



Northern Land Council

Submission on the provisions of the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004* and the proposed administration of Indigenous programs and services by mainstream departments and agencies and related matters.

1. Summary

On 27 May 2004 the Commonwealth Government introduced the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004*. The Bill abolishes the Aboriginal and Torres Strait Islander Commission (ATSIC). It is to be replaced by non-statutory body, the National Indigenous Council, and other administrative arrangements, including a Ministerial Taskforce, Secretaries Group on Indigenous Affairs and Office of Indigenous Policy Coordination. A statutory Office of Evaluation and Audit (Indigenous Affairs) would also be established.

The abolition of ATSIC and the mainstreaming of Indigenous programs and services represent the most significant and substantial change to Indigenous policy in the last 15 years.

NLC's considers that:

- The formulation of significant areas of Indigenous public policy should not take place without the effective participation of Indigenous people and should not be implemented without their informed consent.
- It is essential that a practical replacement is identified to ensure that Indigenous people are represented at a national and regional level.
- The circumstances of different Indigenous groups throughout Australia are variable, and consequently the issues of most pressing concern to different groups are variable.
- Policy and service delivery should be devolved to the regional level.
- Regional bodies should have secure, long term funding base.
- Regional bodies should receive funding directly and not through mainstream Government Departments and Agencies.
- It is imperative that representatives are persons with expertise and credibility within Indigenous groups.
- It is imperative that regions are identified in a manner which is consistent with cultural and historical groupings, and also with the boundaries utilised by existing organisations. In the Northern Territory regions should coincide with the regional boundaries utilised by Land Councils under the *Land Rights Act*.
- Whilst energies and resources should be focussed at the regional level, there remains an important role for a national Indigenous body (the members of which should be chosen by Indigenous people), such as acting as a voice on national issues.
- Funding currently provided to Commonwealth Departments and Agencies, the Territory Government and local governments, for the benefit of Indigenous people, should be pooled or otherwise brought within the control of regional Indigenous bodies.
- The creation of a Government appointed Indigenous Advisory Body is inappropriate.
- The proposed administration of Indigenous services and programs by mainstream departments and agencies is a matter of serious concern as this could create the conditions for an increase in Indigenous disadvantage.
- The proposed Office of Evaluation and Audit (Indigenous Affairs) should be rejected, bearing in mind conflict or apparent conflict of interest and other concerns.
- Mechanisms are required to ensure that the Commonwealth is not placed in a conflict or apparent conflict of interest, either in policy or legal terms, regarding the funding of native title matters to which it is an interested party.
- Government needs to develop a long-term policy for the development of self-sustaining economic growth in Aboriginal communities.

2. Introduction

On 27 May 2004 the Commonwealth Government introduced the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004* (the Bill). The explanatory memorandum states that the Bill:

- implements the Government's decision to abolish ATSIC which was established in 1989;
- "modifies the role of the Office of Evaluation and Audit, to take into account the abolition of ATSIC;
- "makes consequential amendments to a number of other Acts arising from the abolition of ATSIC".

ATSIC is to be replaced by non-statutory body, the National Indigenous Council, and other administrative arrangements, including a Ministerial Taskforce, Secretaries Group on Indigenous Affairs and Office of Indigenous Policy Coordination. A statutory Office of Evaluation and Audit (Indigenous Affairs) would also be established.

The abolition of ATSIC and the mainstreaming of Indigenous programs and services represent the most significant and substantial change to Indigenous policy in the last 15 years.

The proposed establishment of a Government appointed Indigenous Advisory Body and transfer of program responsibility back to mainstream Departments and Agencies constitute a return to policies which comprehensively failed Indigenous people in the pre-ATSIC era.

The NLC considers, the approach taken by the Government risks increasing, rather than decreasing, Indigenous disadvantage.

3. A brief history of ATSIC

ATSIC was established in 1989. It was intended to rectify the failures of past national Indigenous representative structures and be an expression of self-determination. Its principal objective was to enable Indigenous people to exert influence over government policies and programs impacting on their lives and exercise control over important aspects of their lives.

The first attempt at constituting a national representative body to advise government on Indigenous affairs was made in 1973 with the formation of the National Aboriginal Consultative Committee (NACC). In 1976, Dr Les Hiatt conducted a comprehensive review of the NACC. He identified a number of major weaknesses in its formation and structure including:

- A failure by government to articulate a clear role and vision for the NACC.
- The resistance of members to a community consultation role.
- A developing hostility between the NACC and the then Department of Aboriginal Affairs.

The NACC was subsequently disbanded.

The National Aboriginal Conference (NAC) superseded the NACC as the new national representative body. It too had an advisory role to government on policy and programs affecting Indigenous people. However, by 1984 it was also under review as a consequence of the failure to perform.

