
A NEW NATIONAL INDIGENOUS REPRESENTATIVE BODY ... AGAIN

by Thalia Anthony

Since the abolition of the Aboriginal and Torres Strait Islander Commission ('ATSIC') in 2004, there has been a void in national Indigenous representation. In 2007, the Australian Government committed to establishing a national representative body which would build a partnership between Government and Indigenous people. In laying down the founding principles, the Government articulated that it will not 'create another ATSIC' or hold separate elections and that, while the body will have 'urban, regional and remote representation', it 'will not have a service delivery role'.¹

With this Government mandate, there was an initial stage of consultation² and the appointment of Tom Calma, then Aboriginal and Torres Strait Islander Social Justice Commissioner, to assemble a Steering Committee for the creation of a national representative body. The Steering Committee was constituted by Indigenous people and ran further consultations before producing the report *Our Future in Our Hands* in August 2009.³ The report proposed the creation of a National Congress of Australia's First Peoples ('Congress'). Late last year the Government gave official support to Congress and committed \$29.2 million to its establishment and early years of operation.⁴

This article compares functions and governance of ATSIC with those proposed for Congress. It first considers the policy basis of self-determination that gave rise to ATSIC and the erosion of that policy that led to its demise. It then addresses the vision for Congress. The article finally questions whether a new Indigenous representative body can have a meaningful role within the current Indigenous policy framework. Does the ideology of 'building partnerships' go far enough in realising calls for self-determination?

INDIGENOUS NATIONAL GOVERNANCE AND THE PROMISE OF SELF-DETERMINATION

Instruments of Indigenous governance are regarded as central to self-determination.⁵ They allow Indigenous people to be involved in decision making about their own future. This 'policy' of self-determination was first endorsed by the Whitlam Government in 1972. Although

a much more limited concept of 'self-determination' than that set out at international law,⁶ the policy variously promoted greater Indigenous participation in Government decisions on Indigenous affairs, allowed a degree of Indigenous control over service delivery and supported the establishment of Indigenous organisations.⁷ At the national level, under the auspices of 'self-determination', successive Australian governments have experimented with a number of Indigenous representative organisations, including the National Aboriginal Consultative Committee, the National Aboriginal Conference, ATSIC and, more recently, the National Indigenous Council.

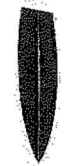
Of these various bodies, ATSIC was the most broad-reaching, straddling representative, executive, research and service delivery roles.⁸ Self-determination was a concept underpinning its creation; in 1987, then Minister for Aboriginal Affairs, Gerry Hand said,

Until all Australians recognise this need for self-determination, recognise the Aboriginal and Islanders' pride and dignity as a people and until Aboriginal and Islander people can take their rightful place as full and equal participants in the richness and diversity of this nation, our claims to being a civilised, mature and humane society sound hollow.⁹

Formed in 1990 as a statutory body under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act'), the principle of 'self-determination' was to be enunciated in a preamble to the ATSIC Act. Ultimately, though, this proposal was defeated by the Opposition, which preferred the language of 'self-management'.¹⁰ Section 3 of the ATSIC Act outlined the objectives of the new representative body, which included the formulation and coordination of policies affecting Indigenous people; the promotion of self-management; and furthering economic, social and cultural development.

The constitution of the ATSIC Board in its final incarnation in 2004 comprised 16 Zone Commissioners. The Commissioners were elected from 35 Regional Councils, which were directly elected by Indigenous people.¹¹ Councilors responded to the needs of local communities by formulating plans on improving

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economic, social and cultural outcomes and working with the ATSI Board and governments to implement plans.¹² The representative objectives of ATSI were limited by its structure and electoral turn out. In order to vote, Indigenous people had to be registered on the electoral roll, which invariably missed a portion of the population. Of those registered, voter turn-out was less than 30%.¹³ Women were generally under-represented,¹⁴ and community councils were based on electoral demarcations, rather than on 'boundaries traditionally recognised by Aboriginal people'.¹⁵ Therefore, the regional councilors were often representing disparate communities that lacked common interests or needs.¹⁶

Since its genesis ATSI's capacity for self-determination was constrained by onerous administrative compliance through ongoing audits, performance evaluations, reporting obligations, policy changes and inadequate funding.¹⁷ Under s 76 of the ATSI Act, the Office of Evaluation and Audit was required to monitor the Commission on a regular basis. It would provide quarterly audit reports to the Minister for Indigenous Affairs, and evaluation reports on every office and service program every three years.¹⁸ Frank Brennan described the close scrutiny of ATSI's expenditure as revealing the 'underlying philosophy of the legislation which is accountable self-management rather than self-determination'.¹⁹

