



**AIATSIS**

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**AIATSIS Submission:  
Indigenous Voice**

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# 1. Summary

AIATSIS welcomes the opportunity to provide input into both the Local and Regional Voice proposal and the National Voice proposal based on our research and evidence and pursuant to our statutory role in providing advice to the Commonwealth.<sup>1</sup>

The interim report has particular strengths, including:

- the strong commitment made to avoiding duplication;
- the recognition that many effective Indigenous governance and representational structures already exist;<sup>2</sup> and
- the flexible approach of the Local and Regional Voices, to ensure that formations are not forced to fit government-mandated structures and have time to develop where needed.

We note that the general recognition of current and historical limitations of Indigenous representation and self-determination does not translate into specific measures to create effective voice mechanisms. Achieving the balance between respecting existing local arrangements while addressing the need for greater recognition of the emergence of Indigenous nationhood and cultural authority, requires more explicit consideration, to support these discussions locally.

In our submission we also highlight the imperative for a structural framework that ensures the independence and long-term security of funding for the Voice. This framework also requires that the Parliament and government not only consult with, but accommodate, the views of Aboriginal and Torres Strait Islander peoples on matters that affect them. While legislative enactment can go some way to achieving this, arguably only Constitutional entrenchment can provide these guarantees. The Voice should be clearly articulated as part of a roadmap toward the realisation of the aspirations of Aboriginal and Torres Strait Islander peoples as expressed through the Statement from the Heart.

Moreover, strengthening the place of Indigenous peoples in Australia's constitutional framework is a matter of unfinished business for the Australian nation.<sup>3</sup> The proposed advisory body to the Commonwealth Parliament and government is a step towards resolving limitations to Indigenous representation. The quality of this structural inclusion will be dependent upon:

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<sup>1</sup> This submission was prepared by Craig Ritchie, Dr Lisa Strelein, Peter Bligh, Tandee Wang, Mia Stone and Dr Tran Tran on behalf of AIATSIS.

<sup>2</sup> Especially as reflected in the subsection 'Supporting existing arrangements' in National Indigenous Australians Agency, *Indigenous Voice co-design process: interim report to the Australian government*, National Indigenous Australians Agency, 2020, pp. 133–134.

<sup>3</sup> We refer here to both 'small c' and 'big C' constitutional framework. 'Big C' constitution refers primarily to explicit inclusion the *Australian Constitution Act 1901*. 'Small c' constitution refers to the systems of parliamentary executive and judicial structures including conventions and institutions.

- the advisory bodies being models that enshrine adequate size, diversity and the independence;
- making their cultural authority operational through inclusive Aboriginal and Torres Strait Islander leadership, and
- being explicit in their function and its relationship to broader ongoing reform initiatives.

While this strengthened voice in law and policy decisions is crucial to improving the recognition and enjoyment of the rights of Indigenous peoples, it is not the only measure in renegotiating the relationship between Indigenous peoples and the state.<sup>4</sup> Ongoing discussions about comprehensive settlements with traditional owner groups should continue to complement this process, noting the primacy of the role of traditional owners in Indigenous governance and the need to accommodate traditional owner diaspora in decision-making and governance structures.<sup>5</sup>

We reiterate the ongoing need to support Indigenous governance and decision-making and the importance of having these structures and processes reflected in our national institutions and laws. Current proposals are embedded within a specific socio-political context that has traditionally excluded or ignored Indigenous perspectives and is structurally inclined to continue to do so.<sup>6</sup> AIATSIS is committed to solutions that do not merely seek to accommodate Indigenous peoples voice in the existing structures of government but for those structures and the individuals within them to undergo their own transformation to better understand and value the potential contribution of Indigenous peoples knowledge to our national story.

Our recommendations for further refinement and practical implementation of the proposed Voice are provided below.

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<sup>4</sup> H Hobbs, 'Locating the logic of transitional justice in liberal democracies: native title in Australia', *University of New South Wales Law Journal*, vol. 39, 2016, p. 41.

<sup>5</sup> For example, a stronger rights framework and implementation of recommendations of reviews of the *Aboriginal Councils and Associations Act 1976 (Cth)* ('ACA Act') and *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* ('CATSI Act') (that are supportive of cultural governance formats) would reduce need for additional structures to provide input to government. See National Indigenous Australians Agency, *CATSI Act review: Draft report*, National Indigenous Australians Agency, 31 July 2020, viewed 9 September 2020, [https://www.niaa.gov.au/sites/default/files/publications/catsi-act-review-draft-report\\_0.pdf](https://www.niaa.gov.au/sites/default/files/publications/catsi-act-review-draft-report_0.pdf); ORIC, *Recommendations from the technical review of the CATSI Act 2017: Attachment C – Summary of technical review recommendations*, ORIC, Canberra, 2018, viewed 10 September 2020, L Strelein & B Burbidge, *AIATSIS submission: Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) review - Phase 1*, AIATSIS, Canberra, ACT, 12 February 2020, p. 3, viewed 8 September 2020, [https://aiatsis.gov.au/sites/default/files/products/submission/aiatsis\\_catsi\\_act\\_review\\_submission.pdf](https://aiatsis.gov.au/sites/default/files/products/submission/aiatsis_catsi_act_review_submission.pdf).

<sup>6</sup> L Strelein and T Tran 2013, 'Building Indigenous Governance from Native Title: Moving away from 'Fitting in' to Creating a Decolonized space', *Review of Constitutional Studies/Revue d'études constitutionnelles* Volume 18, Issue 1, 2013, pp. 19-47.

Recommendation 1: That, of the models provided, the ‘Core model one—Structural Membership Link’—be adopted to form the membership of the National Voice.