Dr H.C. 'Nugget' Coombs conducted the review. He found that the failure to operate effectively was a result of a number of issues. He identified factors such as:

- A lack of community relevance.
- An inability to effectively advocate on behalf of communities and Indigenous groups at the State and Federal levels.
- Limited professional expertise to develop meaningful policies based on community consultation and support.
- Inexperience in assessing how to adequately negotiate with Government for appropriate funding levels for community service delivery and economic development.

Dr Coombs also reported on a number of administrative failures by the NAC. He found that:

- The use of funding by NAC members was extravagant and wasteful.
- Decision-making processes were opaque and tended to be the province of the Executive with only limited influence allowed to members.
- Gender balance and representation was uneven with the interests of Aboriginal women unrepresented and few female Aboriginal members.
- Sectional Indigenous interests influenced decision-making and meant that decisions were not made objectively.

These findings led to the dissolution of the NAC in 1985.

Between 1985 and 1989 there was no peak representative Indigenous organisation.

However, the idea for a statutory body had been being discussed in various circles for some years. Charles Perkins had argued for such an organisation from around 1974. Academics like Charles Rowley also argued for a special purpose organisation. Coombs believed a government department would serve Indigenous interests better than a statutory authority.

At that time, the debate about the most appropriate Indigenous representative structure was influenced by disastrous reviews of the Aboriginal Development Commission as well as attacks on the management and administrative effectiveness of the Department of Aboriginal Affairs (DAA).

The arguments put forward in favour of a statutory body were that:

- Mainstream Government Departments and agencies were dominated by non-Indigenous staff who had little contact with Indigenous communities and limited appreciation of their needs.
- A statutory authority staffed by Indigenous people would provide a direct conduit to the grass roots and hence provide policy relevance. Indigenous people, it was claimed, were unlikely to feel sufficiently comfortable to work in a Department of Aboriginal Affairs or to identify with it.
- A statutory authority would have more power and influence than a Department.
- A statutory authority would have greater flexibility in terms of the capacity to respond to Indigenous community needs.
- A statutory authority would be well placed to stimulate and motivate Departments with responsibility for service delivery to Indigenous communities.

These arguments were broadly accepted and a Commission was ultimately proposed and discussed as one of the key planks of a document tabled in Parliament in December 1987 titled

'Foundations For the Future'.¹ A taskforce was appointed to conduct public consultations and develop the legislative and administrative framework for the proposed Commission.

In considering the structure and functions of the proposed Commission, the taskforce looked to the previous history of the administration of Indigenous affairs and the history of both the NACC and the NAC. Ultimately, the taskforce took up the policy objective of self-determination. The taskforce agreed that this necessitated the direct participation of Indigenous people. Accordingly, ATSIC was envisaged as a 'ground up' structure in which communities at the 'grass roots' would be able to have a direct impact on policies that influenced their daily lives. This fitted with the aspirations of Indigenous communities who have long advocated self-determination.

Indigenous leaders conceived of self-determination as involving:

- The development of Indigenous political structures.
- The adoption of appropriate Indigenous specific social arrangements and economic activities.
- The development and delivery of programs and services appropriate to meet community needs and aspirations.
- The exercise of choice in respect of the practice of traditional law and culture.

Indigenous leaders also believed that Indigenous program design and service delivery would be more effective and beneficial than anything a non-Indigenous agency might provide.

These views, of self-determination and the effectiveness of Indigenous service delivery, operated as touchstones of ATSIC's underlying philosophy. However, for a number of reasons, they have not been successfully implemented in practice, including:

- Particularly in recent years, lack of support at Commonwealth Government level.
- The election based system for creating the ATSIC board and regional councils has not produced the highest calibre of Indigenous representation.

In the Northern Territory the manner in which ATSIC regions are constituted conflicts with longstanding regional boundaries utilised by Land Councils under the *Land Rights Act*, and thus leads to unnecessary inefficiency.

4. The current debate over ATSIC

Much of the current debate about ATSIC has taken place within the context of significant adverse publicity about the conduct of ATSIC office-holders and criticism about the leadership and vision of the Commission. In addition, the extent of Indigenous disadvantage is causing alarm as is the perception that disadvantage is increasing "despite years of policy attention."²

The real situation differs considerably from the public perception for despite the high needs of Indigenous people, expenditure on Indigenous Australians is often considerable less than expenditure on the general population. Moreover, years of policy attention does not equate to years of policy implementation.

The implementation of Government policy in the area of Indigenous Affairs has always been poor. For example, in 1992, the Council of Australian Governments announced the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal peoples and Torres Strait Islanders*. Clause 3.5 of which committed all governments to ensuring

¹ *Foundations for the Future*, Commonwealth of Australia, 1987.

