12 discrete communities of the Ngaanyatjarra lands. It sets out strategic approaches and projects for joint action by government and the Ngaanyatjarra Council, a community organisation, in partnership with Ngaanyatjarra people and communities. The term of the RPA is until 30 June 2008.

The RPA is a statement of mutual intentions but does not create any legally binding obligations. The parties to the agreement are the Australian government, the Western Australian government, the Ngaanyatjarra Council and the Shire of Ngaanyatarraku.

The objectives of the RPA include:

- Establishing partnerships and sharing responsibility for achieving measurable and sustainable improvements for people living in Ngaanyatjarra lands;

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<sup>34</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2005, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission, Sydney.

<sup>35</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2006, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission, Sydney. p15.

<sup>36</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2005, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission, Sydney. pp118-120.

- Providing better coordinated and resourced programs and services to achieve improvements in priority areas;
- Establishing mainstream programs and improving access to them;
- Reducing inefficiencies; and
- Developing a Strategic Investment Plan for the region.

The Ngaanyatjarra principles that underlie the agreement include:

- recognising existing capabilities and capacity;
- maintaining control of Ngaanyatjarra affairs;
- recognising the role of the Ngaanyatjarra Council and its capacity to drive planning and negotiation;
- maintaining and strengthening traditional Ngaanyatjarra cultural and social values and connection to land;
- recognising need for change and innovation to improve living conditions;
- wishing to live in communities on traditional country that have the best achievable standard of living and healthy and safe environment;
- securing core infrastructure funding and developing all participating communities; and
- supporting an education system that provides children with relevant and useful mainstream education while also reinforcing culture.

The representation structures allowed for the Ngaanyatjarra Council to represent and consult those communities in the area that wished to be represented by the council, and facilitate the development of SRAs. The government agreed to support the Council in its representative role by actively engaging with the council and funding it to fulfil its role, and agreeing not to establish another representative arrangement for communities that have endorsed the council's representative status.

The intended outcomes of the RPA included improved regional capacity; establishment of structures to manage the RPA (i.e. Regional Partnership Committee and Agreement Coordinators Group to monitor and develop the partnership), reduced red tape, and development and implementation of the Ngaanyatjarra Strategic Investment Plan (20-30 year vision). Progress for the RPA is to be monitored by all parties in accordance with agreed timeframes and indicators.

#### **b) Murdi Paaki Regional Assembly**

The Murdi Paaki Regional Assembly (MPRA) is the regional governance and engagement forum for 16 communities in the northwest region of New South Wales. It operates in the same geographic region as the previous ATSIC Murdi Paaki Regional Council. The Murdi Paaki region in NSW was also one of eight COAG whole of government trial sites since 2002.

Community working parties (CWPs) exist in each of the 16 member communities. The CWPs operate under a Charter and Code of Conduct and have developed individual Community Action Plans.

On 22 August 2003, Murdi Paaki entered its first SRA with the Australian and NSW governments. Under the Agreement, the ATSIC Murdi Paaki Regional Council was acknowledged as the peak regional body and primary point of Indigenous community contact. The Murdi Paaki Community Working Parties (Working Parties) are acknowledged as the peak community bodies and primary points of Indigenous community contact in each community across the region.

The Agreement incorporates the regional priorities identified by the community and establishes the responsibilities of all parties. Within Regional Priorities, specific priorities and agreed outcomes for each community in the region were agreed to be detailed in separate Shared Responsibility Agreements between the Community Working Parties and the governments.

A subsequent agreement has been reached recognising the Murdi Paaki Regional Assembly as the principal regional Indigenous governance body (replacing the ATSIC Murdi Paaki Regional Council).

The MPRA has currently entered into six regional agreements and 12 SRAs with the government.

The Murdi Paaki Regional Assembly finalised a Regional Plan in 2006. This plan has used as its foundation the 16 Community Action Plans, and previous planning documents developed by the Murdi Paaki Regional Council.

The Plan identifies 10 key areas where the Regional Assembly can enable initiatives, through its influence and representation of the Murdi Paaki region. They are: community governance, economic development, employment and enterprise development, housing and infrastructure, young people, health, law and justice, families, education and culture and well-being.

The Murdi Paaki Regional Assembly has stated that its' Chair and members will use the Plan to:

Convey community priorities as gathered and developed from the sixteen CWP's Community Action Plans at the regional level. This plan will be used to coordinate partnership and funding initiatives from government agencies and non-government service providers that will benefit all communities. The Regional Plan will also be used by the Regional Assembly to influence the development of policies and programs that affect Indigenous peoples within the region.<sup>37</sup>

**c) Post-ATSIC regional representation for Torres Strait Islanders on the mainland**

In the 2006 census count there were 29,515 Torres Strait Islanders and 17,813 persons of both Torres Strait islander and Aboriginal origin in Australia - a total of 47,328

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<sup>37</sup> Murdi Paaki Regional Assembly 2007, *Regional Plan 2007*, GHD Pty. Ltd., Brisbane. p8.

people. Of this only 15% were living in the Torres Strait. Of the remaining proportion of Torres Strait Islanders who live on the mainland, 61% lived in Queensland.<sup>38</sup>

The needs and interests of Torres Strait Islanders living on the mainland are distinct from those living in the Torres Strait. The Torres Strait Regional Authority represents the interests of those living in the Torres Strait Islander region (see the discussion of this regional authority above - 'Regional Authorities - Torres Strait Regional Authority (TSRA)'). Under ATSIC the interests of Torres Strait Islanders living on the mainland were represented through the Torres Strait Islander Advisory Board (TSIAB). The TSIAB was responsible for advising the Government on issues specific to Torres Strait Islanders on the mainland.

With the abolishment of ATSIC, the TSIAB was also abolished and the needs of mainland Torres Strait Islanders were expected to be met through the new federal service delivery arrangements. This included mainland Torres Strait Islanders interests being addressed by the local Indigenous Coordination Centres (ICCs) through Shared Responsibility Agreements (SRAs) and other arrangements. The Office of Indigenous Policy Coordination (OIPC) absorbed the Office of Torres Strait Islander Affairs, but continued to fund the National Secretariat of Torres Strait Islander Organisations Limited (NSTSIOL), to represent mainland Torres Strait Islanders in dealings with government departments, statutory corporations and the Aboriginal community.

The removal of distinct representative bodies for mainland Torres Strait Islanders has meant that the under-representation of their interests in the delivery of government programs and, policies and services has continued if not increased. Since 2004 the Aboriginal and Torres Strait Islander Social Justice Commissioner has sought to assess the adequacy of arrangements for the participation and representation of mainland Torres Strait Islanders. In the *Social Justice Report 2005*, the Commissioner noted that with the abolition of TSIAB the participation of mainland Torres Strait Islanders was no longer assured.<sup>39</sup> The Commissioner reported that very few Torres Strait Island Corporations on the mainland had been involved in the new arrangements for service delivery, and that the bodies responsible for implementing them, namely the ICCs, had very limited understanding of the specific contexts and needs of mainland Torres Strait Islanders.<sup>40</sup>

There is no indication that there have been any improvements to this situation more recently. There have been no SRAs or RPAs signed with mainland Torre Strait Islander Communities.

This situation of the mainland Torres Strait Islanders highlights the need for diversity in Indigenous representative bodies. It demonstrates that, particularly

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<sup>38</sup> Australian Bureau of Statistics Website (available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/14E7A4A075D53A6CCA2569450007E46COpenDocument>; and ABS Table: 4705.0 4705.0 Table 43, Census Counts, Indigenous Status-1991-2006 – available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument>)

<sup>39</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, HREOC, Sydney, 2005, p127.

<sup>40</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, HREOC, Sydney, 2005, p129.

at the regional level, all Indigenous groups cannot be homogenised into a single representative body, but require distinct representative arrangements.

### **State and Territory Government representative arrangements, post-ATSIC (2005 – current)**

Following the abolition of ATSIC, several States and Territories sought to develop replacement regional models for Indigenous representation.<sup>41</sup> The Western Australia and New South Wales governments both convened forums and embarked upon consultations with Indigenous peoples to identify options for representative bodies.<sup>42</sup>

One example of an advanced regional model was the Kulari model of regional governance in the Kimberley region of WA. Involving three tiers of governance with an over-arching council, it involved the retention of the then-existing ATSIC Regional Councils. It included a level of community working parties to enable access, participation and capacity building at the grass roots level.<sup>43</sup>

The NSW Government discussed options at the *Our Future Our Voice* Summit in 2004, on three models including a regional assembly model (based on the Murdi Paaki model), the Coalition of peak Aboriginal Bodies (building on existing organisations) and the Combined ATSIC/ Land Council model (where local land councils input to regional councils, which in turn input to State land councils).<sup>44</sup>

The Northern Territory government considered a model of Regional Authorities under the ‘Overarching Agreement on Indigenous Affairs between the Commonwealth of Australia and the Northern Territory of Australia 2005-2010’, and the ‘Building Stronger Regions – Stronger Futures Strategy.’ This latter strategy was the first step in the current process of amalgamating existing community councils that is underway in the Northern Territory.<sup>45</sup>

In 2005 Victoria established the Premier’s Aboriginal Advisory Council (PAAC), chaired by the Premier. Secretariat support for the PAAC is provided by Aboriginal Affairs Victoria. PAAC provides advice to the Government on strategic issues in Indigenous policy, and acts as a forum for Indigenous community perspectives to inform government direction and processes.

PAAC supplements existing Indigenous consultative arrangements in other portfolios and broad-based community consultations on specific initiatives.<sup>46</sup>

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<sup>41</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2005, *Social Justice Report 2005*, HREOC, Sydney. pp115-117.

<sup>42</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2004, *Social Justice Report 2004*, HREOC, Sydney. p112.

<sup>43</sup> *Ibid.*

<sup>44</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2005, *Social Justice Report 2005*, HREOC, Sydney. p114.

<sup>45</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2004, *Social Justice Report 2004*, HREOC Sydney, p115.

<sup>46</sup> Victoria Department of Premier and Cabinet website: Advisory Bodies (available at: <http://www.dpc.vic.gov.au/CA256D8000265E1A/page/Guidelines+and+Procedures-Advisory+Bodies!OpenDocument&1=80-Guidelines+and+Procedures~&2=75-Advisory+Bodies~&3=~>)

The South Australian government established an interim Aboriginal Advisory Council with the role to oversee the application of the ‘Doing it Right’ policy framework and report to the Premier. Members include the Minister, representatives from ATSIC State Council, leaders of land councils, other Aboriginal peak bodies and community leaders.<sup>47</sup>

In 2008, following the recommendations of this Advisory Council, the government appointed a Commissioner for Aboriginal Engagement, Mr Klynton Wanganeen, and established a permanent South Australian Aboriginal Advisory Council.

The Commissioner is a point of contact for Aboriginal people to express their concerns, which the Commissioner will identify to the government and work towards having resolved.

The new permanent Advisory Council will provide the government with advice on existing programs and policies and help shape future policies and services relating to Aboriginal people, ensuring that Aboriginal views are part of government policy-making. The Council will have ten members each appointed by the Minister for Aboriginal Affairs and Reconciliation for a term of two years.<sup>48</sup>

The Australian Capital Territory government announced the establishment of an elected representative body for Indigenous peoples in May 2008. Elections have now been held and seven members appointed for a three year term to advise the ACT government on Indigenous issues. Details of this new representative body are provided in Text Box 4 below.

#### **Text Box 4 – ACT Government’s Aboriginal and Torres Strait Islander Elected Body (ATSIEB) - 2008<sup>49</sup>**

As this paper was being finalised, elections had been concluded in the Australian Capital Territory (ACT) for members of the Aboriginal and Torres Strait Islander Elected Body (ATSIEB). The Territory’s Chief Minister has indicated his intention that this body fill the void for a democratically-elected Indigenous voice following the abolition of ATSIC

The ATSIEB is established under the *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT), which came into force on 15 May 2008 after a series of consultations about its structure with the local Indigenous community. These consultations were conducted in 2006 via the Aboriginal and Torres Strait Islander Community Consultative Council.

Eligibility requirements for both nominated members and voters are identical: only Indigenous peoples at least 18 years old and on, or entitled to be on, the ACT electoral

<sup>47</sup> Aboriginal and Torres Strait Islander Commissioner 2005, *Social Justice Report 2005*, HREOC, Sydney, p116.

<sup>48</sup> Government of South Australia 2008, viewed 3<sup>rd</sup> June 2008 at <http://www.ministers.sa.gov.au/news.php?id=2692>.

<sup>49</sup> DCHS ACT, “Representative Arrangements for Aboriginal and Torres Strait Islander People in the ACT” brochure, 2008 (available at: [http://www.dhcs.act.gov.au/\\_data/assets/pdf\\_file/0015/16305/brochure\\_7\\_December\\_2007.pdf](http://www.dhcs.act.gov.au/_data/assets/pdf_file/0015/16305/brochure_7_December_2007.pdf)); John Stanhope, Media Release, “Nominations Open Monday for Elected Body”, 26 May 2008 (available at: <http://www.chiefminister.act.gov.au/media.asp?section=24&media=3808&id=3808&title=>).

roll qualify. Nominees have the additional stipulation of not being under a sentence of imprisonment for one year or longer for an indictable offence. Importantly, voting is not compulsory.

Voting was conducted between 16 and 21 June 2008 (inclusive), with the seven elected members of the Body announced in early July.

Seven members are to be elected every three years, among them a Chair and Deputy Chair, and meetings will occur at least six times per year. Voting at meetings will be by majority consensus or, if equal, by a deciding vote from the presiding member (see ss22-25). A Chief Executive of a government agency may be invited to attend (s26). The first meeting is scheduled for July.

The functions of the Elected Body are set out in section 8 of the Act as follows:

1. To receive, and pass on to the Minister, the views of Aboriginal people and Torres Strait Islanders living in the ACT on issues of concern to them;
2. To represent Aboriginal people and Torres Strait Islanders living in the ACT and to act as an advocate for their interests;
3. To foster community discussion about issues of concern to Aboriginal people and Torres Strait Islanders living in the ACT;
4. To conduct regular forums for Aboriginal people and Torres Strait Islanders living in the ACT and report the outcomes of those forums to the Minister;
5. To conduct research and community consultation to assist ATSIEB in the exercise of its functions;
6. To propose programs and design services for Aboriginal people and Torres Strait Islanders living in the ACT for consideration by the government and its agencies;
7. To monitor and report on the effectiveness of programs conducted by government agencies for Aboriginal people and Torres Strait Islanders living in the ACT;
8. To monitor and report on the accessibility by Aboriginal people and Torres Strait Islanders living in the ACT to programs and services conducted by government agencies for the general public;
9. When asked by the Minister, to give the Minister information or advice about any matter stated by the Minister;
10. When asked by a government agency or another person, and in consultation with the United Ngunnawal Elders Council, to recommend any reasonable action it considers necessary to protect Aboriginal and Torres Strait Islander cultural material or information considered sacred or significant by Aboriginal people and Torres Strait Islanders living in the ACT;
11. Any other function given to ATSIEB by the Minister; and
12. Any other function given to ATSIEB under this Act or another territory law.

The body reports to the ACT Minister for Aboriginal and Torres Strait Islander Affairs and is mandated in s9 of the Act to consult with, and consider, the views of the United Ngunnawal Elders Council (UNEC) in the exercise of all its functions. It is also obliged by s11 to conduct a community forum at least twice per financial year on areas of interest to Indigenous residents, at which any Indigenous resident may participate. There is provision for timely, accessible and informed notice and

feedback prior to and during a forum (ss12-13).

### **The ‘new arrangements’ for the administration of Indigenous affairs at the federal level post-ATSIC (2005- current)**

In the wake of the abolition of ATSIC and ATSIIS in 2005, the federal government introduced a series of reforms to the administration of Indigenous Affairs. These reforms are documented and analysed at length in the Aboriginal and Torres Strait Islander Social Justice Commissioner’s *Social Justice Report* for 2004, 2005 and 2006.

These arrangements, which continue today, have substantially changed the operating landscape in which any National Indigenous Representative Body will operate.

Under these new arrangements, policy and service delivery at the federal level is the responsibility of mainstream government departments. All Indigenous specific programs have been retained and sit alongside mainstream programs within these departments.

There have also been a range of mechanisms established within government aimed at delivering a more coordinated, holistic or ‘whole of government’ response to Indigenous affairs. These include the establishment of:

- A Ministerial Taskforce on Indigenous Affairs that is chaired by the Minister for Indigenous Affairs, and involves Ministers with relevant portfolios across the government. Its purpose is to provide high level direction to the Australian government on Indigenous affairs as well as reporting to Cabinet on policy and expenditure.
- A Secretaries Group on Indigenous Affairs that is composed of the heads of Australian government departments, chaired by the Secretary of Prime Minister and Cabinet, and which provides support to the Ministerial Taskforce and reports annually on performance across the whole of the federal government on Indigenous affairs.
- A National Indigenous Council (NIC) that was an appointed council of Indigenous experts to advise the Ministerial Taskforce on policy program and service delivery issues. The NIC’s status as a hand-picked body with no ability to independently consult with Indigenous people meant that it enjoyed very little credibility with Indigenous people. Its mandate expired in December 2007, when the new government decided not to continue with it.
- An Office of Indigenous Policy Coordination (OIPC) that coordinates government policy development and service delivery in Indigenous affairs, across the whole of government.
- A network of regional Indigenous Coordination Centres (ICC) that co-locate staff across federal government departments in regional offices to coordinate whole of government responses to Indigenous issues on a regional level. The

location of these offices is in the same regions that had been adopted by the ATSIC Regional Councils.

- A ‘Single Budget Submission for Indigenous Affairs’ whereby all items relating to Indigenous affairs are considered by the Ministerial Taskforce in a single budget document to promote integrated whole of government activities and allocation of funding.<sup>50</sup>

Policy development is guided by a national framework of principles for government service delivery to Indigenous peoples agreed by the Councils of Australian Governments (COAG). Since 2005, there have been a series of commitments made by COAG that guide Indigenous affairs. Most notably, in 2007 COAG adopted a series of targets to close the gap in Indigenous disadvantage and agreed to a reform agenda through COAG.

The COAG commitments and new arrangements at the federal level were also reflected in bilateral agreements between the federal Government and State and Territory governments.

It is notable that in the absence of a National Indigenous Representative Body, the commitments through COAG and bilateral agreements that set the basis for the relationship between governments and policy directions for Indigenous affairs, have been made without any Indigenous participation or consultation. Indigenous representative structures at all levels are needed to partner governments in planning and determining appropriate service delivery arrangements.