Recommendation 2: That the National Voice consider models from Youth Councils in existing Prescribed Bodies Corporate (PBCs) and ensure ‘youth’ is defined in a way that matches community expectations and needs.

Recommendation 3: That the National Voice not wholly exclude establishing funding priorities or reviewing funding outcomes and impact within its scope.

Recommendation 4: That the National Voice take the legal form of an independent Commonwealth entity, established by its own governing legislation, and adequately funded through direct appropriation.

Recommendation 5: That automatic triggers for an obligation to consult the National Voice be broadened and the duty to consult be further articulated to include a duty to accommodate.

Recommendation 6: That the National Voice’s consultation function be aligned with other mechanisms that currently provide advice on Indigenous policy.

Recommendation 7: That stronger guidance is provided for the proposed ‘Statement on Bills’ relating to consultation with the National Voice.

Recommendation 8: That if an independent ethics council is adopted, its functions be consolidated with other operations for which independent oversight has been proposed.

Recommendation 9: That there is meaningful engagement with both ‘inclusive participation’ and ‘cultural leadership’ with an understanding that traditional owners can be marginalised on their own Country.

Recommendation 10: That Local and Regional Voices be adequately resourced to meet transparency and accountability mechanisms. This includes a commitment to genuine engagement from local and state governments.

Recommendation 11: That the principle of ‘Capability Driven’ governance be cognisant of Indigenous priorities and values in governance.

Recommendation 12: That the Australian government commit to accelerating its capacity to meaningfully engage with Aboriginal and Torres Strait Islander peoples.

Recommendation 13: That Local and Regional Voices are given the opportunity and resourcing to influence and lead the generation of data.

Recommendation 14: That regional boundaries be defined by Indigenous constituencies before establishing their number.

Recommendation 15: That cultural fit take precedence in the establishment of regional boundaries, even if this results in groupings that are not aligned with state and territory borders.

Recommendation 16: That regions, while geographically-based, accommodate diasporas.

Recommendation 17: That the operations of Local and Regional Voices be properly funded.

Recommendation 18: That transitional arrangements be properly funded with graduated measures towards implementation.

Recommendation 19: That a broader survey of existing models and their challenges be undertaken to provide potential models for Local and Regional Voice structures.

## 2. National Voice proposal

### Membership

**Recommendation 1: That, of the two models provided, ‘Core model one—Structural Membership Link’, be adopted to form the membership of the National Voice.<sup>7</sup>**

Drawing membership of the National Voice from Local and Regional Voices, via the proposed ‘Structural Membership Link’ mechanism, is more likely to ensure the diversity of Aboriginal and Torres Strait Islander communities are represented at the national level. This structure would also preserve a critical link to existing governance arrangements (which are formed at the local or regional level) and help build legitimacy at the national level. It should be noted that connection to regional groupings of Indigenous peoples was considered one of the strongest parts of the model of the Aboriginal and Torres Strait Islander Commission (ATSIC) and a weakness of others, and restoring greater representation to the regions was the primary emphasis of the final review of ATSIC.<sup>8</sup> That being said, we do not perceive the National Voice as a re-creation of ATSIC. Our view on membership reflects our submissions below in relation Local and Regional Voice structures, being underpinned by the cultural authority of traditional owners in those regions.<sup>9</sup>

To this end, there may be a need to augment the nomination of individuals from Regional Voices with designated seats that accommodate perspectives of those Aboriginal or Torres Strait Islander people who may be disconnected from their traditional heritage or country through impacts of colonisation. Any such appointment process must be independent of government.

The roles of each of the National and Regional or Local Voice should be clearly articulated to reduce duplication or confusion over roles and responsibilities. For example, it may assist to distinguish the role of the National Voice to consider matters of national significance and federal jurisdiction and not as an escalation point for regional or local issues. Similarly, it may be useful to clearly establish what, if any, representative role individual nominees have toward their regions. For example, that while members of the National Voice are expected to bring their regional and local knowledge and experience to the role, the National Voice acts as a single entity in providing advice to Parliament.

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<sup>7</sup> As described in National Indigenous Australians Agency, *Interim report*, p. 34.

<sup>8</sup> For discussion see K Palmer, ‘ATSIC: origins and issues for the future: a critical review of public domain research and other materials’, *AIATSIS Research Discussion Paper*, vol. 12, 2004.

<sup>9</sup> We note here that the comparative examples referred to in the Interim report reflect ‘assemblies of First Nations’ models where participation is on the basis of tribal group.

We support structural guarantees of gender equality in the National Voice, noting that female representation on boards is already much higher among top Indigenous corporations than other companies.<sup>10</sup>

The formalisation of the relationship between various levels of the federated Voice structure is important to ensure that neither is seen as subservient to the other and that different priorities, at national and regional levels, are not misconstrued and used by government to neutralise the effectiveness of both.

## Youth advisory groups

**Recommendation 2: That the National Voice consider models from Youth Councils in existing Prescribed Bodies Corporate (PBCs) and ensure ‘youth’ is defined in a way that matches community expectations and needs.**

AIATSIS supports structural engagement of youth and people with a disability in the National Voice. As identified in the *Interim Report*, youth make up a significant proportion of the Aboriginal and Torres Strait Islander population. They also face distinct challenges as a result of increased mobility for education and employment, necessitating a shift in ways of connecting to Country and culture.<sup>11</sup> However, we note that a dedicated Youth Council is just one element of a broad measure of reforms needed to support young Aboriginal and Torres Strait Islander people to pursue the social, cultural, economic and political aspirations of their peoples. Resourcing for PBCs and other local community groups is essential given that more informal means of engagement are often the starting point for youth participation.<sup>12</sup>

A number of PBCs and Indigenous communities have dedicated Youth Councils, which could provide a model for a National Youth Advisory Group. These include the Robe River Kuruma Youth Council (RRKYC)<sup>13</sup> and Koorie Youth Council (KYC).<sup>14</sup> Comprised of 10 and 15 members, respectively, RRKYC members are elected by youth of the Robe River Kuruma Aboriginal Council (RRKAC) for two-year terms, while the KYC is membership-based and open to Koorie young people living in Victoria.<sup>15</sup> The National Youth Advisory Group members could be drawn from young people in Local and Regional Voices, which would provide a linking mechanism to existing governance structures. There is also a

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<sup>10</sup> Office of the Registrar of Indigenous Corporations, *The top 500 Aboriginal and Torres Strait Islander corporations 2015-16*, Report, November 2017.