² COMMONWEALTH GRANTS COMMISSION

that Indigenous people “receive no less a provision of services than other Australian citizens.” Nine years later the Commonwealth Grants Commission found that, despite entrenched poverty and significantly higher levels of disadvantage, “Indigenous Australians in all regions access mainstream services at very much lower rates than non-Indigenous people.”³

Many people wrongly believe that ATSIC is to blame for the failure to achieve better outcomes in areas such as Indigenous housing and infrastructure, employment, education and health. Few recall that Parliament never anticipated that ATSIC programs alone could redress Indigenous disadvantage. States and Territories have primary responsibility for delivering services in important areas such as health care, public education, family and youth support services, public housing, courts administration and the justice system. State and Territory governments incur about 70% of the expenditure in Indigenous policy areas (partly funded by the Commonwealth).

Over the years, ATSIC’s program responsibility has fluctuated as a result of functions and responsibilities being transferred to it from other Agencies, as well as initiatives arising from the recommendations of the *Royal Commission into Aboriginal Deaths in Custody*. Functions have also been transferred back to mainstream departments and agencies (for example the 1995 transfer of responsibility for Indigenous health programs).

The Commonwealth Grants Commission estimated that approximately 3% of Commonwealth expenditure was spent on Indigenous-specific programs and services.⁴

Over time, ATSIC ceased to be the primary source of Commonwealth funding for Indigenous-specific programs. As the recent ATSIC Review Committee reported “In 1992/3, the ATSIC budget was more than \$800 million, accounting for about two-thirds of the Commonwealth Government’s Aboriginal programs. In 2001-2, it amounted to approximately \$1.1 billion dollars, less than half of the Commonwealth Government’s allocation for Indigenous-specific programs.”⁵

Nor does ATSIC have full control over its budget. The ATSIC Act requires that the Minister approve estimated expenditure and establishes a compliance regime. In recent years, the Government has required ATSIC maintain minimum levels of expenditure on certain core programs, through quarantining provisions applied by the Minister. These include ATSIC’s two largest programs, the Community Development Employment Program (CDEP) and the Community Housing and Infrastructure Program (CHIP), which together, account for two-thirds of ATSIC’s budget.”⁶

During the same period, over half of the Commonwealth’s expenditure on Indigenous-specific programs was administered by mainstream departments and agencies, including:

- The Department of Health and Aged Care whose Office of Aboriginal and Torres Strait Islander Health (which funds Indigenous primary health care, mental health care and substance- abuse prevention (mainly through the funding of community based Aboriginal Medical Services)).

³ Commonwealth Grants Commission Report on Indigenous Funding, 2001, p 59.

⁴ Commonwealth Grants Commission Report on Indigenous Funding, 2001

⁵ *In the Hands of the Regions – A New ATSIC*, Report of the Review of the Aboriginal and Torres Strait Islander Commission, Commonwealth of Australia, November, 2003 at page 18.

⁶ *In the Hands of the Regions – A New ATSIC*, Report of the Review of the Aboriginal and Torres Strait Islander Commission, Commonwealth of Australia, November, 2003 at page 18.

- The Department of Education, Training and Youth Affairs (which funds Indigenous educational assistance programs including Abstudy and the Indigenous Education Strategic Initiatives Program);
- The Department of Employment, Workplace Relations and Small Business (which distributes funds to the States and Territories under the Commonwealth's Indigenous Employment Policy initiative);
- The Department of Family and Community Services (which funds the \$100 million Aboriginal Rental Housing Program allocations to the States and Territories);
- Environment Australia (which administers the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) and;
- Office of the Status of Women within the Department of Prime Minister and Cabinet which administers \$25 million in funding from the Government's *Partnerships Against Domestic Violence* policy initiative

If blame is to be apportioned for the failure to overcome Indigenous disadvantage, it is important not to overlook the role of the Commonwealth Agencies together with mainstream States and Territory Government Departments.

The services provided by ATSIC have only ever been intended to supplement the mainstream programs provided by the States. However, as ATSIC and its predecessors have experienced, the availability of Commonwealth funds has historically led to a withdrawal of funds and reduction in effort by the States and Territories. Aboriginal people experience such cost-shifting in a number of ways, including:

- Underfunding of Indigenous specific services and programs (which the Commonwealth claims are 'supplementary services' but which are in fact frequently the only services provided);
- Absence of services where the State or Territory government assumes that ATSIC will provide the service and vice versa;
- Diversion of funding for Indigenous programs to other mainstream purposes; and
- Indigenous-specific services being used inappropriately to make up for deficiencies in mainstream services.

Aboriginal people also suffer as a result of the way in which grants to them and their organisations are made. Indigenous-specific funding arrangements are most frequently

- for short periods (often only one year),
- for small amounts
- subject to continuously changing priorities
- subject to inflexible conditions and
- subject to onerous unfunded administrative and reporting requirements.

All of these factors impair the capacity of organisations to address the core problems of Indigenous disadvantage.

