



## Dedicated Indigenous representation in the Australian Parliament

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### Executive summary

There are comparatively high levels of Indigenous representation in Australian state and territory parliaments, but none in the current federal parliament. The proposed National Indigenous Representative Body is unlikely to change this situation. A possible response is to consider dedicated Indigenous representation in Parliament. This has been a feature of the New Zealand parliament for close to 150 years, but in Australia it has remained a matter for discussion. This paper:

- describes current levels of Indigenous parliamentary representation in Australia
- compares levels of parliamentary representation for Indigenous people in Australia with those of Maori representation in New Zealand
- details arrangements that have increased levels of Maori representation in New Zealand, including dedicated seats
- canvasses arguments for and against dedicated seats
- identifies obstacles to the creation of dedicated seats in Australia, and
- considers future possibilities for Indigenous parliamentary representation in Australia.

Proposals for dedicated seats in Australia are subject to both compelling arguments and considerable obstacles. The experience in New Zealand shows that dedicated seats do more than equalise the ‘amount’ of parliamentary representation. Rather, they are a concrete expression of a formal relationship between Indigenous and non-Indigenous constituencies. In Australia, where such a relationship is yet to be defined, dedicated seats could play a key role in the development of such a relationship.

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## Introduction

There is a significant imbalance in the parliamentary representation of Indigenous and non-Indigenous people in Australia. In Australia persons who identify as Indigenous now make up 2.5% of Australia's total population.<sup>1</sup> If federal parliamentary representation were to reflect this, there would be in the order of three Indigenous members in the House of Representatives and one senator.<sup>2</sup> However, there have been no Indigenous representatives in the federal parliament since the end of Australian Democrat Senator Aden Ridgeway's term in 2005,<sup>3</sup> and the only other Indigenous federal representative to date has been Liberal Senator Neville Bonner, who left Parliament in 1983.<sup>4</sup>

This absence is highlighted by relatively high numbers of Indigenous members in contemporary state and territory parliaments. Until the 2008 Northern Territory election, the national count of Indigenous elected representations in parliament was at a high-point of 10 seats in total: six in the Northern Territory, two in Western Australia, one in Tasmania, and one in New South Wales. However, with four seats now held by Indigenous members in the Territory, the total has fallen to eight. There are two jurisdictions—New South Wales and the Northern Territory—where Indigenous members are ministers of government (see Appendix).

There is, then, a disparity between levels of Indigenous representation in different spheres of government. There is also an absence of either a treaty, or a formal body, that defines the relationship between Indigenous and non-Indigenous Australians. However, there are signs that change is possible. The present federal government has undertaken to establish a *National Indigenous Representative Body*,<sup>5</sup> and delegates to the *Australia 2020 Summit*

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1. Australian Bureau of Statistics 2008, *Experimental Estimates of Aboriginal and Torres Strait Islander Australians*, June 2006, 3238.0.55.001, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001> accessed on 1 February 2009.
  2. Alexander Reilly, 'Dedicated Seats in the Federal Parliament for Indigenous Australians: the theoretical case and its practical possibility', *Balay: Culture, Law and Colonialism*, vol. 2, no. 1, 2001, pp. 85–86.
  3. Senator Aden Ridgeway, entry in *Parliamentary Library Biography Database*, 2005, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2Fallmps%2F8G6%22>
  4. See John Chesterman, "'Chosen by the people'? How federal parliamentary seats might be reserved for Indigenous Australians without changing the constitution', *Federal Law Review*, vol. 34, no. 2, 2006, pp. 261–262.
  5. See Department of Families Housing Community Services and Indigenous Affairs *Consultations for the proposed National Indigenous Representative Body*, Commonwealth of Australia, 2008, <http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/rebody.htm> accessed on 1 February 2009, and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a sustainable National Indigenous Representative Body — Issues for consideration*, Human Rights and Equal Opportunity Commission, 2008

demonstrated continuing sentiment in favour of a treaty between Indigenous people and the Australian government.<sup>6</sup> These are all measures intended to articulate the relationship between Indigenous and non-Indigenous Australians more adequately. Dedicated Indigenous representation in federal parliament is a further means by which the relationship may be improved, either on its own or, more likely, in combination with these other measures. For the sake of brevity, these are referred to here as ‘dedicated seats’, whether they are envisaged for the lower or the upper chamber of Parliament.

Discussion of Indigenous representation in general—and dedicated seats in particular—last reached a high-water mark in Australia in and around 1997: the year of the Reconciliation Convention.<sup>7</sup> Since then there has been a continuous thread of discussion on the possibility of dedicated seats in Australia.<sup>8</sup> More recently, dedicated seats emerged as a subject for discussion at the *2020 Summit*.<sup>9</sup> At the same time, the effects of changes in New Zealand have continued to unfold, and Indigenous representation in Australian state and territory parliaments has increased. These factors, together with renewed discussion of an Australian republic, and expectations of policy change on Indigenous affairs, prompt further consideration.<sup>10</sup>