<sup>11</sup> B Williamson & S Little, ‘What do young fellas reckon? Exploring the experiences of Aboriginal and Torres Strait Islander youth in native title’, *Land, Rights, Laws: Issues of Native Title*, vol. 6, no. 6, 2019, pp. 1–16.

<sup>12</sup> Williamson & Little, ‘What do young fellas reckon?’; H Cahill & B Dadvand, ‘Re-conceptualising youth participation: a framework to inform action’, *Children and Youth Services Review*, vol. 95, 2018.

<sup>13</sup> ‘RRK Youth Council’, RRKAC, n.d., viewed 17 August 2020, <https://rrkac.org.au/youthcouncil>.

<sup>14</sup> Koorie Youth Council, *What’s Important to Youth?*, Final Report, 2015; Koorie Youth Council, Webpage, n.d., viewed 12 March 2021, <https://koorieyouthcouncil.org.au>.

<sup>15</sup> Koorie Youth Council, *What’s Important to YOUth?*



benefit to engaging with existing efforts to establish Aboriginal youth advisory councils and engagement strategies.<sup>16</sup>

It is worth considering how 'youth' is defined in existing Youth Councils to meet Aboriginal and Torres Strait Islander population profiles as well as representational and engagement needs.<sup>17</sup> The support – personal, professional and financial – that will be needed to provide an effective, representative voice of this magnitude should also be considered.<sup>18</sup>

## Scope

**Recommendation 3: That the National Voice not wholly exclude establishing funding priorities or reviewing funding outcomes and impact within its scope.**

We note that the proposals wholly exclude funding allocation and decision making from the scope of the National Voice. While there are challenges to the administration of funding, they are experienced by both Indigenous and non-Indigenous agencies equally.<sup>19</sup> While specific funding administration is not contemplated in the scope of the national body, the National Voice may have a legitimate role in providing advice to government on priorities for funding. Further, we agree that there is a central role in national priority setting and impact assessment.

## Corporate form

**Recommendation 4: That the National Voice take the legal form of an independent Commonwealth entity, established by its own governing legislation, and adequately funded through direct appropriation.**

The establishment of *independent* statutory authorities to provide advice to government, primarily funded through government appropriation, is a common strategy employed in Australia. For example, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the Australian National Audit Office (ANAO), the Productivity Commission and the Australian Human Rights Commission (AHRC) are all established by Commonwealth legislation that empowers these bodies to provide advice and

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<sup>16</sup> For example, AIATSIS assisted in the delivery of the 2019 Bigambul Youth Summit, key recommendations of which included the establishment of a youth summit as an annual event and the development of a Bigambul Young People's Engagement Strategy and Young People's Strategy.

<sup>17</sup> Youth is defined in the *Interim Report* as being persons under 25 years of age: National Indigenous Australians Agency, *Interim report*, p. 56.

<sup>18</sup> G Buchanan, 'Gender and generation in native title: Director demographics and the future of prescribed bodies corporate', *Land, Rights, Laws: Issues of Native Title*, vol. 6, no. 3, 2015, p. 20; T Pearson & S Little, *National Native Title Conference 2016: Report on the Indigenous Youth Forum*, Report, AIATSIS, 2016.

<sup>19</sup> For example, in relation to the administration of the Indigenous Advancement Strategy, the ANAO found that 'the department's grants administration processes fell short of the standard required to effectively manage a billion dollars of Commonwealth resources'. See Australian National Audit Office, *Indigenous Advancement Strategy*, Australian National Audit Office, 35, no. 35, 2017, p. 8.

recommendations to the government on the basis of specialist expertise on a range of topics.<sup>20</sup> The governance boards of independent Commonwealth agencies audited by the ANAO have been found to be effective and highly compliant with the *Public Governance, Performance and Accountability Act 2013 (Cth)*.<sup>21</sup>

AIATSIS legislative structure and operational independence may provide a useful comparator for the National Voice. We include some relevant matters here and welcome further more detailed discussion if and when that may be useful.

AIATSIS is established by the *Australian Institute of Aboriginal Studies Act 1989 (Cth)* (AIATSIS Act). The AIATSIS Act sets out the functions of AIATSIS and its governance structure. AIATSIS' work is directed by an independent governing body (the Council). The Council is constituted by five members appointed by the Minister and four members elected by the AIATSIS members. While Council members are selected on two different bases, they act as a single entity in the governance of AIATSIS.

Importantly, while AIATSIS has a responsible Minister (currently the Minister for Indigenous Affairs, the Honourable Ken Wyatt), AIATSIS is not subject to executive or ministerial direction.<sup>22</sup> Section 43, provides that the Minister may request advice, to which AIATSIS must comply, but provides parameters within which Council may respond, reinforcing the independence of Council in directing the work of AIATSIS.<sup>23</sup>

Legislative entrenchment of the functions and powers and constitution of the entity, and its relationship with Parliament and the Government arguably provides a bulwark against government interference in the operations of the entity, acknowledging that it is by no means absolute.