The final review of ATSI in 2003 identified a number of concerns with its organisation.²⁰ It recommended greater regional control of policy and service delivery, public declarations of conflicts of interest, additional performance evaluation by the Productivity Commission, protocols covering working relationships for the elected and administrative arms, and governance training for board members.²¹

While the report did not recommend the abolition of ATSI, in early 2004 the Federal Government announced that the body would be another casualty of the emergent Indigenous policy of 'practical reconciliation'.²² The decision to disband ATSI was followed through with bipartisan support. There was no consultation with ATSI or Indigenous communities. The Prime Minister and Opposition Leader justified the abolition by reference to the 'failure' of self-determination.²³

NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES

While the Labor Opposition regarded ATSI as a failed experiment, the incumbent Federal Government has sought to establish another Indigenous representative

structure to fill the void left behind. In this pursuit, it has emphasised building partnerships and achieving equality.²⁴ Consistent with its pre-election approach, self-determination does not feature prominently in the Government's language. Instead, it is intended that Indigenous Australians will be 'involved in developing policies and programs to improve their lives' and that their views will be 'represented to Government through credible mechanisms'.²⁵

Notwithstanding the Government's reticence, the Steering Committee set for itself self-determination as a foremost guiding principle in developing the blueprint for Congress. In its report, the Steering Committee states that a new representative body is critical to providing 'a national voice' that will 'enable the goals, aspirations, interests and values of Aboriginal and Torres Strait Islander peoples to be heard in national debate'.²⁶ It will also have an essential role in advocating rights, including 'our right to determine our political status and pursue our economic, social and cultural development'.²⁷ Importantly, though, Congress has been designed as a purely advisory body; it will have no direct role in developing policy or implementing services.

COMPOSITION

Congress has been designed in a way that will engage existing Indigenous organisations and community groups, as well as meritorious Indigenous individuals. This will prevent duplication of existing Indigenous bodies, which was identified as a problem with ATSI.²⁸ At the same time, it will present new pressures to already under-funded Indigenous organisations.

There are a number of layers of the Congress. Firstly, the Steering Committee has selected an Ethics Council comprised of Indigenous people 'who are widely recognised for their integrity'.²⁹ The Ethics Council will develop and monitor Congress' ethical standards.³⁰ Congress will be divided into three chambers comprised of 128 delegates: the Representative Bodies Chamber (40 delegates), the Sectoral Chamber (40 delegates) and a chamber comprised of respected members of the Indigenous community (40 delegates). In addition, based on a shortlist prepared by the Ethics Council, the National Executive has now been elected.³¹ Each layer of the organisation will be subject to a gender-balance requirement.

CHAMBER 1

This will draw on Indigenous representative bodies at national, state and territory and local levels. Members will be selected based on strict criteria, including

evidence of their community representation and political independence.³² There will be a maximum of two delegates per organisation. These bodies constitute members who are mostly 'elected, or in lesser numbers, appointed by a Minister or Government'.³³

CHAMBER 2

This will consist of 'sectoral peak bodies and experts', including Indigenous researchers and experts.³⁴ Examples include land councils, prescribed bodies corporate and native title representative bodies, Aboriginal and Torres Strait Islander legal services, the Indigenous Disability Network and Stolen Generations organisations.³⁵

CHAMBER 3

The Ethics Council will be responsible for the appointment of 40 Indigenous delegates based on merit and according to a set of criteria. Applications will be sought every two years. Only individuals from groups who are not represented in the two chambers will be able to apply.

NATIONAL EXECUTIVE

The National Executive of six part-time members and two full-time Co-Chairs was announced in May this year.³⁶ Each member will have a term of four years. The National Executive will lead the three Chambers and will be responsible for formulating, advocating for and implementing priorities consistent with the decisions taken at Congress meetings. It will develop strategic and business plans, organise and lead engagement with Indigenous communities, direct the work of the administrative and executive support team and communicate the views and policies of the organisation to stakeholders and the Australian public.³⁷

FUNDING

Our Future in Our Hands identifies the need for government funding as well as economic independence to ensure 'substantial operational autonomy'.³⁸ The report sets out a number of strategies to achieve this. First, Congress will not be established as a government body or department. Instead, it will be separately established as a corporation,³⁹ making it suitable for fund raising and less vulnerable to policy whims.⁴⁰ Second, the report proposes that, for the first ten years, the Federal Government will provide recurrent (untied) funding support and a \$200 million Investment Future Fund.⁴¹ After the initial five year period, it is envisaged that Congress will begin to operate off its investment income, as well as other independent funding sources, rather than remaining entirely dependent on Commonwealth support.