### **Lessons learnt from existing mechanisms for representing Indigenous peoples at the national, State, Territory and regional levels**

The range of national, State/ Territory, and regional level outlined above demonstrate that a diversity of Indigenous representative bodies is currently in existence in Australia. However, none of these bodies or the combination of them can adequately provide the comprehensive representation that would be met by a National Indigenous Representative Body.

Each category of bodies illustrates strengths and weaknesses of different approaches to representation that can be usefully drawn upon in developing a new National Indigenous Representative Body. This includes understanding how the different models are structured, what functions they fulfil, how their membership is constituted, and the processes for electing the representative body.

The national peak Indigenous bodies commonly represent different sectoral interests of Indigenous service delivery organisations. While some of them may have a role in representing the interests of their Indigenous membership, it is often restricted to the specific sector that they primarily work in. Within their relative areas of interest the peak bodies can be a valuable source of information and input. It will be important to consider how the new Representative Body can ensure these peak bodies will interact

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<sup>50</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner 2005, *Social Justice Report 2004*, HREOC Sydney, pp79-80.

and inform the work and decision making of the new National Indigenous Representative Body. In terms of membership, it may be useful to consider if there should be a special category of membership for these bodies, particularly for those that are elected by an Indigenous membership.

The Land Councils and Native Title Representative Bodies are limited in their scope for representation as they only generally represent Indigenous groups that can demonstrate traditional ownership of areas covered by the land council or NTRB. They are, nevertheless, important bodies in the wider landscape of Indigenous representation, particularly at the local and regional level, particularly as a source of information and input.

The Torres Strait Regional Authority is a useful model to look to in terms of how to structure the membership and functions of a representative body. It also can be a guide on how to resolve the tensions of having multiple functions of representation, policy-making and administrative elements within the one body.

Importantly, the new National Indigenous Representative Body will have to consider how to interface with this regional body in terms of ensuring Torres Strait Islander participation at the national level. It will also be important to consider how to separately include the representation of mainland Torres Strait Islanders in the national body.

The recent development of a representative group in the ACT and advisory committees, such as in South Australia and Victoria, are initiatives that have not existed previously, even during the era of ATSIC. There has been a lack of clarity in past national Indigenous representative bodies on their relationships with States and Territory bodies and mechanisms. It will be critical to ensure that consideration is given to how the new National Indigenous Representative Body will interface with these State/ Territory mechanisms.

A National Indigenous Representative Body will also have to bear in mind the current administration mechanisms for Indigenous Affairs that were put in place post-ATSIC. These arrangements relate primarily to program delivery required to meet government commitments. A key feature of these arrangements is the devolution of service delivery to the regional level, through the ICCs and mechanisms such as the SRAs and RPAs. Another key feature of the new arrangements is the transfer of Indigenous specific programs to mainstream departments. A new National Indigenous Representative Body will have to consider structures for informing all mainstream departments on Indigenous Affairs.<sup>51</sup> It will be important for the new National Indigenous Representative Body to ensure that clear and consistent mechanisms are in place with the relevant bodies (i.e. COAG Ministerial Taskforce on Indigenous Affairs, Secretaries Group on Indigenous Affairs, the Office of Indigenous Policy Coordination and regional Indigenous Coordination Centres). This will be important for ensuring consistency between program delivery by these bodies and the work of the new

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<sup>51</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner has also noted that in the context of mainstreaming Indigenous service delivery, consideration needs to be given to the recruitment and retention of Indigenous staff, cultural awareness training for agencies and appropriate recruitment processes for staff working in Indigenous service delivery areas. Aboriginal and Torres Strait Islander Social Justice Commissioner, 2004, *Social Justice Report 2004*, HREOC, Sydney, p126

National Indigenous Representative Body, particularly in terms of linking national policy development with regional level program implementation.

A new National Indigenous Representative Body will have to determine how to effectively engage and link with these regional and State/ Territory representative bodies, to ensure complementary and supplementary relationships are established.

## **Section 3: National Indigenous Representative Bodies in other countries – some comparisons**

This section of the Issues Paper provides examples of Indigenous Representative Bodies that have been established internationally. These include:

- the Assembly of First Nations (AFN) in Canada;
- the National Congress of the American Indian (NCAI) of the USA;
- the Sami Parliament of Sweden; and
- *Te Puni Kōkiri* (TPK) of New Zealand.

The perceived strengths and weaknesses of these different models are considered. The critical difference between the models is whether self-governance is aspired to and what ‘purchase’ or persuasiveness these structures have with government.

### **The National Congress of American Indians: United States of America**

The National Congress of American Indians (NCAI) was founded in 1944 to facilitate unity and cooperation among tribal governments for the protection of their treaty and sovereign rights. It strives to inform the public and Congress on the governmental rights of American Indians and Alaska Natives. It now comprises 250 member tribes from throughout the United States. NCAI monitors federal policy and has input into federal decisions that affect tribal government interests.<sup>52</sup>

The NCAI provides a forum for policy development among tribal governments to:

- (1) Protect and advance tribal governance and treaty rights;
- (2) Promote economic development and health and welfare in Indian and Alaska Native communities; and
- (3) Educate the public toward a better understanding of Indian and Alaska Native tribes.<sup>53</sup>

Membership is made up of tribes, organisations and individuals. It includes the Alaskan Native tribes.

Tribal members must be an identifiable group who have substantial numbers of their members living on the same reservation or general locality. They must maintain a unified tribal organisation which does not fission. They must be recognised as a tribe by the US Department of Interior, Court of Claims, the Indian Commission or a State.<sup>54</sup>

Any individual with Indian ancestry is eligible for membership. Such individuals must be a member of a recognised tribe. Non-Indians may be admitted as non-voting associate members on payment of an annual fee. Organisations may also be admitted as

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<sup>52</sup> National Congress of American Indians Constitution, By-Laws and Standing Rules of Order as amended February 28 2007, viewed 3 June 2008 at <http://ncai.org/NCAI.org/Home.9.0.html>.

<sup>53</sup> *National Congress of American Indians Constitution, By-Laws and Standing Rules of Order* adopted November 14, 1944, current as amended February 28, 2007.

<sup>54</sup> NCAI Constitution Art. II. Sec. B. 1a-b 2007.

members on the same terms. The Executive Director may confer membership to applicants, subject to review by the Executive Council.<sup>55</sup>

The NCAI is currently addressing a range of issues that range from:

- Service programs for Indian families, targeting Indian Youth and elders;
- Promotion and support of Indian education;
- Enhancing health care, including reducing substance abuse and HIV-AIDS;
- Support of environmental protection and natural resources management;
- Protection of Indian cultural resources and religious freedom Rights;
- Promotion of the Rights of Indian economic opportunity; and
- Protection of the Rights of Indian people to decent, safe and affordable housing.

### **Nature and Extent of Mandate and Decision-Making Authority**

The supreme powers of the Congress reside with the members meeting in General Assembly. The General Assembly meeting of members may delegate its powers to the Executive and Officers of the NCAI.<sup>56</sup>

There are two official meetings of the Congress each year – the Annual Convention and the Mid-Year Conference.

The officers of the Congress are divided into two categories:

- a) the Administrative Board Officers (ABO) which consists of the President, First Vice-President, Recording Secretary and Treasurer, and
- b) 12 Regional Vice-Presidents.

The Administrative Board officers are elected by secret ballot on nomination from the floor at the Annual Convention. The Regional Vice-Presidents are elected by regions (according to procedures established by each region) meeting in caucus at the Annual Convention at a time appointed after the election of the ABO members. Only *tribal government officials or delegates in good membership standing* can qualify for nomination, election or office in the Congress.<sup>57</sup>

Individual Indian members are entitled to one vote and tribal members are allocated between 100 to 180 votes according to size; e.g. tribes with up to 500 members get 100 votes while tribes consisting of more than 7500 members get 180 votes.<sup>58</sup> All officers are elected for two year terms and can only serve two consecutive terms.<sup>59</sup> Elections take place each odd numbered year.

The NCAI also has an Executive Council which comprises the Administrative Board Officers, the 12 Regional Vice-Presidents and one delegate from each member tribe.

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<sup>55</sup> NCAI By-Laws Art. VIII 2007.

<sup>56</sup> NCAI Constitution Art. II. Sec. D 2007.

<sup>57</sup> NCAI Constitution Art. II. Sec. F. 2007.

<sup>58</sup> NCAI By-Laws Art. III. Sec. B. ld. 2007.

<sup>59</sup> NCAI By-Laws Art. IV. Sec. H. 1. 2007.

This Council meets once in annual conference although the Constitution does provide for additional meetings in certain circumstances.<sup>60</sup>

The powers of the Executive Council include administration of the organisation's affairs under the Constitution, management of funds and *bona fide* contributions, to enable policies consistent with the Annual Convention.<sup>61</sup>

The NCAI also has an Executive Committee which comprises the Administrative Board Officers and the 12 Regional Vice-Presidents. It has power to employ the Executive Director and has the full authority to act for the Executive Council between meetings of the Council. This Committee reports in writing to the Council. The Executive Director is the administrative head of the Congress and is subject to the direction and policy set out by the Executive Committee.<sup>62</sup>

The President is authorised to appoint committees and sub-committees. Examples include:

- The Human Resources Committees, which has various sub-committees including Education, Health, Indian Child and Family Welfare, and Elders;
- The Litigation and Governance Committee which has sub-committees on Tribal Gaming and Taxation and Human Religious and Cultural concerns;
- The Veterans Committee; and
- The Rules and Credentials Committee.<sup>63</sup>

The NCAI has 250 member tribes and thousands of individual members from throughout the United States. There are said to be over 550 recognised tribes in the USA and this may impact on the Congress' ability to provide broad representation.

The NCAI has developed a Policy Statement which provides direction on tribal sovereignty, treaty rights, federal trust responsibility, health, housing, education, environmental quality, and physical, spiritual, traditional, and cultural customs and practices.<sup>64</sup> These stem from the NCAI's key objectives: respect for tribal governance and the federal trust relationship; support for healthy Native communities and people, and preservation of human dignity and cultural integrity.

The NCAI pursues these objectives as follows:

- *Respect for tribal governance and the federal trust relationship*: Effective USA and tribal government dialogue and consultation (including Alaskan Native tribal governments and Native Hawaiian rights); the exercise of tribal self-determination and governance; the acknowledgement of tribal sovereignty and receipt of adequate resources for Indian programs and land management.

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<sup>60</sup> NCAI Constitution Art. III 2007.

<sup>61</sup> NCAI Constitution Art. III. Sec. D. 2007.

<sup>62</sup> NCAI By-Laws Art. IV Sec. G. 2007.

<sup>63</sup> NCAI By-Laws Art. VII. Sec. A. 2007.

<sup>64</sup> National Congress of American Indians Constitution, By-Laws and Standing Rules of Order as amended February 28 2007, viewed 3 June 2008 at <http://www.ncai.org>.

- *Support for healthy Native communities and people:* The development of appropriate, sustainable and diversified economies on Indian Land; training opportunities on reserves; accessible housing, transportation infrastructure and information technology; support for a tribally-driven health care system; commitment to Indian education; tribal law enforcement and sentencing; child protection; and development of tribal resources.
- *Preservation of human dignity and cultural integrity:* Ensuring the maintenance and transmission of practices and language; protecting Indian tangible and intangible cultural heritage; recognition of the wider rights of indigenous peoples; and the ending of racially discriminatory practices.

### **Relationship with State governments**

When Indian lands were ceded to the United States the government's ensuing legal commitment was codified in treaties, federal law, executive orders, judicial opinions, and international doctrine. Three general obligations were created by this:

- protection of Indian trust lands;
- protection of tribal self-governance; and
- provision of basic social, medical, and educational services for tribal members.

The NCAI and the states through the National Conference of State Legislatures (NCSL) have reached agreement on a State-Tribal Relations Project to promote cooperation between the tribal and state governments.

This Project acknowledges that States and Indian tribes have a broad range of common interests and shared responsibilities to use available public resources wisely and effectively. The Project aims to coordinate and realise the objectives of 50 state governments and 550 tribal governments with respect to education, health, economic development, law enforcement and cultural and environmental maintenance. It also aims to avoid state-tribal litigation due to jurisdictional disputes.<sup>65</sup>

### **How the Organisation is Funded**

The NCAI is funded through annual membership dues. These dues are payable at the Annual Convention of each year for the following year until the next Annual Convention.

An individual voting member pays \$40.00 and can pay \$1,000.00 for life membership. Tribal membership dues are calculated according to the annual income of the tribal government. Those with less than \$500,000 annual income are at the bottom of the dues scale and pay a membership of \$110.00 per annum. Those at the top of the scale are those with an income of \$30 million or more and they pay \$25,000 per year. An

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<sup>65</sup> National Congress of American Indians Constitution, By-Laws and Standing Rules of Order as amended February 28 2007, viewed on 3 June 2008 at [http://www.ncai.org/State-Tribal\\_Relations.92.0.html](http://www.ncai.org/State-Tribal_Relations.92.0.html)

individual associate member pays \$40.00 whilst organisation Associates pay \$500.00 annually.<sup>66</sup>

Members of the Executive Committee are not entitled to any salary, fees, remuneration gratuities or other form of compensation from the NCAI for serving on the committee.<sup>67</sup>

## **The Assembly of First Nations – Canada**

The Assembly of First Nations (AFN) is the national organisation representing First Nations citizens in Canada. The AFN represents all citizens regardless of age, gender or place of residence. The Assembly of First Nations is a national aboriginal advocacy organisation.

There are over 630 First Nation's communities in Canada. The AFN is intended to present the views of the various First Nations through their leaders in areas such as: Aboriginal and Treaty Rights, Economic Development, Education, Languages and Literacy, Health, Housing, Social Development, Justice, Taxation, Land Claims, Environment, and a whole array of issues that are of common concern to Aboriginal Canadians which arise at any given time.

The Chiefs meet annually to set national policy and direction through resolution. The National Chief is elected every three years by the Chiefs-in-Assembly.

The Chiefs meet between the annual assemblies every three to four months in a forum called the 'Confederacy of Nations'. The membership of the Confederacy consists of Chiefs and other Regional Leaders chosen according to a formula based on the population of each region. First Nations' Chiefs in Canada are elected in accordance with *Indian Act* regulations or by traditional governance practices of the country's First Nations.

## **History of the Assembly of First Nations**

The origins of the Assembly of First Nations (AFN) are rooted in the post-World War I activism of Indian veterans returning from the war. The League of Indian Nations of Canada fought against assimilation from the early 1920's and into the 1930's. The League laid the foundations for the National Indian Brotherhood (NIB). The Brotherhood consisted of the presidents of provincial and territorial organisations.

After the Second World War, First Nations again attempted to form a national lobby group. The North American Indian Brotherhood (NAIB) was established in the late 1940's, but like its predecessor, the NAIB's efforts were hindered by a lack of nationwide support and suppressive government actions, causing it to be disbanded by the early 1950's.

In 1961, the National Indian Council was formed to represent three of the four major groups of Aboriginal people in Canada. However, the National Indian Council found

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<sup>66</sup> NCAI By-Laws. Art. III. Sec. C. 2007.

<sup>67</sup> NCAI By-Laws Art. VI. Sec. L. 2007.

the task of uniting all of the various First Nations people's interests into one national lobby to be challenging.<sup>68</sup>

In 1969 the federal government introduced a *White Paper* which called for the assimilation of all First Nation peoples into the mainstream of Canadian society. The National Indian Council joined forces with the federally appointed National Indian Advisory Council to defeat the *White Paper*. Their efforts were coordinated through an executive – the *National Indian Brotherhood* (NIB).

In 1970 the Indian Association of Alberta produced a *Red Paper* replacing the *White Paper*. In the same year the first nationally elected President was chosen for the NIB. In the late 1970's the Canadian government decided to patriate the Canadian constitution from Britain, which galvanised the NIB and first nations leaders into action to ensure Aboriginal rights were recognised and protected in any new constitution. Their efforts were realised in the Canadian *Constitution Act 1982*.

Prior to that, in December 1980, an assembly of chiefs adopted the *Declaration of First Nations* which established the foundations for the formation of the Assembly of First Nations. From being an 'organisation of representatives from regions' the AFN became an Organisation of First Nations Government Leaders.<sup>69</sup>

The NIB corporate structure provides secretariat and administrative functions to the AFN. The National Chief and 10 Regional Chiefs are elected, through the AFN process, then soon after go through a routine administrative process of being 'elected' in an NIB General Assembly. The NIB Board of Directors also hires an Executive Director, who also is the AFN Chief Executive Officer.

In 2003 discussions began regarding the responsibilities and objectives of the AFN and in January 2004 the AFN Renewal Commission was established to conduct a review of the AFN.

The AFN Renewal Commission delivered a report in September 2005 including 47 recommendations relating to accountability, new structures, relationships and administrative improvements.<sup>70</sup>

The overall structure of the AFN is based on the Charter of the Assembly of First Nations, which was adopted in July 1985. Regional Chiefs are elected/appointed within ten defined regions of Canada. The principal organs of the Assembly of First Nations are:

- the First Nations-in-Assembly;
- the Confederacy of Nations;
- the Executive Committee;
- the Secretariat (AFN/NIB);
- the Council of Elders;
- the Council of Women and

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<sup>68</sup> <http://www.afn.ca/rticle.asp?id=3>.

<sup>69</sup> <http://www.afn.ca>.

<sup>70</sup> Assembly of First Nations Renewal Commission, 2005, *A Treaty Among Ourselves Report*

- the National Youth Council.

The Executive Committee is made up of the Regional Vice-Chiefs, the National Chief, and the Chairperson of the Council of Elders. Chiefs of their respective regions select the Vice-Chiefs.

### **Effectiveness of Representation and in Promoting the Rights and Interests of Indigenous Peoples**

The AFN mandate is primarily to lobby government on behalf of First Nations in Canada. The AFN can use political and moral persuasion to influence government. Because the AFN is funded by the federal government, to some extent it is at the mercy of the government of the day. A hostile national government can make the ability to lobby difficult or limited. Much relies on the political experience and abilities of the National Chief.

Sometimes, the AFN has been seen to be overtly political, and therefore less focused on policy matters that may have long term benefits for community members. This is partly a function of the structure of the AFN and partly a function of capacity and process.

The effectiveness of the AFN almost entirely hinges on several factors:

- The strategic skills of the National Chief and the leadership capabilities of that individual particularly in maintaining the focus on national issues by the Regional Chiefs;
- The disposition of the federal government of the day; and
- The capacity of the organisation to react to current major national issues.