Others argue that the alternative of a private corporation established under the *Commonwealth Companies Act 1981 (Cth)* (or less so, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*) is a more independent legal form. Previous examples of this arrangement include the Congress of Australia's First Peoples (Congress) and the National Aboriginal Congress (NAC). More recently, the First Peoples'

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<sup>20</sup> The Auditor-General is legislated as an independent officer of the Parliament and is empowered to conduct both financial and performance audits of Commonwealth entities, companies and subsidiaries, see *Auditor-General Act 1997 (Cth)*. The Productivity Commission provides advice to the government, both directed and of its initiative, on industry, industry development and productivity, see *Productivity Commission Act 1998 (Cth)*. The AHRC is established to investigate complaints of human rights violations and conduct research and provide advice about human rights, see *Australian Human Rights Commission Act 1986 (Cth)*. AIATSIS is established in a similar way and is provided to provide advice to the Commonwealth on the situation and status of Indigenous culture and heritage. See *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)*, s (5)(e).

<sup>21</sup> Australian National Audit Office, *Board governance*, Audit Insights, 2019.

<sup>22</sup> In contrast, for example, the Productivity Commission, can only undertake work requested by the responsible Minister: *Productivity Commission Act 1998 (Cth)* section 1. This limitation aside, the PC Act has a number of other design elements that may usefully inform legislation to establish the National Voice

<sup>23</sup> It may also be of interest in the design the National Voice that the AIATSIS Act, Section 43, provides that the TSRA (and previously ATSIC) may request advice and AIATSIS 'may' comply with the request.

Assembly of Victoria (the Assembly), which represents Aboriginal Victorians in the treaty process with the Victorian State Government, has been established as a company limited by guarantee.<sup>24</sup> The rationale for this decision from the Aboriginal Treaty Working Group was that such a legal form would ‘maximise [the body’s] flexibility, its independence from Government, and its accountability to the Aboriginal Victorian community’.<sup>25</sup> Like the NAC, the Assembly is recognised in state legislation and that legislation also defines and sets parameters for the operation of the Assembly.<sup>26</sup>

Both NAC and Congress faced considerable challenges in terms of their financial independence and sustainability, as they remained dependent on grant funding from the government, which placed them in a ‘service’ relationship with government.<sup>27</sup> For the NAC, there was a strong suggestion that they were not adequately resourced to respond to the requests for advice from government.

An appropriately sized secretariat, or agency, is essential to ensure the Voice is able to fulfil its purpose. This includes being able to undertake research and consultations relevant to their functions. Funding for the National Voice should be, and be seen to be, secure. This is best achieved through separate ongoing budget appropriation, which may be augmented by other program funding or external revenue (including gifts). While Parliament can refuse to appropriate funds to a statutory body, the legislative basis for the existence of the entity guards against this. To this end, resourcing would be more secure if the legislation establishing the Voice articulates the appointment, roles and responsibilities of a CEO and staff (see Recommendation 1).

Consistent with the statutory authority model, the secretariat support should not be housed within a department of state or Commonwealth agency such as the National Indigenous Australians Agency. While this model is adopted across the Commonwealth for any number of advisory boards and committees, there is a direct conflict for the Voice to depend on a body who simultaneously has responsibility for the very policies and functions over which the Voice may have scrutiny.

The fact that a majority of Aboriginal and Torres Strait Islander people may accept a legislative model for the National Voice should not be understood as acceptance that enshrinement of the Voice in the Australian Constitution is unnecessary. The intention from the Uluru Statement from the Heart, to have constitutional entrenchment of the

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<sup>24</sup> As acknowledged in National Indigenous Australians Agency, *Interim report*, p. 59.

<sup>25</sup> Aboriginal Treaty Working Group, *Final report on the design of the Aboriginal representative body*, 2018, p. 9. This mirrors the rationale provided in the Report recommending the establishment of what ultimately became the National Congress of Australia’s First Peoples, see Australian Human Rights Commission, *Our future is in our hands: creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, 2009, p. 22.

<sup>26</sup> Namely, that the function of the body is to ‘represent the diversity of traditional owners and Aboriginal Victorians’, and that ‘All elected members (however described) other than employees ... must be traditional owners’, see s10 (1)(2)(3) of *Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)*.

<sup>27</sup> These funding challenges are described in National Indigenous Australians Agency, *Interim report*, pp. 126–127.

National Voice to Parliament remains a significant aspiration of Aboriginal and Torres Strait Islander peoples. Only Constitutional entrenchment can provide genuine protection for the existence and independence of the National Voice and the duty of Parliament to consult and accommodate their views, with strong judicial oversight.<sup>28</sup> The National Voice is an appropriate subject for incorporation into Australia's Commonwealth Constitution, which is essentially concerned with federal institutional arrangements. Including Indigenous peoples within our federal constitutional structure addresses, to some extent, the historical exclusion of Indigenous peoples from amongst the self-governing communities that came together to form the Federation in 1901.<sup>29</sup>

Even with Constitutional entrenchment, legislation is also necessary to articulate the functions, powers and constitution of the National Voice.<sup>30</sup> Moreover, legislative incorporation and entrenchment of itself can be an interim step toward constitutional reform.<sup>31</sup> While legislation does not ultimately bind the Parliament (which can change or suspend the legislation), it does define or constrain executive power (that is, ministers and departments of government); and remains subject to a level of judicial oversight.

Ultimately, the National Voice must be able to stand apart and act independently from the executive arm of government. On balance, AIATSIS recommends that a statutory authority model would better guarantee longevity, flexibility, independence and accountability while avoiding the risks of funding dependency.