As many Government inquiries have reported, the mix of Commonwealth and State, mainstream and Indigenous-specific programs and services which are used to meet the needs of Aboriginal people are poorly co-ordinated and subject to little or no performance monitoring. Most mainstream programs have consistently failed to provide for the needs of Indigenous people on an equitable basis. This issue will be discussed further below.

A further issue driving the current changes to Indigenous policy has been the potential for conflicts of interest supposedly created by the involvement of the elected arm of ATSIC in

making decisions about individual loans, contracts and grants within the ATSIC budget process. New guidelines on the standard of behaviour expected of ATSIC office-holders and Government were tabled in Parliament in November 2002. Furthermore, on 24 December 2002, the Minister issued a General Direction under section 12 of the ATSIC Act to prevent ATSIC from funding organisations whose directors included ATSIC office-holders.

From this point, (and regardless of the quarantining of 2/3rds of the ATSIC budget), the potential for serious conflicts of interest to occur in relation to ATSIC contracts and grant funding did not exist.

Nevertheless, in November 2002, the Minister announced the appointment of a three member panel to review ATSIC. The review process was intended to address the issue of conflict of interest, together with the perception that ATSIC programs were failing to make inroads into Indigenous disadvantage. In some respects the two issues were linked, as ATSIC's failure was publicly portrayed as arising from decisions by ATSIC office-bearers to direct money to their own causes rather than the areas of real need in the wider Indigenous community.

Before the Review Committee could conclude its inquiry and make its recommendations, the then Minister for Immigration and Multicultural and Indigenous Affairs, Mr Philip Ruddock, announced a series of changes to the funding arrangements of ATSIC which effectively brought about its abolition. These changes included the establishment of a new agency, Aboriginal and Torres Strait Islander Services (ATSIS), to administer ATSIC's programs and services and make decisions about the allocation of grants.

The Minister's expressed purpose in establishing ATSIS was:

- to address perceived and potential conflicts of interest in ATSIC contracts and grant funding; and
- to ensure that Indigenous-specific program funds were allocated according to need (which, in the Government's terms, means allocated to remote regions only).

In November 2003, the Review Committee tabled its report in ATSIC entitled *In the Hands of the Regions – A New ATSIC*.⁷ The Review Committee found that ATSIC “needs the ability to evolve, directly shaped by Aboriginal and Torres Strait Islander People at the regional level.”(p. 5). The Review Committee did not recommend that ATSIC be abolished but rather that it be revitalised and placed under the direct control of the regions. The Review Committee also recommended that the elected and administrative arms of ATSIC be reunified.

On 30 March 2004 Federal Opposition leader, Mr Mark Latham, announced that, should he become Prime Minister, his government would abolish ATSIC and ATSIS and, after consultation with Aboriginal communities, “establish a new framework for Indigenous self-government and program delivery with a focus on regional partnerships and a newly directly elected national representative body.” On 15 April 2004, the Prime Minister announced the Government's intention to abolish ATSIC, select a group of Indigenous people to act as advisers to the Commonwealth on matters of Indigenous policy and implement new service delivery arrangements for Indigenous Affairs.

The Government's decision to mainstream Indigenous services took effect from 1 July 2004 when the majority of ATSIC's budget was transferred to mainstream departments and agencies.

⁷ Commonwealth of Australia, November 2003.

5. Administration of Indigenous-specific services and programs by mainstream Departments and Agencies

The NLC has serious reservations about the Commonwealth Government's policy of delivering Indigenous-specific programs and services by mainstream departments and agencies, including:

- Mainstream Departments and agencies have consistently failed to deliver services and programs to Indigenous people on an equitable basis.⁸
- Mainstream Departments and agencies have also consistently failed to provide programs and services that meet the needs of Aboriginal people.

As the Commonwealth Grants Commission pointed out "mainstream services are planned and delivered so as to meet the requirements of the general population. They do not allow sufficiently for the extreme disadvantage and special needs of Indigenous people." This is particularly true in the NLC Region.

The NLC does not consider that the failure of mainstream Government Departments and Agencies is inevitable. They are capable of improving service-delivery to Indigenous people. However, despite the rhetoric of partnerships, Indigenous people have only very limited control or influence over the policies and priorities of mainstream departments and agencies.

Mainstream Departments and Agencies are inexperienced in dealing with Aboriginal people and have only limited understanding of aspects of Aboriginal history and culture. Staff are unfamiliar with the dynamics of Aboriginal communities and rarely have much local knowledge.

The NLC is concerned that progress in improving the fit between mainstream services and Indigenous needs is slow. The NLC is concerned that dramatic improvements will not be made in the short term.

