

# THE NEW REPRESENTATIVE BODY FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE: JUST ONE STEP

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## I Introduction

The phrase 'self-determination' has been adopted in many different contexts and with multiple meanings. In this article, Noel Pearson's definition of the 'fullest rights of self-determination'<sup>1</sup> will be adopted as the benchmark against which to assess the new National Congress of Australia's First Peoples. In this context, self-determination is ascribed the characteristics of self-governance: the ability for Indigenous peoples to make decisions concerning their own societies, through their own mechanisms, but within the sovereign State of Australia.

Self-determination is essential to Indigenous people as it recognises that Indigenous people were owners of the land before white settlement; it protects, preserves and helps to re-establish the traditional laws and customs of Aboriginal people; and it helps to address the inequality in the standard of living between Aboriginal and settled Australians. Indigenous people have long recognised that 'white people in responsible positions are no better than us (in fact they would be worse, considering their educational background), at managing or solving difficult individual or community problems.'<sup>2</sup> Thus, for Indigenous people, self-determination is about achieving equality and recognition of fundamental human rights.

With the abolition of the Aboriginal and Torres Strait Islander Commission ('ATSIC') in March 2005, the path to self-determination in Australia took a significant backward step. The election of the Rudd Labor Government, however, brought a promise of 'a new partnership between Indigenous and non-Indigenous Australians'.<sup>3</sup> Australia reversed its previous position and formally endorsed the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP),<sup>4</sup> which provides

in art 3 that all Indigenous peoples have the right to self-determination and to 'freely pursue their economic, social and cultural development'.<sup>5</sup> Whilst the declaration imposes no legally binding obligations on Australia (although James Anaya and Siegfried Wiessner have argued strongly that it reflects customary international law),<sup>6</sup> it was adopted in 'the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust.'<sup>7</sup> The document thus imposes political and moral obligations upon the government and exists as an 'important document of developing standards that Aboriginal and Torres Strait Islanders in Australia can use in their day-to-day relationships with all levels of government.'<sup>8</sup>

Before this endorsement, work had already begun on establishing a new representative body. In July 2008, an Issues Paper<sup>9</sup> was published, which was followed by public consultations. The following year Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time, formed a Steering Committee, convened a national workshop in Adelaide and conducted further consultations. The result of this process, a report entitled '*Our Future in Our Hands – Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples*',<sup>10</sup> was released in August 2009. The report emphasised Indigenous Australians' unique position as the original inhabitants of the land, their contribution to the dynamic and evolving Australian culture and identity and the historical, as well as more recent, discrimination and hardship suffered by Indigenous peoples at the hands of government. It set in motion the establishment of an unelected representative body which, for the first time since the abolition of ATSIC, will provide an independent national voice for Indigenous Australians in the formulation of government policies. In November 2009, it was announced that the new national representative body would be called the

'National Congress of Australia's First Peoples.'<sup>11</sup> In May 2010, the representative body was officially incorporated, and work to establish the operations of the body is now underway.<sup>12</sup>

It will be argued that, as representation is a fundamental part of the adopted definition of self-determination, the ability of the new body to achieve self-determination for Indigenous Australians will depend upon the extent to which it can effectively represent the views of Aboriginal and Torres Strait Islander peoples. It argues that the new body is not as representative as it could be; that striving for efficiency may lead to democratic deficits; and that, ultimately, the proposed body is a step in the right direction, but not the giant leap that it could have been.

## II The Importance of Self-Determination

Since colonisation, Indigenous Australians have been stripped of their land, sovereignty and rights, which ignores the fact that '[s]ince time immemorial [Indigenous Australians] have owned, occupied, used and enjoyed the continent and its islands in accordance with [their] Laws and Customs to the exclusion of the whole world'.<sup>13</sup> The fight for recognition of these pre-existing rights has been hindered by successive governments' fears of losing external sovereignty, and has progressed on the basis of a limited recognition of formal civil rights equality.<sup>14</sup>