## Requirement to consult and engage a National Voice

**Recommendation 5: That automatic triggers for an obligation to consult the National Voice be broadened and the duty to consult be further articulated to include a duty to accommodate.**

AIATSIS supports the proposal to allow the National Voice to provide advice to Parliament and Government on matters that they identify as nationally important. The National Voice should not be constrained to provide advice only on those matters

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<sup>28</sup> The instances where the *Racial Discrimination Act 1976* (Cth) has been 'suspended' to allow governments to breach the rights of Indigenous peoples is the most obvious case in point where legislative protection of rights has been insufficient protection against Parliamentary infringement of minority rights. Compare Lael K Weis, 'Legislation as a Method of Constitutional Reform: An Alternative to Formal Amendment?' on *AUSPUBLAW*, viewed 26 March 2018, <https://auspublaw.org/2018/03/legislation-as-a-method-of-constitutional-reform> and NW Barber, 'Why Entrench?' *International Journal of Constitutional Law* 14(2) (2016), 325–350.

<sup>29</sup> Michael Dodson and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *UNSW Law Journal* 826.

<sup>30</sup> See for example, the *High Court of Australia Act 1979* (Cth) or *Federal Court of Australia Act 1976* (Cth).

<sup>31</sup> For example, Canada had a legislative Bill of rights for 20 years before the rights were constitutionally entrenched in 1982. For further reading see Larissa Behrendt, "It's Broke So Fix It: Arguments For A Bill of Rights" (2003) 9(1) *Australian Journal of Human Rights* 257.

referred to them by Parliament or the Minister.<sup>32</sup> In addition, AIATSIS supports the inclusion of strict requirements for consultation on certain matters.

Legislation establishing the National Voice can include provisions that define certain important aspects of the relationship between the Voice and the Australian Parliament and Government. The most significant of these is the requirement, or duty, for Parliament and the Executive to consult with the National Voice on certain matters. A duty to consult must include standards that ensure that consultation is more than just a token gesture. Rather, the duty to consult must include a genuine effort, in good faith, to seek to accommodate the views and advice of the Voice. In Canada, the Crown's duty to consult and accommodate has developed a corpus of judicial and policy explication that can inform the articulation of this duty.<sup>33</sup>

The proposed triggers for an obligation to consult the National Voice that are outlined in the interim report are severely limited in scope. They are: legislation which invokes sections 51(xxvi) and 122 of the Constitution, or an exemption under the *Racial Discrimination Act 1975 (Cth) (RDA)*.<sup>34</sup> There are a range of policies that solely or significantly impact Aboriginal and Torres Strait Islander people that are not covered by these three triggers, including government policies that do not require legislative amendment at all, or do not require legislative amendment relevant to the constitution or the RDA.

In that context, we suggest the following automatic triggers give rise to an obligation and/or expectation to consult the National Voice:

- A policy, program or law contains the words 'Aboriginal and Torres Strait Islander' or 'Indigenous' in its title (for example: the National Aboriginal and Torres Strait Islander Health Plan 2013-2023)
- A policy or law that is administered by the National Indigenous Australians Agency (or its successors) (for example: the Community Development Program)
- A policy, program or law that could reasonably be assumed to primarily or disproportionately affect Aboriginal and Torres Strait Islander people

Depending on the nature of the policy/law, the National Voice will then have the opportunity to accept or decline the provision of advice within a reasonable time frame.<sup>35</sup> These timeframes must be respectful of cultural protocols and ways of decision-making,

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<sup>32</sup> See note 22 above comparing Productivity Commission's limitations.

<sup>33</sup> See: <https://www.rcaanc-cirnac.qc.ca/eng/1331832510888/1609421255810>.

<sup>34</sup> National Indigenous Australians Agency, *Interim report*, pp. 52–53.

<sup>35</sup> As a prominent Yolngu leader articulated in her criticism of the government's consultation with the Northern Land Council: 'Traditional owners need to know the details of these changes. We need time to discuss the amendments. We need to think about what they will mean to us culturally. We need to think about and discuss these changes together, and this is very important'. See Commonwealth Parliamentary Debates, Senate, 21 July 2006.

which oftentimes require decisions to come back to communities and families.<sup>36</sup> Consultation times should also reflect the extent of the impact of the law or policy on Aboriginal and Torres Strait Islander people. There are emergent processes in some states such as Queensland (and on the national level) that can be either adopted or expanded to include the role of the Voice.<sup>37</sup>

Consultation with the National Voice on a matter does not obviate or replace governments' duty to consult with specific Aboriginal and Torres Strait Islander communities directly affected by proposed legislative and policy changes or executive acts.<sup>38</sup> For example, in planning for regional governance in the Torres Strait, the powers and authority of the then proposed Land and Sea Council (now Gur A Baradharaw Kod) were discussed, including the ability to speak or take action in relation to regional issues affecting native title bodies and native title in the Torres Strait without authorisation in areas such as fisheries and housing. This was distinguished from interfering directly in the operations of individual PBCs.

**Recommendation 6: That the National Voice's consultation function be streamlined with other mechanisms that currently provide advice on Indigenous policy.**

In providing advice, the Voice must also be streamlined with the functions of other agencies, extant and prospective, that also provide advice to parliament and government on Aboriginal and Torres Strait Islander policy. This includes:

- the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, of the Australian Human rights Commission, who has existing responsibilities to report to Parliament on Aboriginal and Torres Strait Islander peoples' enjoyment of human rights;
- the House of Representatives Standing Committee on Indigenous Affairs;
- the Productivity Commission's Aboriginal and Torres Strait Islander Commissioner (including the proposed Office of Indigenous Policy Evaluation, outlined in the Productivity Commission's Indigenous Evaluation Strategy);<sup>39</sup> and
- AIATSIS, which has a legislative function to provide advice to the Commonwealth on the situation and status of Aboriginal and Torres Strait Islander culture and heritage.

