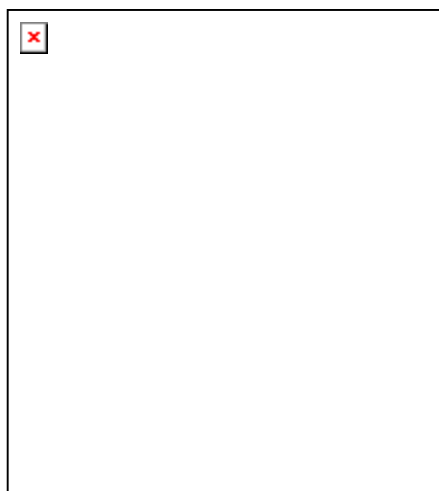


**AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT
ISLANDER STUDIES**

**Submission to the Senate Select Committee on the
Administration of Indigenous Affairs**



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Executive Summary

Part One of the submission specifically discusses the effect of the proposed changes to the administration of Indigenous affairs to AIATSIS.

AIATSIS has a key role in the proposed whole-of-government coordinated approach to service delivery. Specifically, this relates to its capacity to provide research, policy advice and resources to government and Aboriginal and Torres Strait Islander communities in the development of regional and local governance structures, as well as in the design, implementation and monitoring of the delivery of services by mainstream agencies.

With the proposed Amendments to the ATSIC Act, the onus for the development and distribution of information about Aboriginal and Torres Strait Islander peoples and cultures will now rest more heavily on AIATSIS. AIATSIS can anticipate an expanded role as a national institution and, consequently, a significantly higher profile.

The reforms proposed by the Government have a number of consequential implications for the capacity, resources and budget of AIATSIS. This submission contains recommendations for future resource needs in order for AIATSIS to increase its capacity in the promotion of understanding about Aboriginal and Torres Strait Islander peoples in the wider Australian and international environment.

Part Two of the submission makes a number of observations on the wider implications of proposed changes to the administration of Indigenous affairs, beginning with the fact that reasons for the perceived failures of ATSIC are historically complex and multi-faceted. Development and implementation of new arrangements to replace ATSIC structures should be taken only after full and open consultation with Indigenous peoples. Any new structure will require the free and informed consent of Indigenous people. If not, the legitimacy of replacement representative bodies will be at risk.

Under proposed changes, Governments are asking for a structural response from Indigenous communities, as partners in the new policy environment. In order to achieve intended outcomes, governments will require a structural interface with diverse Aboriginal and Torres Strait Islander communities, which in turn will require adequate resources in a post-Regional Council environment. Proposed arrangements will have to respect both the diversity of Indigenous communities, as well as the particular role of traditional owners.

The historic failure of program and service delivery to Aboriginal and Torres Strait peoples must be understood against the fact that the most significant responsibility for service provision lies not with ATSIC or ATSIS, but state and territory and local governments. The proposed 'whole-of-government' approach contains the potential to address this failure, though far more rigorous analysis is needed. Proposed partnership agreements must recognise the Indigenous governance structures upon which they rely, and resource them to be involved in the delivery, monitoring and renegotiation of agreements.

Recommendations

Part 1

Recommendation 1: That AIATSIS Public Affairs and Press be resourced to expand the role of AIATSIS in producing and communicating general information and publications and providing comment on Indigenous peoples, societies and cultures including through formats accessible on line.

Recommendation 2: That, in addition to existing projects and funds earmarked by DEST for Universities to undertake governance research, AIATSIS be resourced with a three year commitment to a dedicated governance research project to coordinate and collaborate with existing governance projects, including additional resources to facilitate access to collections and repatriation of materials in digitised forms

Recommendation 3: That AIATSIS be determined as an eligible body for nationally competitive grants schemes such as the Australian Research Council Grants scheme.

Recommendation 4: That the role of research, and AIATSIS in particular, be recognised in the development and funding of monitoring and evaluation processes in the new policy environment.

Recommendation 5: That AIATSIS be resourced to expand its research base in specific program areas to provide evaluative research of national importance on wellbeing indicators such as health.

Recommendation 6: That the need for the establishment of a knowledge base developed through long term longitudinal research using applied community based research models and ethical research practices be recognised as part of the whole of government policy approach.

Recommendation 7: That long term externally funded projects previously funded by ATSIC/ATSIS be recognised as core activities and funded directly through the AIATSIS budget appropriation and increased administrative costs of dispersed program and funding agencies be recognised in the budget appropriation.

Recommendation 8: That any ATSIC assets of archival importance at risk of divestiture on the abolition of ATSIC or ATSIS be transferred to AIATSIS. Collections, in particular the art and pictorial collections, should be kept intact. Adequate resources to appropriately document and store the materials for future uses, including conservation, digitisation and mass data storage should accompany any collections.

Part 2

Recommendation 9: That decisions affecting the involvement of Indigenous peoples in policy development and implementation should be taken only after full and open consultation and with the free and informed consent of Indigenous peoples. Withdrawing representative structures like ATSIC should only occur with the consent of Indigenous peoples.

Recommendation 10: That the development of policy include the development of processes and structures to take account of the views of Indigenous peoples and be accountable to them for performance.

Recommendation 11: That Indigenous organisations be effectively resourced to carry out advocacy roles that will allow them the capacity to engage in planned representative networks.

Recommendation 12: That the negotiation of Regional Partnership Agreements and Shared Responsibility Agreements take into account matters of land, culture and Indigenous rights as well as service delivery and government intervention.

Recommendation 13: That resources currently available to Regional Councils for regional interface between government and Indigenous communities not be withdrawn but redirected to Indigenous representation under any new arrangements.

Recommendation 14: That regional approaches to government policy development, at all levels, accommodate the diversity of Indigenous regional networks and respect the role of traditional owner groups in the delivery of government services on their country.

Recommendation 15: That the effective coordination between and among governments and the timely delivery of essential services be closely monitored in terms of providing safety net essential services such as water, power, housing, health and other programs and services.

Recommendation 16: That the COAG trials be independently evaluated against criteria including extent of intergovernmental cooperation actually achieved, the measurable improvement in the wellbeing of the community over and above previous programs and the sustainability of outcomes and processes on a larger scale.

Recommendation 17: That OIPC performance reporting on departmental performance against wellbeing indicators include all program and service delivery to Aboriginal and Torres Strait Islander people not just Indigenous specific programs or former ATSIC/ATSIS programs.

Recommendation 18: That agreements negotiated under the new policy approach contain substantive commitments, including timetables, resources and plans for implementation.

Recommendation 19: That agreements recognise the Indigenous governance structures upon which they rely and resource them to be involved in the delivery, monitoring and renegotiation of agreements.

Recommendation 20: That Regional Partnership Agreements include, where appropriate, regional and local self government outcomes, to meet the aspirations of Aboriginal and Torres Strait Islander peoples.

Part 1: AIATSIS and the proposed changes to the administration of Indigenous affairs

1.1 Background

1.1.1 AIATSIS

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is an independent Commonwealth statutory authority devoted to Aboriginal and Torres Strait Islander studies. It operates under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*. AIATSIS is Australia's premier institution for information and research about the cultures and societies of Aboriginal and Torres Strait Islander peoples.

AIATSIS is governed by a Council of nine members, four of whom are elected by the Institute's membership. The remaining five members are appointed, to date, by the Minister of Indigenous Affairs. AIATSIS maintains an expert Membership body, research credentialed Council membership, Research Advisory Committee, Research Ethics Committee, staff of researchers, a national research grants program, a national library and archive and the Aboriginal Studies Press.