This limited view fails to recognise that self-determination is not only about the formal recognition of rights, but also about the 'decolonisation of the mind':<sup>15</sup> It is about recognising Indigenous peoples' unique identity, empowerment and de facto equality.<sup>16</sup> Whereas civil rights attach to the individual, self-determination is a collective right of Indigenous peoples to establish and protect their unique cultural and historical identity.<sup>17</sup>

Organised political campaigning for self-determination began with the Day of Mourning Protest in 1938 which called for Indigenous Australians to be given 'full citizen status and equality within the community'.<sup>18</sup> Although citizenship and voting rights were achieved in 1948 and 1962 respectively this period was marked by 'neo-evolutionary views' that 'Aboriginal people need to be helped or forced to overcome their dependency through paternalistic policies, regardless of the effects these policies may have on Indigenous culture'.<sup>19</sup> This attitude survives in some spheres of political thought today.<sup>20</sup>

Unlike the Indigenous peoples of New Zealand, Canada and the USA, Indigenous Australians never signed a treaty with the white occupants. The *Larrakia Petitions* in 1972 expressed a feeling that the unequal and unjust treatment of Indigenous Australians left them feeling like 'refugees in the country of [their] ancestors'.<sup>21</sup> From this point on, Aboriginal and Torres Strait Islanders adopted the term 'self-determination' in their discourse with government, with the call for this right appearing in the *Barunga Statement* (1988),<sup>22</sup> the *Kalkaringi Statement* (1999)<sup>23</sup> and the Council for Aboriginal Reconciliation's *Declaration Towards Reconciliation* (2001).<sup>24</sup>

'Self determination' has had a contentious meaning. The Howard government sited 'concerns about the references to self-determination and the potential for misconstruing those'<sup>25</sup> as one reason for opposing UNDRIP. Whereas self-determination's original incarnation in the *International Covenant on Civil and Political Rights*<sup>26</sup> concerned the right of colonial states to achieve independence, its modern form is 'a problem more of public law than interstate law':<sup>27</sup> it calls for greater recognition of and control by minority groups within the state rather than independence from the state.

Self-determination encompasses more than merely self-government (UNDRIP art 4, for example, expresses the right to self-government as a corollary of self-determination). In all of the aforementioned statements and declarations, self-determination is intimately tied to land; to 200 years of inequality and mistreatment; to the imposition of one culture onto another at the expense of that culture; to misunderstanding, intolerance and misguided attempts to help. Nonetheless, self-government is of pre-eminent importance in achieving economic and social empowerment and autonomy.<sup>28</sup> It must also be accepted as a necessary step towards reconciliation.<sup>29</sup> Self-determination both requires and fosters the 'courage to own the truth, to heal the wounds of its past so that we [Indigenous and non-Indigenous Australians] can move on together at peace with ourselves.'<sup>30</sup>

Given the separation of Aboriginal groups, the varying times of contact with European settlers and the particular impact of contact for different groups, Indigenous Australians have historically engaged in ad-hoc, uncoordinated conversation with the ruling powers.<sup>31</sup> Since the abolition of ATSIC, this has largely remained unchanged. For effective engagement today it is necessary for Indigenous people to speak the language of government, and this translates to the need

for an organisation that is recognised as a political entity representative of the voices of all Indigenous Australians. At the same time, however, Indigenous ownership of such an organisation requires that the representative body reflect Indigenous cultural structures. Thus, 'the challenge is to develop distinctively indigenous institutions which nonetheless facilitate effective engagement'<sup>32</sup> with government.

### III The Consultation Process and Representation

Article 18 of the UNDRIP states that:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives *chosen by themselves* in accordance with their *own procedures*, as well as to maintain and develop *their own* indigenous decision-making institutions [emphasis added].

It is of fundamental importance that the Indigenous population of Australia determine the structure and form of their new representative body. Indeed, the freedom and power to shape representative structures is inherent in the phrase 'self-determination'. In the Australian context, this right is even more important given the break-down of trust between the Indigenous communities and the government.