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- [http://www.hreoc.gov.au/Social\\_Justice/rebody/rebody\\_paper2008.pdf](http://www.hreoc.gov.au/Social_Justice/rebody/rebody_paper2008.pdf) accessed on 1 February 2009.
6. Australia 2020 Summit 2008, *Final Report*, p. 226, [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_full.pdf](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf) accessed on 1 February 2009.
  7. The Parliamentary Library’s last publication on this subject also dates from this time. See Georgina McGill, ‘Reserved seats in Parliament for Indigenous peoples — the Maori example’, *Research Note*, no. 51, 1997, Parliamentary Library, <http://www.aph.gov.au/library/pubs/rn/1996-97/97rn51.htm> accessed on 16 May 2008.
  8. See Catherine Iorns Magallanes, ‘Indigenous political representation: identified parliamentary seats as a form of Indigenous self-determination’, in B.A. Hocking (ed.), *Unfinished Constitutional Business?*, Aboriginal Studies Press, Canberra, 2005, pp. 106–17; Reilly, op. cit. and ‘A constitutional framework for Indigenous governance’, *Sydney Law Review*, vol. 28, no. 3, 2006, pp. 403–35, and Chesterman, op. cit. For recent coverage from Indigenous points of view, see ‘Eight is enough?’, *National Indigenous Times*, September 18, 2008, pp.15–18.
  9. Australia 2020 Summit, op. cit., p. 340.
  10. ABC News 2007, ‘Rudd pledges referendum on republic’, 25 July 2007, <http://www.abc.net.au/news/stories/2007/07/25/1988149.htm>, accessed on 30 June 2008.; AAP 2008, ‘Calma welcomes Rudd’s indigenous reform’, *The Age*, 20 February 2008, <http://news.theage.com.au/national/calma-welcomes-rudds-indigenous-reform-20080220-1ta3.html> accessed on 30 June 2008.

## Approaches

Experiences in other countries suggest that mainstream parliamentary systems rarely display a strong record on incorporating Indigenous peoples into their process. To address this, four main approaches have been developed:

- designated seats for Indigenous peoples, such as those adopted by New Zealand for Maori and the US State of Maine for First Nations peoples<sup>11</sup>
- separate Indigenous parliaments, such as those adopted by Finland, Norway and Sweden for Sami peoples<sup>12</sup>
- electoral reform making parliament more accessible to minorities, such as that adopted by New Zealand<sup>13</sup> and
- an approach incorporating education to the wider public about Indigenous issues and positive discrimination in relation to the preselection of Indigenous candidates, such as those proposed by successive reports in Australia.<sup>14</sup>

There have been various critiques of these approaches. Some Australian Indigenous speakers have argued that both separate assemblies and dedicated Indigenous seats are likely to be unduly subordinate to the mainstream political process.<sup>15</sup> This is borne out in practice: such separate parliaments that do exist, such as the Sami parliaments, have circumscribed powers limited, substantially, to an advisory role. Observers suggest that such bodies are likely ‘to be

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11. Chesterman, *op. cit.*, p. 267.

12. Jennifer Schmidt, *Aboriginal representation in government: a comparative examination*, Law Reform Commission of Canada, December 2003, pp. 13–15.

13. Andrew Geddis, ‘A dual track democracy?: the symbolic role of Maori seats in New Zealand’s electoral system’, *Election Law Journal*, vol. 5, 2006, pp. 347–71.

14. See Legislative Council Standing Committee on Social Issues, *Enhancing Aboriginal political representation: inquiry into dedicated seats in the New South Wales Parliament*, Parliament of New South Wales, 1998; Legal, Constitutional and Administrative Review Committee, *Hands on Parliament: a parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples’ participation in Queensland’s democratic processes*, Queensland Legislative Assembly, 2003; and Legal, Constitutional and Administrative Review Committee, *Hands on Parliament: interim evaluation of the implementation of recommendations made following a parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples’ participation in Queensland’s democratic processes*, Queensland Parliament, 2007.

15. See John Ah Kit, *Reconciliation and constitutional issues: participation in government—sovereignty or subjugation?*, Australian Reconciliation Convention, May 1997, <http://portsea.austlii.edu.au/au/other/IndigLRes/car/1997/4/ahkit.html> accessed on 1 February 2009.

ignored'.<sup>16</sup> These limitations on power are also a feature of the way in which dedicated Indigenous seats have been created in the Maine legislature.<sup>17</sup> Indigenous critics of dedicated seats in Australia argue that there could never be a sufficient number of Indigenous seats to shield them from the influence of the major parties.<sup>18</sup> In either case, there appears to be a tension between parliamentary representation created by virtue of ethnic status and that which occurs through the mainstream political process. It is difficult to give these two forms of parliamentary representation equal status without significant departures from the principle of 'one vote, one value'.<sup>19</sup>

In New Zealand, dedicated seats and, more recently, electoral reform, appear to have avoided such departures. Together, they have proved effective in increasing Indigenous representation in parliament. In Australia, the approach which is generally proposed is an assisted gradual increase in Indigenous participation in the political process. Such an approach may be a practical one in view of forbidding constitutional constraints,<sup>20</sup> but to date has not led to sustained change. This leaves us with the question of whether we should be optimistic about Indigenous representation in the states and territories or concerned about its absence in the federal parliament. If 'concerned' is the answer, questions remain as to whether Australia should adopt a deliberate course of action and adopt dedicated seats within a framework of electoral reform, or continue to rely on a gradualist approach.

## **New Zealand**

Like Australia, New Zealand has a substantial population of Indigenous people. Unlike Australia, New Zealand has had dedicated parliamentary seats for Indigenous representatives since the 1860s. New Zealand achieved parity between the proportion of Maori in its population and the proportion of Maori representatives in parliament following the 2002 national elections.<sup>21</sup>

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16. Schmidt, op. cit., p. 16.

17. Iorns Magallanes, op. cit., pp.112–113.

18. Ah Kit, op. cit.

19. Iorns Magallanes, op. cit., pp.112–113.

20. This approach is common to Enhancing Aboriginal political representation, and Hands on Parliament. See n.14.

21. New Zealand Parliamentary Library, 'Final Results 2002 General Election and Trends in Election Outcomes 1990–2002', *Background Note*, 2002/06, 20 August 2006 <http://www.parliament.nz/NR/rdonlyres/66A07AE7-54D4-433A-85E7-05B744D63780/350/026FinalElectionResults1.pdf> accessed on 27 May 2008; See also Chesterman, op. cit., pp. 268, 349–350.