The Government has already confirmed that it will not be supporting a future fund⁴² and has encouraged the body to source funds from 'other sectors'.⁴³ The Minister for Indigenous Affairs, Jenny Macklin, has stated that funding for the Congress will be

administered in the same way as it is for other national peak bodies, respecting the right of organisations to put their view, while requiring them to demonstrate that they are representative and that funding is used responsibly.⁴⁴

In the absence of a capital fund, financial autonomy will be unviable. This was one of the keystones of the new model, put forward by the Steering Committee to distinguish Congress from ATSIC. This limitation will not only maintain its dependence on Government, but also limit the body's scope to initiate new projects, research and consultations. One of the most forthcoming criticisms of ATSIC was that it lacked 'certainty of access to resources' which Indigenous people controlled.⁴⁵ So, notwithstanding the development of an extra-governmental corporate structure, the question of financial dependence means that Congress will once again be prone to budget cuts where it voices opposition to government policy.⁴⁶

CONCLUSION

Our Future in Our Hands responds to a need arising from the absence of a national Indigenous representative body since the demise of ATSIC. In its absence, bi-partisan Indigenous policy has been able to develop without Indigenous input. The Steering Committee sought to overcome some of the shortcomings of the ATSIC structure – in particular its lack of engagement with local organisations – through the representative and sectoral chambers. However, unlike previous representative bodies, whose membership was determined by democratic elections, Congress delegates will be partly appointed. With respect to the election of the National Executive, only those Indigenous people who successfully apply to be members of Congress can vote at Annual General Meetings. Moreover, the National Executive was drawn from a shortlist compiled by the Ethics Council. In these respects, there are questions about how 'representative' this new body will be at the local and community levels.

Moreover, one of its benchmarks for success – financial autonomy – has already become untenable. This not only puts Congress on shaky ground but calls into question the nature of the Government's commitment to 'building partnerships' with Indigenous people. It reveals 'partnerships' to be something quite different from the principle of self-determination. The failure to advert to the central pillar of financial autonomy furthers the constraints

imposed on the new body from the outset, that is, the lack of power to deliver services, to implement policy, or to conduct separate elections. These practical limitations are in many ways a step backwards, reinforcing the idea that Indigenous people are unable to govern themselves unless they are subject to strict criteria and supervision.

Ultimately, the success of Congress will depend on its capacity to attain legitimacy and support from Aboriginal and Torres Strait Islander people across Australia.⁴⁷ Tom Calma has made it clear that the model set out in *Our Future in Our Hands* was 'determined and controlled by Indigenous people'.⁴⁸ However, if this is to continue into the next phase of national representation, the Government will have to move beyond its uneven construction of 'partnership' towards self-determination.

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- 1 Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *National Indigenous Representative Body - Update November 2009* (2009).
- 2 See FaHCSIA, *Report on the Outcomes of the First Phase of Consultation for a National Indigenous Representative Body (NIRB)* (2008).
- 3 Steering Committee for the Creation of a New National Representative Body ('Steering Committee'), *Our Future in Our Hands: Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples*, (2009) 1.
- 4 Jenny Macklin, 'Australian Government response to "Our Future in Our Hands"' (Press Release, 22 November 2009), available at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/new_rep_body_22nov2009.htm. Congress will begin operating in early 2010, but will not be fully operational until January 2011, see FaHCSIA, above n1.
- 5 See Jackie Huggins, 'Speech to the Cultural Heritage and Native Title Conference' (Speech delivered at the Cultural Heritage and Native Title Conference, Brisbane, 30 September 2003).
- 6 See, for example, Article 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*.
- 7 A central legislative outcome of the era of self-determination was the *Aboriginal Councils and Associations Act 1976* (Cth). This gave Indigenous peoples the statutory right to form associations. Over three thousand Aboriginal councils, associations and corporations, including Aboriginal land trusts, town councils and business enterprises, have been incorporated under the Act. See Tim Rowse, 'Culturally Appropriate Indigenous Accountability' (2000) 43(9) *The*

American Behavioral Scientist 1514, 1517.