As Tom Calma has noted, 'it is vital that this new body is owned and supported by our communities if it is to be effective.'<sup>33</sup> Not only does this allude to lack of trust in, and competence of, the government, but it underlines the importance of empowering Indigenous communities so that they may have confidence in their representative body. Popular support in turn gives legitimacy and authority to the representatives.

In order to determine the form that Indigenous peoples want the body to take, it is necessary to canvas the opinions of the Indigenous population. According to the Australian Human Rights Commission, the research and consultation phase has taken two years and involved 'an unprecedented level of consultation'.<sup>34</sup> Contributions were in the form of workshops, focus groups, written submissions and national surveys.

The consultation process nevertheless came under some criticism for its 'exclusive' procedures. As one media commentator noted, 'workshop participants were largely drawn from organisations such as land councils, homelands

associations, shire councils and other advocacy groups.'<sup>35</sup> The same article expressed concern that representatives of local communities such as the Dilak Provincial Authority representing the Yolngu communities, and prominent Aboriginal leaders such as Noel Pearson, were not approached. At this stage it is worth noting that the Adelaide conference, from which the founding principles of the new representative body have been drawn, comprised of just 100 Indigenous peoples selected by the Steering Committee, many of whom had come from peak bodies or other organisations. The proposed model will largely consist of representatives of these peak bodies. Michael Anderson has criticised this process for its lack of representativeness, claiming that the chosen model reflects the views of '100 dutiful Aborigines who were approved by Minister Macklin'<sup>36</sup> and questions whether it meets human rights standards (as discussed below).

It is, of course, impossible in any consultation process to engage face to face with every stakeholder. Community guides were published following the Adelaide conference, and copies were published in the two national Indigenous newspapers. One hundred one written submissions on the new body were received, and a national online survey was conducted.<sup>37</sup> However, one might question how these methods managed to adequately engage with the large percentage of the Indigenous population who are not sufficiently literate in English and who do not have access to the internet. Mr Marawili, a member of the Dilak leadership committee, may well have some ground for concern that Indigenous opinion may be represented by a person who is 'probably living in town and he is recognised because maybe he has got a good job, and he's probably speaking good English, probably he went through the university and all that sort of thing.'<sup>38</sup>

Whilst these issues do bring into question the satisfactory fulfilment of obligations under art 18 of UNDRIP, it must be noted that ATSIC enjoyed popular support in its early days, despite there being a less thorough consultation process prior to its establishment. The constitution of the new body is also intended to be 'flexible'<sup>39</sup> to respond to stakeholder criticisms. It will be possible to amend the constitution to meet stakeholder needs without the approval of Parliament.

### IV Structure

The steering committee report recommends the formation of a national executive, elected at a national congress

consisting of delegates from three national chambers, scrutinised by an ethics committee and supported by a full time secretariat.<sup>40</sup> The most striking differences between the new model and the ATSIC structure are the gender balance requirements, the merit-based election hybrid and greater independence from government. Whilst it is tempting to judge the proposed model by western democratic models, to do so would run contrary to UNDRIP art 18 and fail to acknowledge that Indigenous Australians have their own history of democratic and 'legal' structures in which they place their trust and confidence.<sup>41</sup>

### A National Executive

The national executive is incredibly small. There will be two full-time co-chairs and six part-time members.<sup>42</sup> As well as chairing the different chambers of representatives, the executive will be responsible for liaising with government and, presumably, must also take on the envisaged international roles.

The choice of co-chairs means that there will be no single figurehead for the body. On the one hand, difficulties may arise as to who the government ought to have as their first point of contact when dealing with Indigenous affairs. On the other, the two positions are symbolic of the gender equality that the representative body will embrace, and the notion that policy will be driven from the bottom up and based upon a broad consensus amongst Indigenous stakeholders.