Since its inception in 1964, and through the revision of its Act in 1989, AIATSIS has had as its mission to provide leadership and excellence in promoting, facilitating and undertaking high quality research in Australian Indigenous studies; to develop, maintain and preserve well documented archives and collections and to maximise access to these, particularly by Indigenous peoples; and, to encourage understanding in the general community of Aboriginal and Torres Strait Islander societies.

1.1.2 Core activities and funding

The Research Section of AIATSIS undertakes high quality, multidisciplinary research in areas of relevance to Aboriginal and Torres Strait Islander people. This is achieved by promoting research that has significance across many fields of study as well as by undertaking research that responds to and informs community development and policy formulation in priority areas. AIATSIS conducts specialised research in fields of contemporary importance including native title, intellectual property, governance, social health, language, cultural heritage and social organisation. The Research program has also developed an environment that supports early career researchers and encourages the development and implementation of ethical standards and protocols for research conducted with Indigenous peoples and communities.

AIATSIS holds the world's most extensive collections of printed, audio, and visual materials on Aboriginal and Torres Strait Islander lifestyles and cultures. These now comprise a world class Library and Audiovisual Archive and provide a major resource for Indigenous communities. Specialised access services have been developed to respond to demand for material to conduct research into native title and family history. In 2001 AIATSIS commenced its digitisation program which has as its primary aim the facilitation of access to, and preservation of the Institute's collections, particularly audio recordings, print material and photographic images.

The Institute's publishing arm, Aboriginal Studies Press, facilitates the dissemination and publication of work conducted through AIATSIS as well as publishing authors in many fields of Indigenous studies. Approximately 12 new titles are published annually.

AIATSIS has an annual appropriation of \$7.6 million, with externally funded programs providing an additional \$3.4 million.

AIATSIS works closely in its research and other activities with Indigenous communities and organisations, from Regional Councils, Land Councils, language centres and native title groups, through to individuals and families. AIATSIS derives its expertise from sustained consultative and collaborative processes with Indigenous individuals and communities. The demand from Indigenous groups for AIATSIS researchers to work with them on projects or for the collections staff to package and repatriate materials of relevance to communities and groups far outstrips our capacity to respond.

1.1.3 AIATSIS and the administration of Indigenous affairs

AIATSIS has made a significant contribution to policy development in Aboriginal and Torres Strait Islander affairs over the last four decades. This contribution has ranged across a diverse field of social and political issues. For instance, AIATSIS played an instrumental role in negotiations around, and the consequent development of, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

In recognition of our particular expertise, various government departments have contracted AIATSIS to conduct research and provide advice, particularly, of course, ATSIC and ATSI, in areas such as native title, governance and language, but also, Departments of Health, Environment and Heritage, Education, and smaller agencies such as the National Oceans Office and Murray Darling Basin Commission. Ongoing programs have also provided ready access to experts for general inquiries or to respond to Parliamentary inquiries and departmental reviews. The ongoing independent research has also been utilised by departments in their daily work and referred to in government publications and court judgments.

Engagement with particular communities to collaborate on research projects provides a practical base for the research conducted by AIATSIS. This ensures that policy advice provided by AIATSIS is attuned to the differing circumstances and expectations of Aboriginal and Torres Strait Islander peoples. Sustained commentary and analysis of particular policy areas, for example in native title and social health, and the collection of research material in a central repository, has created a wealth of research outputs that provide a longitudinal base for policy development and implementation for both government and community.

Public forums such as the regular seminar series and conferences, most particularly the annual native title conference, provide government agencies with access to new thinking, models and community perspectives from speakers involved directly in policy implementation and community administration. The recent seminar series on regional autonomy and the session at the native title conference on pathways to regional autonomy were prescient in bringing together various speakers from communities that are on the way to developing strong governance structures within a variety of contexts.

1.2 Provisions of the Aboriginal and Torres Strait Islander Commission Amendment Bill and their impact on AIATSIS

1.2.1 Public access to information about Australia's Indigenous peoples

The proposed abolition of ATSIC as the peak national Indigenous institution is likely to create a significant gap in the generation of material and public information and the promotion of understanding about Aboriginal and Torres Strait Islander peoples among the wider Australian and international community. Interest in such information continues to grow. General reference resources such as the *Map of Aboriginal Australia* and *Encyclopaedia of Aboriginal Australia* published by Aboriginal Studies Press are among our highest selling publications. It is important that this positive interest be fostered in order to build the recognition of Indigenous peoples within Australia's national identity and reduce the impact of racist and discriminatory attitudes, caused by lack of understanding, that directly impact upon the lives of Indigenous people.

The onus for the development and distribution of information about Indigenous peoples and cultures will now rest more heavily on AIATSIS. To this end it is likely that AIATSIS, as a national institution can anticipate an expanded role and, consequently, a significantly higher profile. It is unlikely that within the current capacity of the organisation AIATSIS could adequately address this demand.

Recommendation 1: That AIATSIS Public Affairs and Press be resourced to expand AIATSIS role in producing general information and publications and provide media comment on Indigenous peoples, societies and cultures including through formats accessible on line..

1.2.2 Proposed new regional governance networks – research and resources

The proposed abolition of ATSIC, the national Board of Commissioners and Regional Councils will have an enormous impact on the governance resources within many Indigenous communities and regions. In our experience, significant new policies in Indigenous affairs create a demand for information and assistance from communities who are asked to respond to new government initiatives.

With the significant new approach proposed to regional governance structures for Aboriginal and Torres Strait Islander peoples and the associated Regional Partnership agreements, Indigenous communities are likely to be asked to reconsider the basis upon which they organise within a region. For many Indigenous peoples this will not be a straightforward task and will require a review of existing multilayered governance arrangements. The absence of a prescribed form in such regional structures (in contrast to the ATSIC model) will necessitate a critical examination of existing and best practice Indigenous governance models. AIATSIS has dedicated research activity to this issue through a Fellowship in governance and social organisation and special emphasis on community governance in the Research Grants program over the last three years. Together with the work of the Australian Indigenous Leadership Centre in the area of effective governance and leadership and the work of the Native Title Research Unit in relation to the impact of native title processes on decision-making within Indigenous communities, as well as research on regional autonomy and agreement making, AIATSIS research expertise will be useful in this process.

Many communities will seek assistance in developing new governance structures and will seek out resources on governance generally as well as the contemporary and historical research concerning their own social, political and cultural resources. Research coalitions developed by AIATSIS in collaboration with organisations such as the South West Aboriginal Land Council and the Murray Lower Darling Rivers Indigenous Nations are examples of the kind of approach that can facilitate access to research support. These models are resource intensive but can be effective in providing the support and informed resources necessary.

There are a number of governance projects being conducted and emerging in this new policy environment, for example, the Reconciliation Australia and the Centre for Aboriginal Policy Research project in part funded through an Australia Research Council grant. However, with the extent and pace of the proposed reforms, considerable resources should be devoted to mapping and evaluating Indigenous governance structures within the whole-of-government policy approach. It is imperative that these projects be networked and collaborative to ensure the research outcomes are shared and accessible. Moreover, it is imperative that such projects are linked to research in other related areas.

As well as garnering existing research and resources, there will be a need to document and critically examine the development and implementation of any new structures. The impact of these changes upon individuals and communities is unlikely to be understood for some time. A comprehensive and sustained study of the models considered and agreed to, the successes and failures, competing governance arrangements and the impact on service delivery is central to the long term and sustainable development of communities and the wellbeing of Aboriginal and Torres Strait Islander people and the informed development and implementation of policies that affect them.

Recommendation 2: That, in addition to existing projects and funds earmarked by DEST for Universities to undertake governance research, AIATSIS be resourced with a three year commitment to a dedicated governance research project to coordinate and collaborate with existing governance projects, including additional resources to facilitate access to collections and repatriation of materials in digitised forms.