The research of the Commonwealth Grants Commission is pertinent. The Commonwealth Grants Commission found that:

"Initiatives to improve Indigenous access to mainstream services are having some success, [however] they fall short of the across-the-board improvements that are needed to address existing disadvantage."⁹

The Commonwealth Grants Commission recommended that the Government:

- Identify and address the barriers to access that Indigenous people face in using mainstream programs;
- Establish funding arrangements that reflect the long term and wide ranging nature of Indigenous need;

⁸ Commonwealth Grants Commission *Report on Indigenous Funding, 2001*, p xvii. The Commonwealth Grants Commission found that the mainstream services provided by the Commonwealth do not adequately meet the needs of Indigenous people because of barriers to access. These barriers include the way programs are designed, how they are funded, how they are presented and their costs to users. In remote areas, there are additional barriers to access arising from the lack of services and the long distances necessary to access those that do exist. The inequities resulting from the low level of access to mainstream programs are compounded by the high levels of disadvantage experienced by Indigenous people.

⁹ Commonwealth Grants Commission *Report on Indigenous Funding, 2001*, p 65.

- Establish a defined role for Indigenous people in decision making on the allocation of funds and service delivery at the Commonwealth, State and local level;
- Take steps to improve the capacity to manage; and
- Collect better data.

It also recommended that the Commonwealth should give priority to promoting the extension of collaborative decision-making arrangements by:

- Introducing and enforcing additional conditions for both mainstream and Indigenous specific SPPs. Such as data collection, mandatory performance reporting, Indigenous specific performance criteria and greater Indigenous involvement in decision making;
- Seeking extra conditions that target some of the expenditure of mainstream SPPs to aspects of the services that are important to Indigenous people.”¹⁰

These recommendations have not been fully implemented.

The Indigenous population is increasing and aspects of Indigenous disadvantage are worsening. In this context, reducing access to Indigenous-specific programs and services has the potential to bring about further social dislocation.

There are limits to the extent to which improved Indigenous access to services can be obtained by adapting mainstream services. The services are not always replicated in the wider community and may not be interchangeable with other mainstream services. Moreover, Indigenous people are not simply disadvantaged people. They have the right to maintain their distinct cultures, languages and communities. This is true regardless of their places of residence.

The NLC considers that mainstreaming puts at risk the benefits of investments that have been made over a number of years, including investments in cultural understanding, community development, organisational capacity and Indigenous capacity building. These investments are the foundation of future self-sustaining economic growth in Indigenous communities.

6. Addressing the current crisis in funding

It is essential that Government acknowledge and respond to the significant level of under-funding in the key priority areas for addressing Indigenous disadvantage. Even in critical areas such as health the Commonwealth Grants Commission found that “a further significant increase in [expenditure on primary health care] would be necessary to bring direct Commonwealth expenditure on Indigenous people to the Australian average.”¹¹ Similar reports have made similar findings in all major areas of Indigenous policy.

For many years, the Commonwealth has made only limited provision for the growth in demand for Indigenous services and programs. This is significant given that the ABS reports that the Indigenous population has increased by 16% between the 1996 and 2001 Census (12% due to births and deaths and 4% due to an increasing propensity for individuals to identify as Aboriginal, Torres Strait Islander or both).

¹⁰ Commonwealth Grants Commission Report on Indigenous Funding, 2001, p xx.

¹¹ Commonwealth Grants Commission Report on Indigenous Funding, 2001, p xxi.

The NLC is concerned that, without a further significant commitment of funds, not only will the situation of Indigenous people fail to improve, Australia will be unable to maintain the status quo and Indigenous disadvantage will substantially worsen.

7. Future of Indigenous Service Delivery

The Commonwealth Grant Commission found that Indigenous people experience a high level of disadvantage in comparison with non-Indigenous people in all the areas examined by the Commission. The disadvantage is high in all areas but greatest in remote areas.

The Commission also found that: “Indigenous people are reliant on Government programs and services to meet basic needs to a far greater extent than non-Indigenous households”¹²; and furthermore, that: “until such time as Indigenous people have established a degree of economic and financial self-sufficiency comparable with other Australians, they will remain heavily dependent upon Government service provision. Designing service delivery and programs and committing to their funding will need to reflect this reality.”¹³

These findings were confirmed by the Productivity Commission in 2003¹⁴ and more recently, confirmed by the National Aboriginal and Torres Strait Islander Social Survey, released in June 2004.¹⁵

One of the most urgent tasks facing Indigenous people and their leaders, as well as the Commonwealth and State Governments, is that of improving the social and economic well-being of all Indigenous people. How to achieve this has been the subject of continuous debate over many years. Recently, discussions have centred around the need to reduce welfare dependence in Indigenous communities and encourage economic development. However, there appears to be little understanding within Government of what may be involved in moving beyond a passive service-delivery model.

The NLC considers a movement away from welfare requires Indigenous communities and Governments to consider bigger issues than who is best placed to deliver particular services and programs. Australia needs to have a long-term policy for the development of economic growth in Indigenous communities. This requires a shift in focus from job-creation to job-growth.