Interestingly, there is no recommendation that the different executive members should take on specific responsibilities for certain policy areas such as employment, housing, or land rights. It is also unclear whether this is a conscious choice, an oversight, or a matter intended to be left to the executive officers themselves to decide. The size of the executive may count against such a system, since the six members would inevitably have to take on multiple responsibilities. The size surely reflects the committee's proposal that the body 'start small and be streamlined'<sup>43</sup>, but, as will be examined below, this approach may originate out of concerns for financial independence that may have led to the committee compromising on issues of accountability and transparency of decision-making at the executive level. Since transparency and accountability go towards issues of legitimacy, effectiveness and Indigenous support, the small executive may detract from the ultimate goal of self-determination.

There are two possible consequences of having an under-sized executive. The first is that extraordinary freedoms will be given to the less accountable administrative staff. The second is that there will be a repeat of a problem that undermined ATSIC: governments will look to other sources for advice and other Indigenous organisations will lose faith in the body's ability to adequately represent their views on the national stage.<sup>44</sup> This in turn leads to conflicting advice, which fails to advance Indigenous positions in society and gives ammunition to those in government who are sceptical of the advantages of a national representative body.

### B National Chambers

The report recommends the establishment of two permanent chambers. The first will comprise representatives from peak and national/state representative bodies. The second will comprise representatives from sectoral peak bodies and other experts.<sup>45</sup> In both cases, the roles of the chambers will be to:

- a) nominate up to 40 delegates on the National Congress (with a maximum of 2 representatives from any one organisation, and with a gender balance of delegates)
- b) to prepare advice to the National Congress annually; and
- c) to prepare advice on specific issues when requested by the National Executive or National Congress.<sup>46</sup>

While the majority of the issues concerning these chambers are dealt with under the headings of 'national congress' and 'regional representation', two points are worth noting here in regards to self-determination. The first is that organisations will have to meet certain requirements of representativeness and independence in order to sit in the first chamber. An associate member privilege is also suggested along the lines of the United Nations scheme for National Human Rights Institutions,<sup>47</sup> the principle of which is to incentivise organisations to become more representative and independent of government. Thus, there is the potential for self-determination not only to be encouraged in feeder organisations of the representative body, but also to create tensions in those feeder organisations between government funding and full involvement in the representative body.

The second point is that most of the Indigenous input in the national representative body will come from organisations' representatives rather than via universal suffrage (as was the process employed under ATSIC). This method has

been supported by O'Donoghue<sup>48</sup> and Coombs, the latter suggesting that a delegate model 'seems closer to traditional Aboriginal processes than those based upon the models of representative parliamentary institutions' and that, since 'it is to such organisations that Aborigines turn for advocacy of their claims', Indigenous peoples would be mistrusting of anybody that did not incorporate these organisations.<sup>49</sup> On the other hand, Palmer has argued that

the reasons for not following a community-based representational system was ... that it was impractical – most areas boasting a great many community organisations – so deciding which should send representatives would have been complex, vexatious and probably inequitable.<sup>50</sup>

The committee has attempted to address these concerns at the national congress but no thought has been given to the national chambers: there is no limit to the number of representatives who can attend the chambers and, given that the committee considers that the vast majority of attendees will be self-funded, the likelihood is that the larger, wealthier organisations will dominate over the smaller, but no less valuable, representative organisations. And, as the committee itself acknowledges, Torres Strait Islander interests would be under-represented in this model.<sup>51</sup>

Moreover, the decision not to have directly elected representatives raises the issue of how unelected representatives can fulfil the aims of self-determination.<sup>52</sup> Some previous demands for self-determination have called for elected representatives.<sup>53</sup> For example, many of the written submissions given during the consultation process stressed the need for elected representatives, as universal suffrage is the cornerstone of democracy: it ensures the accountability of representatives and adds legitimacy to the opinions of the national congress.<sup>54</sup> Articles 3, 18 and 43 of UNDRIP stress the need for Indigenous people to 'freely determine their political status' and participate in decision-making through 'representatives chosen by themselves' as 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.' It is, at the very least, questionable whether the current proposals meet these minimum requirements for self-determination.