One of the biggest challenges faced by the AFN at the moment is in representing all of its members. In the past, the AFN has focused more on ‘on-reserve’ status members. However, at least 50% of all status Indians now resides in urban centres, especially in some of Canada’s larger cities.<sup>71</sup>

The Congress of Aboriginal Peoples (CAP) was established to represent so-called ‘non-status’ Indians in Canada (that is, aboriginal people who do not have ‘status’ under the *Indian Act*). By default, they represented Indians in urban Canada in meetings with the federal government. Today, CAP asserts that it represents both status and non-status Indians in urban areas. This creates the opportunity for hostile governments to ‘play off’ the different organisations. In this scenario AFN does not have a ‘monopoly’ on national representation.

The dual accountability of Regional Chiefs to both their regional constituents and strategic national agenda policy items has been seen as a tension during meetings of both the Special and General Assemblies. The AFN Renewal Commission recommended that women’s organisations, treaty groups, Native friendship centres and other First Nation organisations be allowed to attend and participate in AFN

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<sup>71</sup> See for example: Annual General Assembly Resolution No. 22/2007 July 10, 11, & 12, Halifax, NS on the subject: First Nation Chiefs, the only legal and traditional representatives of all First Nations’ people.

Assemblies and be allowed to speak on specific issues concerning them (Recommendation 34).

### **The Assembly of First Nations Renewal Commission**

The Renewal Commission was established by the AFN with a broad mandate to consult with First Nations communities and peoples across Canada about the renewal and restructuring of the AFN. The Commission's recommendations were wide ranging and stressed that the AFN needed to change lest it risk becoming ineffective and also risk diminishing its claim to be representative of First Nations and its citizens.

The key according to the Commissioners was for the internal structures and processes of the AFN to be responsive to the priorities and objectives of First Nations (see Resolution No. 58/2006). Almost two years after the production of the Report of the Renewal Commission the AFN has resolved that the National Chief and the Executive must now implement the recommendations.<sup>72</sup>

Specific recommendations include the adoption of the Gender Balanced Analysis Framework; the development of a new Corporate Charter (and the dropping of the NIB); the election of the National Chief by First Nations Citizens; training for AFN chairs and co-chairs and a Universal Vote. There are present discussions about coordinating First Nation's community elections with an election for National Chief and Regional Chiefs. At present the terms of regional chiefs vary from community to community, some are elected for two year terms others for three year terms and still others for four year terms. Some of the existing community arrangements are well entrenched and it may take some time to implement this recommendation across the country.

### **The Sami Parliament – Sweden**

Sami comprise about 70,000 people and are spread across four countries; portions of Russia, Sweden, Norway and Finland. Around 20,000 Sami live in Sweden.<sup>73</sup>

The Sami are renowned for their pastoralist reindeer herding having a long history of organising themselves into polities. The Sami parliament in Sweden is a publicly elected body.<sup>74</sup> The Swedish Sami parliament was established in 1993 and is regarded as a State authority with the overall objective of achieving a living Sami culture.<sup>75</sup> Recently, the Finnish, Norwegian and Swedish Sami parliaments endorsed a draft Nordic Sami Convention, which is currently under consideration by their corresponding States.<sup>76</sup>

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<sup>72</sup> *Assembly of First Nations Resolution No. 21/2007* July 10, 11 & 12, 2007, Halifax, NS.

<sup>73</sup> Josefson E 2007 'The Saami and the National Parliaments – Channels for Political Influence', *Galdu Cala Journal of Indigenous Peoples Rights* No. 2, Guovdageaidnu/Kautokeino, Norway. p8.

<sup>74</sup> *Ibid.* p20.

<sup>75</sup> The Finnish Sami parliament was established in 1972; Norway's was established in 1989.

<sup>76</sup> Ahren M, Sheinin M and Henrikson JB 2007 'The Nordic Sami Convention: International Human Rights, Self Determination and other Central Provisions', *Galdu Cala Journal of Indigenous Peoples Rights* No. 3, Guovdageaidnu/Kautokeino, Norway.

The status of Sami as the Indigenous peoples of Sweden is not recognised in the Swedish Constitution however the establishment of the parliament provides this recognition in the Swedish State.<sup>77</sup> The main purpose of the parliament is “...to monitor issues that relate to Sami culture in Sweden” rather than act an instrument for self-governance.<sup>78</sup>

The Sami Parliament has 31 elected members who meet three times per year and the President is the only full time employee of the Parliament. The meetings are known as the Plenary Assembly. The Parliament has some 20 staff.

The Swedish State did not officially recognise the Sami as an Indigenous people until 1977. The Sami Parliament reports annually to the Swedish Parliament and its operations are controlled by the Swedish Parliament. The Swedish Parliament does this through laws, ordinances and appropriation decisions.<sup>79</sup>

Swedish Sami are entered on the Sami electoral register and are entitled to vote in general elections for candidates to the Sami Parliament. There are requirements to be eligible as an elector. Firstly, each elector is entitled to vote if they consider themselves to be a Sami, culturally and ethnically and secondly, if they speak a Sami language or have, or had, a parent or grandparent who spoke Sami.

Sami identity and Sami culture has been bound up with pastoralism and reindeer herding and the Swedish state’s view of what constitutes a Sami. The early reindeer grazing laws (the first of which was the *Reindeer Grazing Act 1886*) sought to define the rights of the Sami people. The nomadic reindeer herders were considered the ‘real’ Sami and they were separated from the rest of the population to preserve ‘genuine Sami’ culture. As many Sami were forced out of herding and children were separated, the state established special schools for nomadic Sami children along assimilationist lines.

New laws have changed this situation. The format of the Sami Parliament is tightly controlled by the *Sami Assembly Act*. The Sami parliament became both a publicly elected body and an authority that is controlled by the Swedish government.<sup>80</sup> The Sami still have no political representation in the Swedish parliament.<sup>81</sup>

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<sup>77</sup> They are however recognised in Norway’s Constitution s110a which enforces a positive State duty to create conditions enabling the Sami to preserve and develop language, culture and way of life. In accordance with recommendations of the Sami Rights Committee Report 1984 and international law, the State interprets this as encompassing the material foundation or basis for culture (i.e. land, natural resources and other economic conditions): see Act No. 56 of 12 June 1987 and parliamentary debate on the Bill.

<sup>78</sup> *Sametingslag [Sami Assembly Act] 1992: 1433*

<sup>79</sup> Josefsen E 2007 ‘The Saami and the National Parliaments – Channels for Political Influence’, *Galdu Cala Journal of Indigenous Peoples Rights* No. 2, Guovdageidnu/Kautokeino, Norway. p15. p10, 15, 20-21

<sup>80</sup> *Ibid p15*

<sup>81</sup> Sami have not yet been represented in the Finnish parliament (Aikio, P 1994, ‘Development and the political status of the Sami people of Finland’ in Majority-Minority relations, The case of the Sami in Scandinavia, *Diedut* No. 1.). Sami in Norway have no direct representation through fixed seats but have been elected to the Norwegian parliament and government via party and approved lists, and a national Sami People Party (*Sámeálbmot bellodat*) (Josefsen E 2007 ‘The Saami and the National Parliaments-Channels for Political Influence’ *Galdu Cala Journal of Indigenous Peoples Rights* No. 2., Guovdageidnu/Kautokeino Norway pp16-17).

## How the Organisation is Funded

The Sami Parliament is funded by the Swedish government. In 2004 the Parliament received 17 million SEK (about AUD 3.07million) to cover the operations of both its elected arm and its role as a public authority. In 2005 the budget was increased by a further SEK 3.0 million (about AUD 0.54million) to cover the work of the Sami Information Centre. A further SEK 14.5 million annually (about AUD 2.60million) is distributed by the Cultural Affairs Council of the Sami parliament.

The Sami Parliament has also been able to access funding through the European Union (EU). One of the objectives of the EU is to maintain the diversity of cultures in Europe. The EU is also concerned to reduce the economic and social imbalances between the member states and the organisation has set up 'structural funds' for this purpose.

The Sami Parliament has been able to access funds via allocations made by the EU to Sweden.<sup>82</sup> Under the arrangements Sweden has to also make matching payments of between 30-50 percent of the total cost. These resources are used to promote Sami business and culture.<sup>83</sup>

Sweden was also required to agree to a Sami Protocol as part of its conditions of membership to the EU and to recognise the domestic and international legal obligations and responsibilities Sweden has to Sami people in their country. The protocol states that Sweden is committed to preserving and developing the Sami people's living conditions, language, culture and way of life – and specifically pastoralism and reindeer herding.

## Māori Representation – New Zealand

Māori, the indigenous people of New Zealand make up 632,900 or 14% of the total population spread across the North and South Islands of the nation.<sup>84</sup>

There are numerous ways in which Māori interests are represented across the political system. Distinct from their Australian, Canadian and Swedish bodies, the New Zealand scheme primarily revolves around the provision of guaranteed Māori seats in the legislative system as opposed to a separate National Indigenous Representative Body or indigenous parliament.

The interests of New Zealand's indigenous people are embodied in the Ministry of Māori Development, *Te Puni Kokiri* (TPK), a governmental advisory body that links the Crown with the Māori population. A branch of this body, the Māori Trusts Office exists to support Māori land and asset management. Importantly however, recent

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<sup>82</sup> A form of Sami business fund was created nationally in Sweden (Target 1), as well as an 'all-Sami' fund (Interreg III) where Norway, Finland, Sweden and Russia are working jointly for the development and reinforcement of Sami business and cultural life.

<sup>83</sup> With the support of the EU's subsidiarity principle, an improved form of self-determination has been achieved as a result of the Swedish Sami parliament and other publicly elected bodies being responsible, and making decisions, for the use of the funds, as well as prioritising work to undertake.

<sup>84</sup> Te Puni Kokiri (2007) Statement of Intent 2007-10, available online at: <http://www.tpk.govt.nz/en/in-print/our-publications/corporate-documents/soi-2007/page/5/>, accessed 26 June 2008; Statistics New Zealand (2007) Communities: Maori, available online at: <http://www.stats.govt.nz/NR/rdonlyres/3E2AAEF9-1E77-4591-B047-09028D6F29EB/23497/MaoriPopEstAt30Jun1.xls>, accessed 26 June 2008.

consultations by the New Zealand Government with Māori groups have proposed that the Trust become independent of the TPK and be required to report on an annual basis to Parliament. The proposed changes are likely to be embodied in legislation sometime in 2008<sup>85</sup>.

### **Māori Electorates**

In 1867 the New Zealand Parliament established four Māori electorates, an enduring and distinctive feature of the State's 'first past the post' electoral system. This was initially a temporary measure to accommodate the opposing demands of members of the North and South island but was solidified with the passing of the *Māori Representation Act 1867* and became permanent in 1876.<sup>86</sup> Despite criticism and recommendations for their abolishment, Māori seats were retained under the State's new 'mixed member proportion' voting system instituted in 1993. The number of seats Māori now occupy fluctuates according to the results of the regular Māori electoral option. Of the 120 existing seats in the House of Representatives, seven are designated for Māori representatives, although Māori persons may also run for and occupy non-reserved seats. Notwithstanding the existing seven Māori seats, they currently hold a further 15 seats, bringing the overall Māori participation rate to approximately 18% of the entire parliament.<sup>87</sup>

### **Ministry of Māori Development, *Te Puni Kōkiri***

The Ministry of Māori Development, *Te Puni Kōkiri* (TPK), is the principal government body that advises on policy and legislation regarding Māori wellbeing. It currently has no service delivery role but acts as an intermediary between government agencies and other external organisations to ensure that 'Māori succeed as Māori'<sup>88</sup> and that their concerns are reflected in policy development.

A Chief Executive is at the head of its organisational structure, with three Deputy Secretaries of Support Services, Relationships and Information, and Policy, and a Māori Trustee. Importantly, the Relationships and Information branch of TPK focuses on developing and maintaining relationships between Māori and those stakeholders pertinent to this process. This is facilitated by the 10 regional offices of TPK which provide a direct and vital link with Māori communities.

The Ministry, or TPK, formulates policy and amendments to legislation and subordinate legislation that fall within the Māori Affairs portfolio. In particular, one of TPK's primary functions is its statutory responsibility in accordance with the *Ministry*

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<sup>85</sup> Te Puni Kōkiri (2007) About Us: Maori Trust Office, available online at: <http://www.tpk.govt.nz/en/about/mto/>, accessed 26 June 2008.

<sup>86</sup> Mc Gill, G., (1997) 'Reserved Seats in Parliament for Indigenous Peoples: the Maori Example', Research Note 51, 1996-7, available online at: <http://www.aph.gov.au/library/pubs/RN/1996-97/97rn51.htm>, accessed 25 June 2008. And Waitangi Tribunal (1994) 'Maori Electoral Optional Report', pp, available online at: <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=C04FF009-8245-455E-9BF2-A8998413132F&chapter=1>, accessed 25 June 2008.

<sup>87</sup> Joseph, P., (2008) The Maori Seats in Parliament, New Zealand Business Roundtable May 2008; Tahana, Y., (2008) Abolish Maori Seats, Roundtable Urges, New Zealand Herald, 30 May 2008, available online at: [http://www.nzherald.co.nz/topic/story.cfm?c\\_id=252&objectid=10513372](http://www.nzherald.co.nz/topic/story.cfm?c_id=252&objectid=10513372), accessed 25 June 2008.

<sup>88</sup> Te Puni Kōkiri (2007) Statement of Intent, available online at: <http://www.tpk.govt.nz/en/about/strategic/>, accessed 25 June 2008.

of *Māori Development Act 1991*, which provides an avenue for monitoring the effectiveness of government policies towards Māori inhabitants.

It is also responsible for providing independent policy advice to, and coordinating the legislative obligations of, the Minister of Māori Affairs. A policy framework ('Māori Potential') was developed by the TPK which informs and coordinates the Māori Affairs portfolio and the development and implementation of Māori public policy. The focus of their Māori Potential framework is on building knowledge and skills (*mātauranga*), strengthening Māori culture, leadership and decision-making (*whakamana*) and on the development and use of natural, financial and physical resources (*rawa*).

### **Maori Trust Office**

The Māori Trust Office, currently independent of the Crown and accountable to landowners and the Māori Land Court, exists to assist Māori to manage land and assets by acting as trustee or agent for owners of Māori land and assets. Part of its mandate is to minimise the adverse effects of fragmented and multiple ownership. This entails collection and payment of income (such as rental income in the context of leasing land) and the investment of trust monies. Legislation to establish the Māori Trustee as a stand-alone organisation, separate from TPK, will be introduced in 2008 following government consultations in 2007 with Māori. The office will thereafter be responsible for regular review and adjustment of the interest rate paid on trust funds and required to report annually to Parliament.

### **Treaty of Waitangi and the Waitangi Tribunal**

An additional point worth noting is that TPK are charged with the responsibility of facilitating Treaty of Waitangi settlements. The Treaty of Waitangi is a founding document in New Zealand history that affirms the status of Māori as its indigenous inhabitants. Signed in 1840, the document represents an agreement between the British Crown and the Māori people of New Zealand encapsulated within three main articles. The first is that concerning the right of the British to govern Māori people, the second to the rights of indigenous peoples to the land and natural resources, and the third to affirm the right of Māori to the enjoyment of the same rights as their non-indigenous counterparts.<sup>89</sup> Although not enforceable at law, there are three fundamental ways in which the principles of the Treaty are given effect. To this end, both the Crown and the Courts can apply the principles to legislation where possible and otherwise have a moral obligation to resolve other conflicts where necessary.<sup>90</sup>

However, the primary means of implementing the principles is through the Treaty of Waitangi Tribunal. It is through this mechanism, which was established in 1975 under legislation of the same name that grievances between the Crown and Māori are addressed. The Tribunal has non-binding power to make recommendations on breaches of the Waitangi Treaty principles and means of redress as well as the ability to hear current and past claims. An equal distribution of *pakeha* (non-indigenous) and Māori

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<sup>89</sup> New Zealand Treasury (2007) Economic and Financial Overview 2007, available online at: <http://www.treasury.govt.nz/economy/overview/2007/02.htm>, accessed 25 June 2008; Office of Treaty Settlements (2002) *Healing the past, Building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown*, p12.

<sup>90</sup> *Ibid* p11.

persons comprise the 16 member Tribunal, all of which are appointed by the Governor General either on the advice of the Minister of Māori Affairs or from the Māori Land Court.

A claim can be brought by any member of Māori community which generally involves the negotiation phase which establishes that a well-founded grievance exists, within the mandate of the Tribunal legislation. Matters outside this which can not be considered by the Tribunal include commercial fishing interests and matters between conflicting Māori claimants. The modern claims process provides assistance to resolve claims which have arisen after 21 September 1992. In particular, any grievances arising after that date may be brought before the Waitangi Tribunal so long as they fit within the mandate provided by section 6 of the *Waitangi Tribunal Act 1975*. Crown responses to contemporary claims are dealt with by the relevant governmental agency so that current policy is consistent with the Treaty as much as possible.

### **Treaty of Waitangi Fisheries Commission**

The Treaty of Waitangi Fisheries Commission or *Te Ohu Kai Moana* (TOKM) came about after an arrangement between the Crown and its Māori population between 1989 and 1992 to establish a settlement which provided the basis for Māori ownership for a proportion of New Zealand's commercial fishing industry.

Developed under the *Māori Fisheries Act 2004*, TOKM has responsibility for enhancing the participation of Māori people in the fishing industry. In particular, TOKM is responsible for allocating assets to Iwi or tribal groups, 57 of which are recognised under the fisheries legislation. Importantly, the *Treaty of Waitangi (Fisheries Claims Settlement) Act 1992* provided for a scheme whereby Māori people were entitled to 10% of the total allowable catch for each species of fish.<sup>91</sup> However, the Fisheries Settlement process which began in 1989 has now seen Māori people control approximately one third of the fisheries industry where previously there was little to no control at all<sup>92</sup>. A major responsibility of the Fisheries Commission is to oversee this process.

### **Lessons to be learnt from overseas experiences of Indigenous Representative Bodies**

It is encouraging that all developed nations have seen the need to provide a distinct voice to their Indigenous peoples, and have struggled so hard to devise appropriate structures. However, each country, in light of the differing historical and cultural contexts, has developed different forms of Indigenous representative bodies.

The perceived strengths and weaknesses of the different models outlined demonstrate that the critical difference between the models is to what extent self-governance is aspired to and the purchase these structures have with government.

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<sup>91</sup> Office of Treaty Settlements (2002) *Healing the past, Building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown*, p26.

<sup>92</sup> Treaty of Waitangi Fisheries Commission (2002) 'what it means for you: Summarising the Report for Agreement', available online at: [teohu.maori.nz/archive/allocation/ahu\\_whaku\\_mua/ahu\\_whakamua\\_summary.pdf](http://teohu.maori.nz/archive/allocation/ahu_whaku_mua/ahu_whakamua_summary.pdf) -, accessed 25 June 2008.