Australian and International experience (see for example the findings of the Harvard Project)¹⁶ has shown that sustained economic growth in Indigenous communities, including remote

¹² Commonwealth Grants Commission *Report on Indigenous Funding*, Commonwealth of Australia, 2001, p10.

¹³ Commonwealth Grants Commission *Report on Indigenous Funding*, Commonwealth of Australia, 2001, p10.

¹⁴ Productivity Commission, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage, Key Indicators*, Commonwealth of Australia, 2003.

¹⁵ Australian Bureau of Statistics *National Aboriginal and Torres Strait Islander Social Survey 2002*, Commonwealth of Australia 2004.

¹⁶ In the United States the Harvard Project on American Indian Economic Development has been engaged since the 1980's in comparative research on economic development on Native Indian Reservations. The Harvard Project found that the indispensable keys to successful, long term economic development are: Having the power to make decisions about their own future, Exercising that power through effective, politically robust and culturally appropriate institutions, and Choosing appropriate economic policies and projects.¹⁶

communities, can be achieved, through culturally legitimate, and practically capable, Indigenous decision-making structures.

The Harvard Projects findings accord with NLC's experience. Service delivery must be seen in the context of self-determination and economic development.

7.1 What should replace ATSIC?

The NLC considers that it is essential that a practical replacement is identified which ensures that Indigenous people are represented at a national and regional level.

Any new model of Indigenous service delivery be developed in close consultation with Indigenous people.

The main points to emerge from consultations with Aboriginal people in the NLC region are as follows:

- The overwhelming majority of Aboriginal people within the NLC region want to control over their own affairs. They want to make decisions about what services are funded and how those services are delivered but also the priority to be afforded to different objectives.
- Aboriginal people want to be allowed to make decisions in their own way, in accordance with their own decision-making structures.
- Aboriginal people believe that the best way to ensure that they have control over the decisions that affect them is:
 - to create a system whereby policy and service delivery are devolved to the regional level;
 - to have a secure, long term funding base from which to provide services and programs;
 - to receive funding directly and not through mainstream Government Departments and Agencies;
 - to have the funding currently provided to Commonwealth Departments and Agencies, the Territory Government and local governments, for their benefit, pooled or otherwise brought within their control.
- Aboriginal people want political parties to act in a bipartisan manner and work together with them to overcome discrimination and disadvantage.¹⁷

In fact, the researchers found that these 'nation building' elements appear to be more important to economic growth than natural resources, education or geography.¹⁶ The Harvard Project's findings are based on data from a wide range of case studies over a long period of time and they should not be ignored.

¹⁷ This is surprisingly similar to the Commonwealth Grant Commission's key areas for action. The CGC commented that "There are important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These include:

- the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;
- a focus on outcomes;
- ensuring that a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;
- ensuring genuine collaborative processes with the involvement of government and non-government funders and service deliverers, to maximise opportunities for pooling of funds, as well as multi-jurisdictional and cross-functional approaches to service delivery;

Aboriginal people within the NLC region have made similar statements over many years including publicly in the Barunga Statement of 1984, the Kalkaringi and Batchelor Statements of 1998 and in the Indigenous Constitutional Strategy which was released in December 1998.

7.2 Regional bodies

The NLC considers that resources should be concentrated at the regional level in Indigenous controlled bodies.

The NLC considers that focusing effort at a regional level is necessary in order to take account of the diversity of Indigenous people and their circumstances¹⁸.

However, whilst energies and resources should be focussed at the regional level, there remains an important role for a national Indigenous body (the members of which should be chosen by Indigenous people), such as acting as a voice on national issues.

Regional bodies would be broadly representative of the Aboriginal people of the regions but large enough to be stable and financially viable. A larger organisation would also have the capacity to:

- Advocate strongly and robustly for Aboriginal interests and negotiate with Governments from a position of relative equality;
- Coordinate the delivery of services and programs across a number of communities and take advantage of economies of scale; and
- Participate effectively in regional development.

In NLC's experience, how well programs and services meet needs depends upon many things, including how well they are designed, how well they are run and managed, whether the service is relevant to the needs of the community and the social and economic environment in which the service is delivered. All of these factors vary considerably between regions. Often the best way of achieving particular outcomes differs accordingly to the location.

One of the fundamental decisions that must be made concerns the boundaries of the regions.

The NLC considers it is imperative that regions are identified in a manner which is consistent with cultural and historical groupings, and also with the boundaries utilised by existing organisations. In the Northern Territory regions should coincide with the regional boundaries utilised by Land Councils under the *Land Rights Act*.

At present, the Commonwealth has limited influence on the extent to which the distribution of State and Territory based programs address the needs of Indigenous people. Available funds should be pooled, or otherwise brought within the control of regional bodies. A regional Indigenous body, with control over pooled resources, would improve coordination between service providers.