The second chamber has even less democratic legitimacy when viewed from a European or white-Australian perspective. By their very definition, these are organisations that are not representative of Indigenous people as a whole,

and yet are treated as equal to the first chamber in terms of responsibilities and delegate numbers for the national conference. Whilst Coombs' thesis is that legitimacy can come via Aboriginal reliance upon these organisations for advocacy, Indigenous peoples should be careful to consider fully the differences between voluntary reliance and blind deference. Given the caution raised over the effectiveness of the consultation process, have the proposals in fact replicated to a large extent, Howard's body of 'distinguished indigenous people'?<sup>55</sup> Indigenous self-determination could have been advanced more effectively by turning the second chamber into a purely advisory body whose opinions would have been considered by the more representative delegates of the national conference and the executive.

### C The National Congress

The national congress will be an annual meeting of delegates from the two chambers, plus 40 individuals and the six members of the executive with responsibility for determining national policies and priorities.<sup>56</sup> In this respect, the new model seems to have learnt from the mistakes of ATSIC: the 2003 review, for example, noted that the lack of meetings between the regional bodies and the executive represented a 'systemic failure that may be contributing to the 'disconnect' between the regions and the national body.'<sup>57</sup> Of course, the extent to which the new model remedies that 'systemic failure' will depend upon the extent to which the congress is able to represent the different regions and interests of the Indigenous population.

As noted above, the composition of the national congress attempts to alleviate some of the practical difficulties of the delegate system. A maximum of two delegates from any one organisation can be elected to the national congress. Whilst this prevents a single organisation dominating in terms of its own delegates, nothing in the report prevents organisations from controlling the vote within chambers. The report also states that

[d]elegates in the National Congress will participate as individuals. They are there to contribute to a national collective perspective rather than to simply represent the organisation or state/territory that has nominated them or employs them in other capacities.<sup>58</sup>

Whilst this is easy enough to state in writing, it will surely be problematic in reality. Organisations will inevitably

only nominate candidates who they believe will favourably represent the views of the organisation. Moreover, if the delegate has been chosen as a representative of a representative body then surely it is exactly their responsibility to represent the views of that organisation, since those views should be representative of the Indigenous population? Perhaps this reveals the committee's own concerns about the representativeness of their model, and further suggests that it has been dictated by financial constraints.

The third feeder-group for the national congress is Aboriginal individuals not eligible for selection via one of the chambers. Here, selection will be merit-based and will ensure gender equality.<sup>59</sup> Delegates will be chosen by the small executive, which already has so many different responsibilities. The merit-based process is intended to be similar to that used for the Adelaide conference,<sup>60</sup> but one might question what special skills one needs to represent local views (this assessment is in addition to the ethics council requirements), and how 40 delegates are going to sufficiently represent an entire nation of diverse and widespread communities. It must also be kept in mind that the analysis of the consultation process revealed weaknesses in the representativeness of the Adelaide conference, and that this model will replicate the same faults in the national body. Moreover, since positions at the national congress will be unpaid,<sup>61</sup> Mr Marawili's university-educated, well-paid, town-based 'representative' may well become a reality.

Gender equality is a stand-out feature of the new model. The initiative has come from grass-roots suggestions and is often mentioned in the same breath as fundamental human rights.<sup>62</sup> It is an innovative solution to an issue that plagued ATSIC<sup>63</sup> and continues to trouble all western democratic institutions. As well as giving a voice to an often under-represented half of the Indigenous population, advisory committees to ATSIC also suggested that greater female representation would bring greater attention to 'issues related to families and women, including the needs of youth, the homeless and itinerants, substance misuse and family violence.'<sup>64</sup>

Whilst having to resort to positive discrimination is unfortunate, gender equality at all levels of the new body is itself an example of Indigenous self-determination and will improve the cause of Indigenous self-determination – in terms of representation at the national conference. It will also serve as a positive example of female involvement to all Aboriginal and Torres Strait Islander organisations. In a 1995

report, only five per cent of women interviewed believed that ATSIC was meeting the needs of Indigenous women.<sup>65</sup> Indigenous women bring a 'unique set of concerns'<sup>66</sup> to the political debate and will do much to tackle the dominance of men's concerns over issues such as the human right violations against women and children that occurred under previous regimes.<sup>67</sup> As the Native Women's Association of Canada have stated, 'to the extent that women's roles as leaders are undervalued, the collective good of the nation is also undermined'<sup>68</sup> and for this reason, the gender balance must be seen as a powerful mechanism for improving the representativeness of the congress.