The National Congress of American Indians model from the USA highlighted the advantages of having an entirely independent body that sits outside of government and is financially independent. While it is not involved in any service delivery, it has active dialogues with government and plays a strong role in advising on policy development and the promotion of Indigenous rights, as well as monitoring government policies. The membership base is limited to tribe members. The level of independence has in part been achieved because of the historical recognition of tribes' independence through treaty processes.

In contrast, the Assembly of First Nations from Canada is an independent advocacy body. The Assembly was born out of advocacy campaigns opposing assimilation policies hence advocacy has been the primary function of the body. Sometimes the focus on advocacy has been perceived to be at the cost of having a role in influencing policy. Its independence is limited to an extent because it is funded by the government. Its membership includes all First Nation citizens who elect representatives from their communities to the Assembly. The Assembly has tried to represent a diversity of First Nation people's interests, including representing women's interests, as well as the interests of both those living on reserves as well as those living in urban areas.

The example of the Sami Parliament from Sweden is an interesting model of a parallel Indigenous parliament. However, its primary role is limited to monitoring government rather than acting an instrument for self-governance. It is both a publicly elected body and a public authority that is controlled and funded by the Swedish government. More recently the Sami Parliament has also received some funding from the European Union.

Finally, the situation in New Zealand illustrates the possibilities of how representative mechanisms such as the Māori electorates can co-exist with non-representative government bodies such as the Ministry of Māori Development, *Te Puni Kōkiri* (TPK). The Māori electorates allows for Māori representatives to sit in Parliament. The TPK, while not being a representative body, is the principal government advisor on policy and legislation regarding Māori wellbeing. It has 10 regional offices, but has no service delivery role. In addition Māori interests are represented through other offices and commissions such as the Maori office trust, the Waitangi Treaty Tribunal and the Waitangi Fisheries Commission. These bodies have Indigenous members, but not necessarily elected members, and address issues of land and asset management, grievances between the Crown and Māori relevant to the Treaty of Waitangi, and management of fisheries, respectively.

Clearly, each of the arrangements for national Indigenous representation described in this part of the Issues Paper is based on different historical, cultural and legislative circumstances. The manifestations of representation in each differ according to whether they have a policy or advocacy role, who their membership is and how they are structured across the national and regional level. The Australian experience is also unique. However, appropriately adapted, the indigenous bodies described here offer useful examples that can be referred to when considering the options for a new National Indigenous Representative body outlined in the next part of this paper.

## **Section 4: Key issues in establishing a sustainable National Indigenous Representative Body**

The previous sections of this paper have outlined existing and previous forms of representation of Indigenous peoples in Australia and internationally. It shows that there is a wealth of information available on the key issues that have been faced by representative bodies. It also provides some guidance on possible features and roles for a new National Indigenous Representative Body in Australia.

This section of the paper identifies and discusses some of the key issues that will need to be addressed in formulating a new National Indigenous Representative Body.

At the outset it should be acknowledged that the intention here is to identify those key issues that relate to creating a sustainable basis for a new National Indigenous Representative Body. It is not intended to raise every possible issue that may need to be considered in establishing such a body, nor is it intended to propose a specific model.

Accordingly, the intention is to assist in creating dialogue among Indigenous peoples and government about the key principles for a new National Indigenous Representative Body that draws on the experiences and lessons of other bodies to date.

It will be up to Indigenous peoples to consider whether there are other issues that need to be addressed in formulating a new National Indigenous Representative Body, and indeed whether the issues raised here are the key ones. The list of key issues identified here should therefore not be seen as prescriptive or limiting in any way.

The following key issues are addressed in the remainder of this paper:

- Principles that should underpin the creation of a new National Indigenous Representative Body;
- The functions of a National Indigenous Representative Body;
- Structure of a National Indigenous Representative Body (including the mechanisms for representing Indigenous people at the regional, State/ Territory and national level);
- Relationship with existing national Indigenous peak bodies and State/ Territory advisory bodies;
- Membership of a National Indigenous Representative Body;
- Relationship with governments and COAG; and
- A secure resource base for a National Indigenous Representative Body.

In considering the key issues here, the following factors should also be borne in mind.

*First, the need for a National Indigenous Representative Body is understood and accepted.* The reviews of the NACC and NAC occurred at a time where national representation of Indigenous peoples was not necessarily accepted as a positive development. Some Australians felt it was premature, as in their view Indigenous peoples were not sufficiently organised at the regional level and had not had sufficient experience as emancipated citizens to organise themselves nationally in an effective

manner. Others felt that a national organisation had no counterpart in Indigenous history and culture.<sup>93</sup>

ATSIC's fifteen year run in Indigenous representation and services can be credited with settling this aspect of the debate once and for all.<sup>94</sup> Since the abolition of ATSIC there has been a sense that a vital component of the Indigenous polity is missing and that it will only be remedied when a strong national body (re)emerges. Regional and State/Territory representation is clearly desirable both for government and for Indigenous peoples.

A recent study by researchers in the School of Psychology at the Australian National University surveyed both Indigenous and non-Indigenous samples about support for an Indigenous representative body. They concluded that:

- a) There was strong support from Indigenous peoples for a new Indigenous decision-making body on behalf of Indigenous peoples. It also showed there was broad community support for the idea as opposed to purely sectoral interest groups;
- b) That there would likely be social-protest consequences of denying Indigenous peoples a say in political decision-making;
- c) That decisions of the Australian Government without Indigenous representative input are likely not to be perceived as neutral by both Indigenous and non-Indigenous peoples;
- d) That both Indigenous and non-Indigenous peoples felt that fairness requires the provision of unique voice to Indigenous peoples. This finding suggests that the non-Indigenous sample group appeared to have recognised the stake held in the debate by the Indigenous population, and were relatively magnanimous in their preference for an Indigenous voice.<sup>95</sup>

*Second, a new National Indigenous Representative Body will not be borne into a historical vacuum.* With the extensive history of reviews and reports on representative structures in Australia (as well as examples overseas) it makes sense to build on the past, drawing on what has worked or not, as well accepting that times have changed.

In particular, ATSIC was reviewed several times during its fifteen years of operation. The Hannaford review of 2003 had considered in depth the role of ATSIC as a National Indigenous Representative Body from first principles. There had been limited focus on the findings and recommendations of this review when ATSIC was abolished in 2004. There is certainly a lot of value in reconsidering the principles to underpin a National Indigenous Representative Body that were recommended by the review team (note: these are reproduced Text Box 5 below).

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<sup>93</sup> Weaver, SM 1983, 'Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies Part II', *Oceania*, Vol.54 No. 2. p9; Hiatt, LR *et al.* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. p75.

<sup>94</sup> Palmer, K 2004, *ATSIC: Origins and Issues for the Future, a Critical Review of Public Domain Research and Other Materials*, AIATSIS Research Discussion Paper 12, Research Programme, Australian Institute of Aboriginal and Torres Strait Islander Affairs, Canberra. p9.

<sup>95</sup> Peate, VG, Platow, MJ and Eggins, RA 2008 'Collective voice and support for social protest among Indigenous and non-Indigenous Australians: Considering the role of procedural fairness in an intergroup conflict of interest', *Australian Journal of Psychology*. pp1-11.

*Third, a consistent experience in Australia of national Indigenous representative bodies to date is a gap between the outcomes of reviews and consultations on what is the optimal representative structure and the actions of government.*

A note of caution must be sounded here. It is a striking fact that none of the reviews mentioned here were wholly accepted by government or led directly to the optimal form of organisation envisaged. In her 1986 report pre-dating the establishment of ATSIC, Lowitja O'Donoghue wisely suggested that the government should set the parameters of the process by "...announcing guidelines within which it is prepared to see a new organisation established".<sup>96</sup>

*Fourth, there will need to be a discussion of the role of Torres Strait Islanders within a new National Indigenous Representative Body.* The NACC and the NAC were Aboriginal bodies. ATSIC recognised and gave a voice to Australia's other Indigenous peoples, Torres Strait Islanders. This evolved into a unique measure of autonomy in the Torres Strait Regional Authority. Torres Strait Islanders, both resident on the Islands and on the mainland, clearly will need to discuss among themselves the form of their participation in a national body.

### **Issue for discussion: Guiding principles for the establishment of a National Indigenous Representative Body**

Before considering the key features of a National Indigenous Representative Body, it is important to consider what principles should guide a representative body.

Indigenous peoples' vision of what they want from a representative body and the principles to guide its operation will have a significant impact on the design of a National Indigenous Representative Body.

There are some useful sources to look to for identifying foundational principles, which are outlined below. These include the Themes and Ambitions from the Indigenous Stream of the 2020 Summit, the Principles and Vision for a National Indigenous Representative Body outlined in the Hannaford Review of ATSIC, and the objects of the *Aboriginal and Torres Strait Islander Act 2005 (Cth)*.

Drawing on different sources and experiences of national Indigenous representative bodies both here in Australia and overseas, following are some foundational principles for a new National Indigenous Representative Body<sup>97</sup>:

- In order for the representative body to be persuasive, it will need to have **legitimacy** and **credibility** with both government and Indigenous peoples.

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<sup>96</sup> O'Donoghue, L 1986, *An Aboriginal and Islander Consultative Organisation*, Australian Government Publishing Service, Canberra. p43.

<sup>97</sup> These principles are also reflective of the five principles (collaboration, regional need, flexibility, accountability and leadership) underpinning the 'new arrangements' for the administration of Indigenous affairs at the federal level post-ATSIC, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, 2004, *Social Justice Report 2004*, HREOC, Sydney, p84-85.

- A representative body will, therefore, require **‘two way’ accountability** –to government and to Indigenous peoples and communities.
- Such **accountability** will come from the representative body being **transparent** and accountable in its operations. This requires transparency in the mechanisms for determining membership or election; in its policy making processes; as well as financially.
- The **credibility** of the representative body will come from it being regarded as truly **representative** of a diverse Indigenous polity This might be achieved through a variety of means, such as from ensuring participation of different groups of Indigenous people including stolen generations, traditional owners, Torres Strait Islanders, youth and women for example.
- The credibility of the representative body will also come from having a **structure** that is internally **consistent** and **‘connected’**, so that there is a clear relationship between the national body and Indigenous peak bodies, service delivery organisations and other representative mechanisms that may exist at the State, Territory or regional level.
- The **legitimacy** of the representative body will also depend on whether it is seen as **independent** and robust in its advocacy and analysis. This was one of the most critical failures of the National Indigenous Council – it was seen to deal with an agenda set entirely by government.
- A critical issue to be considered by Indigenous peoples is what is meant by **independence**. It can mean that the policy advice and advocacy is not restricted to occurring within the confines of the policies of the government of the day, but it may also extend to sustainable funding options to reduce the vulnerability of the organisation to the political process and the threat of budget cuts if the advice provided is not to the liking of the government.

A National Indigenous Representative Body should do more than simply provide a ‘consultation mechanism’ for government. It should also outline a clear vision for a positive future for all Indigenous Australians, and inspire action and partnerships for change.

To achieve this, for example, the National Indigenous Representative Body might be expected to:

- Play a leading role in forging a new partnership between governments and Indigenous people;
- Ensure Indigenous peoples contribute and lead policy development on Indigenous issues;
- Ensure that an Indigenous perspective is provided on issues across government (such as in relation to issues which have a broader impact or focus than just Indigenous peoples – for instance, debates about climate change, social inclusion or homelessness);
- Advocate for the recognition and protection of Indigenous peoples rights;

- Seek to ensure that adequate and appropriate accountability mechanisms exist for the performance of governments on Indigenous issues; and
- Ensure that commitments, such as Closing the Gap, are supported by comprehensive, long-term action plans that are targeted to need, evidence-based and capable of addressing the existing inequities experienced by Indigenous peoples.

Text Box 5 sets out the proposed vision and principles for a new National Indigenous Representative Body as recommended in 2003 by the ATSIC Review Team. While the process of creating a new National Indigenous Representative Body is not about recreating or reviving the ATSIC structure, this vision and these principles nonetheless provide useful guidance.

**Text Box 5 – ATSIC Review Team’s vision and principles for a new National Indigenous Representative Body**

*In the hands of the regions*, the final report of the ATSIC Review proposed the following vision and principles to underpin a new National Indigenous Representative Body.

The report sets out the following **vision** for a National Indigenous Representative Body. It should result in an organisation that:

- Enables Aboriginal and Torres Strait Islander people to build a future grounded in their own histories and cultures within the broader Australian framework;
- Represents and promotes the views of Aboriginal and Torres Strait Islander people, including their diversity of opinion;
- Vigorously pursues the interests of Aboriginal and Torres Strait Islander people through partnerships with Aboriginal and Torres Strait Islander communities, governments and other sectors of Australian society;
- Influences priorities, strategies and programs at the national, State/ Territory and regional level;
- Minimises and streamlines the government interface with Indigenous communities;
- Promotes good Indigenous governance;
- Recognises the complexity of relationships between Aboriginal and Torres Strait Islander individuals, communities, organisations and governments and the values and limitations created by this;
- Is an equal partner in all negotiations, resourced adequately to achieve this equality, and commands goodwill and respect;
- Increases women's participation and expression of views;
- Ensures that there is transparent accountability of all organisations that are funded to provide services for Aboriginal and Torres Strait Islander people;
- Maintains its unique status;
- Recognises that the representative body is a key player, but not the only player, that seeks to advance the interests of Aboriginal and Torres Strait Islander Australians with government and others.

The report also proposed that the new representative body be underpinned by the following **principles**:

- It should be the peak State/ Territory and national body, which advocates for the development of Aboriginal and Torres Strait Islander communities;
- It should have regional mechanisms to provide the State/ Territory policy interface with the governments co-coordinating regional activities;
- Representatives from each State/ Territory should constitute the national body, achieving a direct relationship between the regional, State/ Territory and national levels;
- The national body should provide the policy interface for the Australian Government setting and advocating a national strategic direction and monitoring progress against the representative body's national plan to reinforce the accountability of program and service providers;
- Its primary focus should be on building strong local communities through development and implementation of a needs-based regional plan;
- State/ Territory and national programs should be informed by, and undertake activities consistent with, regional plans;
- Strengthening Aboriginal and Torres Strait Islander communities must not be based solely on the provision of welfare services;
- Aboriginal and Torres Strait Islander people should be provided with equal access to health services and there should be an appropriate balance of preventative, environmental and public health policies, programs and services;
- Health, education, training, skills development and employment are integral to building the local and regional economy on a long term sustainable basis;
- Housing should be provided on the basis of ensuring access is available to those who need it and ownership is available to those who desire it;
- All government funded programs should be subject to an independent assessment of outcomes; and
- The role of elected officials should be clearly delineated from that of the administration.

ATSIC itself had proposed to the ATSIC Review Team the following five guiding principles. These were also endorsed in the final report of the Review Team:

- **The right to self-determination** based on inherent rights and the laws, traditions and cultures of the Indigenous peoples of Australia is central to the development of the national representative body as an organisation.
- **Aboriginal and Torres Strait Islander peoples should be able to engage with governments** on the basis of equality and mutual respect about policies and programs affecting them.
- **The goal of sustainable and equitable outcomes** for Aboriginal and Torres Strait Islanders peoples in respect of economic, social and cultural rights is a major priority in achieving social justice.
- **Flexibility of the national representative body's structures and processes** is important in order to reflect and represent the full diversity of Indigenous cultures and situations in Australia, whether at family, clan, community, language group or national level.
- **The rights of traditional owners and native titleholders** needs to be

protected through negotiated agreements regarding new regional structures, developments and plans.

Text Box 6 below provides an overview of the main themes to emerge from the Indigenous stream of the Prime Minister's 2020 Summit earlier in 2008. These also provide useful guidance on the principles that might underpin a new National Indigenous Representative Body.

### **Text Box 6 – Options for the future of Indigenous Australia - Ambitions and Themes from the 2020 Summit**

The following ambitions and themes for Indigenous Australia were agreed at the Prime Minister's 2020 Summit by the Indigenous policy stream.

#### **Ambitions**

The ambitions of the stream were discussed in each of the sub-groups, and a number of themes and aims were identified in plenary sessions:

- Following the historic and significant Apology a new national, bipartisan dialogue between Aboriginal and Torres Strait Islander people and government should begin.
- There should be a new form of engagement of Aboriginal and Torres Strait Islander people in public policy and planning that affects them, as well as formal national recognition of Aboriginal and Torres Strait Islander people and their place in the national identity and national story.
- By 2020 we will have capable, productive and confident families, young people and children who are proud, independent and contributing members of society.
- By 2020 there will be a high level of attention, energy and resources focused on the needs of Aboriginal and Torres Strait Islander children.
- By 2020 Aboriginal and Torres Strait Islander people will have parity with other Australians across the spectrum of measures—most importantly, in the strength and wellbeing of their families and young people, safety and security for families and children, decent housing, good health and education.
- By 2020 at least one person in each Aboriginal and Torres Strait Islander household will be in ongoing employment.

These points were summarised by some participants as follows:

Our ambition is an Australia where Aboriginal and Torres Strait Islander people have formal recognition in the Australian legal framework and Australia's global identity is one that is recognised as being enriched by a living culture that is 50 000 years old. In this Australia in 2020, Aboriginal and Torres Strait Islander people have the same health, education and economic participation opportunities and outcomes as other Australians, are able to realise their hopes and aspirations and are affirmed in their cultural identity. This can only be achieved by taking measures now to urgently transform society to nurture today's Aboriginal and Torres Strait Islander

youth and children.

### **Themes**

The stream as a whole agreed on a number of priority themes, which were further explored by the smaller discussion groups during the summit:

- Enshrine formal recognition of Australia’s Aboriginal and Torres Strait Islander people.
- Provide stronger support for families and their wellbeing and their role in keeping Aboriginal and Torres Strait Islander culture and identity vibrant. This includes safe, private space in community life for families, so children can be nurtured and cared for and are able to get a good education.
- Encourage a new form of engagement that harnesses Aboriginal and Torres Strait Islander ability, knowledge and leadership.
- Overcome the complex arrangements at the national, state and territory and local government levels in relation to funding, infrastructure and some service delivery—for example, housing.
- Develop new, more comprehensive accountability arrangements.
- ‘Close the gap’ in all areas and capitalise on links between formal recognition and achieving better social and economic outcomes.
- Identify and maximise the interdependencies between housing, education, health and employment.
- Provide to young Aboriginal and Torres Strait Islander people an opportunity to be involved in developing policies and programs designed to assist them, recognising that these young people represent a substantial proportion of the Indigenous population.
- Ensure that young Aboriginal and Torres Strait Islander people, in urban and regional areas, are involved in decisions that affect them, rather than being invisible to policy makers and planners.
- Speed up the pace of economic development, redistribution of resources and clarification of property rights.
- Expand partnerships between Aboriginal and Torres Strait Islander entrepreneurs and business.
- Place value on Aboriginal and Torres Strait Islander cultures and weave them into global identity.
- Give due recognition to Aboriginal and Torres Strait Islander knowledge of country, and recognise the relevance of this knowledge to the response to climate change, water and sustainability challenges.
- Confront racism.