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- recognition of the critical importance of effective mainstream programs and services, and clear actions to identify and address barriers to access;
 - improving the collection and availability of data to support informed decision-making, monitoring of achievements and program evaluation; and
 - recognising the importance of capacity building in Indigenous communities.

¹⁸ This approach is supported by the ATSIC Review, the Inquiry into Indigenous Capacity Building, the Productivity Commission and the Commonwealth Grants Commission.

8. Additional consequence from abolishment of ATSIC: conflict of interest regarding funding for native title applications

The following issue will also be raised before the Parliamentary Joint Committee on Native Title in relation to its current inquiry into native title representative bodies.

Under the *Native Title Act 1993* ATSIC is the responsible body for allocating funds to representative bodies to perform native title functions. In practice specific decisions are made as to whether to provide funds for the prosecution of particular native title applications (rather than providing a general grant with specific decisions as to the allocation of funds being made by representative bodies). ATSIC is not a party to native title applications, and accordingly no conflict of interest can arise.

The abolition of ATSIC means that responsibility for funding representative bodies (including specific applications) will be performed by the Commonwealth through the Department of Multicultural and Indigenous Affairs (DIMIA). Indeed since 1 July 2004 DIMIA have performed this function, and from 1 July 2003 the function was performed by ATSIS¹⁹ (which legally is the Commonwealth).

The Commonwealth is joined as a respondent party to approximately one third of all native title applications in Australia, and has a statutory right to intervene at any time regarding any application. A serious policy and in some cases legal issue arises regarding the existence of an actual or perceived conflict of interest, in that the Commonwealth is required to make funding decisions regarding proceedings to which it is a party. This issue arises notwithstanding that decisions are made on behalf of the Commonwealth by DIMIA rather than, for example, by the Attorney-General's Department.

9. Proposed Office of Evaluation and Audit (Indigenous Affairs)

The *ATSIC Act 1989* established, within ATSIC, an Office of Evaluation and Audit (s 75) (the current Office). The functions of the Office include to (s 76):

- regularly evaluate and audit the operations of ATSIC, Aboriginal Hostels Ltd, the Commercial Development Corporation, and the Torres Strait Regional Authority (TSRA);
- when requested by the Minister to evaluate or audit particular aspects of the operations of the above bodies as well as the Indigenous Land Corporation (ILC) (including any subsidiary);
- when requested by the Minister to evaluate or audit the operations or activities of any person or body which has received a grant or loan (including a guarantee) from ATSIC, the TSRA or the ILC (but only in relation to the grant, loan or guarantee).

The current Office is directed by the Director of Evaluation and Audit, who is appointed by the Minister (s 77(1)). For the purposes of an evaluation or audit of a person or body the Director may examine and copy documents, and require a person to answer questions. The legislation is silent as to whether this may include examination of documents, or answering of questions, where legal privilege is concerned.

¹⁹ Aboriginal and Torres Strait Islander Services.

The functions of the current Office and powers of the Director are in addition to, and not in substitution for, the evaluation and auditing functions and powers conferred on the Auditor-General by the *Auditor-General Act 1997* (ss 76(1A) and 79(10)).

The Bill renames the Office of Evaluation and Audit (which is within ATSIC) as the Office of Evaluation and Audit (Indigenous Programs) (the proposed Office), and expands the ambit of its operations. The purpose of the proposed Office is to report to the responsible Minister²⁰ on evaluations or audits of:

- relevant programs, being programs which further "the social, economic or cultural development" of Indigenous persons, administered by Australian Government bodies; and
- the activities of any individual or organisation that receives funding under any relevant program.

The Director of the proposed Office is required to develop a program for the evaluation or audit of Australian Government bodies in relation to relevant programs over a three year period to 1 July 2007 (and in three year periods thereafter). The Director must also conduct an evaluation or audit whenever so requested by the Minister (cl 193X(2)). The Director has the same powers as in relation to the current Office, and the powers and functions are in addition to those conferred on the Auditor-General by the *Auditor-General Act 1997*.

The primary differences between the current Office and the proposed Office are as follows:

- The proposed Office may conduct an evaluation and audit regarding all Australian Government bodies (and must do so triannually), rather than only a small number of bodies (ie ATSIC, Aboriginal Hostels Ltd, the Commercial Development Corporation, and the TSRA. This would apparently include the Land Councils regarding their functions under the *Land Rights Act*, and would likely also include Aboriginal associations which receive mining or other royalties²¹ from a Land Council pursuant to that statute.

In other words the functions of the proposed Office is not a consequential amendment and would, in effect, constitute a significant amendment to the *Land Rights Act* - in circumstances where a workability package of amendments regarding that statute are being separately considered by the Commonwealth and others.

- The proposed Office may conduct an evaluation and audit regarding both the operations, and the activities, of an Australian Government body (and of individuals or associations which have been granted funds). In other words the proposed Office would evaluate and report not only in relation to financial and accountability issues, but also regarding particular decisions made by a body as to the expenditure of funds.