- 8 Larissa Behrendt, 'The Abolition of ATSIC - Implications for Democracy', *Democratic Audit of Australia* (2005) 2.
- 9 Senator Tate (on behalf of Minister Hand), 'Foundations for the Future', *Senate Hansard*, 18 December 1987, 3433.
- 10 *Ibid.*
- 11 See *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) No. 80 of 2004, Schedule 1. Originally ATSIC had 60 Councils, which was one of the demands that emerged in Minister Hand's consultation (along with the increase of zones from six to 17, including the Torres Strait). The Chair was an elected position from and among the Zone Commissioners see Schedule 1, s31A *Aboriginal and Torres Strait Islander Commission Amendment Act (No. 1) 1999* (Cth).
- 12 This was mandated under s 94(1) *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
- 13 Gary Foley, 'ATSIC: Flaws in the Machine', The Koori History Website, 15 November 1999, <http://www.kooriweb.org/foley/essays/essay_4.html>.
- 14 Megan Davis, 'ATSIC and Indigenous Women: Lessons for the Future' (2009) 10 *Balay: Culture, Law and Colonialism* 73, 76-77.
- 15 Michele Ivanitz, *Straddling Two Worlds: ATSIC and the Management of Indigenous Policy* (1998) 3.
- 16 Frank Brennan, 'ATSIC - Seeking a National Mouthpiece for Local Voices' (1990) 2(43) *Aboriginal Law Bulletin* 4.
- 17 Thalia Anthony, 'Aboriginal Self-determination after ATSIC: Reappropriation of the 'Original Position'' (2005) 14(1) *Polemia* 4, 6.
- 18 Each of the 33 offices, containing up to 1000 public servants, was reviewed each quarter, see Lois O'Donoghue, 'Addresses to the United Nations' (Speech delivered at the United Nations Working Group on Indigenous Populations, Geneva, July 1992). See also s 78, *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
- 19 Brennan, above n16.
- 20 John Hannaford, Jackie Huggins and Bob Collins, *In the Hands of the Regions - A New ATSIC* (2003).
- 21 *Ibid.*, 8-13.
- 22 The policy of practical reconciliation seeks to mainstream Indigenous services and removing support for Indigenous governance structures, which were regarded as akin to 'symbolic reconciliation'. From 1996 the Government began to incorporate Indigenous services run by ATSIC into mainstream Government departments. For a general discussion, see Andrew Gunstone, 'The Howard Government's Approach to the Policy of Indigenous Self-Determination' (2008) 1 *MAI Review* 1, 1. The abolition of ATSIC was legislated through the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).
- 23 Kathy Marks, 'Outrage as Australia Abolishes 'Failed' Aboriginal Council', *The Independent*, UK, 16 April 2004, 1.
- 24 FaHCSIA, above n1.
- 25 FaHCSIA, above n2, 2.
- 26 Steering Committee, above n3, 5.
- 27 *Ibid.*, citing the UN *Declaration on the Rights of Indigenous Peoples*.
- 28 Brennan, above n16.
- 29 Steering Committee, above n3, 26.
- 30 *Ibid.* In January 2010 the inaugural Ethics Council was selected, comprising Tom Calma, Larissa Behrendt, Wesley Enoch, Mary Graham, Nalwarri Ngurruwutthun and Lester Irabinna Rigney see Australian Human Rights Commission, 'Inaugural Ethics Council Up and Running' (Press Release, 4 January 2010).
- 31 In May 2010, the first Executive Committee was selected, comprising Sam Jeffries (co-chair), Kerry Arabena (co-chair),

Josephine Bourne, Peter Buckskin, Ned David, Colleen Hayward, Klynton Wanganeen and Daphne Yarram, see National Congress of Australia's First Peoples, 'New Congress to Represent Aboriginal and Torres Strait Islanders' (Press Release, 2 May 2010).

- 32 Steering Committee, above n 3, 26-27.
- 33 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a Sustainable National Indigenous Representative Body* (2008).
- 34 Steering Committee, above n3, 27.
- 35 Ibid, 24.
- 36 Ibid.
- 37 Ibid.
- 38 Ibid 1.
- 39 Ibid 22.
- 40 See Christos Mantziaris, 'The Dual View Theory of the Corporation and the Aboriginal Corporation' (1999) 27 *Federal Law Review* 283, 308-309.
- 41 Steering Committee, above n3, 18, 31.
- 42 Nicola Berkovic, 'Congress 'resets' Aboriginal affairs', *The Australian*, 23 November 2009, <http://www.theaustralian.com.au/politics/congress-resets-aboriginal-affairs/story-e6frgczf-1225801855276>.
- 43 Macklin, above n4.
- 44 Ibid.
- 45 HC Coombs and CJ Robinson, 'Remembering the Roots: Lessons for ATSIC' in Patrick Sullivan (ed), *Shooting the Banker: Essays on ATSIC and Self-Determination* (1996).
- 46 On this experience with ATSIC, Larissa Behrendt, 'Election 2004: Indigenous rights and institutions', *Australian Review of Public Affairs*, 16 August 2004 <<http://www.australianreview.net/digest/2004/08/behrendt.html>>.
- 47 See Damien Barnes, 'After ATSIC: which way?' (2004) 8(4) *Australian Indigenous Law Reporter* 13.
- 48 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 33.