1.2.3 Consequential Amendments to the AIATSIS Act

The Amendment Act contains provisions for certain revisions within the AIATSIS Act. Amendments include removing references to ATSIC, the ATSIC Act, and the Torres Strait Islander Advisory Board. The Minister responsible will now be the Minister for Education. Whilst a Torres Strait Islander will continue to be appointed to the AIATSIS Council, this will not be on the recommendation of the Torres Strait Islander Advisory Board. Instead the appointment will be made by the Minister. The effect of this is to reduce the representation and decision making processes afforded to Torres Strait Islanders and their engagement with AIATSIS. The Minister should be cognisant of seeking Torres Strait input into the appointment to the Council.

1.3. The impact on AIATSIS of the proposed administration of Indigenous programs and services by mainstream departments and agencies.

1.3.1. The administration of AIATSIS within the DEST Portfolio

Under the new administrative arrangements from 1 July 2004, AIATSIS is located within the DEST portfolio. The recognition of the place of AIATSIS within the Education sector provides opportunities for AIATSIS to be recognised as a lead agency in the provision of research expertise in the area of Indigenous societies and cultures. The measurement of the performance of AIATSIS in relation to research output and support services remains competitive with the leading research institutions in the country. The AIATSIS Research Grants program remains one of the most competitive national programs.

AIATSIS does not currently enjoy access to competitive grant funds through the Australian Research Council. However, AIATSIS will expect access to research funds from mainstream sources under the new portfolio arrangements, whether through direct grants, appropriation or changes to ARC eligibility.

Recommendation 3: That AIATSIS be determined as an eligible body for nationally competitive grants schemes such as the Australian Research Council Grants scheme

1.3.2. The role of AIATSIS in the coordination of policy across government

As an independent statutory authority, AIATSIS has a role in the coordination of policy and program delivery across governments. The Government has recognised the importance of strong policy coordination, as a central pillar of the proposed changes, with the establishment of the Office of Indigenous Policy Coordination.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HoRSCATSIA) Report of the inquiry into capacity building and service delivery in Indigenous communities specifically identified in its recommendations the ongoing need for research into governance in Indigenous communities.¹ The report also examined the capacity of government to deliver the coordinated approach promised by the mainstreaming arrangements. Independent analysis of the success of government approaches is crucial in the proposed new environment.

Moreover, as the HoRSCATSIA noted, such research cannot take place in isolation from the impact of underlying issues of health and mental wellbeing that devastate the capacity of communities, especially in the crucial human resources necessary for effective governance and leadership.² Dr Peter Shergold foreshadows web resources for agencies to share information and research on whole-of-government approaches.³ The same level of commitment should be given to providing accessible resources of relevance to the role and needs of Indigenous communities in the proposed new arrangements.

¹ HoRSCATSIA *Many Ways Forward: Report of the Inquiry into Capacity building and Service Delivery in Indigenous Communities* 2004, Recommendation 10.

² Ibid., at 127.

³ . Shergold, P. 'Connecting Government', speech to launch *Connecting Government: Whole-of-Government Response to Australia's Priority Challenges*, Management Advisory Committee, Report no.4, 20 April 2004, at 14.

AIATSIS is able to provide policy makers and government agencies delivering services and programs to Indigenous peoples with high quality independent research and advice on policy formulation, implementation and, importantly, monitoring.⁴ AIATSIS can be used as a repository for material on governance and the whole-of-government policy approach of relevance to Aboriginal and Torres Strait Islander peoples.

Recommendation 4: That the role of research, and AIATSIS in particular, be recognised in the development and funding of monitoring and evaluation processes in the new policy environment.

Recommendation 5: That AIATSIS be resourced to expand its research base in specific program areas to provide evaluative research of national importance on wellbeing indicators such as health.

1.3.3. Evidence based policy and longitudinal research base

The transfer of Indigenous programs and services from ATSI to mainstream departments will not reduce the need for policy to be based on data and evidence. From its inception in 1964 AIATSIS has conducted and promoted research as its primary function. The disaggregation of specialisation among government departments with responsibility for Indigenous policy and programs, is likely to increase the burden on AIATSIS as service providers look to base policy on sound Indigenous specific research, ongoing policy support, and longitudinal research to assess policy and program delivery. With a limited research capacity (only 10 full time research fellows), AIATSIS endeavours to maintain a broad disciplinary base of relevance to Aboriginal and Torres Strait Islander peoples and government policy in Indigenous affairs.

AIATSIS has demonstrated its capacity to deliver comprehensive applied research. AIATSIS has conducted two state based surveys of Indigenous language use, and is currently completing the *National Indigenous Language Survey* project. ATSI is also a partner in a research project initiated by the Australian Collaboration to identify factors involved in the successful management of Indigenous organisations in a range of sectors. AIATSIS currently maintains a joint project on Indigenous Intellectual Property Rights in association with the Intellectual Property Research Institute of Australia; a consultancy concerning policing protocols undertaken through the National Drug Law Enforcement Research Fund; and, is the lead agency in a number of national research consortia, such as the comprehensive agreement initiatives underway for southwest Australia and the Murray Darling Basin.

There is an urgent need to expand the research base within AIATSIS and the research grants program to protect and enhance the development of knowledge in key program areas such as health and language.

Recommendation 6: That the need for the establishment of a knowledge base developed through long-term longitudinal research using applied community based research models and ethical research practices be recognised as part of the whole-of-government policy approach.

⁴ For further information about nationally significant research undertaken by AIATSIS see the National Research Priorities Report to the Standing Committee.

1.3.4. AIATSIS external funding sources

Nearly 50% of the AIATSIS budget is provided from sources external to the annual appropriation. Approximately 80% of that external funding was provided by ATSIC, and latterly, ATSI. In recognition of our particular expertise ATSI has contracted AIATSIS to conduct research on a range of matters.

These externally funded projects have been among the most successful programs within AIATSIS. For over ten years there has been grant support for the maintenance of a Native Title Research Unit within the research program. This Unit has provided policy advice to ATSI, publishes advice on the implications of legislation and legal determinations in native title, is involved in major regional agreement making processes, and capacity building for staff in Native Title Representative Bodies. ATSIC and ATSI have also supported digitisation of the Institute's collections, increasing their accessibility to Indigenous communities and the general public, and encouraging Indigenous people to have greater self-reliance and develop skills in the management of their own cultural heritage, reinforcing other government initiatives aimed at strengthening families and communities. ATSIC and ATSI have also supported research of family history through specialised research services and extensive databases of personal information vital for those tracing their families through separation and dislocation by various government policies. All of these activities are in heavy demand, yet funding is constantly uncertain.

The dispersal of program responsibility among a multitude of departments risks the sustainability of these programs. Apart from the increased administrative costs of multiple reporting, long term relationships between program managers and funding agency can be adversely affected. Where possible, funds should be provided directly through AIATSIS annual appropriations.

Recommendation 7: That long-term externally funded projects previously funded by ATSIC/ATSI be recognised as core activities and funded directly through the AIATSIS budget appropriation and increased administrative costs of dispersed program and funding agencies be recognised in the budget appropriation.

1.3.5. Collection and holding of cultural material and information

With the abolition of ATSIC, there is an immediate risk of disbursement of material of long term historical significance to Indigenous peoples and the Australian community in general. AIATSIS is well placed to fulfil the responsibilities of a central repository of cultural and other material of relevance to Indigenous peoples held by ATSIC/ATSI, including the library, art, media and ephemera. Demands on AIATSIS have already increased as a result of disbursements from ATSI, including management and administration of library and art collections.