It is also worth noting that the following objectives are contained in the *Aboriginal and Torres Strait Islander Act 2005* (Cth). This Act is the primary piece of legislation at the federal level for Indigenous affairs (and was previously called the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth)).

**Section 3:** The objects of this Act are, in recognition of the past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society:

- a) to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
- b) to promote the development of self management and self sufficiency among Aboriginal persons and Torres Strait Islanders;
- c) to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
- d) to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

A National Indigenous Representative Body will have a significant role to play in realising these objectives. Consultations on a National Indigenous Representative Body may also reveal other objectives and principles that should also be reflected in the *Aboriginal and Torres Strait Islander Act 2005* (Cth). This will particularly be the case should the new National Indigenous Representative Body be established or confirmed through legislation.

**Issue for discussion: Guiding principles for the establishment of a National Indigenous Representative Body**

What principles should guide the formation of a new National Indigenous Representative Body?

What aspects of the following documents provide useful guidance in answering this question:

- The Principles and Vision for a National Indigenous Representative Body outlined in the Hannaford Review of ATSIC;
- The Themes and Ambitions from the Indigenous Stream of the 2020 Summit; and
- The objects in the *Aboriginal and Torres Strait Islander Act 2005* (Cth)?

**Issue for discussion: Role and functions of a National Indigenous Representative Body**

A major issue that must be addressed in establishing a new National Indigenous Representative Body is what its role and functions should be.

A new National Indigenous Representative Body will not be born into an historical vacuum. It will build upon and inevitably be seen as a progression of previous forms of national Indigenous representation. It will also have to operate within or alongside the new system for whole of government service delivery at the federal level.

The following potential functions of a new National Indigenous Representative Body are discussed in this section:

- Delivery of government programs;
- Advocacy;
- Policy formulation and advice;
- Coordinating long term planning processes at regional level;
- Contributing to legal reform;
- Review and evaluation of government programs;
- Clearing house role;
- International role;
- Research; and
- Facilitation and mediation.

The issue of whether a new National Indigenous Representative Body should deliver government services is a threshold question that will significantly impact on the design of a representative body. Other potential functions are less contentious, but they need to be seen in the context of proposals for an organisation that delivers development programs or one that is simply representative and advisory.

### **Government service delivery**

Ultimately, a new National Indigenous Representative Body must confront the ghost of ATSIC.

The main distinction between ATSIC and its predecessors was that ATSIC was actively involved in the planning and delivery of (limited) programs to Indigenous communities. ATSIC had difficulty in reconciling its functions in advocacy, forming policy, program/service delivery and review.<sup>98</sup>

This paper progresses on the basis that the functions of a new National Indigenous Representative Body should *not* include the delivery of government services.

In preparing this paper, the new Australian Government has made clear that it does not support a new National Indigenous Representative Body having responsibilities for delivering government services and will continue to deliver services through a coordinated whole of government system. The Minister for Indigenous Affairs has stated that the new representative body will not be ‘a new ATSIC’.

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<sup>98</sup> It should also be recognised that ATSIC only ever had responsibility for a limited range of programs. The Senate Select Committee into the abolition of ATSIC in 2005 found that ATSIC often took the blame for programs it was not funded to provide (Senate 2005: 13). It lost responsibility for health programs in the early years of its operation. By 2005 only 15% of its \$1.1 billion allocation was available for discretionary programs. The remainder was mandated by government and largely quarantined for the Community Development Employment Projects (CDEP) program and the Community Housing and Infrastructure Program (CHIP). In all, ATSIC accounted for less than half of all Commonwealth government expenditure on Indigenous programs (Senate 2005: 13-15).

It is notable that the national Indigenous representative bodies profiled in this paper (for example, in Canada, the USA, Sweden and New Zealand) also do *not* exercise service delivery responsibilities on behalf of government.

This still leaves open a series of questions relating to the role of a National Indigenous Representative Body and government service delivery. These include what role (if any) should a National Indigenous Representative Body have in:

- setting priorities for service delivery (This might include through a formal or informal role in determining priorities for the federal budget such as through participating in the Single Line Budget Submission Process and/or involvement in the Secretaries Group or Ministerial Taskforce on Indigenous Affairs);
- contributing to planning processes to ensure such services are appropriately directed and funded to levels capable of addressing the outstanding needs of Indigenous peoples; and
- monitoring government service delivery.

Views on whether a National Indigenous Representative Body should be directly engaged in service delivery tend to fall into two camps. There are those who argue that control of significant resources is the only way to assert power in political relationships with non-Indigenous Australia.<sup>99</sup> They would argue, also, that self-determination requires that Indigenous peoples have their hands on the levers of their own development.<sup>100</sup> This is seen as both a practical as well as a symbolic requirement, since Indigenous peoples have a privileged understanding of their own needs and local insight into the design of programs.

On the other side of the discussion there are those that argue that the performance of ATSIC did not bear out any of these assertions. While it did exert some influence both nationally and internationally, the greatest power wielded by ATSIC occurred at the local and regional levels and mostly concerned only Indigenous peoples. The structure of ATSIC was often perceived to be overly bureaucratic. There was conflict, too, between the representative structure and the resource distribution function which led to suspicions of nepotism and lack of transparency.<sup>101</sup>

The difference of views boils down to whether a National Indigenous Representative Body will assert more influence if it is in control of program funding, as against the view that service delivery is properly the province of government, gets in the way of advocacy and representation, and diverts attention from the main job of holding government to account.

If Government were to ensure that the new National Indigenous Representative Body was mandated to have a significant role in program design as well as performance

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<sup>99</sup> Behrendt, L 2005, 'Habeas Corpus', *Arena Magazine*, Vol. 73, pp5,6,25; Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. p62.

<sup>100</sup> Behrendt, L 2005, 'Habeas Corpus', *Arena Magazine*, Vol. 73, p7.

<sup>101</sup> Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. p19.

monitoring and evaluation it is feasible that these conflicting approaches could be reconciled. In other words, it is feasible that the national body could exercise influence over program delivery without itself delivering the programs.

Although ATSIC was a new departure in Indigenous control of some important development programs (CDEP and CHIP), actual service delivery was, and largely continues to be, carried out by local and regional community organisations (many of which are incorporated by the Registrar of Aboriginal Corporations). These pre-dated ATSIC, in many cases by several decades.

A national Indigenous body that engages with these service based organisations meets many of the arguments for Indigenous control of local development programs. It also meets the requirement of adequate democratic representation since these organisations are controlled and governed by their members. If the national body does not have a national program delivery function then the source of friction that existed between ATSIC and many of these organisations is removed, and attention can turn to the responsibilities of government.

While this paper has proceeded on the basis that a new National Indigenous Representative Body will not have a direct government service delivery role, if national consultations uncover a firm belief that a national Indigenous-controlled organisation must be involved in program delivery then the tension that this creates between this function and other functions would then need to be addressed.

### **Issue for discussion: The National Indigenous Representative Body and government service delivery**

How could the National Indigenous Representative Body influence program delivery without itself delivering services to Indigenous people and communities?

For example, should the National Indigenous Representative Body have a role in the following:

- setting priorities for service delivery;
- contributing to planning processes to ensure such services are appropriately directed and funded to levels capable of addressing the outstanding needs of Indigenous peoples; and
- monitoring government service delivery?

## Advocacy

Advocating an Indigenous perspective on issues is a key function of all national Indigenous representative bodies. Without advocacy there can be no representation.

Accordingly, the main issues relating to an advocacy role of a National Indigenous Representative Body are not whether it should undertake such a role, but how to ensure such advocacy is robust, credible and effective.

This will cover a raft of issues such as whether the representative body is located within or outside of government; how its funding is secured; and how it ensures that its advocacy is drawn through representative processes. These issues are discussed further in the remainder of this paper.

Whether the representative body is located within or outside of government, will pose different advantages and challenges, depending on which path is chosen.

ATSIC exercised its advocacy role from within government. Similar examples of bodies that advocate from within government include bodies such as:

- The Human Rights and Equal Opportunity Commission (HREOC) which has a broad mandate to advocate for the recognition and protection of human rights. The Social Justice Commissioner within HREOC, for example, has powers to promote awareness and understanding of the human rights situation facing Indigenous peoples and regularly review government compliance with human rights obligations. In doing so, the Commission may direct government agencies at all levels to provide requested information. Operating as an independent statutory authority, the government is not able to direct HREOC as to how it performs its functions or to restrict its findings and public comments to ones that are consistent with government policy. HREOC is, however, reliant upon the government financially through the regular budget process.
- The Australian Law Reform Commission (ALRC) which has a broad mandate to advocate for law reform, predominately through national inquiries. As the ALRC note on their website, ‘while accountable to the federal Parliament for its budget and activities, the ALRC is not under the control of government, giving it the intellectual independence and ability to make research findings and recommendations without fear or favour’.<sup>102</sup>

The Office of the Privacy Commissioner and the Commonwealth Ombudsman are statutory offices with some similarities.

A statutory authority model, underpinned by legislation that mandates the National Indigenous Representative Body to advocate for the interests of Indigenous peoples in policy processes and for government to consider such advice, is one way of proceeding.

Most organisations that are focused on advocacy, however, tend to stand outside government. The Australian Council of Social Service (ACOSS), for example, is part

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<sup>102</sup> ALRC Website available at: <http://www.alrc.gov.au/about/index.htm>

funded by government, statutorily independent, and draws its membership from State and Territory councils and other national organisations.<sup>103</sup> The Federation of Ethnic Community Councils of Australia is another example (and similarly relies on a mix of government and non-government funding).

ACOSS carries out its advocacy functions through the media, especially during the budget process, as well as through more discreet lobbying, and by its inclusion in government-sponsored policy forums. However, it has had a tense relationship with governments of both major political parties and this has sometimes led to its exclusion, and thus limited the effectiveness of its advocacy.

Whether the National Indigenous Representative Body is positioned inside or outside of government, effective advocacy will also depend upon a robust representative structure indicating legitimacy, sound research, professional presentation, adequate resourcing and a trustworthy relationship with government, the public service and the media.

### **Policy Formation and Advice**

Indigenous individuals have lifelong experience of conditions in Indigenous areas and practical understanding of the impact of a succession of government programs. Senior bureaucrats do not usually have this experience, nor do many ministerial advisers.

Coming together in a National Indigenous Representative Body, Indigenous individuals have the opportunity to pool their experiences to reflect the diversity of conditions in Indigenous Australia. This too is a form of expertise currently not available to government.

While it is often formally recognised that Indigenous peoples bring particular expertise to Indigenous questions, the actual process of policy formation tends to roll over Indigenous input with the weight of mainstream practice. No previous National Indigenous Representative Body has managed to take the predominant role in setting policy goals, implementation strategy and evaluation. Rather, they have been seen as one element in a consultative process which may or may not have influence when senior officials design the details of government programs.

One school of thought in political science firmly supports this approach. It believes that policy originates in the senior ranks of the public service in touch with politicians, is delivered down through the ranks to the public, evaluated, and the evaluation passed back to the top to further inform policy. This is presented as the 'policy cycle'.

This approach has been challenged by other political scientists, such as Colebatch<sup>104</sup>, who see *better* policy outcomes resulting from the collaborative efforts of both government and non-government players.

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<sup>103</sup> Mendes, P 2006, *Inside the Welfare Lobby: A History of the Australian Council of Social Service*, Sussex Academic Press, Eastbourne (UK). pp1-6

<sup>104</sup> Colebatch, HK (ed) 2006, *Beyond the Policy Cycle: the Policy Process in Australia*, Allen and Unwin Crows Nest (NSW).

The experience of previous Indigenous bodies indicates there is a task ahead in convincing the Indigenous affairs bureaucracy of the value of this approach, and political leadership may be required.

This has begun to be acknowledged by the federal government. In late 2006, the Department of Prime Minister and Cabinet joined with the Australian National Audit Office to produce the *Better Practice Guide on Implementation of Programme and Policy Initiatives*. This emphasises the importance of ‘stakeholder management’ and emphasises the importance of adopting a consultative and participatory approach to policy development.<sup>105</sup>

To this end it is notable that in his Apology speech and at the National Indigenous Health Equality Summit in March 2008 the Prime Minister has committed to:

- A new partnership to achieve equality in health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by the year 2030;
- To developing a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities; and
- To measure, monitor, and report on our joint efforts, in accordance with benchmarks and targets, to ensure that we are progressively realising our shared ambitions.

It is also important to acknowledge that there have been significant international developments in recent years that support a more inclusive approach being taken to policy development, particularly in relation to Indigenous Peoples.

For example, a human rights based approach to development has now become standard practice across the United Nations. This requires that in developing policy and delivering services, governments should:

- recognize and accommodate the **cultural distinctiveness and diversity** of Indigenous Australians;
- adopt a people-centred approach which values the **full participation** of Indigenous peoples in the process, from the very beginning of policy development, through to service delivery and monitoring and evaluation;
- involve the development of **agreed targets and benchmarks**, so we have a clear picture of what it is exactly that is trying to be achieved; and
- be supported by an **evaluation framework** to assess whether the rights of Indigenous peoples are being ‘progressively realised’, so that we can be confident that government efforts are effective, well targeted and taking place at the maximum level possible.

We have also seen the emergence internationally of respect for the principle of **free, prior and informed consent**. This principle is increasingly emerging as a practical

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<sup>105</sup> Department of Prime Minister and Cabinet and Australian National Audit Office, *Better Practice Guide: Implementation of Programme and Policy Initiatives – Making Policy Matter*, Commonwealth of Australia, Canberra 2006, Chapter 6.

methodology within the UN system for designing programs and projects, which either directly or indirectly affect indigenous peoples.

The United Nations Working Group on Indigenous Populations has commented on this principle as follows:

Substantively, the right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources - a complex (series) of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent.

Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.<sup>106</sup>

This will require a more open and collaborative approach to policy development by government departments.

To be effective a National Indigenous Representative Body will need to have its own processes to debate and refine policy proposals based on evidence as well as aspirations. Sound structural arrangements for feeding policy proposals and advice to government are desirable, and some suggestions for these are made later in this part of the Issues Paper.

Effective steering of the policy debate will depend most of all on well-founded proposals which are well-argued and presented, and inevitably in competition with others who present themselves as experts on Indigenous peoples. The national organisation will need to balance its broadly representative forums that harness the diversity of Indigenous experience and give it legitimacy, with more tightly focused arrangements for research and political lobbying.

### **Contributing to Legal Reform**

ATSIC was often supportive of legal reform movements once these were underway, such as negotiating the *Native Title Act 1993* (Cth) or reviewing the recommendations of the Royal Commission into Aboriginal Deaths in Custody. It did little, however, to promote and drive reform from the start from its own resources. This is with the exception of its legal services funding stream that provided funding for test cases with significant precedent value for Indigenous people.

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<sup>106</sup> Working Group on Indigenous Populations, *Standard-setting: Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*, UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005, paras 56-58, p15.

The Aboriginal Legal Services, in general, have been limited to addressing criminal matters, rather than contribute directly to legal reform, due to limited resources or funding constraints. The result has been a patchwork of advances under a variety of legislative regimes, as well as limited follow up of significant reform processes such as those emerging from the Deaths in Custody Royal Commission.

Indigenous peoples may consider this to be a priority area for a new National Indigenous Representative Body.

Many ‘big picture’ issues remain to be addressed in Australia (such as the *UN Declaration on the Rights of Indigenous Peoples*), as well as smaller test cases of civil rights. As debate is renewed over an Australian republic the place of Indigenous peoples in the constitution and any recognition of sovereign rights needs to be addressed. The effectiveness of the *Racial Discrimination Act 1975* (Cth) is under question after its suspension for the Northern Territory intervention. The existence of unextinguished mineral rights could be tested outside of the native title legislative framework. The removal of children from families without good cause and the misappropriation of the wages of state wards are also issues that are proceeding piecemeal across the country.

This national discussion could consider whether a national body should actively pursue law reform and be involved in coordinating and otherwise supporting test cases in cooperation with existing Aboriginal and Torres Strait Islander Legal Services, Family Violence Prevention Legal Services and Legal Rights Movements.

### **Review and Evaluation of Government Programs**

An important role of a National Indigenous Representative Body would be to ensure that governments, both State/ Territory and national, are responsive to Indigenous needs. Responsiveness is encouraged where there is a sense of continuous well-informed scrutiny.

A national body with a robust regional structure would be well-placed to receive ‘field reports’ on government performance where at present government only reports to itself. This form of scrutiny from the member base is important to the functions of policy formation and advocacy, but it is also desirable that a national body be tied into formal evaluation and monitoring processes. To do so it would need some investigative authority. Some proposals for formal relations between government and a national body to review government performance are put forward in the ‘Relations with the Commonwealth Government’ section later in the Issues Paper.

One issue for consideration will be how a National Indigenous Representative Body would work with existing monitoring and evaluation processes (such as the Office of Evaluation and Audit – Indigenous Programs in the Department of Finance).

### **Clearing House Role**

A potential role for a National Indigenous Representative Body could be to undertake a coordination role or act as a ‘clearing house’ to share information between Indigenous representative organisations and service delivery organisations. As an example, the

Social Justice Commissioner has proposed that a national body could convene an annual congress on service delivery to Indigenous communities.

Such a congress could be run along similar lines to the National Native Title Conference coordinated by the Australian Institute of Aboriginal and Torres Strait Islander Studies. It would provide an opportunity for communities, Indigenous service delivery organisations, as well as regional representative Indigenous organisations, Indigenous Coordination Centres and State and Territory governments to share best practice examples in service delivery to Indigenous communities and in the formulation of agreements, and in improving whole of government coordination. This could also be conducted on a State/ Territory basis or be done on a thematic basis each gathering.

The outcomes of such a Congress would provide valuable input to the formulation of advice and national policies by a National Indigenous Representative Body. It could also:

- inform research into best practice examples, identifying success factors and strengths within communities;
- identify opportunities for greater collaboration between Indigenous organisations and communities, or between communities and governments; and
- identify opportunities for innovation and new solutions to existing, and often entrenched, problems faced at the community level.<sup>107</sup>

### **International Role**

A further issue for consideration is whether or how a National Indigenous Representative Body might engage at the international level.

Indigenous Australians, as with other indigenous peoples across the world, have a long history of engaging in the various forums and mechanisms of the United Nations. This includes through the Permanent Forum on Indigenous Issues; the Working Group on Indigenous Populations (which has now been replaced by the new Indigenous Expert Body which has its first meeting in October 2008); the Human Rights Council (and previously the Commission on Human Rights); human rights treaty committee system and various Rapporteurs of the human rights system; as well as in forums relating to biodiversity, climate change and intellectual property among others.