#### D Ethics Council

The final group that will contribute to the new body is the Ethics Council. Lack of accountability and transparency, as well as rumours and realities of executive misconduct and corruption, slowly eroded faith in ATSIC, and with that, the legitimacy of the body to represent Indigenous Australians.<sup>69</sup> The establishment of a permanent ethics council to firstly screen proposed members of the national congress and executive, and later to monitor the behaviour of those elected representatives, will improve the integrity of the institution.

All congress members will be expected to abide by a modified version of the UK Nolan principles<sup>70</sup> and executive members must undergo governance training.<sup>71</sup> Members not meeting the standards set will face sanctions set by the ethics council and/or the national congress rather than dismissal by government ministers, as was provided for under s 40 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). The importance of these principles lies in the fact that they were identified as necessary by the Aboriginal community themselves and will be enforced by their own institutions, rather than being subject to external government scrutiny.

Since the first Ethics Council was appointed on 4<sup>th</sup> January 2010, some concerns have arisen as to its appropriateness.<sup>72</sup> Firstly, why should Aboriginal 'representatives' be subject to greater scrutiny than federal politicians and company directors? What justifies this intense probing of candidates' lives and histories, and what exactly is the council looking for? The answer to the former may be that the ethics committee is a 'poor-man's ballot box'. Without a general election the representatives face less public scrutiny, and so the ethics council must replicate that scrutiny (with, however, a much lower budget).

But who are these council members to decide how the Indigenous public would react to revelations of their 'representatives'? The appointment of the current council is far from the 'transparent, rigorous process for engaging with Indigenous peoples'<sup>73</sup> that the Issues Paper called for in 2008. That the first members were part of Calma's Steering Committee (and Calma himself) raises concerns about the council being 'hand-picked' and the impact that this might have for the choosing of representatives. Might (as the New Way Summit delegates recently claimed) the council be inclined to select more conservative-minded Indigenous persons (or, as one commentator has put it, a 'self-appointed policy elite unconstrained by the common sense of the Ab[o]rigines'<sup>74</sup>) who are less likely to rock the boat and perpetuate a perceived 'white government control of Aboriginal lives'<sup>75</sup> The Ethics Council is in fact extremely powerful, with its powers to vet new representatives and to terminate the tenure of undesirable representatives. The Council has the power to alter the make-up of the Congress in a manner that could potentially undermine the intentions of the membership at large and indirectly determine the policies of the Congress.

Further, as Hagan points out, who vets the Ethics Council?<sup>76</sup> As a private body corporate, the Congress' Ethics Council will not be subject to judicial review or the *Freedom of Information Act 1982* (Cth). This raises further questions about the accountability of the new congress, its democratic legitimacy, and its compliance with UNDRIP.

## **E Regional Representation**

One strength of ATSIC was its presence in the communities and its regional structures.<sup>77</sup> Through these ATSIC had the capacity to engage in grass roots discussions and to better involve local communities in determining their own priorities and policies. The system, however, was not perfect.<sup>78</sup> One of the biggest criticisms in the 2003 report was that ATSIC was not engaging sufficiently with its regional councils.<sup>79</sup> The steering committee clearly took these observations on board when it announced that:

We have not proposed that the new National Representative Body have state or regional level structures. Instead, we propose that it operate in a way that provides for structured and transparent engagement at the regional and jurisdictional level, with regular opportunities for large groups to engage in policy setting and to hold the body accountable.<sup>80</sup>

One would have thought that permanent representative regional councils were an excellent method of providing regular opportunities for local people to set policy and hold the body accountable. ATSIC's weakness lay not in the ineffectiveness of its regional councils, so the 2003 report suggests, but in the 'disconnect' between the regions and the national structures. Without a formal and permanent regional forum it seems probable that such a disconnect will be perpetuated under the new model (or that the national body will be able to be unfairly selective when it comes to deciding who and when to consult). Once again, this seems to be an example of the financial streamlining mentality undermining Indigenous self-determination.