Recommendation 8: That any ATSIC assets of archival importance at risk of divestiture on the abolition of ATSIC or ATSI be transferred to AIATSIS. Collections, in particular the art and pictorial collections, should be kept intact. Adequate resources to appropriately document and store the materials for future uses, including conservation, digitisation and mass data storage should accompany any collections.

Part 2 : Observations on the wider implications of proposed changes to the administration of Indigenous affairs

2.1 General comments on the provisions of the Aboriginal and Torres Strait Islander Commission Amendment Bill 2004

2.1.1. The vision for ATSIC

ATSIC was established to give Aboriginal and Torres Strait Islander peoples a greater say in the running of their affairs. Upon its creation, ATSIC was strongly supported as a vehicle for Indigenous self-determination. The principle of self-determination that underpinned the structure required that Indigenous peoples be involved in and have control over decisions and policies that affect them. It was thought that the establishment of ATSIC would herald a radical move away from the paternal policies that had characterised the former Department of Aboriginal Affairs. Not only would Indigenous people be employed within a network of regional state and national offices to develop and implement policy but a representative structure would oversee policy development at all levels. The model divested some control in the administration of Indigenous affairs from the Minister to the nationally elected Board, with the departmental officers having a dual accountability to both the Board and the Minister.

Dual accountability, for example to two ministers, or to a Minister and a Board are not unknown to the public service and may be appropriate in a variety of circumstances.⁵ Such relationships can be managed for successful outcomes provided the lines of accountability and communication are clear.⁶ While the ATSIC Act provided clear roles and responsibilities between Minister and Board, it was a balance that appeared to become difficult to manage within the bureaucracy in terms of reaching agreed outcomes between Minister and Board.⁷ The lines were less clearly articulated and observed in practice.

From the outset, there was no universal agreement as to the extent of Indigenous control within the new national body and how the views of the elected representatives would be regulated through the machinery of government.⁸ These issues were never fully resolved by the bureaucratic leadership of ATSIC and subsequently, the confusion in roles and levels of control that had existed for previous bodies such as the NACC and the NAC had flow on effects for ATSIC.⁹ As views of the Minister and the Board diverged the Commission appeared to move further away from their responsibilities as part of the broader machinery of government, with the government establishing an alternative source of Indigenous policy advice within the Office of Aboriginal and Torres Strait Islander Affairs.¹⁰

⁵ See for example, the Australian Greenhouse Office which works to two Ministers – the Minister for Environment and Heritage and the Minister for Energy – or the National Oceans Office, which reports to an Oceans Board of Management made up of a number of departmental secretaries that coordinates advice to a Ministerial Board, similarly diversely constituted, with technical and stakeholder advisory boards also operating.. For further information see Management Advisory Committee Report 4: *Connecting Government: Whole-of-government Responses to Australia's Priority Challenges*, Canberra 2004, (*Connecting Government*) at 39-40.

⁶ Dr Shergold makes this point in relation to other whole of government structures such as interdepartmental committees: Shergold, p. 8. See also, *Connecting Government* at 105-6.

⁷ Review of the Aboriginal and Torres Strait Islander Commission *In the Hand of the Regions – A New ATSIC* November 2003 (ATSIC Review 2003) at 49. See also, *Connecting Government*, at 105-6.

⁸ Palmer, K., 'ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials', 2004, 12 *ALATSIIS Research Discussion Paper* at 5.

⁹ *ibid.*

¹⁰ Rowse, T. *Indigenous Futures: Choice and Development for Aboriginal and Islander Affairs* UNSW Press: Sydney, 2002.

The perceived failures of ATSIC from government and community perspectives are historically complex and multi-faceted. Whilst there are others that have outlined these in more depth, it is worth pointing out that many of the problems that have come to the surface in the last few years, were evident at the establishment of the organisation, but remained latent until the adversarial relationship between the Board and the government reached a zenith.

The marginalisation of the views of ATSIC within government exacerbated an already significant problem in service delivery to Aboriginal and Torres Strait Islander peoples.

2.1.2 The process involved in designing and implementing the Amendment Bill

Aboriginal and Torres Strait Islander peoples would legitimately have expected to be consulted, in the first instance, about what shape any new political or consultative structure should take that would represent their interests in the design and implementation of policy.

International standards recognise the right of Indigenous peoples to self-determination and the equal enjoyment of human rights and impose positive obligations on states to provide legal protection and measures to ensure the effective participation of Indigenous peoples in decisions that affect them.¹¹ Indeed the United Nations Human Rights Committee suggest that a measure of whether Indigenous peoples enjoy equal rights to effective participation in public life is the extent to which the state ensure that no such decisions are taken without informed consent. This is a high benchmark, it requires more than mere consultation.¹²

The government has been critical of any reference to standards imposed by United Nations bodies.¹³ However, similar standards of engagement with Indigenous peoples are considered necessary in numerous countries who share a colonial heritage. In Canada, the right to be consulted in relation to infringements of Aboriginal rights is well developed and includes principles of good faith and issues such as notification and information about proposals; the opportunity to take action for themselves to meet the policy objectives; and, at least, the right have their views accommodated.¹⁴

The government argues that substantial consultation processes were undertaken in the form of the ATSIC Review. They argue that,

a thorough and extensive consultation process was undertaken, involving two major rounds of public consultation...The Review Panel met with a wide range of

¹¹ As a party to the international Covenants on Human Rights, Australia agrees to bring its laws and policies into line with the standards set in those instruments, including positive measures to ensure the equal enjoyment of the rights recognized therein.

¹² United Nations, Human Rights Committee, General Comment 23 (1994) UN Doc HR1/GEN/1/Rev1(1994) p. 40. See also, Committee on the Elimination of Racial Discrimination, General Recommendation XXIII(51) (1997), UN Doc CERD/C/51/Misc.13/Rev.4

¹³ Consider the Australian government response to the criticisms of the CERD Committee in relation to the Native Title Amendment Act 1998 (Cth). For discussion see Strelein, L., M Dodson and J. Weir, 'Understanding non-discrimination: Native Title Law and Policy in a Human Rights Context, (2001) 3 *Balayi* 113 at 126-131.

¹⁴ *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, 2002 BCCA 59, 31 January 2002; *Haida Nation v. B.C. (Minister for Forests)* 2002 BCCA. 147, 27 February 2002.

stakeholders across the nation, including each of the 35 ATSIC Regional Councils and received 126 submissions.¹⁵

Consultations undertaken by members of the Review Committee do not, however, expunge the responsibility upon the Australian Government to undertake consultations based on the specific proposal now put forward.

The Review concluded that whilst the current ‘one size fits all’ ATSIC paradigm remains open to criticism, ATSIC should remain in place with various modifications in order to make it function more effectively, building upon the positive processes that ATSIC has facilitated and is developing.

In what seemed a sudden move by Cabinet, the government rejected the recommendations of the ATSIC Review. The Government instead determined to abolish ATSIC, including the Regional Councils and ‘mainstream’ all program responsibilities.¹⁶

The government took action to implement the decision without further consultation with Indigenous people about the action or about what the future representative structures might resemble. The government now intends to undertake consultations with Regional Councils and a range of other organisations communities and individuals in the development of new representative structures in their regions. This will have to take place over the next twelve months while Regional Councils still exist and before the infrastructure support is withdrawn.

The Report of ATSIC Review, the responses and submission by Indigenous communities and ATSIC, as well as previous reviews and the myriad reports, for example by the Aboriginal and Torres Strait Islander Social Justice Commissioner, that have suggested alternative ways to address Indigenous policy and representation deserved greater consideration and a more considered response.