The legitimacy of the participation of Indigenous peoples in international processes has long been accepted by the Australian government and among the international community.

The participation of Indigenous Australians at the international level has been important in contributing to the development of human rights standards and learning from best practice to inform policy development in Australia. It has also played a key role in providing some accountability for Australia's human rights performance.

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<sup>107</sup> The Social Justice Commissioner has also suggested convening an annual conference on service delivery to Indigenous communities, or even the establishment of a national Indigenous non-government organisation peak body, as other mechanisms for information sharing and achieving better linkages between regional representative structures and the national, (Source: Aboriginal and Torres Strait Islander Social Justice Commissioner, 2004, *Social Justice Report 2004*, HREOC, Sydney, p106-107).

Since the demise of ATSIC, HREOC has received limited funding from the federal government to support international engagement by Indigenous peoples. The Social Justice Commissioner has focused this limited funding on supporting attendance at the UN Permanent Forum on Indigenous Issues and ensuring that participation in the Forum is coordinated and that feedback is provided once people return to Australia.

There is a capacity building element to this process, with support and mentoring for youth participants, as well as an expert focus with participants supported who can provide expertise on the thematic issue under discussion in the Forum.

Through this process, HREOC does not fund the full costs of participation of individuals at the international level. Instead, it makes a funding contribution and requires that the organisation that the person is representing also contributes. Participants also have to meet a series of obligations relating to activities prior to departing for the Forum, their participation while at the Forum, and the dissemination of information upon their return.

The HREOC process responds to widespread concerns about a lack of accountability for international engagement that had existed towards the end of the ATSIC period. Feedback to date suggests that the process has resulted in a high quality engagement at the Forum sessions.

The HREOC support only extends to the Permanent Forum on Indigenous Issues, although it may be extended to also cover the new Indigenous Expert Mechanism of the Human Rights Council in future years. It does not cover other relevant forums and processes which impact on Indigenous peoples rights and interests.

The issue will be whether a new National Indigenous Representative Body has an overall coordinating role for international engagement to ensure strategic and well-targeted participation.

It may also be appropriate for HREOC to retain, as part of its educative role and due to its expertise on human rights, its current role in coordinating international engagement at the Permanent Forum and to also provide mentoring support to the new National Indigenous Representative Body to focus its engagement in such processes.

## **Research**

Good research is essential to good policy and advocacy. The national body will need to consider whether it needs its own research coordination arm. This may require commissioning its own research as well as encouraging community based research in the regions, and expert reports. The community organisations that are currently facilitating unofficial evaluations of the Northern Territory intervention in Central Australia are an example of important and timely community-based research.

Coordination with existing research centres is also important. The Cooperative Research Centre for Aboriginal Health (CRCAH) brings together experts from across the country under Aboriginal research leadership. Its work, and that of other leading research centres such as the Centre for Aboriginal Economic Policy Research (CAEPR)

at ANU, the Desert Knowledge Centre in Alice Springs, and emerging institutes such as the United Nations University's Centre on Traditional Knowledge, could be enhanced by a national body with a strong commitment to evidence based research. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), an Indigenous-controlled national statutory body, is another resource that could be tapped.

Contrary to popular perception, researchers in Indigenous affairs mostly wish to see their work have practical effects in improving conditions for Indigenous peoples. To do this, they need leadership from those working at the coal-face of Indigenous policy. A national research coordination role for the national body could assist as a channel of communication between the two. The National Body could also be expected to be active in encouraging and supporting skills transfer to, and between, Indigenous researchers.

### **Facilitation and Mediation**

There is a large unmet need for mediation between Indigenous peoples and non-Indigenous interests where one impacts upon the other.<sup>108</sup>

This is most obviously the case where the current resource boom expands mineral exploration and exploitation into Indigenous areas. Native title claims often provide the focus for mediation. They often also bring up the need to mediate between, and facilitate decisions among, different Indigenous actors in the process.

Mediation and facilitation are not only required where there are commercial interests at stake. Government plans and services frequently have only the most rudimentary form of consultation processes carried out by people whose main expertise may not necessarily lie in this area. These are cross-cultural and intercultural problems that require particular skills and experience.

The realization of human rights also requires recognition of conflicts between competing rights and the designing of mechanisms for negotiation and conflict resolution. More specifically, human rights principles require the development of norms and decision-making processes that:

- Are democratic and accountable and enjoy public confidence;
- Are predicated on the willingness of interested parties to negotiate in good faith, and in an open and transparent manner;
- Are committed to addressing imbalances in the political process in order to safeguard the rights and entitlements of vulnerable groups;
- Promote women's participation and gender equity;
- Are guided by the prior, informed consent of those whose rights are affected by the implementation of specific projects;
- Result in negotiated agreements among the interested parties; and
- Have clear, implementable institutional arrangements for monitoring compliance and redress of grievances.<sup>109</sup>

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<sup>108</sup> See for example the research work of the Indigenous Facilitation and Mediation project at AIATSIS on this topic: <http://ntru.aiatsis.gov.au/ifamp/>.

<sup>109</sup> Extracted from: Working Group on Indigenous Populations, *Standard-setting: Legal commentary on the concept of free, prior and informed consent*. Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the

The *Social Justice Report 2005* and *2006* discussed the difficulties of negotiating Shared Responsibility Agreements between the federal Government and Indigenous communities due to the power and skills differentials. The former government had appointed a panel of experts to assist in negotiation processes for agreements. However, these panels could only be accessed at the request of the regional Indigenous Coordination Centre Manager and as an assistance mechanism for the ICC (i.e., for the government). A National Indigenous Representative Body could provide specialist mediation and facilitation assistance to Indigenous communities in developing community planning processes to be fed into a broader regional and State/ Territory-wide planning process.

A national body could support mediation training and possibly give accreditation to the best professionals and organisations in this area. If it is decided that the National Indigenous Representative Body should be an independent body, it would also be in a good position to provide negotiation, mediation and facilitation on a fee-for-service basis both to government and to private industry.

### **Issue for discussion: Role and functions of a National Indigenous Representative Body**

What should be the roles and functions of a new National Indigenous Representative Body?

Some options for discussion may include the following roles / functions:

- Advocacy;
- Policy formulation and advice;
- Contributing to law reform;
- Review and evaluation of government programs and service delivery;
- Clearing-house / coordination role;
- International role;
- Research;
- Facilitation and mediation; and / or
- Other roles/functions?

### **Issue for discussion: Structure of a National Indigenous Representative Body**

Identifying the overall structure of a National Indigenous Representative Body that will best meet the needs of Indigenous peoples will depend on many factors.

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*Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*, UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005, paras 56-58, p15.

It will necessarily be influenced by decisions about the broad principles that should underpin the organisation, as well as the roles and functions that the National Indigenous Representative Body undertakes.

Having decided these issues, there will then be a further threshold question which will need to be addressed in order to design the structure for the National Indigenous Representative Body. That is how many levels of representation should the national body have? In other words, should the national body just involve a national level structure; or should it also include State and Territory and/ or regional structures.

As noted in section 1 of this paper, a key finding of every review of national Indigenous representation in Australia has stressed the importance of ensuring a connection between Indigenous people and communities at the local and regional level through to the State/ Territory and national level.

This does not necessarily require formal representative structures at the regional and State and Territory levels. But if such structures are not part of the overall national body then the organisation will face significant additional challenges to ensure that it is truly representative and therefore legitimate and credible as an organisation.

Ordinarily, organisations tend to be broad at the base and narrow at the top. The national discussion of a future Indigenous body needs to consider how a ‘narrow’ leadership be kept in touch with the ‘broader’ base. Much of the negative reaction against ATSIC related to the fact that it was seen as too top-heavy and ‘top down’ in its approach.

This issue can be addressed in a variety of ways. Broadly speaking, these range from:

- formal mechanisms whereby a National Indigenous Representative Body has components that exist at different levels (such as in each State and Territory and at the regional level);
- a mixture of processes to engage different sectors of the Indigenous community (such as forums at different levels or membership processes for individuals and organisations); or
- relatively informal processes whereby Indigenous peoples can have their say at a national congress or through other processes that draw people together on an expert or issue specific basis.

It is important to note that the preferred option may involve a mixture of these mechanisms. These proposals are not mutually exclusive, and it may be desirable to seek to ‘mix and match’ from among the many options available, and to fine tune the way an organisation represents Indigenous peoples through establishing different forums, levels and functional units throughout the organisation, each which is representative and responsive in different ways.

**Issue for discussion: Ensuring that a National Indigenous Representative Body is representative of Indigenous peoples**

Should the National Indigenous Representative Body just involve a

national level structure; or should it also include State and Territory and/or regional structures?

Could a national body (without State, Territory or regional structures) effectively represent Indigenous peoples through the conduct of participatory processes and engagement (such as issue specific forums and advisory groups, regional or State/ Territory level planning processes, or the convening of a National Congress)?

### **Mechanisms for representing Indigenous peoples at the regional level**

As noted above, Indigenous peoples could be represented at a regional level by a National Indigenous Representative Body through the existence of formal structures at the regional level, or through more informal processes.

It is notable that the federal government's arrangements for delivering services to Indigenous peoples post-ATSIC relies on a network of State Offices and Indigenous Coordination Centres that are regionally focused. These regions are based on previous ATSIC Regional Council boundaries.

One option for a new National Indigenous Representative Body would be for it to include formal regional Indigenous mechanisms based on the same boundaries as the government's Indigenous Coordination Centres. This approach was formally endorsed by the previous government, although the only regional structure established consistent with this was the Murdi Paaki Regional Assembly.

As the Social Justice Commissioner has noted in the *Social Justice Report 2006*, there is a lack of capacity at the regional level for Indigenous peoples to 'organise' themselves into a regional structure that the government could then endorse and negotiate with. This approach of regional Indigenous mechanisms that operate parallel to the government's ICC network will therefore require significant support to design appropriate regional mechanisms, as well as to resource them and make them operational.

At the same time, the government has had ICC offices in operation for several years now and presumably has developed relationships with Indigenous communities and sectors within each region. The government therefore has in place the machinery to support the development of regional Indigenous representative arrangements should it so desire.

A related option would be to support formal regional mechanisms that are drawn along different boundaries to the ICC network of offices. This has been done with a Regional Partnership Agreement with the Ngaanyatjarra Council in Western Australia.

In this instance, the boundaries of regional mechanisms would be determined by Indigenous people. It could result in different mechanisms for representation, rather than a uniform system that is applied across all geographic areas. Such an approach may provide advantages in ensuring the legitimacy and credibility of the organisation

with Indigenous peoples. It may also result in disadvantages such as a multiplicity of regional mechanisms that are too small and accordingly more complex to administer (with reduced economies of scale) or which have to interact with the government's regional structures that are drawn along different boundaries.

A third, informal and more minimalist option would be for a National Indigenous Representative Body to convene regional forums and planning processes on a regular or cyclical basis. This could be done directly by the National Indigenous Representative Body or in partnership with governments (such as the federal government through the ICC; the state or territory government; and possibly also the local council). How such an approach would impact on the level of direct engagement with Indigenous peoples at the regional level would depend on what other processes for participation existed within the National Indigenous Representative Body.

**Issue for discussion: Relationship between the National Indigenous Representative Body and Indigenous peoples at the regional level**

What mechanisms should exist for the National Indigenous Representative Body to engage with Indigenous peoples at the regional level? Should the National Indigenous Representative Body:

- a) Formally include regional representative mechanisms as part of its structure? If so, how should those regions and their boundaries be determined?
- b) Convene regional forums and planning processes on a regular or cyclical basis? If so, should the representative body seek to conduct these itself, or in partnership with governments at the local, State/ Territory and federal levels?
- c) A combination of the above? or
- d) None of the above – it should engage through some alternative process.

**Mechanisms for representing Indigenous peoples at the State or Territory level**

As with determining the appropriate interface at the regional level, it will also be important to consider whether formal mechanisms or other processes are needed at the State or Territory wide level. This is particularly given the significant responsibilities for Indigenous affairs exercised by this level of government.

In the past, National Indigenous Representative Bodies have not usually dealt with the States/ Territories very well. They have largely depended on their State or Territory arms to feed into the national forum and attempted to influence states from there.

The first government-sponsored national Indigenous organisation, the NACC, divided the country into electoral constituencies each of which directly elected a member to the Council. However, the members did little to organise their electoral regions and there

was no coordination at the state level. The NAC, which superseded the NACC, was more successful at organising regional programs, though this varied across the country, and did have some state presence, though state governments did not take this very seriously.

ATSIC had no effective State/ Territory representative organisation but was usually effective at the regional level with its Regional Councils. The procedures for electing Commissioners, however, failed to reflect this strong local support base in the composition of the ATSIC Board.

O'Donoghue's minority report in the Hiatt inquiry aimed to deal with this issue by proposing that the replacement for the NACC should be based in regional organisations feeding into state advisory bodies that comprised both regional Indigenous representatives and state public officials.<sup>110</sup> This model was not accepted when the NAC was established. When Coombs in turn came to review the NAC he also argued for strong regional assemblies, with a mixed delegate/electoral base. He felt that these should federate at the state level to deal with state governments.<sup>111</sup> O'Donoghue's 1986 report advocated continuing discussions with state authorities about their relationship with the national body, but did find strong support for the concept of state components of the national body being able to influence state-based programs.<sup>112</sup>

The lack of strong mechanisms for engaging the states with a national body is partly due to the states themselves stepping back from responsibility for Indigenous programs. Following the 1967 referendum there was an assumption by the states that the Commonwealth would fund and largely administer Indigenous development. It would do this in two ways. Firstly, it would devise and deliver its own programs, secondly it would subsidise the states to deliver services largely through their mainstream public programs.

With the abolition of ATSIC this second tendency increased, though it had already been identified as an area for reform by the Howard government. Bi-lateral agreements for the delivery of services to Indigenous peoples have been signed with most States and Territories. One option would be for a new National Indigenous Representative Body to become a party to such agreements as trilateral agreements, appropriately renegotiated.

At the federal level, mainstream departments are currently increasingly questioning their role in direct service delivery, especially in areas that are State or Territory responsibilities for non-Indigenous people. Essential and municipal services, housing and public health are areas where the states are being encouraged to take up a greater role, while education has always been a state responsibility.

Greater state involvement in providing Indigenous services is administratively logical, given the constitutional responsibility of the states. It may also be desirable to have program administration closer to where the programs are delivered. Nevertheless,

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<sup>110</sup> Hiatt, LR *et al.* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. pp117-129.

<sup>111</sup> Coombs, HC 1984, *The Role of the National Aboriginal Conference*, Australian Government Publishing Service, Canberra. pp58-59.

<sup>112</sup> O'Donoghue, L 1986, *An Aboriginal and Islander Consultative Organisation*, Australian Government Publishing Service, Canberra. p32.

reform of state processes is also necessary in many areas. It is desirable for a National Indigenous Representative Body to play a part of this process.

The states often do not have good systems in place for Aboriginal Affairs because the Commonwealth has been in charge for more than three decades. Nor do they have a good track record of accounting for Indigenous expenditure through their mainstream systems.<sup>113</sup> In the current climate, there is a reasonable argument for a strong state based component of a national body both to render advice and to monitor performance. Whether a state component of the national body is directly elected or consists of delegates from communities and organisations, the state component's relationship to the national body needs to be considered.

It is notable that the new federal government has clearly expressed its intention to reform the relationship between the Commonwealth and the States and Territories and to end the 'blame game' across a range of activities and service delivery. The Council of Australian Governments is the primary vehicle for a reform agenda of Commonwealth-State relationships. It would be appropriate to consider whether a National Indigenous Representative Body could usefully play a role in advising and interacting with COAG on inter-governmental reform issues.

The Commonwealth Government is also reviewing the system of Special Purpose Payments to the states and territories, including by including accountability measures such as specific Indigenous performance indicators, benchmarks and targets for service delivery by state and territory governments. Similar accountability measures are also being considered in the renegotiation of the Australian Health Care Agreements and will no doubt also be considered in the context of other bilateral arrangements for housing, education and other issues as those agreements arise for renegotiation. These may also provide an opportunity for the new National Indigenous Representative Body to advise the federal government in order to achieve improved outcomes at the state and territory level.

Accordingly, some options for the relationship between the National Indigenous Representative Body and State and Territory governments may include:

- State-based mechanisms being a feature of a new National Indigenous Representative Body, potentially drawing their representatives from regional representative mechanisms;
- State-based mechanisms that are constituted through other means, such as direct election and/ or representation of organisations – these might, for example, be constituted outside the framework of the National Indigenous Representative Body such as with the new ACT Governments' Aboriginal and Torres Strait Islander Elected Body;
- The conduct of State-wide policy forums conducted on a regular, cyclical basis to feed into the National Indigenous Representative Body; or
- A combination of these mechanisms.

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<sup>113</sup> Langton, M 1994, 'Self-Determination: Overhauling the Administrative Practices of Colonisation' in P. Jull, M. Mulrennan, M. Sullivan, G. Crough and D. Lea (eds), *Surviving Columbus: Indigenous Peoples, Political Reform and Environmental Management in North Australia*, North Australia Research Unit, Australia National University, Darwin. Pp133-134.

**Issue for discussion: Relationship between the National Indigenous Representative Body and Indigenous peoples at the State or Territory level**

What mechanisms should exist for the National Indigenous Representative Body to engage with Indigenous peoples at the State/Territory level? How might this influence the significant responsibilities and under-performance of State and Territory governments on Indigenous affairs?

If such mechanisms are established, should they:

- a) draw their membership from regional representative mechanisms;
- b) be based on other mechanisms to be determined on a state by state basis (including existing state-based representative bodies and advisory boards);
- c) be based on the conduct of state-wide policy forums conducted on a regular, cyclical basis; or
- d) a combination of the above; or
- e) None of the above?

Should a National Indigenous Representative Body seek to exert influence at the State and Territory level through a formal or informal role at the Council of Australian Governments, and/or by participating in or advising on the negotiation of inter-governmental agreements?

**The national structure of the National Indigenous Representative Body**

The above sections have addressed the key issues of how many levels of representation the national body should have as well as the roles and functions it would exercise. This will have a significant impact in determining the most appropriate national level structure for the representative body.

Once consensus is achieved on a broad outline of what a National Body should do, and how it should look, then structural proposals can proceed.

It is important to mention that it is possible to ‘mix and match’ from among the many options available, and to fine tune the way an organisation represents its membership through establishing different forums, levels and functional units throughout the organisation, each responsive to the membership in different ways. A significant issue to consider is how different forums or mechanisms within the national body would relate to each other to ensure internal cohesiveness.