Dedicated seats for Maori were introduced by the Maori Representation Act of 1867.<sup>22</sup> The creation of Maori seats occurred at the same time as a broadening of suffrage among Maori. At a time when Maori greatly outnumbered non-Maori, dedicated seats allowed the political power of Maori to be constrained, limiting their vote to the Maori electoral roll and the four Maori seats alone.<sup>23</sup>

This ambiguous *status quo* persisted until the 1986 Royal Commission on the Electoral System, after which there was a transition to Multiple Member Proportional voting (MMP) in national elections. The first vote under MMP occurred in 1996, and since then it has played a significant part in increasing Maori parliamentary representation.<sup>24</sup> In addition, New Zealand has introduced measures such as education and affirmative selection by political parties.<sup>25</sup> As a result of these changes, the present system of parliamentary representation in New Zealand consists of a combination of measures, which comprise:

- dedicated seats for Maori, with the number of seats, calculated as a proportion of the Maori population—currently eight seats
- Multiple Member Proportional voting (MMP) for a proportion of seats in parliament. For the 2005 election there were 52 ‘party list’ (proportional) seats and 69 ‘electorate’ (first-past-the-post) seats and
- voters nominating to be on either Maori or ‘General’ electoral rolls.<sup>26</sup>

Under MMP, Parliament in New Zealand is made up of a combination of ‘electorate seats’ (which include dedicated Maori seats) and an approximately equal number of ‘list’ (proportional representation) seats. In list seats, political parties establish a ranking of candidates, and acquire a number of seats as a ratio of the proportion of the total vote attracted by the party.

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22. M.P.K. Sorrenson, ‘A History of Maori Representation in Parliament’, in *Towards a better democracy: report of the New Zealand Royal Commission on the Electoral System*, Parliament of New Zealand, 1986, B-5.

23. Iorns Magallanes, op. cit., p. 110.

24. Chesterman, op. cit., p. 268; Iorns Magallanes, op. cit., p. 112.

25. These were amongst the recommendations of the Legislative Council Standing Committee on Social Issues 1998 (NSW), op. cit., and Legal, Constitutional and Administrative Review Committee, (Qld) op. cit.

26. New Zealand Parliamentary Library, ‘A list of Ma-ori / General and South / North Island electorates’, *Electorate profiles*, 15 March 2008, [http://www.parliament.nz/en-NZ/PubRes/Research/Electorates/7/3/6/00PlibEP\\_List-A-list-of-M-ori-General-and-South-North-Island-electorates.htm# 8](http://www.parliament.nz/en-NZ/PubRes/Research/Electorates/7/3/6/00PlibEP_List-A-list-of-M-ori-General-and-South-North-Island-electorates.htm# 8) accessed on 1 February 2009.

This system has some significant effects in raising the electability of Maori candidates, because ‘identified Maori electors can vote not just for a Maori representative in their Maori electorate but ... also ... for a party that has other Maori candidates on its list’.<sup>27</sup> Nevertheless, all electors cast two votes (an electorate vote and a party vote), and electors’ votes have the same weight, whether they are enrolled on the Maori or general electoral roll.<sup>28</sup>

Because Maori and non-Maori votes are equal in this sense, there is less of a need to apply a test for voters’ Indigenous status, since there is no electoral advantage to be gained by enrolling on either roll. There are, however, safeguards against electors swapping between rolls for the purpose of producing a particular short-term outcome. Electors can only change their enrolment during nominated periods, and this discourages such behaviour, since voters stay on their nominated roll for some time afterwards.<sup>29</sup> As a result, the state neither determines nor checks the Indigenous status of electors. If that were necessary, it could cause considerable anxiety, as it has in Australia when other approaches have been contemplated.<sup>30</sup>

The New Zealand system has considerably increased the number of Indigenous candidates elected to parliament. There has been a marked rise in numbers of Maori parliamentarians since the transition from First Past the Post (FPP) to MMP in 1996. In 1993, in a parliament of 99 seats, there were seven Maori MPs (7.1% of MPs) and Maori made up 13.0% of the New Zealand population.<sup>31</sup> In 2002, for the first time, Maori representation in parliament reached the point where it was consistent with the proportion of Maori in the New Zealand population.<sup>32</sup> This was notable because Maori had only been permitted to stand for general electorate seats from 1967.<sup>33</sup> In 2005, in a parliament of 121 seats, there were 21 Maori MPs (17.3% of MPs) and Maori were 14.7% of the overall population.<sup>34</sup> Hence, levels of Maori representation in parliament more than doubled at the first MMP election (1996) and have increased at a slower rate since.<sup>35</sup>

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27. Chesterman, *op. cit.*, p. 268.

28. *ibid.*

29. Geddis, *op. cit.*, p. 354.

30. See John Gardiner-Garden, ‘Defining Aboriginality in Australia’, *Current Issues Brief*, no. 10, 2002–2003, Parliamentary Library, <http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib10.htm> accessed on 16 October 2008.

31. Elections New Zealand, *Maori, Pacific and Asian MPs 1990–2005*, <http://www.elections.org.nz/maori/ntkm-democracy/ethnicity-mps.html> accessed on 6 June 2008.