The process followed by the Australian Government in this instance appears to move away from the standards for government engagement with Indigenous peoples that are accepted elsewhere, not just in international law but in the standards applied by states around the world. Australia is likely to be subject to further significant international criticism for failing to meet these standards.

Recommendation 9: That decisions affecting the involvement of Indigenous peoples in policy development and implementation should be taken only after full and open consultation and Indigenous peoples own representative structures be withdrawn only with the consent of Indigenous peoples.

2.1.3 Representation and the legitimacy of Indigenous policy input

The ATSIC Act adopted a democratic electoral system of representation at both the Regional Council and Board of Commissioners levels. The disjunction between culturally appropriate governance structures and direct election models created difficulties for Regional Councils of

¹⁵ Senator Troeth, 2nd Reading ATSIC Amendment Bill *Hansard*, Tuesday 15 June 2004.

¹⁶ Senator Vanstone, ‘New Service Delivery Arrangements for Indigenous Affairs’ Media Release 12 April 2004.

competing legitimacy with traditional owners and cultural authority structures.¹⁷ The national Board of Commissioners were a further step away from these regional accountabilities. Once elected, Commissioners were not formally accountable to their Regional Councils. The competition between community representation and electoral representation affected the capacity of ATSIC structures in many instances to strengthen existing Indigenous governing structures and consequently led to an argument that ATSIC was part of the machinery of government and not a part of Indigenous systems of representation and governance.

The proposed National Indigenous Council is intended to provide policy advice to the Ministerial Taskforce, which is constituted by the ten government Ministers with responsibility for delivering Indigenous specific programs. Any proposed national advisory council will face even greater challenges to their legitimacy to provide a national Indigenous voice to the design and implementation of policy.¹⁸ It can only be presumed that the government intends that an appointed council will be more manageable than a representative body. The decision not to include a representative Indigenous voice at the highest levels of policy design does not remove the dissension among Aboriginal and Torres Strait Islander peoples in the face of adverse government decisions.¹⁹ It merely removes it from the systems of accountability within government and relegates it to a matter of interest group disquiet. There is a significant risk of creating structures that foster dissenting views between advisory and representative bodies that may not be easily evaluated by the public service.

Recommendation 10: That the development of policy include the development of processes and structures to take account of the views of Indigenous peoples and be accountable to them for performance.

2.1.4 Advocacy and the administration of Indigenous policy across Government

As part of its legitimate role in policy development as well as implementation, a significant feature of ATSIC was its dual role in both the administration of programs and the representation of interests. Notably, it is this feature that has fuelled the sustained questioning of the capacity of ATSIC to separate its dual responsibilities, ‘a predicament that has been called “separation of powers”, but which is probably better termed “separation of responsibilities”’.²⁰

Dr Shergold, Secretary of the Department of Prime Minister and Cabinet and former Secretary of ATSIC, in his address launching the new policy approach to Indigenous affairs stated that a successful whole-of-government approach does not require a single view across the public service, rather, the ‘key’ to providing a whole-of-government approach is to ‘ensure that policy presented to government for debate and decision has examined all aspects of the issue under

¹⁷ As H.C. Coombs suggested: ‘the European concept of representative government seems incompatible’ with Indigenous culture(s).’ Coombs, H.C. *Aboriginal Autonomy: Issues and Strategies*, Cambridge University Press: Cambridge, 1994, at 133. In addition, the ATSIC review public discussion paper noted one of the ‘fundamental dilemmas’ facing ATSIC from the outset was the fact that a ‘western political and administrative model is alien to a traditional Indigenous family/clan/community structure.’ ATSIC Review 2003 at 12.

¹⁸ ‘Not much reason to be confident’ *The Age* April 16, 2004.

¹⁹ ‘Vanstone defends decisions to abolish ATSIC’ *AM* April 16, 2004.

²⁰ Palmer, at 5.

consideration'.²¹ Indeed, Dr Shergold admits, good public policy depends upon Ministers being informed by comprehensive, informed and frank advice.²²

It should not have been a problem *per se* that the Board and Commission represented the interests of Aboriginal and Torres Strait Islander peoples in the development and implementation of policy, including in representations to the Minister. However, the point at which representation and advocacy became vocal opposition, the government has moved to remove this role from within the structures of government. While the abolition of the national Board is the most extreme example of this approach, the policies of ATSIIS over the last twelve months in funding Indigenous organisations have placed pressure on community organisations not to use Commonwealth funds for advocacy activities. The 'professional service delivery' models for funding to legal services and native title representative bodies are one example, the termination of international advocacy funding is another.

Recommendation 11: That Indigenous organisations be effectively resourced to carry out advocacy roles that will allow them the capacity to engage in planned representative networks.

2.1.5 The abolition of Regional Councils and the development of Regional Networks

The proposed new approach continues to involve Aboriginal and Torres Strait Islander peoples at a regional level in the negotiation of planned Regional Partnership Agreements. However, while utilising the Regional Council structure in the interim, it is intended to replace Regional Councils with Regional Representative Networks.

These Regional Networks will be drawn from Indigenous organisations, groups and interests for the purpose of negotiating the Regional Partnership Agreements. In many instances, these networks, will be a loose coalition of organisations who come together for the purpose of reaching the agreement but may not have an ongoing role.

In adopting this model Dr Shergold suggests that the role of the public service is to provide advice to the Minister which takes account of the views of those who will be affected by policies and, in providing advice to the Minister, weigh those views against the national interest.²³ This is a substantial shift away from the idea of direct involvement and control over decisions at all levels. The consultation model proposed to replace the Regional Councils displaces Aboriginal and Torres Strait Islander people from decision making and treats them as end users of policy, in a manner not dissimilar to the role of any interest group.

The government has acknowledged that RPAs must be underpinned by more detailed Shared Responsibility Agreements at the community level, which will address specific policy initiatives and their plans for implementation. Both RPAs and SRAs will be focused on service delivery, no mention has been made of the relationship with land and cultural matters, including language. It is likely that for some time SRAs will be developed on an ad hoc basis and will not cover the gamete of policy matters affecting communities.

²¹ Shergold, at 3.

²² Ibid. , at 8.

²³ Ibid. , at 6

For Indigenous peoples, there is a significant risk in non-indigenous structures of government seeking to interpret what is in the best interest and what will work effectively for Aboriginal and Torres Strait Islander communities. Indigenous peoples may point to the history of the loss of Indigenous land and resources in the name of the national interest. It has proved unlikely that governments would place the protection and promotion of Indigenous interests including in land and resources as a matter of national interest, equal to that of economic development.

Recommendation 12: That the negotiation of Regional Partnership Agreements and Shared Responsibility Agreements take into account matters of land, culture and Indigenous rights as well as service delivery and government intervention..

2.1.6 Regional engagement under the new arrangements

Apart from the thrust of the recent ATSIIC Review, that ATSIIC be placed ‘in the hands of the regions’,²⁴ an increase in role for Regional Councils was one recommendation of the 1993 review of ATSIIC,²⁵ while the importance of regionalism was a central theme of the 1998 review.²⁶ A regional focus remains central to the proposed new arrangements for the delivery of services and programs for Indigenous people. As noted, however, regional priorities will be set through new Regional Representative Networks.

Regional Partnership Agreements play a key role in outlining the broad principles which will guide Indigenous-government interaction in the region. Underneath these RPAs, a good deal of community consultation will result in more detailed Shared Responsibility Agreements.