The following are a range of issues to be addressed relating to a national structure for the new National Indigenous Representative Body:

- a) Whether the national structure should be directly drawn from regional and State/Territory levels of the body with delegates nominated to the national structure through these mechanisms, or whether it should instead be based on a direct election model at the national level;
- b) Whether it should be a membership based organisation, whereby communities, organisations or individuals can join the organisation – representation in this model would then flow from the participation of individuals or representatives of organisations or communities, in the ordinary governance processes of the organisation;
- c) Whether the national structure be decided through a process of merit selection presided over by a panel of eminent Indigenous peers;
- d) Whether or how the national structure of the representative body should involve Indigenous peak bodies, other regional or state based Indigenous bodies and/or Indigenous service delivery organisations in its activities – for example, directly in its decision making or in an advisory role;
- e) Whether at the national level there should be an allocation of positions to a national board or executive of representatives for particular sectors of the Indigenous community – for example, stolen generations members, traditional owners, youth, and Torres Strait Islanders (on the mainland and in Torres Strait). Such positions could also be allocated to specific working groups or advisory panels to the national body;
- f) How at the national level the National Indigenous Representative Body can maintain a gender balance and ensure equal participation and representation for Indigenous women; and
- g) Whether there ought to be processes to enable the broad-based participation of Indigenous peoples in the national decision making process – such as through the convening of an annual policy Congress open to all Indigenous peoples (and possibly also Indigenous organisations and/or non-Indigenous organisations).

One view may be that it is not necessary to re-invent the wheel, and discussion should start with improvements to the ATSIC experience, perhaps based on the Hannaford review.<sup>114</sup> This would certainly allow for a narrowing down of the issues.

The ATSIC Review of 2003 had recommended a revised two tier structure for “a new ATSIC”. It proposed that each regional representative organisation’s Chair would become a member of a national forum. That national forum would meet occasionally and would also elect an Executive Council from a smaller number of its members. The Executive Council would then make the decisions and run the organisation on a day to day basis.<sup>115</sup> This may provide a starting point for how the new National Indigenous Representative Body may operate.

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<sup>114</sup> Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra.

<sup>115</sup> Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. pp78-80.

Some of the issues to be addressed in relation to the options identified above include:

- Whether representatives should be chosen by election or by delegation, or alternatively whether they should be chosen through a merit selection process presided over by a panel of eminent Indigenous peers;
  - Whether particular groups of Indigenous peoples should be directly represented on the national body's structure (eg stolen generations, traditional owners, Torres Strait Islanders or youth);
  - How to ensure gender balance and equal representation of Indigenous women on a national representative body structure; and
  - The role of non-Indigenous organisations.
- **Representatives chosen by election or by delegation?**

Three distinct ways of reflecting the membership in a board, council or executive must be considered. By:

- **Direct election:** Here members of the organisation participate as individuals.<sup>116</sup> They each have a vote for a representative.
- **Delegation:** In this model, organisations, national Indigenous peak bodies, regional and/or state/territory level representative organisations could nominate a delegate/s to represent them in the National Indigenous Representative Body. The delegate can be selected in a number of ways; elected from within the organisation or group, or appointed by its Board, officers or elders.
- **Merit selection:** In this model, the members of a national executive would be selected through a merit selection process by a panel of eminent Indigenous people. This process would be used during the establishment phase of the representative body. Once the representative body was in place and operating, the national executive could then establish its own procedure for the selection/appointment of members in subsequent rounds.

### *Election*

Both the NACC and the NAC held direct elections, while ATSIC had direct election to Regional Councils and then an indirect election model for other positions.

ATSIC Regional Councillors were elected from local constituencies. Regional Councillors then elected the Chairs of the Regional Councils, as well as Commissioners on the national board (with Regional Councils grouped together into zones for the purpose of electing a Commissioner). The Commissioners then elected a Chairperson

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<sup>116</sup> It is also possible that, such as in the National Congress of American Indians, organisations also have a number of votes allocated to them.

and Deputy Chairperson.<sup>117</sup> It was a complicated system and voter turn out overall was poor, although greater rates of voter turnout were achieved in remote areas.<sup>118</sup>

In the reviews before the demise of each of the national organisations the principle of popular election was often challenged.<sup>119</sup>

In relation to ATSIC, many electors were unaware of the intricacies of the ATSIC system beyond the election of Regional Councillors, which made this part of the process susceptible to political intrigue. The distribution of votes across the country also favoured remote areas to the disadvantage of Aboriginal people in urban and densely settled Australia.<sup>120</sup>

The Hannaford review of 2003 found dissatisfaction with the uniformity of the electoral model.<sup>121</sup> It did not allow for the adoption of different approaches in different regions.

### *Delegation*

Several effective national representative bodies are based on delegates being nominated by member organisations.

The Australian Council of Trades Unions (ACTU), for example, is constituted by its affiliated unions, its state branches, provincial Trades and Labor Councils, and its officers and executive members. It has a Congress which is made up of delegates from its constituent parts and its officers.<sup>122</sup>

The Australian Council of Social Service (ACOSS) is similar. There are Councils of Social Service in each of the States and Territories. The membership of state Councils differs from State/ Territory to State/ Territory, depending on the community service organisations that are active there.

In addition, ACOSS members include national organisations representing those who need social services as well as those who provide them. It includes religious groups and relevant professional associations as members. It has more than seventy member organisations.

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<sup>117</sup> Hannaford, J, Huggins J, and Collins B, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. pp24-26.

<sup>118</sup> Behrendt, L 2005, *Briefing Paper No 5: National Representative Structures*, Ngiya Institute for Indigenous Law, Policy and Practice, Sydney, pp37-38.

<sup>119</sup> Hiatt, LR *et al.* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. pp57-62; Coombs, HC 1984, *The Role of the National Aboriginal Conference*, Australian Government Publishing Service, Canberra. pp20-23; Hannaford *et al* 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. pp45-46.

<sup>120</sup> Behrendt, L 2005, *Briefing Paper No 5: National Representative Structures*, Ngiya Institute for Indigenous Law, Policy and Practice, Sydney. pp32-36.

<sup>121</sup> Hannaford *et al.*, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra. pp45-46

<sup>122</sup> ACTU 1985 Constitution, Rules and Standing Orders. Unpublished Document.

The eight State and Territory-based Councils each elect a delegate to the twenty-member Board. The President and Treasurer are elected by the members at large. National organisations elect six Board members, two are elected by an Assembly of consumer groups, and the Board itself co-opts a further two members.<sup>123</sup> This gives very broad representation of State/ Territory and national interests, service providers, service receivers and professionals. ACOSS does not directly represent its members, but advocates on behalf of their constituency, the poor and the disadvantaged.<sup>124</sup>

No similar national body of Indigenous community service and representative organisations has been tried. This is despite recommendations for this model in each of the reviews since 1976. Hiatt did not personally accept the proposal, but included O'Donoghue's recommendation for it.<sup>125</sup> Coombs firmly believed it would be a more robust structure than the directly elected NAC that he was reviewing.<sup>126</sup> O'Donoghue again, in the 1986 consultations that eventually led to ATSIC, proposed a mixed model of delegates from organisations and communities for regional assemblies, with national representatives directly elected,<sup>127</sup> though she admitted there were some difficulties to be dealt with.<sup>128</sup>

In these reviews it was particularly felt that coalitions of community councils and community service organisations would be effective as regional assemblies, which would be the legitimising basis of state and national representation. Gerry Hand, past Minister for Aboriginal Affairs, outlined his preference for Regional Councils to be based on member organisations in his policy paper *Foundations for the Future* in 1987. By 1988, when he introduced the first ATSIC Bill to Parliament, he had dropped it in favour of direct election.

There are about 2,000 Aboriginal and Torres Strait Islander organisations registered with the Registrar of Aboriginal and Torres Strait Islander Corporations, and possibly 5,000 registered nation-wide under all Acts.<sup>129</sup> There are also statutory organisations such as the Northern Territory and New South Wales land councils. All have elected Boards answerable to the membership at Annual General Meetings. Most can be recalled by Special General Meetings. This can be seen as a more direct form of democracy than national elections.

The vast majority of these organisations are engaged in delivering some form of service to Indigenous clients. Normally they are effectively controlled by a board and senior officials with direct affinity with their local client base. They very often have a long history of service provision at the local and regional levels; some thirty years of service

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<sup>123</sup> Mendes, P 2006, *Inside the Welfare Lobby: a History of the Australian Council of Social Service*, Sussex Academic Press, Eastbourne (UK). pp1-2.

<sup>124</sup> *Ibid.* p1.

<sup>125</sup> Hiatt *et al* 1976, *National Aboriginal Consultative Committee, Report of Committee of Inquiry*, Parliamentary Paper 343/1976, Commonwealth Government Printer, Canberra. pp117-129.

<sup>126</sup> Coombs, HC 1984, *The Role of the National Aboriginal Conference*, Australian Government Publishing Service, Canberra. pp25-28,37.

<sup>127</sup> O'Donoghue, L 1986, *An Aboriginal and Islander Consultative Organisation*, Australian Government Publishing Service, Canberra. pp27-28.

<sup>128</sup> *Ibid.* p31.

<sup>129</sup> Rowse, T 2005, 'The Indigenous Sector in Austin-Broos', D and G McDonald (eds) *Culture, Economy and Governance in Aboriginal Australia*, University of Sydney Press, Sydney. p208.

is not uncommon. They could offer an effective basis for a national organisation with a strong regional and state-based structure.

One problem could arise if the national body is engaged in program delivery. Most often this will be done through community controlled organisations. When these organisations form the membership base and send delegates to the national representative body, questions of fair allocation of resources, evaluation and accountability arise. Internal quarantine of these functions from perceived ‘interference’ from the Executive would be required.

#### *Merit selection by a panel of eminent Indigenous peers*

An alternative option to an election or delegate model is for the executive/ national structure of the representative body to be based on a merit selection process.

In this model, a call for nominations would be made for people with particular experience or expertise to sit on the national body. Nominations would then be assessed by a panel of eminent Indigenous peers based on a series of criteria which may include factors such as the relevant expertise that the nominees could contribute to the representative body, geographical spread of nominees, gender and youth representation and so on.

In order to promote a diversity of views it may be appropriate to limit nominees to sitting on the national body for a maximum number of terms.

In the first instance, there will be a need for a process to select or appoint the eminent Indigenous peers who will conduct the nomination process. Importantly, once the representative body is operational the national board or executive could then be charged with the responsibility of establishing a selection process for subsequent terms on the body. On this understanding, and in the instance that the National Indigenous Representative Body is a government body, it may be appropriate for the Minister for Indigenous Affairs to appoint the panel for the first nomination process. In the event that the National Indigenous Representative Body is not a government body, then another process for selecting this esteemed peer committee will need to be decided.

- **Representation of distinct Indigenous groups on the National Body’s executive**

A National Indigenous Representative Body could also put into place structures to ensure that the voice of distinct groups of Indigenous peoples is heard in the national body.

There are two main options here – first, it could designate positions on the national executive structure for distinct groups (e.g. stolen generations, traditional owners, Torres Strait Islanders, youth etc). Second, it could establish advisory/ expert panels that don’t directly make the decisions of the National Body but which are consulted on a range of specific issues.

Special purpose committees to devise aspects of policy, or to investigate issues of concern, may be established. These could have non-Indigenous as well as Indigenous

expert advisors. Portfolio committees under the guidance of a particular Board or Council member may also help to spread the load of decision-making and produce both better policy proposals and advocacy.

It is important, though, for the structure to balance the need for a broad base seeking wise input wherever it may be found, with the need for the main decision making body or executive to remain focused, effective and capable of swift action.

There may be a number of distinct groups within the Indigenous population for whom some specific role should be considered. This section considers three such groups – traditional owners, stolen generations members and youth.

### *Traditional Owners*

Each of the previous national representative bodies in Australia was set up before the decision of the High Court in *Mabo v Queensland (No.2)* in 1992. That case established the principle that Indigenous peoples in Australia had pre-colonial systems of land tenure that could be recognised by Australian common law.

One important consequence of that recognition has been relatively neglected. Systems of land tenure cannot exist alone; they are inevitably bound up in systems of authority and governance, in political systems. These systems of governance may remain relatively intact in some areas of Australia, or they may need to be renewed in order to establish organisations that can hold and deal in native title, in line with overseas experience. A national Indigenous organisation may offer the opportunity to reinstitute the political dimension in native title.

There is wide diversity in the ways that Indigenous peoples assert their traditional ownership. Some have been through formal statutory processes under Land Rights Acts in the Northern Territory, NSW and South Australia, and to a lesser extent Victoria. Each of these is quite different.

Some groups establish their traditional rights through involvement in heritage protection procedures, often through informal agreement with states-based authorities. Others have fought out native title claims in court where quite precise details of cultural practice and descent are required. Consent determinations of native title tend to be less precise about the boundaries of group membership. Many groups are incorporated under legislation, while others remain unincorporated or are represented by several corporations.

While there is a tendency across the country for Indigenous groups to describe themselves as nations defined by language, descent and territory, land and native title claims have often split groups that naturally belong together. Disputes over rights to land are also commonplace.

There is, then, no single uniform formula to decide what a traditional ownership group is, who its members are, and precisely the geographical area it covers. A procedure for claims to membership of a traditional owner group would be required of a national traditional owner organisation, but it would be difficult to achieve one that is both simple and fair. Fairness in representation would also be difficult to achieve, since

some groups are large and others comprise only a handful of people. With the disparity in group sizes, experience, and current circumstances it could also be difficult to fairly recruit many effective individuals from some regions without passing over regions where there is a wealth of such individuals.

The effectiveness of a ‘united nations’ of Indigenous Australia could also be questioned. While each nation may be able to contribute an effective regional voice, they would have difficulty dealing consistently with State/ Territory governments where the group crosses State/ Territory lines.

Also, many Indigenous peoples do not live on their traditional lands. While they may not claim to be able to speak for the country where they reside, they usually do feel strongly about the provision of services in their local region. There is also a tendency for land-based groups only to develop interest and expertise in land and heritage issues, they do not usually concern themselves with health, housing or employment, for example.

With these difficulties considered, if the national discussion does reveal that traditional ownership needs to be reflected in a national organisation, perhaps the formation of a traditional owner chamber or forum as part of a differently organised body would be a suitable option.

### *Stolen Generations*

If it were the general view that traditional owners should be directly represented in the National Body’s executive there is a further issue that will need to be addressed. One of the impacts of the forced removal of Indigenous children from their families is that members of the Stolen Generations have often lost connection to their culture or traditional lands. *Bringing them home* notes the consequent difficulties for members of the Stolen Generations being able to be recognised within traditional owner groupings (such as being custodians of native title or holders of title under land rights legislation).<sup>130</sup> Other such processes for recognition would also need to be put into place to ensure that stolen generations members are not further disadvantaged through the processes of representation in the new National Indigenous Representative Body.

### *Youth*

The Indigenous population is an extremely young one, with more than half of the population under the age of 25 years of age. A National Indigenous Representative Body needs to grapple with issues facing Indigenous youth for this very reason.

It can also be argued that ensuring the engagement of Indigenous youth in the representative structures of the National Indigenous Representative Body is important so as to ensure ongoing development of an Indigenous leadership and transitions between generations. It may be appropriate for mentoring opportunities to be provided to youth participants in a national body to nurture and support good leadership into the future.

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<sup>130</sup> Human Rights and Equal Opportunity Commission, *Bringing them home*, HREOC Sydney 1997, pp202-206.

## *Torres Strait Islanders*

The Torres Strait Islanders are a distinct Indigenous group within Australia, who also require adequate representation in a new National Indigenous Representative Body. The Torres Strait Islanders fall into two groups, the first are those living in the Torres Strait, and who are represented at the regional level through the Torres Strait Regional Authority (TSRA). The TSRA became an independent statutory authority by amendment to the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) in 1994. Post-ATSIC, the TSRA continues to be the principal Commonwealth agency co-ordinating Indigenous affairs in the region.<sup>131</sup> The new National Indigenous Representative Body will have to consider what mechanisms are needed to liaise with the TSRA, and how this group should be represented. For instance representation could be through having a delegated representative of the TSRA on the new National Indigenous Representative Body, or it could be through the TSRA acting as an advisory group to inform the National Indigenous Representative Body.

The second group of Torres Strait islanders consists of those living on the mainland. Although the *ATSIC Act (1989)* provided mechanisms to ensure the interests of mainland Torres Strait Islanders were represented, this group still faced problems in accessing funding bodies, programs and services. With the abolition of ATSIC these mechanisms no longer exist and the opportunities for participation by mainland Torres Strait Islanders in government processes have reduced even further. Given the marginalisation of this group among other mainland Indigenous groups, it is important to ensure that the new National Indigenous Representative Body also give consideration for establishing specific forms of representation for this group. This again could be through elected representation, to through the establishment of an advisory body.

- **Gender balance and ensuring equal participation and representation for Indigenous women at the national level**

A significant issue for a new National Indigenous Representative Body is how it will ensure gender equality in its operations. This is a significant issue that ATSIC did not grapple with well. It has been argued that there is a danger that women can become “merely a ‘special interest’ group ... rendered invisible within the notion of ‘family.’”<sup>132</sup>

A lack of appropriate representation of women and youth in national Indigenous governance structures, including at the highest levels of office, can impact on the confidence and legitimacy of the representative body among its constituents.<sup>133</sup>

The Hannaford Review of ATSIC emphasises the “irreplaceable perspective [Indigenous women] contribute.”<sup>134</sup> It found that gender imbalance in ATSIC’s political structure was in part caused by insufficient recognition of the role of

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<sup>131</sup> For an overview of the TSRA see Chapter 2.

<sup>132</sup> Davis, M 2008 ‘Indigenous women’s representation and the proposal for a new national representative body’, *Indigenous Law Bulletin*, Vol. 7, No. 4.

<sup>133</sup> *Ibid.*

<sup>134</sup> Hannaford *et al* 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra.

Indigenous women and matters that impact significantly on them (such as substance abuse, homelessness and family violence), as well as inadequate leadership development and a failure to involve women in formal decision-making processes.<sup>135</sup>

Consequences included “distorted and flawed”<sup>136</sup> policy and program design with limited capability to meet Indigenous women’s needs<sup>137</sup> and a resultant lack of participation by women in such programs.