32. New Zealand Parliamentary Library, 2002, ‘Final Results 2002 General Election’ *op. cit.*, p. 1.

33. New Zealand Parliamentary Library, 2002 #59, p. 4.

34. Elections New Zealand, *op. cit.*

35. *ibid.*



There has been a diversity of views on the continuance of dedicated seats for Maori, particularly in the face of the subsequent effectiveness of MMP in increasing Maori representation in parliament.<sup>36</sup> Some non-Maori commentators consider that this has been too successful. They suggest that a higher rate of Maori representation in parliament than in the general population warrants the abolition of the Maori seats.<sup>37</sup> Prior to the recent election, Conservative non-Maori candidates discussed plans to terminate the seats, but the emergence, after the election, of the Maori Party as a key member of the new ruling coalition is thought to have altered these plans.<sup>38</sup> The *Election Policy* of the Maori Party for the 2008 elections continued to support dedicated seats, and indeed to extend opportunities for Maori representation by reviewing arrangements for general seats which, it argues, are discriminatory.<sup>39</sup>

While a sense of ‘better the devil you know’ has played a role in Maori sentiment in favour of the retention of the seats since the 1986 Royal Commission, there has been another reason in favour of their retention.<sup>40</sup> Maori seats have acquired, for Maori, a particular significance in relation to the Treaty of Waitangi.<sup>41</sup> They have come to be seen as a means of recognition, and continued faith with the terms of, the Treaty. That is, they are seen as a formal expression and guarantee of the continuing viability of the Treaty and the relationship it describes between Maori and pakeha.<sup>42</sup> Dedicated seats symbolize ‘a recognition of the position of the Maori people as a “Treaty partner” in the enterprise of national government’, and have thus become a ‘treaty icon’.<sup>43</sup> It is this distinction between the *level* and *nature* of Indigenous representation in parliament that has significant implications for the debate on dedicated Indigenous seats in Australia.

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36. Geddis, op. cit., p. 351.

37. Muriel Newman, ‘The future of Maori seats’, *NZCPR Weekly*, no. 23, June 2008, pp. 1–2.

38. Audrey Young, ‘Key u-turn on Maori seats denied’, *The New Zealand Herald*, 7 October 2000 [http://blogs.nzherald.co.nz/blog/audrey-young/2008/10/28/finally-breakthrough-maori-seats-issue/?c\\_id=1501219](http://blogs.nzherald.co.nz/blog/audrey-young/2008/10/28/finally-breakthrough-maori-seats-issue/?c_id=1501219) accessed on 1 February 2009; Audrey Young, ‘Finally, a breakthrough on the Maori seats issue’, *The New Zealand Herald*, 28 October 2008, [http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10536190](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10536190) accessed on 1 February 2009.

39. Maori Party, *Election Policy*, 2008, <http://www.maoriparty.org/index.php?pag=cms&id=130&p=election-policy.html> accessed on 21 November 2008.

40. Geddis, op. cit., pp. 358–359.

41. *ibid.*

42. Iorns Magallanes, op. cit., p. 112; Geddis, op. cit. pp. 358–359.

43. Geddis, op. cit., p. 359.

## Australia

Australia's present imbalance in Indigenous parliamentary representation—higher in the states and territories, absent in federal parliament—is a relatively new state of affairs. In the past there was, for the most part, simply an absence of Indigenous representation across the board. However, particularly over the last decade, there have been a series of reports and discussions that have envisaged higher levels of Indigenous engagement and representation within the mainstream parliamentary process.<sup>44</sup> These exchanges, among them the *Australia 2020 Summit*, have included a persistent thread on dedicated seats, showing that the idea has retained currency in political debate.

This decade-long round of dialogue begins with influential documents such as the 1998 report of the New South Wales Legislative Council Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation*. This report has been a significant point of reference for, and is representative of, many of the positions presented in subsequent debate. In general, it avoids proposing dedicated seats. It sees parliamentary representation for Indigenous people as increasing through an evolutionary process, rather than deliberate, structural change, with the exception that it recommends the creation of a separate Aboriginal Assembly.<sup>45</sup> Otherwise, it proposes: further consultation with Aboriginal people; a public education campaign on dedicated seats and the electoral system; the development of action plans by political parties to increase participation by Aboriginal people; and support for and expansion of mentoring programs for Aboriginal people involved in local government.<sup>46</sup>

This approach implies that Australia is 'not ready' for dedicated seats, but could become so given a change of public awareness and sentiment. Consistent with this, when the *Enhancing Aboriginal Political Representation* report describes points for and against dedicated seats, the arguments are equivocal. Arguments in favour are that dedicated seats would:

- be a symbolic 'acknowledgement of Aboriginal people as the original owners of Australia'
- express the 'distinct rights' of Indigenous people
- 'provide a voice for Aboriginal people in Parliament'

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44. As noted, these include *Hands on Parliament*, op. cit.; documents from the 1997 Reconciliation Convention such as Ah Kit, op. cit.; and the *Australia 2020 Summit*, 2008, Chapter 7: *Options for the future of indigenous Australia*, Commonwealth of Australia, [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_7\\_indigenous.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_7_indigenous.doc) accessed on 13 May 2008.

45. Reilly, *Dedicated Seats*, op. cit., pp. 102–103.

46. New South Wales Legislative Council Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation*, op.cit., pp. 104–109.

- allow an ‘Aboriginal contribution to decision-making processes’
- be instrumental in overcoming ‘existing barriers to representation in Parliament’
- lead to better ‘community awareness of Aboriginal culture’ and
- ‘provide Aboriginal communities with leadership and role models which could encourage Aboriginal people to become more politically involved’.<sup>47</sup>

Arguments against are that dedicated seats would:

- ‘be seen as undemocratic’
- lead ‘other minority groups to demand dedicated seats’
- deliver ‘limited power to the Aboriginal community’
- expose Aboriginal Members to pressure from both the Aboriginal constituency and major political parties
- be ‘tokenistic and patronising to Aboriginal people’
- ‘marginalise Aboriginal issues and political representation’, and that they could
- produce ‘backlash and division in the Community’.<sup>48</sup>

Many of these points, for and against, are echoed in subsequent discussion, suggesting that the basic terms of this debate have remained stable over the past decade. The case in favour of special rights to representation for Indigenous people, consistent with the report’s argument on ‘distinct rights’, has been argued on grounds that:

- Indigenous people are ‘the first inhabitants of Australia’ and thus have special rights and
- there is precedent for this approach in three other jurisdictions—New Zealand, the US State of Maine, and Norway.
- ‘Systemic disadvantages’ suffered by Indigenous people due to colonisation have also been considered a basis for special status. At the Reconciliation Convention of 1997 the

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47. Legislative Council Standing Committee on Social Issues, 1998, pp. 43, 44, 45, 46–47, 47–48, 48–49.