The Indigenous Coordination Centres will play a strategic role in implementing the new policy framework.²⁷ The interpretation, implementation and monitoring of these Agreements will be the responsibility of government through the Indigenous Coordination Centres and OIPC. The monitoring of government performance by government without independent evaluation risks the perception of lack of objectivity and transparency. The ATSIIC review concluded that ‘it is not realistic to assume that State and national governments will always be able to provide programs that can be tailored to meet the individual needs of communities, hence the role for ATSIIC as the ‘community interface’.²⁸ Increasing local influences over decision-making, and services and programs being delivered by stronger and more autonomous Indigenous bodies can increase the responsiveness of organisations to Indigenous constituents and improve outcomes in service and program delivery.

Policy plans seek to intensify engagement at this community level even while this interface has been removed. There must remain some doubt as to how the web of agreements will be developed at the regional, community and family group level, when existing regional resources for Indigenous people to coordinate their input are being withdrawn. There is a significant risk that potential benefits of proposed changes will be limited to the extent that these changes represent a withdrawal of resources to assist to build and maintain the capacity of regional governance.

²⁴ ATSIIC Review 2003.

²⁵ Review of the operation of the ATSIIC Act 1989. Report to the Minister for Aboriginal and Torres Strait Islander Affairs. Aboriginal and Torres Strait Islander Commission, Canberra 1993, at 4-8.

²⁶ *ibid.*, at 22.

²⁷ Senator Vanstone, Senate, *Hansard*, 17 June 2004, at 24094.

²⁸ ATSIIC Review 2003, at 35.

The process of consulting local communities about mechanisms of service delivery seems to imply the existence of ready governance or representative structures which merely need to be identified, or at least the capacity to easily create them. While this may in fact be the case in some instances, the proposed changes are directed to removing existing structures, with little practical attention to how replacements will be formed, let alone how they will achieve the difficult twin tasks of operating efficiently in partnership with government agencies, while also having the necessary legitimacy from the perspective of the particular Indigenous ‘community’.

There is perhaps an underlying presumption that existing organisations, such as land councils, legal services or health services will be able to play a vital role in representing the priorities of the region they operate in. Many of these organisations are not resourced to undertake additional responsibilities. Indeed, ATSISS has enforced service delivery models that have actively discouraged the connection to community and political advocacy.²⁹ Both the RPAs and SRAs rely on the identification of bounded communities without necessarily requiring clearly identifiable representation, membership and mandate.

The demands that the proposed model imposes on Indigenous communities and organisations will not be met without support. Governments are asking for a structural response from Indigenous communities, as partners in the new policy environment. In order to achieve the intended and promised outcomes, governments will require a structural interface with Indigenous communities at either a local or regional level.

Recommendation 13: That resources currently available to Regional Councils for regional interface between government and Indigenous communities not be withdrawn but redirected to Indigenous representation under any new arrangements.

2.1.7 Diversity in regional representation and community governance

Regional Councils have provided a fixed regional structure for a number of years, but it is one that has not always reflected the natural or traditional coalitions between Indigenous groups.³⁰ Coalitions of groups and interests on a regional basis may vary depending on the issues of concern. The size of the region over which agreements can be reached may also vary. Communities, particularly on a regional level are often not static or bounded, but can be dynamic and changeable. Communities come together for different purposes, in different contexts and split, coalesce or develop overtime.³¹ The point here is that there is not always a clear consensus about markers to identify a region or membership of a region, and policy approaches which assume a static, easily identifiable ‘region’ are likely to lack necessary flexibility.

The proposed arrangements raise a number of questions about the relationship between different representative structures. For instance, given the focus on regional service delivery, is a greater role envisaged for existing regional organisations such as Native Title Representative Bodies? Do

²⁹ Review of Native Title Representative Bodies (Hunter) 2000. See also Murdi Paaki Regional Council. 2003. Review of Indigenous Participation in the Development of Commonwealth Policies and Programs (The ATSISS Review) Submission by Murdi Paaki Regional Council. p23. [online] Available at: <http://atsicreview.gov.au/pdf/murdipaakirc.pdf>

³⁰ Peters-Little, F. ‘The Community Game: Aboriginal Self-Definition at a Local Level’ (1998) 10 *ALATSISS Research Discussion Paper* 1

³¹ Anderson, J. ‘The Politics of Indigenous Knowledge: Australia’s Communal Moral Rights Bill’ (2004) 27(3) *UNSW Law Journal*.

the proposed changes create the likelihood of Indigenous driven alternative representative structures emerging in opposition to government approved ones? And if this occurs, how is it to be managed? Which regional structures are to be favoured under the new arrangements?

The relationship between regional and local representative structures must be given considerable attention. Regional representative structures must draw their legitimacy from the local communities or interests they represent. Within any region, even in the delivery of services, traditional owners continue to play a primary role in defining the priorities and negotiating the outcomes in their traditional country. Native title has increased the say that traditional owners have over government and private sector activities on their country, regardless of a successful native title claim.³² This legitimacy is not limited to matters of land or natural resource management. Traditional ownership of land, and the assertions of prior and continuing identity and authority implies a role in the governance of the region.

In some parts of Australia it may be appropriate to retain a representative or service delivery structure which closely resembles existing Regional Councils. In other areas, regions may be more appropriately defined on a larger scale (for example the South West of Australia), or a smaller scale (for example remote communities within the former ATSIC Warburton region of Western Australia). In recent seminars and conference sessions conducted by AIATSIS, the diverse pathways adopted by communities toward greater regional autonomy and self-government were illustrated:

- The unique position of the Torres Strait Regional Authority was examined with a view to the management of internal layers of governance and authority structures
- As a COAG trial site, Murdi Paaki Regional Council has been championed across the country for its progressive initiatives to address the economic, social and political aspirations of Indigenous people within its (ATSIC) boundaries.
- Miwatj Regional Council also gave its vision for greater autonomy in their region.
- Murray Darling River Indigenous Nations is a confederacy of Nations who have come together to negotiate with the Murray Darling Basin Commission over natural resource management in their region, based on the primacy of traditional owners rights to speak for country, within that individual Nations such as the Yorta Yorta, continue to seek outcomes at a Nation level in employment and infrastructure.
- Noongar People through the South West Aboriginal Land and Sea Council and the Regional Councils have been exploring ways to move toward a non-land based autonomy model for greater economic and political development.
- Bunuba Aboriginal Corporation provides a unique corporate model for developing community capacity through business enterprise.
- Martu native title holders explained their Prescribed Body Corporate as a vehicle for greater autonomy.

Various communities, native title groups, Regional Councils and nation groups have been building their capacity to address these complex issues for more than a decade. It is undoubtedly true to say that some have achieved better results than others. Addressing the intransigence of Indigenous disadvantage will require the ability to be flexible, according to the needs of local communities. For some this may mean the best approach is to modify or even expand rather

³² See, the Yorta Yorta Cooperative Management Agreement with the Victorian government. Fact sheet available at: [http://www.dse.vic.gov.au/dse/nrenlwm.nsf/93a98744f6ec41bd4a256c8e00013aa9/9caa04f414e69789ca256e900026da12/\\$FILE/YortaYorta-FactSheet.pdf](http://www.dse.vic.gov.au/dse/nrenlwm.nsf/93a98744f6ec41bd4a256c8e00013aa9/9caa04f414e69789ca256e900026da12/$FILE/YortaYorta-FactSheet.pdf)

than reinvent existing structures, and to take advantage of the structural resources that were directed to Regional Councils rather than withdraw them.

Recommendation 14: that regional approaches to government policy development, at all levels, accommodate the diversity of Indigenous regional networks and respect the role of traditional owner groups in the delivery of government services on their country

2.2 General comments on the proposed administration of Indigenous programs and services by mainstream departments and agencies

2.2.1. Failure of mainstream service delivery during the life of ATSIC/ATSIS

The admitted failure of Australian governments to secure the enjoyment of adequate program and service delivery to Aboriginal and Torres Strait Islander peoples is reflected in the chronically poor socio-economic outcomes they continue to endure.³³ These vital statistics are well documented in relation to poor health, morbidity, education and employment outcomes.³⁴ The key indicators of wellbeing point to a systematic failure of Australian society to provide equal access to the benefits of a strong economy and social structure to Indigenous citizens.