Indigenous people remain without any permanent regional or state-based representative structure to engage with state governments. However, there are, as was recognised at the Adelaide conference, because '[a] number of Aboriginal and Torres Strait Islander advisory bodies already exist at the state/ territory level'.<sup>81</sup> Nevertheless, these bodies are not agents of the national body and often have sectoral agendas that will prevent them from being objective when it comes to prioritising issues. There are multiple advisory bodies at this level in some states, which could lead to multiple conflicting agendas.

As Peter Yu has argued, '[r]egional empowerment is ... the key ingredient to a reconciled Australia.'<sup>82</sup> Many other leading academics and Indigenous experts have also stressed the importance of making decisions at local levels, and warned of the dangers of a one-size-fits-all approach.<sup>83</sup> Yet the proposed new model fails to adequately provide a platform for Indigenous engagement with local government and, as such, it weakens the body's ability to achieve the 'fullest rights of self-determination'<sup>84</sup> for Indigenous peoples.

## **V Independence**

Unlike ATSIC, the new representative body will be a private company limited by guarantee.<sup>85</sup> The advantages of this model over a statutory form were identified by the steering committee as: (i) being able to amend the company's constitution rather than waiting on government; (ii) protection from being abolished by government; (iii) being able to attract corporate support more easily; and (iv) an ability to begin immediately rather than waiting on legislation to be passed.<sup>86</sup> The first advantage is another facet of the concept of complete Indigenous ownership of

the representative body as it is the Indigenous population that controls how their own organisation is run as well as enjoying the exclusive use of it.

The second advantage is the most fundamental, given the recent demise of ATSIC. Often at odds with the government and prepared to speak out about it, ATSIC proved an effective tool for challenging ineffective government policies. Larissa Behrendt has highlighted that '[i]t was this capacity to embarrass and challenge government that some have said have led to its being [in] the governments [sic] sights for dismantling.'<sup>87</sup> Supporters of this view can point to the fact that the 2003 report on ATSIC recommended reform, and not abolishment, of the representative body. Whilst UNDRIP arts 18, 20 and 38 would make such action more difficult in the future, institutional independence provides stronger guarantees.

The importance of independence from government is that it 'will enable the body to fulfil its advocacy function in a bold and robust manner',<sup>88</sup> unafraid of the negative consequences of challenging the government. As identified in the report, however, there is a tension between independence and the importance of having the government's ear.<sup>89</sup> The more independent the body is the more it becomes a pressure group rather than an advisory body. However, this particular tension would not be of great concern to a truly representative body able to exercise the views of Indigenous peoples on the national and international stage with the authority and legitimacy that such a body would command, especially given the state's moral and political obligations under UNDRIP to 'cooperate in good faith with the indigenous peoples concerned through their own representative institutions'.<sup>90</sup> It is, therefore, the body's (questionable) representative legitimacy that is of paramount importance in addressing this tension.

## VI Financing the New Body

The steering committee proposals also call for financial independence from government within five to 10 years. This will be achieved by a combination of corporate sponsorship and accumulation of a capital base.<sup>91</sup> Financial independence is important in freeing the body from government influence. The report calls for \$200 million for the capital fund and anticipates a recurrent expenditure of \$50 million for the first six years of its operations. Macklin MP has declared that 'the government is prepared to provide modest and appropriate recurrent funding for the national representative body once

it is established, as well as providing support in its critical establishment phase',<sup>92</sup> which is in line with government obligations under UNDRIP.

The contentious issue here is the focus on the streamlining and 'efficiency' measures adopted by the steering committee. Whatever the other justifications, the small executive, lack of regional bodies, non-payment of delegates and the decision not to hold national elections all represent cost-saving options. In each case it is questionable whether 'streamlining' has meant sacrificing more robust representative and effective advocacy models in the quest for speedy financial independence. Here the familiar adage, 'if a job's worth doing, it's worth doing well' comes to mind. This article has sought to establish that representative legitimacy is not only relevant to complying with UNDRIP, but also to determining the political influence of the congress. It is dangerous to cut corners on such a fundamental component.