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<sup>36</sup> Australian Human Rights Commission, 'Native Title Report 2010: Chapter 3: Consultation, Cooperation, and Free, Prior and Informed Consent: The Elements of Meaningful and Effective Engagement', 2010.

<sup>37</sup> See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) in the national context (and s42 of the *Legislation Act 2003* (Cth)), noting that the UN Declaration on the Rights of Indigenous Peoples remains unrecognised in the definition of 'human rights'. See also the *Human Rights Act 2019* (Qld) in the Queensland context, and the application of the Statement of Compatibility.

<sup>38</sup> See note 35 above.

<sup>39</sup> Productivity Commission, *Indigenous evaluation strategy*, 2020, pp. 20–21. The proposed entity is not mentioned in the *Interim Report*.

Demarcating responsibilities for policy advice and information sharing will be crucial to this process. As will be the articulation of and justification for seeking multiple or overlapping advice.

**Recommendation 7: That stronger guidance is provided for the proposed ‘Statement on Bills’ relating to consultation with the National Voice.**

AIATSIS notes that the legislative provisions in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), on which the proposal to include Statement on Bills is based, lack specificity and are likely to be unenforceable.<sup>40</sup> However, ‘human rights’ is defined in relation to seven international human rights instruments (not including the United Nations Declaration on the rights of Indigenous Peoples).<sup>41</sup> At the very least, an equivalent level of definition should be given around what constitutes ‘consultation and engagement’ with the National Voice.

We suggest that in compiling a Statement on Bills, the following information is used to assess consultation and engagement:

- When and how often was the National Voice engaged, and what were the nature of those engagements?
- What was the advice provided by the National Voice?
- What steps were taken to accommodate the advice provided by the National Voice?
- Were steps taken to address the advice provided by the National Voice reflective of what both the Indigenous Australian and broader Australian public can reasonably expect of the government/parliament? Why/why not?
- If no steps were taken to address the advice provided by the National Voice, what is the justification for this?
- How satisfied was the National Voice with the steps taken to address their advice provided?

Per our comment above on the limited scope of ‘duty to consult’, we also note that some kind of compliance statement should apply to government policy, not only bills introduced to parliament.

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<sup>40</sup> On lack of specificity, the legislation merely requires ‘an assessment of whether the Bill is compatible with human rights’ (s 8(3)); on lack of enforcement, the statement is ‘not binding on any court or tribunal’ (s8(4)) and a failure of human rights compliance ‘does not affect the validity, operation or enforcement of the Act’ (s8(5)). See *Human Rights (Parliamentary Scrutiny) Act 2011*. For details about the proposed ‘Statement on Bills’, see National Indigenous Australians Agency, *Interim report*, p. 54.

<sup>41</sup> Namely, the *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination Against Women*, *Convention Against Torture*, *Convention on the Rights of the Child* and *Convention on the Rights of Persons with Disabilities*. We note that while UNDRIP is not explicitly referred to, the Declaration articulates the enjoyment of rights included in these Covenants and Conventions, including, amongst others, the right of all peoples to self-determination (ICCPR, ICESCR Article 1)

The National Voice should also develop guidelines and/or templates for these statements of compatibility and it should be an expectation that Australian governments and the parliament use them when reporting on compliance.<sup>42</sup> Further, a mechanism for these statements to be presented to Indigenous Australians should be explored.

## Advice on probity, ethics and governance

**Recommendation 8: That if an independent ethics council is adopted, its functions be consolidated with other operations for which independent oversight has been proposed.**

AIATSIS does not have specific advice on whether matters of probity, ethics and governance should be referred to a separate, independent ethics council, or an internal committee(s) composed of National Voice members.

However, we note that there are numerous operations for which independent oversight has been suggested throughout the *Interim Report*. We do not necessarily advocate that such operations are given to an independent, external body, we note that there is an opportunity for consolidation. These operations include:

- Considering issues and offering advice on probity, ethics and governance
- Regular ‘health checks’ of the state of partnership and mutually agreed mediation and dispute resolution mechanisms, as well as dispute mechanisms for internal disagreements<sup>43</sup>
- Approving candidates for eligibility (if this option is chosen: ‘Candidates to be pre-cleared against a broader character test’)<sup>44</sup>
- Recognising Local and Regional Voices (if this option is chosen: ‘Formal recognition by an independent body’)<sup>45</sup>

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<sup>42</sup> A model is the New Zealand ‘Cultural Impact Assessment’, which provides a framework for documenting Māori cultural values, interests and associations with an area or a resource, but could be applied in a policy context for Aboriginal and Torres Strait Islander peoples. See D Jolly, *The potential of Cultural Impact Assessment - how far have we come*, New Zealand Association for Impact Assessment, n.d.

<sup>43</sup> National Indigenous Australians Agency, *Interim report*, pp. 80, 100.

<sup>44</sup> National Indigenous Australians Agency, *Interim report*, p. 41.

<sup>45</sup> National Indigenous Australians Agency, *Interim report*, p. 97.



## 3. Local and Regional Voice proposal

### Local and Regional Voice Principles

#### Cultural leadership

**Recommendation 9: That cultural authority and traditional owners be placed at the centre of the design of local and regional voice structures.**

AIATSIS welcomes recognition of the need to negotiate the interaction between inclusive participation and cultural leadership sensitively and on a case-by-case basis. However, while generally supporting the notion that appropriate ways of interaction between 'inclusive participation' and 'cultural leadership' will be determined by each community,<sup>46</sup> we note that, historically, the cultural authority of traditional owner groups has often been marginalised. This marginalisation has occurred in their own territories as a result of the historical denial of the rights of Indigenous peoples to self-determination and autonomy as polities, and the right to freely determine their own economic social and cultural development.<sup>47</sup> There is an ongoing challenge (that is not explicit in the proposal) to design mechanisms that appropriately distinguish where Aboriginal and Torres Strait Islander individuals seek input to decisions that affect their responsibilities where they live, and those responsibilities that arise from where they hold cultural responsibilities.