In assessing the reform of Indigenous service delivery and mainstreaming of programs, it must be acknowledged that the most significant responsibility for service provision to Aboriginal and Torres Strait Islander people lies not with ATSIC or ATSIS, but state and territory and local governments.³⁵ This includes responsibility for primary and secondary education, community infrastructure including roads, water and sanitation, access to primary health care, housing and criminal justice.

By 2001-2, less than half of the Commonwealth budget allocation for Indigenous specific programs was provided to ATSIC.³⁶ ATSIC has never had full discretion to spend its budget in accordance with Board or Regional Council priorities, with two-thirds of ATSIC's budget tied to the Community Development Employment Program (CDEP) (the Indigenous 'work for the dole' program), and the Community Housing and Infrastructure Program (CHIP). Neither ATSIC nor ATSIS has ever had control of Indigenous education programs such as Abstudy, and responsibility for Indigenous health programs was transferred back to the mainstream health department in 1995.

ATSIC funded programs such as CDEP and CHIP were intended to supplement the provision of essential services to Aboriginal communities from Commonwealth, state and territory and local governments. However, ATSIC was drawn more and more into becoming a replacement

³³ Steering Committee for the Review of Government Service Provision, *Overcoming Disadvantage Report: Key Indicators 2003*, AGPS Canberra 2003 (*Overcoming Disadvantage*).

³⁴ *ibid.* Chapter Three, includes among the headline indicators of wellbeing and disadvantage: life expectancy, rates of disability, years 10 and 12 retention and attainment, labour force participation and employment, income, home ownership, suicide and self-harm, child protection rates of homicide and assault, victims rates for crime and imprisonment and juvenile detention.

³⁵ Commonwealth Grants Commission *Report on Indigenous Funding 2001* Canberra pp. 55-56.

³⁶ ATSIC Review 2003, at 18

funder as particularly state and territory and local governments failed to accept their responsibilities to Aboriginal people.³⁷

This cost shifting from mainstream to Indigenous specific programs was seen in even the most fundamental services.³⁸ The CHIP program increasingly took responsibility for large infrastructure needs such as water and power supplies. Perhaps unsurprisingly, without ongoing program responsibility being taken up by mainstream providers, the security of water supply in some areas was left to community members without the skills and technological knowledge to maintain it.³⁹

The withdrawal of mainstream government services meant an ever-increasing burden for ATSIC, particularly in CDEP participation where fundamental local services such as rubbish collection became reliant on CDEP.⁴⁰ While CDEP was intended as a transition to employment program to provide support for Indigenous people wanting to find full time employment, governments were withdrawing jobs from communities and decreasing the long term employment options for CDEP participants.⁴¹

As demand for CDEP and housing and infrastructure increased in the years of ATSIC's operation, governments continued to cut the ATSIC budget in other areas, limiting the support and infrastructure around those programs.⁴² Moreover, the increasing financial scrutiny and politically adversarial environment no doubt diverted resources and energy away from the delivery of services and the monitoring of outcomes.

As a corollary of the cost shifting between levels of government and among departments at the same level, ATSIC became the target of criticism for failing to produce outcomes in areas it was never established to address, nor given the resources and power to achieve. The 'blame shifting' for poor outcomes in Indigenous affairs to ATSIC has been acknowledged in the wake of the ATSIC Review.⁴³ Senator Troeth on the introduction of the ATSIC Amendment Bill to the Senate admitted 'all too often the specialist Indigenous agency, ATSIC, provided an excuse for mainstream departments to avoid their responsibilities to Indigenous Australians.'⁴⁴

The failure of service delivery to Aboriginal and Torres Strait Islander peoples over the life of ATSIC should not be explained as a failure of Indigenous governed program delivery, as the role of ATSIC in service delivery forms only a small part of the total responsibility of Australian

³⁷ Brian Johnstone, 'The white anting of ATSIC has been brought to you by the usual suspects', *Online Opinion* [online] Available at <http://www.onlineopinion.com.au/view.asp?article=2156>

³⁸ *ibid.*, at 30

³⁹ Grey-Gardner, R. and Walker, B.W. *What Lies Beneath: Sustainable Groundwater Management for Communities of Indigenous People* Centre For Appropriate Technology Report 2002. Available at: <http://www.icat.org.au/documents/cr-220-05-whatliesbeneath.pdf>

⁴⁰ See generally: Morphy, F. and W. Sanders (eds), *The Indigenous Welfare Economy and the CDEP Scheme* CAEPR Research Monograph 20, 2001.

⁴¹ Altman, J.C. and V. Johnson, 'The CDEP in town and country Arnhem Land: Bawinanga Aboriginal Corporation' *CAEPR Discussion Paper* 209, 2000.

⁴² See also: Spicer, I. *Independent Review of the Community Development Employment Projects (CDEP) Scheme* [the Spicer Review], Office of Public Affairs, ATSIC, Canberra, 1997.

⁴³ ATSIC Review 2003 at 30.

⁴⁴ Senator Troeth, 2nd reading ATSIC Amendment Bill, 15 June 2004, at 23552

governments at all levels. Indeed, the delivery of CDEP and CHIP programs have arguably been among the more successful programs in many Indigenous communities.⁴⁵

There is a need to be cognisant that there are risks associated with mainstreaming these programs given the historical failure of service delivery by mainstream departments. The risks of removing the safety net of an organisation that has for many years provided emergency funding and borne responsibility for failures will depend upon the successful implementation of bold promises of a new order of accountability in Indigenous affairs that will bring the weight of the Executive arm of government to bear in ensuring the coordinated and effective delivery of previously unmet responsibilities.

2.2.2 'Whole-of-government' approach

The preceding discussion suggests that the mainstreaming of Indigenous specific programs should be considered apart from the failure of mainstream service delivery to Indigenous peoples as part of the general community. As Dr Shergold, Secretary of the Department of Prime Minister and Cabinet and advocate of the new policy approach in Indigenous affairs, argued, 'most of the pressing problems of public policy do not respect organisational boundaries'.⁴⁶ He continued, 'the solution to functional demarcations rarely lies in the structures of officialdom'.⁴⁷ There is no evidence to suggest that the reallocation of the remaining Indigenous programs to mainstream departments will in itself overcome the failures in Indigenous affairs that Aboriginal and Torres Strait Islander peoples have experienced.

The existence of a department with responsibility for Indigenous specific programs, if Dr Shergold's analysis is applied, was not the reason for failure. Rather it was the inability or unwillingness to coordinate policy development and implementation across government in an area which has been long identified priority for government action. Failure on this front cannot be attributed to the accountability of ATSIC to an elected body but to the status placed on the advice of the organisation by other agencies and the Cabinet.

Dr Shergold outlined five qualities of mainstreaming that will apply in the new policy environment.⁴⁸ Most rely on the leadership and collaboration among the most senior members of the public service, not least on the fear of performance assessment and peer review. The management of bureaucratic failure appears to be the centre-piece of the reform. The faith that has been placed in such a transformation in performance appears to carry significant risks. The complexity of coordination and the human capacity to overcome the difficulties of interdepartmental and intergovernmental communication and agreement should not be underestimated.

Recommendation 15: That the effective coordination between and among governments and the timely delivery of essential services be closely monitored in terms of providing safety net essential services such as water, power, housing, health and other programs and services.