48. *ibid.*, pp. 49, 49–50, 50–51, 51–52, 52–53, 53–54.

combination of the two grounds—Indigenous people as prior inhabitants and as experiencing unique disadvantage—was proposed as a sufficient basis on which to establish a unique right of representation.<sup>49</sup>

Other ‘positive’ arguments from the *Enhancing Aboriginal Political Representation* report have also been echoed elsewhere: in particular, that dedicated seats would provide a point of access for the views of the Indigenous community, and allow the legislature to reflect, more closely, the composition of society.<sup>50</sup> From an electoral perspective, some have argued that dedicated seats would be a good response to obstacles to Indigenous access to ‘normal’ parliamentary seats, given Australia’s small and widely-distributed Indigenous population.<sup>51</sup> Other arguments support the ‘developmental role’ attributed to dedicated seats by the positive arguments of *Enhancing Aboriginal Political Representation*. According to this view, dedicated seats are seen as a means of raising the profile of Indigenous issues in parliament, and to avail Indigenous representatives of the unique opportunities and resources afforded to members of parliament.<sup>52</sup>

Some arguments go beyond this, suggesting that there is something distinctive in the kind of representation created by dedicated seats: that it is ‘one thing for an Indigenous person to be elected to Parliament ... [and] another for that Indigenous person to be elected as a representative of Indigenous people’.<sup>53</sup> In this view, acceptable forms of Indigenous representation in parliament hinge not only on *numbers* of Indigenous members in parliament, but on whether they are, in formal terms, the representatives of Indigenous people. Such an approach evokes tensions between liberal-democratic views which hold that democracy is primarily ‘about representation of individuals and not groups’, and collectivist models of ‘identity representation’.<sup>54</sup> Views in support of this second approach argue that there are issues which affect the Indigenous community quite differently than they do the broader electorate. As a result, Indigenous points of view can only be heard in any genuine sense where the system allows for direct input by Indigenous people on matters that affect them.<sup>55</sup> This is the most powerful line of argument in favour of dedicated seats, borne out in New Zealand by the reluctance of Maori to relinquish dedicated seats. According to this view, dedicated seats continue to be signifiers of a formal relationship with the Crown, even

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49. Reilly, *Dedicated Seats*, op. cit., pp. 91, 101.

50. Chesterman, op. cit., p. 265.

51. Reilly, *Dedicated Seats*, op. cit., p. 95.

52. *ibid.*

53. Chesterman, op. cit., p. 265.

54. See Johanna Sutherland and Russell Wynne, ‘Reserved Seats for Indigenous Australians?’, *Indigenous Law Bulletin*, no. 47, 1997 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/ILB/1998/5.html> accessed on 16 February 2009.; Phillips quoted in Reilly, *Dedicated Seats*, op. cit., p. 88.

55. Chesterman, op. cit., p. 265.

though electoral reform has done more to increase the number of *seats* held by Maori representatives.

A further area of exploration considers the Australian Senate, specifically, as a place in which dedicated ‘seats’ might be created. Brennan argues that the Senate is uniquely suited to this approach in that it already employs a form of proportional representation, and was originally designed to represent collective entities: Australia’s states and territories.<sup>56</sup> However, the Senate in practice no longer performs this function, and a better approach, now, may be to make the Senate a chamber that could ‘guarantee minorities representation’, including the Indigenous minority.<sup>57</sup> A similar approach has been proposed for Canada, arguably a comparable country, both in terms of its relationships with its Indigenous people, and its political system.<sup>58</sup> Three aspects of this approach can be considered problematic, however. First, under this approach, claims made on behalf of Indigenous people are likely to lose focus when couched in terms of ‘minorities’. The exact relationship between ‘first peoples’ and other minorities would need to be articulated. A second difficulty is that such a change to Australian constitutional arrangements would require the will of the electoral majority to cede elements of representation to electoral minorities. Achieving this could be a formidable, and perhaps forbidding, task. A third obstacle lies in the section 24 ‘nexus’ provision of the Australian Constitution, which maintains proportionality between the size of the Senate and the House of Representatives, which is considered further below.

From a more general perspective, the main *objections* to dedicated seats fall into two camps. One centres on perceived threats to the unity of the liberal state. From the standpoint of pure liberal democratic doctrine, dedicated seats are ‘special arrangements’, objectionable because they challenge the indivisibility of the liberal state, which is viewed as a collectivity of individuals, not of groups. Dedicated seats represent Indigenous people as a collective, rather than as individual voters.<sup>59</sup> In this view, special forms of representation for Indigenous peoples, and subsequent claims by other minorities with similar aspirations, will lead to the ‘balkanisation’ of Parliament which, under these conditions, would become ‘a collection of vested interests’.<sup>60</sup> In some quarters, it also raises concerns that there will be ‘states within states’ and a threat to the principle of equality before the law.<sup>61</sup>

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56. Frank Brennan, *One Land, One Nation: Mabo—towards 2001*, University of Queensland Press, St Lucia, 1995, p. 200.

57. *ibid.*, pp. 200–201.

58. Report of the Special Joint Committee for a Renewed Canada (Ottawa, 1992) p. 42, cited in Reilly, *Dedicated Seats*, *op. cit.*, p. 98.