Among the recommendations in the Hannaford review for redressing gender disadvantage and poor political representation were strategies developed with the Australian Electoral Commission and a taskforce addressing the reasons for under-representation.<sup>138</sup> Megan Davis has argued that a more deliberative democratic process is “not inimical to Indigenous culture”<sup>139</sup> and is corroborated by international legal understandings of self-determination.<sup>140</sup>

Evidence suggests that institutional structures properly representing the diversity of Indigenous political culture would be more sustainable.<sup>141</sup>

Gender-balanced approaches or frameworks identify how social conditions affect experiences and access to political, economic and social institutions. The Canadian AFN Women’s Council Gender-Balanced Analysis 2007 suggests this sort of framework should be “overlaid with a diversity analysis that considers factors such as race, ethnicity, level of ability and sexual orientation”.<sup>142</sup>

- **The role of Non-Indigenous organisations**

As noted previously in this Issues Paper, the form of the organisation will depend on its functions. If it is to provide a uniquely Indigenous perspective then it cannot involve non-Indigenous people in its core representative structure.

An issue is whether there ought to be capacity for Associate Membership of the representative body open to non-Indigenous organisations. This could take the form of contributing to specialist committees and forums (as for example, can happen in the National Congress of American Indians in the USA).

**Issue for discussion: National structure of a National Indigenous Representative Body**

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<sup>135</sup> *Ibid.*

<sup>136</sup> Davis, M 2008 ‘Indigenous women’s representation and the proposal for a new national representative body’, *Indigenous Law Bulletin*, Vol. 7, No. 4.

<sup>137</sup> Hannaford *et al*, 2003, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, Department of Immigration & Multicultural & Indigenous Affairs, Canberra.

<sup>138</sup> *Ibid.*

<sup>139</sup> Davis, M 2008 ‘Indigenous women’s representation and the proposal for a new national representative body’, *Indigenous Law Bulletin*, Vol. 7 No. 4.

<sup>140</sup> *United Nations Declaration on the Rights of Indigenous Peoples 2007 GA Res 61/295, UN Doc A/RES/47/1*

<sup>141</sup> Davis, M 2008 ‘Indigenous women’s representation and the proposal for a new national representative body’, *Indigenous Law Bulletin*, Vol. 7, No. 4; AFN Women’s Council Gender-Balanced Analysis 2007.

<sup>142</sup> AFN Women’s Council Gender-Balanced Analysis 2007. p2.

Should the national structure of the National Indigenous Representative Body:

- be based on a *delegate* model, where regional and state/territory levels of the body nominate their representatives to the national structure;
- be based on a *direct election* model whereby Indigenous peoples themselves directly elect representatives to the national structure;
- be based on a model of merit selection by a panel of eminent Indigenous peers;
- involve Indigenous peak bodies and possibly other organisations nominating representatives to the national structure, or alternative provide for the participation of these bodies in a purely advisory capacity;
- allocate dedicated positions on the national structure for designated segments of the Indigenous community – such as stolen generations members, traditional owners, youth or Torres Strait Islanders;
- be required to have an equal representation of Indigenous women and men on the national structure;
- provide for the participation of non-Indigenous organisations in an advisory capacity;
- a combination of the above; or
- address other factors not mentioned here?

### **Issue for discussion: Formal relationship between the National Indigenous Representative Body and the federal government and Parliament**

A National Indigenous Representative Body will need to work closely with all levels of government if it is to be effective in representing the interests of Indigenous peoples. As noted at the outset, such effectiveness will most likely come from the body being seen as credible and legitimate by the government as well as by Indigenous peoples.

Ultimately, however, the issue will emerge as to whether the new National Indigenous Representative Body should be established as a Commonwealth government entity (such as a statutory authority) or should be established through some other means, such as being a non-government organisation either with or without government funding assistance.

Since 1972, with the beginnings of the NACC, it has been assumed that a national Indigenous organisation should be part of the formal advisory mechanisms of government.

Both the NACC and the NAC were established as committees of Aboriginal affairs administration. ATSIC was a statutory Commonwealth body regulated by its own Act of Parliament. Each of these organisations struggled to assert its independence while at the same time remaining part of the fabric of government.

Arguably, a statutory body can meet the requirements of both independence and privileged access to government.

The fundamental reason for establishing a statutory commission is to improve the quality of governance of an area of public concern by operating at arms length from executive government. At the same time, being established by government charter, it should also have a privileged ability to steer these same areas of public policy.

In practice, the experience of ATSIC did not bear this out. Government rarely sought its advice, and rarely took it when offered.

This is no reason to reject this approach entirely, however. Some statutory authorities such as HREOC, the ALRC, the Productivity Commission, Privacy Commission, Commonwealth Ombudsman and the Australian Competition and Consumer Commission do indeed have authority and are influential with government. A better designed Indigenous Affairs Commission might be more effective than ATSIC.

### **Issue for discussion: Establishment of the National Indigenous Representative Body**

Should the National Indigenous Representative Body be established by government, for example as a statutory authority, or be established independent of government?

Regardless of whether the organisation itself is to be a governmental statutory authority or established independently, a tighter relationship with government than has previously existed must be found. This is particularly important for two of the national body's proposed functions: policy advice to government and review of government performance.

There are a range of options for how a new National Indigenous Representative Body might operate so as to have a closer relationship to government. For example:

- It could have *ex-officio* membership of the Ministerial Taskforce on Indigenous Affairs as well as the Secretaries Group on Indigenous Affairs, and therefore have a 'seat at the table' where the major decisions on Indigenous affairs are made at the federal government level.<sup>143</sup> Alternatively, it could operate as an advisor to these bodies.

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<sup>143</sup> This could draw on the experiences of the Council for Aboriginal Development (CAD) established as a subsidiary body of the NAC in 1977(as discussed in section 1 of this paper) as well as the lessons from the current Ministerial Taskforce and Secretaries Group.

- It could be invited to participate in discussions of the Council of Australian Government (COAG), as well as the various committees of COAG such as the Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA). It must, however, be noted that it would be a very unsatisfactory outcome for the new National Indigenous Representative Body to only be invited to participate in MCATSIA due to its lack of influence on the overall COAG agenda over the past decade.

The National Indigenous Representative Body could also seek to establish a direct relationship with the federal Parliament, in addition to the government of the day. A direct relationship with the Parliament will be extremely important in seeking to establish a bipartisan approach and long term commitments to Indigenous affairs.

If it were established as a statutory body, the National Indigenous Representative Body would have a direct reporting relationship with Parliament through its annual report.

It may be useful for the representative body to also have statutory powers to enable it to table reports and advice in Parliament from time to time.

A further possibility is for a new National Indigenous Representative Body to have a role in the committee systems of the Parliament. There are two possibilities here: a formal role participating in Budget Estimates hearings (that occur usually twice per year and where Department are held to account for their expenditure and activities); and a formal role on parliamentary committees of review (such as a parliamentary committee on Indigenous affairs).

In Senate Estimates committees, Senators question government departments over their performance in the context of the estimates for their budgets. This is often effective in targeting problem areas, but it is fragmented. There are some limitations to this process – in particular, departments and ministers can only be questioned on operational matters and not on matters of policy.

Similarly, Indigenous programs are spread over several departments. The Senate Estimates process itself is divided among eight committees. When an Indigenous affairs responsibility changes portfolios, it can also change the committee that examines it. When responsibility for Indigenous affairs moved from the Department of Immigration to the Department of Families and Community Services its scrutiny passed from the Legal and Constitutional Committee to the Community Affairs Committee. Arguably, neither of these is appropriate.

Senators have varying degrees of background in Indigenous affairs and cannot divide their time effectively across all of these committees to get an overview of the many strands of Indigenous program delivery.

Nonetheless, the power of Senate Estimates committees to call the government and bureaucracy to account is something that many Indigenous peoples would like to emulate. This power, though, is fragile. The committees are renewed by resolution at

the beginning of each Parliament, and they are regulated by a standing order of the Senate that itself could be rescinded or amended by the Senate.<sup>144</sup>

A second option is a regular committee of review on Indigenous issues. When the Senate reviewed the Bill to abolish ATSIC and ATSIIS the majority recommended that a Senate Standing Committee be established to regularly consider the government's performance in delivering Indigenous development programs.<sup>145</sup> The minority report, by government Senators, recommended instead that the current House of Representative Standing Committee on Indigenous Affairs should become a joint Parliamentary Committee of both the House of Representatives and the Senate.<sup>146</sup>

Both proposals suffer some drawbacks from the point of view of meaningful, rather than merely symbolic, Indigenous input into the process. These committees are populated by politicians, and thus sometimes mere political instruments. The political party with control of the chamber may amend or rescind the regulations. They may control the matters referred to the committees, the frequency of sitting days, and responses to requests from the committee. The fragility of these arrangements for the operation of a democratic Parliament, let alone for a single contentious area such as Indigenous affairs, has been roundly criticised by the Clerk of the Senate.<sup>147</sup>

More robust committees, which are established by Acts of Parliament and given defined functions, do exist. They are less susceptible to direction by the government of the day. The examples of the Public Accounts and Audit Committee and the Public Works Expenditure Committee, which reviews proposed infrastructure expenditure over \$10 million, could be explored as models. These are both joint committees, reporting to both chambers of Parliament.

These committees of the Parliament are powerful bodies. There is still a question how Indigenous peoples, through their national body, could exert influence on such committees.

Importantly, there is nothing to say that a National Indigenous Representative Body could not be given a formal role in such a committee process.<sup>148</sup> It is not a requirement of Parliamentary Committees that their members be parliamentarians. Members of the national body's Executive, or their delegates, could comprise these committees in whole or in part. They could be invested with any legal power that the Parliament sees fit. This could include the protection of Parliamentary privilege, and the power to conduct hearings, summon witness and documents, and take evidence under oath. Similarly, the Parliament could provide for suitable remuneration, support staff and facilities. It would be desirable for the Indigenous members of such committees to have facilities in Parliament House to encourage active engagement with the day to day processes of government.

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<sup>144</sup> Viewed at <http://www.aph.gov.au/senate/pubs/briefs/brief05.htm>.

<sup>145</sup> Senate, 2005, *After ATSIC-Life in the Mainstream?* Select Committee on the Administration of Indigenous Affairs, unpublished report, viewed April 8 2008 at <http://www.aph.gov.au/Senate/committee/Indigenouaffairsccte/report/final/report.pdf>. p112.

<sup>146</sup> *Ibid.* p134.

<sup>147</sup> Evans, H 2007, 'The Senate', in Hamilton, Clive and Maddison, Sarah (eds) *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling debate*, Allen and Unwin, Sydney.

<sup>148</sup> Sidoti, E 2007, 'Indigenous Political Representation: A Parliamentary Option' unpublished concept paper, Whitlam Institute, University of Western Sydney.

A University of Melbourne political scientist, John Chesterman, has alternatively proposed that the membership of such a committee could be elected by Indigenous peoples at the same time as a general election.<sup>149</sup> An exclusively Indigenous committee, with democratically chosen representatives, and all the powers of Parliamentarians, would be a strong innovative development in Australian constitutional arrangements for dealing with Indigenous matters. It could evolve, effectively, into an Indigenous chamber of Parliament.

### **Issue for discussion: Relationship of the National Indigenous Representative Body with government and Parliament**

What formal mechanisms should be built into the structure of a National Indigenous Representative Body to ensure that it has a direct relationship with the federal government and the federal Parliament?

What role should the National Indigenous Representative Body have in the federal government's whole of government arrangements?

What formal mechanisms should be built into the structure of a National Indigenous Representative Body to ensure that it can inform and work with State/ Territory governments?

### **Issue for discussion: Resourcing the National Indigenous Representative Body**

A critical issue will be deciding how the National Indigenous Representative Body is to be funded for its regular activities so that it has the capacity to undertake the roles and functions that are ultimately decided for the body.

If the national body is to be a statutory arm of government it must be funded by government to perform its functions.

If the body is a non-government organisation, then the government may still decide that it is valuable for it to allocate grants to the representative body even though it is not a government authority. ACOSS, for example, receives about 45 per cent of its funding from government.<sup>150</sup>

Government funds may be useful, but they may come at a cost of the independence of the organisation. They may be tied to certain functions not seen as a priority by the membership, they can put an organisation in the position of being a proxy for government, they often come with conditions attached such as limiting the

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<sup>149</sup> Chesterman, J 2008, 'Forming Indigenous Policy Without Representation Will Fail', *The Age*, 4<sup>th</sup> March.

<sup>150</sup> Mendes, P 2006, *Inside the Welfare Lobby: A History of the Australian Council of Social Service*, Sussex Academic Press, Eastbourne. (UK). p5.

organisation's ability for public comment on certain programs, and if withdrawn they can pull the rug out from under the organisation.

Some of these dangers can be managed by the allocation of block funding for significant periods with broad reporting requirements at realistic intervals. The experience of ATSIC and many community organisations with dependency on government funds may lead to a decision that the organisation needs to find the majority of its income from independent sources or to have the capacity to supplement government funding with independent sources of income.

One source could be a foundation fund. The Indigenous Land Corporation and the NSW Land Council have used this model. An examination of these shows both benefits and drawbacks.

The ILC draws much of its income from the statutory Indigenous Land Fund (or Account). Some of its income is from its own operations and investments separate from the Land Fund. For the first ten years of its operation, 1995 to 2006, the Commonwealth government provided \$120 million per year, indexed for inflation, to the Land Fund. The indexation increased the payment to \$145.7 million by the end of the ten-year period. After this the ILC was expected to fund itself from investment of the accumulated capital. By the end of 2004 the ILC was taking \$54.7 million per year of the Land Fund allocation for its operations and the Land Fund stood at \$1.42 billion.<sup>151</sup>

On the face of it this is a good model, but there are problems. In the first year of dependence entirely on the Fund the ILC was able to draw down only \$4 million, when it had expected in the region of \$45 – 50 million.<sup>152</sup>

The ILC is bound by statute only to take the 'realised real return' of the fund. The first constraint on this return is the level of interest the fund may earn. The Fund is required to invest in a conservative manner, determined by Department of Finance rules. It seems to have chosen bank bills which in 2007 returned it 6%.<sup>153</sup> To get the 'real return' it needs to compensate the fund for the effects of inflation, before the ILC can take what remains. The ILC legislation determines that inflation is measured using the 'non-farm product deflator' index rather than the Consumer Price Index (CPI). This type of inflation has been running high due to the resources boom and the rising price of commodities.

In short, a high inflationary factor and a modest rate of return on the investment combined to provide much less cash than the ILC needed. In addition, there is a further difficulty with the way the draw down is calculated. The ILC is required to compute the real return over the previous two years performance of the fund. Taking the entire return in one year reduces the Fund's profit in that year to zero for the purposes of the next year's calculation.

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<sup>151</sup> Indigenous Land Corporation, 2004, Annual Report, Adelaide.

<sup>152</sup> Senate 2006 Standing Committee on Community Affairs, Hansard, May 30.

<sup>153</sup> Senate 2007 Standing Committee on Community Affairs, Hansard, May 28.

The lesson here is to be realistic about the funds investment strategy, balancing risk against the need for a robust return. Secondly, the formulas which are applied to adjust for inflation and to calculate the amount available must also be realistic.

The NSW Land Council ran into difficulties for different reasons. The NSW Land Council was established by legislation in 1983 and funded by a levy of 7.5% of land taxes in the state, which lasted for 15 years. In each year, half of the amount collected was allocated to the operation of the Land Council and the remainder placed in an investment fund.<sup>154</sup> When the 2005 review was undertaken the Land Tax levy had ended, the investment fund stood at about \$550 million of which the NSW Land Council could draw about \$20 million per year without affecting the viability of the fund.<sup>155</sup>

The review found that this was not enough to meet the NSW Land Council's obligations. In essence the NSW Land Council had heavy obligations in providing funding to a wide network of local Land Councils which had great disparity in needs and access to resources - many of which were struggling.<sup>156</sup> The lesson here, clearly, is to be realistic about the true costs of the obligations of the organisation when establishing the fund.

An option for building a foundation fund for the representative body, could be in the form of a statutory levy on production as restitution and compensation for the historical loss of Indigenous resources and productive capacity. This could be modelled on the NSW fraction of land tax, or some other tax equivalent. These funds should be sustainable, recurrent and indexed appropriately.

Reconciliation Australia, which is the privately incorporated company that superseded the statutory Council for Aboriginal Reconciliation, has also found that the size of its foundation grant from government in 2003 is not enough to meet its needs. It supplements its income with corporate and philanthropic donations, often tied to particular projects. It still negotiates with government for long term funding on the basis that it provides services of value to government policy objectives.

Although a foundation fund is a useful option, its limits must be realised. It must be large because the returns are small relative to the size of the fund. Secondly, service organisations are always spending into an increasingly costly environment, with prices rising all the time. While the fund can be adjusted for inflation so that it always retains the same value in real terms, the organisation faces mounting costs with only a slight increase in annual income from the rising quantum of the fund. Businesses compensate themselves for inflation by raising prices.

It seems inescapable that an organisation wishing to be substantially independent of government will need to raise at least some of its income elsewhere. This could be from:

- Donations;

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<sup>154</sup> ALRAR Task Force, 2005 *Structure, representation, Governance and Benefits*, 2004-2005 Review of the Aboriginal Land Rights Act 1983, Issues Paper 2, unpublished report. P17.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.* pp19-21.

- Membership fees; and/or
- selling products and services.

A credible and effective National Indigenous Representative Body could be granted charitable status so that donations to it are tax deductible. Donations could then be used to supplement its operational costs, for specific projects, or to supplement any establishment fund to contribute to the long term sustainability of the organisation.

A further option for government funding may be for the funding level to be independently set by the Commonwealth Grants Commission, in the same way that Special Purpose Grants and General Purpose Payments are allocated to the states and territories.

The organisation could also sell services to governments and private organisations. Such services could be research into particular issues which it would be in a unique and privileged position to carry out, consultations over policy proposals, development of policy papers, and facilitation and mediation between Indigenous peoples and private interest groups.

### **Issue for discussion: Resourcing the National Indigenous Representative Body**

How should the National Indigenous Representative Body be funded so as to ensure it has a secure, ongoing source of funding? For example, should the body:

- receive government funding;
- be granted charitable status so that it can raise donations;
- have an establishment fund to provide a capital base for the organisation;
- charge membership fees to organisations and individuals;
- charge for the delivery of services and products;
- a mix of the above; and/ or
- other options.

### **Conclusion: Scoping a National Indigenous Representative Structure**

In crafting a new national Indigenous voice there is a solid foundation of experience to build on from FCAATSI to ATSIC. This Issues Paper has provided some background on these experiences while putting up possible forms that a future national Indigenous representative structure might take. Some of the suggestions in this paper may not be supported. Equally, some ideas not canvassed here will be forthcoming in the national discussion process that this paper has aimed to contribute to.

The Issues Paper does not promote any particular model over another, and after discussion much work will remain to be done on the detail of formal structural matters.

If this Issues Paper stimulates and channels Indigenous energy towards a strong and effective new national voice, then it will have served its purpose.

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