⁴⁵ Saunders, W. 'Adjusting balances: Reshaping the CDEP scheme after 20 good years' in Morphy, F. and W. Sanders (eds), *The Indigenous Welfare Economy and the CDEP Scheme* CAEPR Research Monograph 20, 2001

⁴⁶ Shergold, at 1.

⁴⁷ *ibid.*, at 6.

⁴⁸ *ibid.*, at 11-13.

2.2.3 COAG Trials: critical evaluation

In November 2000, The Council of Australian Governments agreed on a framework through which governments would advance reconciliation and address Indigenous disadvantage. COAG agreed that where they have not already done so, ministerial councils were to develop action plans, performance reporting strategies and benchmarks for addressing indigenous disadvantage.

COAG identified eight trial sites in which to test the capacity of governments to coordinate across agencies and levels of government and deliver programs and services in particular communities. Commonwealth departments were allocated trial sites to which they committed to play a coordination role under the leadership of the departmental secretary.

The Australian Government suggests the new approach to the service delivery to Aboriginal and Torres Strait Islander peoples 'will build on what we have learnt from the whole-of-government approach adopted in the COAG Indigenous trials'.⁴⁹ The Minister for Indigenous Affairs has spoken of 'the lessons emerging from the COAG trials'⁵⁰ and COAG itself talks of 'promising early progress'.⁵¹ Yet at this stage, comments on the efficacy of the COAG trials cannot draw on rigorous analysis and evaluation because they will only be evaluated for the first time over the next six months, at the end of the first two years of the program. If the government intends to build on the lessons learned from the COAG trials it is imperative that this review be frank open and honest about the difficulties as well as the positive outcomes.

Dr Shergold acknowledges that the eight trials have provided glimpses of what can be achieved. But they have also provided only glimpses of what is required to ensure the outcomes are and sustainable. They have certainly provided glimpses of the difficulties that governments face in developing a coordinated, collegiate and effective response to the priorities of Indigenous communities. The expansion of such an intensive program in only eight communities across the entire country will test the capacity of governments to deliver on their promises and responsibilities.

Reconciliation Australia noted that one of the initial lessons from the COAG trials was the need for further intergovernmental coordination *prior to* engagement with communities.⁵² While the question of capacity is often directed at Indigenous communities, the capacity of governments to engage with Aboriginal and Torres Strait Islander peoples and to coordinate among themselves is central to the assessment of the proposed reforms by this Committee.⁵³

Recommendation 16: That the COAG trials be independently evaluated against criteria including extent of intergovernmental cooperation actually achieved, the measurable improvement in the wellbeing of the community over and above previous programs and the sustainability of outcomes and processes on a larger scale.

⁴⁹ Sen Troeth, ATSIIC Amend Bill, 2nd reading, 15 June 2004, at 23552.

⁵⁰ Senator Vanstone, Letter to Indigenous organisations, 22 April, 2004.

⁵¹ COAG Meeting 25 June 2004.

⁵² Reconciliation Australia, *Reconciliation Report 2003* at 3.

⁵³ Lisa Strelein, 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander self-government' in Langton, M., M. Tehan, L. Palmer and K. Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* Melbourne University Press: Melbourne, 2004.

2.2.4 National policy coordination and evaluation

Under the proposed arrangements, following the abolition of ATSIIS and ATSIC, the coordination of Indigenous policy formulation, implementation and monitoring is to be carried out by the Office of Indigenous Policy Coordination in the Department of Immigration, Multiculturalism and Indigenous Affairs. The proposal to mainstream Indigenous services under a ‘whole-of-government’ approach means the OIPC, along with the Indigenous Coordination Centres will be expected to carry out a great deal of both intra- and inter-governmental coordination. In order to be effective this role will require a level of power and influence within government that ATSIC was unable to achieve.⁵⁴

The need to evaluate and assess performance of Commonwealth departments and other levels of government is central to the proposed whole-of-government approach. If secretaries are to be held personally accountable, their performance must be independently measured against the benchmarks established by the Productivity Commission Report on *Overcoming Indigenous Disadvantage*.⁵⁵ While it is imperative that Indigenous programs are not lost in the ‘mainstreaming’ of responsibility, it will not be sufficient to measure the implementation of the proposed policy approach merely against the maintenance or delivery of Indigenous specific programs. The ongoing external and independent review of the rate of improvement in the delivery of government programs to Aboriginal and Torres Strait Islander peoples is imperative. The maintenance of funding on CDEP, for example, cannot be assessed in isolation from the overall performance of the Department of Employment and Workplace Relations in ensuring employment outcomes for Indigenous people. Similarly, health outcomes are not measured in a whole-of-government approach by the maintenance of Indigenous health programs but by substantive improvements in the service provided to Indigenous people by the broader health system.

Recommendation 17: that OIPC performance reporting on departmental performance against wellbeing indicators include all program and service delivery to Aboriginal and Torres Strait Islander people not just Indigenous specific programs or former ATSIC/ATSIIS programs

2.2.5 Flexibility and Scope of Agreements

The planned engagement with Aboriginal and Torres Strait Islander peoples is based on agreement making. The proliferation of agreements in the native title era demonstrates the vast difference between the type of agreements being reached and their ability to deliver real change to Indigenous peoples’ lives.⁵⁶ Agreement making should not be celebrated for its own sake. It is imperative that the resources and commitment required to reach agreement result in substantive outcomes rather than motherhood statements. Agreements must contain substantive commitments, including timetables, resources and plans for implementation. The history of

⁵⁴ See *Connecting Government*, at 101, in which it was acknowledged that the COAG trials relied on APS ‘clout’ of senior officers to achieve results in coordination among agencies.

⁵⁵ *Overcoming Disadvantage*.

⁵⁶ See: Agreements Treaties and Negotiated Settlements database <www.atns.net.au>.

framework agreements and ‘statements of commitment’ in the native title sphere should not be repeated in the Regional Partnership Agreements.⁵⁷

There is still a place for the fundamental principles of self-determination in the new policy environment. The proposed policy approach recognises the need to accommodate diversity and to reach agreements that are targeted to the particular needs of the regions and communities or groups they are negotiating with. The assessment of needs must acknowledge the social justice measures that go beyond headline statistics and examine the quality of life and the freedom to enjoy one’s identity and culture.

The government has employed the rhetoric of partnerships and shared responsibility for the delivery of services to Indigenous peoples as collectives. It would be problematic to rely on Indigenous governance structures, whether at the regional community or group level, to enter into the proposed arrangements without respecting those governing structures in the ongoing implementation and monitoring of the agreed programs and outcomes.

Negotiations should not fall short of including various levels of regional or local self-government, a role in decision-making benchmarking and performance assessment where communities have the capacity to deliver. It may be that the reinforcement and resourcing of self-government is the most appropriate pathway to successful service delivery. Governments must come to negotiations with everything on the table. What is needed, if a fresh approach is to be taken, is a comprehensive examination of the aspirations of communities and a joint decision on what the community can, needs, and wants, to take on for themselves. The plans should take a long term perspective to meet the aspirations of Indigenous communities for greater autonomy and authority in the future.

Recommendation 18: That agreements negotiated under the new policy approach contain substantive commitments, including timetables, resources and plans for implementation.

Recommendation 19: That agreements recognise the Indigenous governance structures upon which they rely and resource them to be involved in the delivery, monitoring and renegotiation of agreements.

Recommendation 20: That Regional Partnership Agreements include, where appropriate, regional and local self government outcomes, to meet the aspirations of Aboriginal and Torres Strait Islander peoples.

⁵⁷ Bradfield, S. ‘Agreeing to Terms: What is a ‘Comprehensive’ Agreement?’ 2(26) *Land Rights Laws: Issues in Native Title* 2004.

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