From a practical perspective, this historical denial of inherent sovereignty of Aboriginal and Torres Strait Islander nations can result in current power imbalances between emergent and typically under-funded traditional owner bodies, such as PBCs, and well-established and resourced organisations such as local government shires, land councils and other organisations that represent resident populations; and community controlled service organisations that embody local leadership in particular areas of expertise.<sup>48</sup> Consequently, support may be required to ensure equal participation in community negotiations over roles and responsibilities. This was the experience in facilitating a Memorandum of Understanding between the Bardi Jawi PBC and three community councils in 2011-12 to resolve conflict over roles, responsibilities, and decision-making on Country upon the recognition of native title.<sup>49</sup>

In general, to the extent that Local and Regional Voice advice on 'community aspirations, priorities and challenges' is service-focused, the inclusion of resident communities and

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<sup>46</sup> National Indigenous Australians Agency, *Interim report*, p. 77.

<sup>47</sup> ICESCR and ICCPR Article 1, UNDRIP Article 3.

<sup>48</sup> T Tran & C Stacey, "'Wearing two hats": the conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities', 2016, p. 22.

<sup>49</sup> Involvement of the Department of Family, Housing, Community Services and Indigenous Affairs and the Kimberley Land Council was required to kick-start the conversation, with support provided by AIATSIS to facilitate a two-day workshop. See Kimberley Land Council, 'What is the Bardi Jawi Governance Project?', *Native Title Newsletter*, vol. 16, 2011.

service organisations is appropriate. However, the cultural authority of traditional owners and their views should take priority in relation to decisions over Country (for example, housing allocation, land use and water planning legislation).<sup>50</sup> Poor differentiation between resident populations and traditional owners and their respective realms of decision-making has been identified as a likely contributing factor to the demise of Community Action Groups (CAGs) in Western Australia and should be avoided within Local and Regional Voices.<sup>51</sup> As noted earlier, many of the comparative examples described in the *Interim Report* are nation-based, highlighting the importance of foregrounding traditional owner authority and leadership.<sup>52</sup> This has implications for membership and jurisdiction, as not all cultural leaders live on Country (see recommendation 16).

We note concern in the *Interim Report* to ensure that Voice arrangements 'do not encroach on the specific remit of cultural leaders over traditional law/lore, custom and cultural matters'.<sup>53</sup> However, it should be emphasised that this authority often extends to very practical matters like housing and even electricity use and cannot be 'siloed'.<sup>54</sup>

Guidance on the interaction between the principles of cultural leadership and inclusive participation in practice would be useful as part of the stage two 'best practice implementation' guidelines. These should be developed in close consultation with Aboriginal and Torres Strait Islander people as local solutions are explored. It should also be paramount throughout the formulation of any Voice mechanism; that the mechanism itself should be built on the sound principles of cultural authority. This authority is vested in Aboriginal and Torres Strait Islander nationhood and rights as peoples under international law, and any representative structure should have this built into its bedrock.

## Transparency and accountability

**Recommendation 10: That Local and Regional Voices be adequately resourced to meet transparency and accountability mechanisms. This includes a commitment to genuine engagement from local and state governments.**

Mechanisms for guaranteeing transparency and accountability can often be inappropriately matched to the scale and size of corporations, creating administrative

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<sup>50</sup> Tran & Stacey, "'Wearing two hats": the conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities'; see also C Stacey & J Fardin, 'Housing on native title lands: responses to the housing amendments of the Native Title Act', *Land, Rights, Laws: Issues of Native Title*, vol. 4, no. 6, 2011.

<sup>51</sup> S Maddison & M Brigg, *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance*, Federation Press, 2011.

<sup>52</sup> National Indigenous Australians Agency, *Interim report*, p. 193-204.

<sup>53</sup> National Indigenous Australians Agency, *Interim report*, p. 77.

<sup>54</sup> For example, service delivery has a major impact on culture and communities. See Stacey & Fardin, 'Housing on native title lands'. See also P Memmott & D Nash, 'Housing conditionality, Indigenous lifeworlds and policy outcomes - Mt Isa case study', Australian Housing and Urban Research Institute, 2016, p. 102.

burdens and inefficiencies.<sup>55</sup> This is a common experience in the Indigenous governance sector because many Indigenous governance bodies are the product of the mandatory corporatisation required by Australian law for traditional owners to hold and manage native title rights. For example, our research found that the Eastern Maar Aboriginal Corporation required \$150,000 per annum simply to meet governance obligations and to ensure its basic operations before they even considered identifying and pursuing members' aspirations and external expectations.<sup>56</sup> Moreover, increasing recognition of the need for 'co-design',<sup>57</sup> means bodies that the Local and Regional Voices would complement are required to be available for consultation on an increasing array of issues, often without corresponding resourcing.<sup>58</sup> In this context, it is imperative that funding is designed and allocated with an appropriate recognition of the significant resources required to conform to transparency and accountability mechanisms.

Further, all governments need to commit to fully and transparently engaging in the resourcing and advisory processes.

## Capability driven

### **Recommendation 11: That the principle of 'Capability Driven' governance be cognisant of Indigenous priorities and values in governance.**

AIATSIS welcomes the commitment to capability-building, support and resourcing during the establishment/transitional period and for ongoing operations of the Local and Regional Voices.<sup>59</sup> However, we emphasise that 'capability' is often understood differently by Indigenous and non-Indigenous people. Elsewhere, AIATSIS has argued that many initiatives and proposals in the realm of Indigenous governance 'situates Indigenous peoples as different ... but then ultimately expects them to act the same as non-Indigenous people'.<sup>60</sup> As a result, many community bodies have to straddle both

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<sup>55</sup> L Strelein, C Hassing & B Burbidge, *AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006*, AIATSIS, 2017.