## VII Functions

The role envisaged for the new representative body is largely identical to ATSIC's responsibilities,<sup>93</sup> with the exception that there will be no service delivery arm. The dual roles of advocacy and service delivery were often identified as a weakness of the ATSIC structure: firstly because too many resources were focused on service delivery and not enough upon advocacy, and secondly, because Indigenous people associated ATSIC with the delivery of all services and so deflected the blame away from government.<sup>94</sup> Peter Sutton has also suggested that Indigenous service delivery may be more about identity than need and that this does not constitute part of self-determination.<sup>95</sup>

Government includes the provision of services as well as the determination of policy, and self-determination encompasses self-government as well as the right to control economic, social and cultural development (UNDRIP art 3). Therefore, the flip-side to ATSIC's service delivery function was that it was capable of providing a fuller form of self-determination than the new body will be able to deliver (although not fully across the board as ATSIC had no powers to deal with education). The significant budget and service portfolio also gave ATSIC 'leverage and a greater potential to influence policy-making ... than previous and subsequent national Indigenous bodies'.<sup>96</sup> The new Congress will have to wield similar clout without holding such services or resources. The newly endorsed UNDRIP will no doubt help as the National



Congress can use it to hold government to account (in a political rather than legal sense), but equally, formal channels of negotiation with ministers and the support of peak bodies who might otherwise petition the government directly will add to the new body's strength.

Moreover, nothing changes the fact that 'Indigenous organisations deliver more effective services than those available in the mainstream.'<sup>97</sup> The new body's ability to make government realise this will be key to its success in achieving self-determination for Indigenous peoples. However, as Barker asserts, 'only the law or political necessity can force governments to take action and even there it can be difficult',<sup>98</sup> especially where the interests concerned are those of a minority group who have little influence on MPs at the ballot box. Despite the 2008 issue paper proclaiming that the congress is 'about our place at the table in *making* the decisions that impact on our communities'<sup>99</sup> [emphasis added] there will be no formal power to make legally binding directions, rather a more 'watered down' process of systematic contact and the art of persuasion.<sup>100</sup> Once again, it comes down to the democratic legitimacy of the representative body to enable it to use the rule of law, UNDRIP and the popular press to persuade government to adopt its recommendations.

## VIII Conclusion

Self-determination is a fundamental right of all peoples and Indigenous peoples are recognised as deserving of this right even though they are ultimately subjects of a state and legal system. Self-determination is about respect and about preserving cultural identity from the assimilating effects of mainstream government. It encompasses not only the opportunity to be consulted in decision-making processes, but also the opportunity to make decisions about service provision.

The Congress, with its lack of service delivery, weak democratic credentials and absence of law-making powers, will not satisfy self-determination demands in itself. It does, however, have the potential to achieve self-determination through legal and political interfaces with governments and international organisations. The extent to which it is able to achieve this will depend on how representative the new body will be.

There are question marks over the representativeness of those people consulted by the steering committee, and of the

organisations which will form the national congress; over the potential compromises made in order to achieve financial independence as quickly as possible; and over the influence the new body will have on national and regional governments. Nevertheless, one of the most important lessons learnt from the ATSIC era was that a united voice is a powerful tool in the interface with western governance institutions, and that faith and trust in the integrity and dedication of 'representatives' can be as important, if not more important, than accurate representation in a demographic sense. The new body will be founded on strong ethical principles and, provided the right organisations have access to the congress, its delegates will come from organisations that are trusted by the Indigenous population to act in their best interests. Much rests on the ability of the new body to foster 'mutual respect and partnership'<sup>101</sup> between Indigenous people and the Australian federal and state governments. However, as Tom Calma has said, this is just 'the first step'.<sup>102</sup>

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COURT AND TRIBUNAL DECISIONS