59. Reilly, *ibid.*, p. 86.

60. Chesterman, *op. cit.*, p. 266.

61. See John Howard, ‘Ministerial Statement: Administration of Aboriginal Affairs’, House of Representatives, *Debates*, 11 April 1989, p. 1328, quoted in Angela Pratt and Scott Bennett, ‘The end of ATSIC and the future administration of Indigenous affairs’, *Current Issues Brief*,

Arguments of this nature tend to come from a non-Indigenous perspective. But important critiques also spring from Indigenous positions which espouse self-determination. The speech of Indigenous Northern Territory MLA and Minister John Ah Kit to the Reconciliation Convention of 1997 identifies a number of problems. The first is ‘to do with old-fashioned political muscle’.<sup>62</sup> Because the number of dedicated seats could never be any more than a minority rump, the Indigenous voice in parliaments would be ‘a “special interest group” appendage to a coalition’.<sup>63</sup> The anticipated effect is that dedicated seats would be ‘a form of tokenism’.<sup>64</sup> Dedicated seats would also be perceived as a form of special treatment for indigenous people, contributing to negative sentiment toward Indigenous people in the wider community.<sup>65</sup> The result, it is argued, would be a further marginalisation of Indigenous issues, and a reduction in parliament's focus on, and responsibility for, Indigenous matters.<sup>66</sup>

A second significant objection is that dedicated seats would breach ‘the independence and sovereignty of indigenous Australian nations’. According to this argument, due to the diversity of Indigenous groups, ‘it would never be possible to properly elect people who could speak for all the indigenous nations’. This, he argues, is a consequence of a fundamental aspect of Aboriginal law: that ‘you cannot speak for or make decisions over someone else’s country’. As a result, dedicated seats could be used by non-Indigenous interests to divide and conquer Indigenous representation, thus nullifying their political effect.<sup>67</sup>

In Ah Kit’s view, alternatives to dedicated seats are the avenue of choice. Indigenous representatives should be preselected to run for conventional seats, not through positive discrimination or affirmative action, but through ‘a situation in which skilled indigenous Australians are not locked out of the political process by the party machines’.<sup>68</sup> In this sense, Ah Kit’s argument affirms principles of self-determination while at the same time advocating a greater engagement, by Indigenous people, with non-Indigenous structures of governance. It is a position that is both negative toward dedicated seats and vigorously in favour of

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no. 4, 2004–05, Parliamentary Library, Canberra,  
<http://www.aph.gov.au/library/pubs/CIB/2004-05/05cib04.htm> accessed on 24 June November 2008.

62. Ah Kit, *op. cit.*

63. Ah Kit, *op. cit.*

64. Ah Kit, *op. cit.*

65. Ah Kit, *op. cit.*

66. See Ah Kit, *op. cit.* Similar objections have been canvassed by Chesterman and, in the New Zealand context, by Geddis, who discusses a perceived threat of Maori parliamentary representation being ‘ghettoized’ by dedicated seats. See Chesterman, *op. cit.*, p. 266; Geddis, *op. cit.*, pp. 360–361.

67. Ah Kit, *op. cit.*

68. Ah Kit, *op. cit.*

Indigenous peoples' greater participation in the political process. Uniquely, it straddles both the imperatives of self-determination and classic principles of liberal political thought: engagement with the parliamentary process and careers being open to talent.

There are, then, a number of arguments against dedicated seats that have been put forward over the past decade. However, proponents have also formulated counter-arguments over that period, and these arguments warrant attention. They include replies to the first set of liberal-democratic objections discussed above. One approach has suggested that failure to represent minorities reduces the overall effectiveness of representation in the liberal state. From this perspective, special measures to ensure the adequate representation of minorities, in effect, enhance representation for all citizens of the State.<sup>69</sup> A second line of argument asserts that collective entities are already tacitly recognised in current practice in Australia: the federation already recognises collective entities in the form of states and territories.<sup>70</sup> The Senate is the formal embodiment of this, in which the collective entities represented are Australian states and territories.<sup>71</sup> An analogous view is that Indigenous governance is also recognised, in a tacit sense, through such arrangements as Shared Responsibility Agreements, which depend on a distinct layer of governance provided in and by the Indigenous community in Australia.<sup>72</sup> In this view, dedicated seats are seen simply as a desirable formalisation of relationships already in place. Their explicit recognition would improve the management of these relationships by giving all parties to such agreements formal status under law.<sup>73</sup>

It is more difficult to answer Ah Kit's argument that representation for the different parts of the Indigenous community cannot be condensed into a small number of parliamentary seats. Increasing dedicated seats to represent all distinctive groups would require such a number of Indigenous representatives that it would be difficult to implement while maintaining 'one vote, one value'. This would, among other things, make it more difficult to gain the assent of the wider electorate to such a proposal.<sup>74</sup> Ah Kit's observations raise the possibility that Indigenous people would be dissatisfied with less than that, and this represents another obstacle to the implementation of dedicated seats.

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69. Reilly, *Dedicated Seats*, op. cit., pp.87–88.

70. *ibid*, pp. 90–91.

71. *ibid*.

72. Reilly, *Constitutional Framework*, op. cit., p.435. Shared Responsibility Agreements (SRAs), are those in which in '[in] return for discretionary benefits from government, communities make some specific commitments in order to achieve their identified goals', see 'SRAs and RPAs website', <http://www.indigenous.gov.au/sra.html>, accessed on 1 February, 2009.

73. *ibid*.

74. Ah Kit, op. cit.

## Obstacles

Arguments have been considered for and against dedicated seats in Australia. However there is also the practical dimension to be considered: whether they *could* be created. There are a number of obstacles, of which the most considerable are various provisions of the Australian Constitution, which is notoriously difficult to change. Sections 24 and 29 of the Constitution would appear to close off a number of the avenues through which dedicated seats might be created.