In the context of Land Councils and native title representative bodies, whose functions include to conduct or facilitate the conduct of litigation or negotiations in which the Commonwealth is a party, this is of serious concern - since a conflict or apparent conflict of interest may arise. In particular Land Councils are in possession of documents which are subject to legal privilege, however there is nothing in the Bill which ensures those documents are protected from consideration or discovery by the Commonwealth by means of evaluation or audit through the proposed Office.

²⁰ The explanatory memorandum and Bill refer to the responsible Minister, but do not state whether the proposed Office will be located in the Department of Immigration and Indigenous Affairs or in a different Department (eg Finance).

²¹ That is, funds which are equivalent to mining royalties which are received by a Government.

The proposed Office should also be considered by comparison to the functions of the Auditor-General under the *Auditor-General Act 1997*. The Land Councils, being Commonwealth statutory authorities, are subject to an annual financial audit under that statute by the Australian National Audit Office (ANAO) (the Land Councils invariably receive an unqualified audit). Like other Commonwealth authorities the Land Councils may also be the subject of a performance audit by the ANAO, such as was conducted during 2003 (the Land Councils received a positive performance report from the ANAO).

The primary differences between the proposed Office and the Auditor-General are:

- The Auditor-General (together with the ANAO) is independent of the Minister or Executive Government with "complete discretion in the performance or exercise of his or her functions or powers [and] is not subject to direction from anyone [regarding the manner in which and audit is conducted]" (s 8(4) of the *Auditor-General Act 1997*). Consequently a conflict or apparent conflict of interest will not arise regarding an evaluation or audit by the Auditor-General (or ANAO).
- The Auditor-General (together with the ANAO), when conducting a performance audit, reviews or examines "any aspect of the operations" of a body.²² In other words, consistent with standard practice, the Auditor-General examines the operations but not the activities of a body. By contrast the proposed Office would be empowered to examine both of these matters, thus compounding the above concerns regarding a conflict or apparent conflict of interest.
- The statute ensures that information provided to, or obtained by, the Auditor-General is strictly confidential and may not be disclosed (except where the information discloses a criminal offence and it is in the public interest).²³ Further the Minister may not disclose information contained in a report by the Auditor-General except with the consent of the Auditor-General. No such safeguards and protections against inappropriate use of confidential information by the Executive Government or others exist regarding the proposed Office.
- While the *Auditor-General Act 1997* does not explicitly deal with the issue of documents which are subject to legal privilege (this being left to the general law which allows for certain exceptions), the statutory independence of the Auditor-General and protections regarding confidentiality mean that concerns of conflict of interest and potential interference in the Court process do not arise. No such safeguards and protections exist regarding the proposed Office.

The above differences and issues regarding the proposed Office raise serious concerns regarding:

- ensuring the integrity, and perceived integrity, of Court processes and also regarding arms length commercial negotiations conducted by Land Councils and native title representative bodies;
- the establishment of Land Councils under the *Land Rights Act* as Commonwealth statutory authorities which are answerable to the Parliament but in broad terms, like other statutory authorities, are independent of the Executive Government;
- using a Bill proposed for the purpose of abolishing ATSIC to indirectly achieve an additional purpose, which is not explained in the explanatory memorandum, whereby a significant amendment is made to the *Land Rights Act* regarding the operations and activities of both Land Councils and Aboriginal associations which receive mining royalties or other payments.

²² Definition of "performance audit" in s 5 of the *Auditor-General Act 1997*.

²³ Section 36 of the *Auditor-General Act 1997*.

The seriousness of these concerns is fortified when it is recalled that on 10 April 1996 a special auditor was appointed to inquire regarding ATSIC and up to 3,000 Indigenous organisations which received funding from ATSIC. The appointment of the special auditor was subsequently found by the Federal Court to be invalid. The auditor did not find evidence of widespread maladministration or corruption, but these findings were nevertheless misrepresented to the contrary in the media.

In these circumstances the Bill in relation to the proposed Office requires careful consideration with a view to rejecting it.

Alternatively in the event that the proposed Office is implemented its functions should be limited so that:

- they have no application to Land Councils or representative bodies regarding their functions under the *Land Rights Act* or *Native Title Act 1993*, or to Aboriginal associations which receive mining royalties or other payments under that Act;
- the proposed Office may only evaluate and audit operations, not activities, of a body (or individual who receives funding);
- the proposed Office may not examine any documents which are subject to legal privilege;
- the proposed Office may only evaluate and audit operations, not activities, of a body (or individual who receives funding);
- the proposed Office, and its Director, are established as independent of the Minister and the Executive Government;
- information or documents provided to the Office are confidential, and to the extent such information is included in a report to the Minister may not be revealed without the consent of the Director of the proposed Office.