Section 29 rules out electoral divisions being ‘formed out of parts of different States’. This section figures prominently in the history of (unfavourable) legal opinion on the practical possibilities of dedicated seats.<sup>75</sup> It has been the basis of a succession of negative opinions.<sup>76</sup> More optimistic advocates rely on the High Court taking the view that while section 29 prevents combinations of parts of current state and territories, it is ‘silent’ on the possibility of considering whole states or territories as electoral divisions, or whether they could be combined.<sup>77</sup> This approach would require the High Court to take a so-called ‘robust view’ on section 29, but this is not likely in view of the history of legal precedent on the matter. The onus would fall on a new claimant to show why such precedents should be set aside.

Other ‘big bang’ approaches, such as electoral reform in favour of a widening of Proportional Representation (beyond the Senate) face similarly forbidding obstacles. Attempts, for example, to consider the respective strengths of the House of Representatives and or the Senate as a place where dedicated seats could be created are currently prevented by the ‘nexus provisions’ (section 24) of the Constitution. These provide for proportionality between numbers of seats in the two chambers, thus preventing the special creation of seats for either of the chambers alone.<sup>78</sup> On the other hand, more encouragingly, Australia has achieved reforms in the past: the creation of parliamentary representatives for Australia territories is an example of changes that took a long time, but which we now take for granted.<sup>79</sup>

Nevertheless, to achieve the level of change sufficient to achieve dedicated seats is a significant challenge. Aspects of the Australian Constitution would need to be changed, beyond those which are immediately apparent as being needed to implement new structures

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75. Chesterman, *op. cit.*, p. 275.

76. *ibid.*, pp. 269–273.

77. *ibid.*, p. 276.

78. *ibid.*, p. 282.

79. Scott Bennett and Gerard Newman, *A Fair Deal for Territory Voters?*, Research Note no. 27, 2002-03, Parliamentary Library, <http://www.aph.gov.au/pubs/rn/2002-03/03rn27.htm> accessed on 19 February 2009, and Margaret Healy, *Territory Representation in the Commonwealth Parliament*, Research Note no. 8, 2000-2001, Parliamentary Library, <http://www.aph.gov.au/library/pubs/rn/2000-01/01RN08.htm> accessed on 19 February 2009.



in Parliament. Again, this highlights contrasts between Australia and New Zealand. New Zealand's lack of a written constitution, and the existence of two rather than three levels of government, allow for greater flexibility: there are no 'states' rights' enshrined as there are in the Australian Constitution.<sup>80</sup> Clearly, these conditions mesh with the existence of a Treaty between Indigenous and non-Indigenous New Zealanders, and the relatively long-term existence of Indigenous seats in parliament, to produce a significantly different set of conditions.

There are also other significant obstacles that would be faced by any campaign to institute dedicated seats for Indigenous people in Australia. To the restraining influence of the Constitution we must add significant objections from both the Indigenous constituency and those concerned with the liberal-democratic disposition of the state. This may mean that while there are significant structural obstacles to the implementation of dedicated seats, there are also distinct challenges involved in generating sufficient public sentiment with which to overcome them.

## **Ways and means**

While these all appear to be formidable barriers to dedicated seats, potential avenues remain open. Chesterman considers a range of possibilities. In his view the Senate appears to be the natural place for Indigenous representatives because it is elected through Proportional Representation, and this is known to provide better outcomes for minorities. However, he suggests that the specific electoral mechanisms for the Senate mean that Indigenous people would end up with either more or less than would be proportional to their population.<sup>81</sup>

Better, argues Chesterman, to focus on options that would create four Indigenous seats in the House of Representatives. This entails combining states and territories, such as South Australia and the Northern Territory, into single electorates for these seats.<sup>82</sup> In this way, the contemporary Indigenous population would achieve representation in parliament on the same ratio of seats to population as those for other seats.<sup>83</sup> This assumes a 'robust reading' of section 29 of the Constitution: that is, that it only forbids 'parts', and not whole states or territories, being combined to form an electorate.<sup>84</sup>

Another option, less reliant on such a 'robust reading' of the Constitution, would be to create six Indigenous seats in the House of Representatives. This would result in a less uniform

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80. Elections New Zealand, *New Zealand's system of government—an overview*, 2006, <http://www.elections.org.nz/democracy/system-of-government.html> accessed on 6 June 2008.

81. Chesterman op. cit. pp.280–281.

82. Chesterman op. cit. p.284.

83. Chesterman op. cit. p.282.

84. Chesterman op. cit. p.284.

relationship between each seat and its electorate population, but would still provide representation for Indigenous people across the nation without gaps or holes.<sup>85</sup>

For either of these two options to succeed, however, the Constitution's nexus provisions would need to be addressed to allow such seats to be created.

## **Conclusion**

There are strong arguments in favour of dedicated seats in the Australian federal parliament. Among these are arguments which suggest that higher levels of Indigenous representation in the Australian federal parliament would bring a better quality of representation for the Australian polity as a whole.<sup>86</sup> As or more compelling is the assertion that dedicated seats would be a tangible expression of something currently lacking: a formal recognition of Indigenous people within the Australian political system.

The history of dedicated seats in New Zealand suggests, although not unequivocally, that such a status is capable of providing support for higher levels of Indigenous political engagement: for both voters and parliamentary representatives.<sup>87</sup> Continued Maori support for dedicated seats is indicative of their significance in this sense. If this is true, it raises the possibility that improved Indigenous representation in New Zealand is the result of a synergy between dedicated seats and electoral reform: a possibility generally not considered in the literature.

Whatever their virtues, as we have seen, there are at present significant obstacles to the introduction of dedicated seats in Australia, due to constitutional constraints and challenges in achieving appropriate representation for Indigenous people across a diverse and widely-distributed community. In the face of these, dedicated seats alone may appear a less promising avenue: either as a way to increase in Indigenous representation in federal parliament, or as a means to formalise the relationship between Indigenous and non-Indigenous Australians. In the immediate-term, those who wish to see greater Indigenous representation in Australian parliaments must consider more than one approach.

There are, however, encouraging aspects to the situation. It is notable, for example, that the present increase in levels of Indigenous representation in the parliaments of Australian states and territories has occurred outside of government policy, and this suggests that more enduring factors may be involved. A broader analysis of the 2008 Northern Territory election supports this view: the conservative opposition fielded Indigenous candidates in a

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85. Chesterman op. cit. p.284.

86. Reilly, *Dedicated Seats*, p. 77.

87. Eljon Fitzgerald, Brendan Stevenson and Jacob Tapiata, *Maori electoral participation: a report produced for the Electoral Commission*, Massey University, May 2007.

significant number of Legislative Assembly electorates.<sup>88</sup> This shows that elected Indigenous members of parliament represent only a component of a broader Indigenous engagement with the parliamentary process and that the true level of engagement is much higher. In such jurisdictions, political players can no longer afford to allow the Indigenous vote to be the natural province of one party alone.

It is too soon to say whether the current levels of Indigenous parliamentary representation in Australian states and territories amount to a trend. This adds to uncertainty on whether it will, over time, carry over into an Indigenous presence in the federal parliament. Smaller electorates, with higher proportions of Indigenous voters, make the election of Indigenous parliamentarians more likely in the states and territories, but in federal electorates candidates must attract the vote of larger, more diverse constituencies. On the other hand, higher levels of Indigenous representation in the state and territory parliaments have borne out many of the positive arguments of *Enhancing Aboriginal Political Representation*: among other things, that Indigenous Members *and* Indigenous issues have, as a result of a greater Indigenous presence in parliament, achieved a higher profile than ever before.<sup>89</sup> This in itself could make an important contribution to change. Moreover, non-Indigenous members of parliament have been known to move between state, territory and federal parliaments, and Indigenous members could make similar transitions.<sup>90</sup>

In any case, if and when Australia returns to the question of a republic, opportunities for change will necessarily arise. Given the notorious difficulty of initiating constitutional change in Australia under normal circumstances, a transition to a republic could represent a unique opportunity to resolve structural impediments to the introduction of dedicated seats. Moreover, if a persistent trend of increasing Indigenous representation in Australian jurisdictions were to emerge, this would be a powerful factor in giving credence to such a plan. It would exert an influence on both Indigenous and non-Indigenous constituencies alike—increasing levels of representation would make continuing disparities less tolerable. At that point, it would be natural to consider both the formal relationship between Indigenous Australians and the Commonwealth, and remaining imbalances in parliamentary representation. That both of these questions can be resolved by adopting dedicated seats for Indigenous people in parliament shows the power of the idea. If it is an idea that gains

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88. The Country Liberal Party fielded Indigenous candidates in the seats of Arafura, Daly, Nhulunbuy and Stuart.

89. One notable instance was a contribution by the Northern Territory Member for Arnhem on the extension to the McArthur River Mine, Northern Territory, ‘Adjournment’, *Debates*, 19 October 2006; Tara Ravens, ‘Aboriginal MP makes landmark speech’, *AAP*, 20 October 2006.

90. For example: Mr Bob Debus, federal Minister for Minister for Home Affairs, formerly a Minister in New South Wales Legislative Assembly, was elected to the House of Representatives in the 2007 election. Mr. David Tollner was a member of the House of Representatives until the 2007 election, and is now the member for the Northern Territory Legislative Assembly seat of Fong Lim..

credence, legal conjecture that has been described thus far will prove important in providing options for change.<sup>91</sup>

In Australia, the most promising role for dedicated Indigenous seats lies in combination with other initiatives. This is apparent in New Zealand, where dedicated seats and MMP have worked in concert to produce a more substantial engagement by Maori in the political system. The creation of an Indigenous representative body in Australia, as proposed by the current government, could provide a forum in which to ‘work-through’ appropriate forms of representation for Australia’s diverse Indigenous community.<sup>92</sup> If such a body were to make proposals on this issue, they could form the basis for a model that could work in combination with either a ‘gradualist’ increase in Indigenous representation, or with a more deliberate approach involving electoral reform.

Dedicated seats could then provide a point of articulation between that body and other mechanisms of Australian political representation. If a treaty were to be put in place, dedicated seats would be the palpable expression of that treaty. This would be a demonstration of good faith and a concrete guarantee that the treaty amounted to more than a form of words. If all three mechanisms were put in place (that is, a representative body, a treaty, and dedicated seats) then Indigenous people would achieve a level of formal recognition within the Australian political system which would be less subject to the policies of individual Australian governments. Arguably, such an arrangement would provide a better basis for an enduring relationship between Indigenous and non-Indigenous Australians than has been apparent to date.

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91 Such as those presented in Chesterman, op. cit.; Reilly, *Dedicated Seats*, op. cit. and *Constitutional Framework*, op. cit.

92 See Jenny Macklin, ‘Next steps for Indigenous body’, media release, 16 December 2008, [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/indigenous\\_body\\_17dec08.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/indigenous_body_17dec08.htm) accessed on 16 February 2009; and ‘National Indigenous Council’, media release, 15 January 2008, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22media%2Fpressrel%2FRCHP6%22> accessed on 16 February 2009.

## **Appendix: Indigenous parliamentarians in the States and Territories**

As at 1 February 2009

### **Northern Territory**

- The Honourable Alison Anderson MLA—Minister
- Mr Karl Hampton MLA — Minister
- The Honourable Malarndirri McCarthy MLA—Minister
- Ms Marion Scrymgour MLA — Deputy Chief Minister

### **New South Wales**

- The Honourable Linda Burney MLA—Minister

### **Western Australia**

- Carol Martin MLA
- Ben Wyatt MLA

### **Tasmania**

- Paul Harriss MLC

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