<sup>56</sup> B Burbidge and J Clark in L Strelein, C Hassing, & B Burbidge, 'AIATSIS submission: inquiry into the opportunities and challenges of engagement with traditional owners in the economic development of northern Australia', *AIATSIS Submission*, 2019, p. 8. See also McGrath, Pamela, 'The work of rights: The nature of native title labour', in *Engaging Indigenous Economy*, Centre for Aboriginal Economic Policy Research, ANU Press, Canberra, 2016.

<sup>57</sup> On the recent rise in the rhetoric and logic of 'codesign', see MC Dillon, 'Codesign in the Indigenous policy domain: risks and opportunities', *CAEPR Discussion Paper*, no. 296/2021, 2021.

<sup>58</sup> Strelein & Burbidge, *AIATSIS submission: Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) review - Phase 1*.

<sup>59</sup> National Indigenous Australians Agency, *Interim report*, p. 69.

<sup>60</sup> E Lee & T Tran, 'From boardroom to kitchen table: Shifting the power seat of Indigenous governance In protected area management: Tebrakunna country', vol. 2016, 2016, pp. 81–93.

Indigenous and external enabling environments (and corresponding expectations) to achieve their aims.<sup>61</sup>

Indigenous governance is typically realised through family structures, with kinship central to culture and decision-making.<sup>62</sup> This can, however, lead to allegations of nepotism from a non-Indigenous perspective. Lockwood argues that principles such as transparency, accountability and inclusiveness – all part of the Local and Regional Voice framework – are markers of good governance in both Indigenous and non-Indigenous structures, but that it is important to be able to recognise when they manifest in different ways. Measures of ‘capability’ should be agreed upon in partnership with Local and Regional Voices, noting that imposing performance measures that have not been jointly negotiated is often unproductive and contrary to best practice.<sup>63</sup>

**Recommendation 12: That the Australian government commit to accelerating the development of its capacity to meaningfully engage with Aboriginal and Torres Strait Islander peoples.**

Discussions of governance challenges must acknowledge the shortfalls of government agencies in appropriately engaging with Aboriginal and Torres Strait Islander peoples.<sup>64</sup> Barriers to more effective engagement across government agencies include: lack of understanding of Aboriginal and Torres Strait Islander cultures and their role in Indigenous governance systems; lack of cultural competency amongst staff, resulting in inappropriate engagements; and insufficient experience in engaging with Aboriginal and Torres Strait Islander peoples.<sup>65</sup>

In order to address governance challenges on the part of Australian governments, there must be a legislative and policy commitment to government upskilling. The establishment in 2018 of Te Arawhiti (the Office of Māori Crown Relations) in Aotearoa/New Zealand reflects this approach. One of its explicit aims is to ‘make the Crown a better Treaty partner, able to engage effectively with Māori on a range of

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<sup>61</sup> Toni Bauman et al, *Building Aboriginal and Torres Strait Islander Governance* (Report, May 2015); BA Hendrix, D Delaney, RC Witmer, M Moran, W Sanders & E Ganter, ‘Building Capacity in Indigenous Governance: Comparing the Australian and American Experiences’, *Australian Journal of Public Administration*, vol. 79, 1, no. 1, 2019.

<sup>62</sup> Lee & Tran, ‘From boardroom to kitchen table: Shifting the power seat of Indigenous governance in protected area management: Tebrakunna country’.

<sup>63</sup> See Principle 1 of AIATSIS, *Code of Ethics for Aboriginal and Torres Strait Islander Research*, 2020 <https://aiatsis.gov.au/research/ethical-research/code-ethics>.

<sup>64</sup> In their evaluation of the OCHRE program in NSW, the evaluators noted that one important avenue for greater improvement is to ‘develop and build cultural capability of government representatives and service providers (including NGOs) in working with NSW Aboriginal peoples’. See I Katz, S Bates, J Idle, W Jopson & M Barnes, *OCHRE evaluation synthesis report: Stage 1 final report*, Social Policy Research Centre, UNSW Australia, 2018, p. 16.

<sup>65</sup> Bauman et al n 61 above.

issues', and it has developed a number of tools and frameworks for lifting the public sector's capability to work with Māori.<sup>66</sup>

## Data and evidence-based decision making

### **Recommendation 13: That Local and Regional Voices are given the opportunity and resourcing to influence and lead the generation of data.**

AIATSIS welcomes the emphasis on data sharing, and the commitment to empowering communities to access and gather data specific to their own needs. But this does not address how many important data sources, collected by national agencies (such as the Australian Bureau of Statistics), can and should be reformed to better inform Indigenous policymaking, including at the local and regional level.<sup>67</sup> Much national data is only available on very general levels of disaggregation (remote/non-remote, or by state and territory), which is of minimal use to Indigenous communities locally.<sup>68</sup> They also focus on government priority agendas—such as employment—which do not necessarily match the full range of aspirations for evidence based decision-making of all communities. A vast amount of data is still collected analysed and communicated from within deficit discourse and Indigenous nation-based data remains a significant gap. In response, many Indigenous communities are spearheading data projects for their own needs. For example, the Yawuru 'Knowing our Community' household survey, conducted by the local PBC, which supported planning and community development.<sup>69</sup> A greater commitment to building local control of data, supported by national infrastructure, is required.

AIATSIS has a statutory function to provide leadership in Aboriginal and Torres Strait Islander research as well as the ethics and protocols for research and collections relating to Aboriginal and Torres Strait Islander peoples, which includes collections of data. In 2020 AIATSIS released the new Code of Ethics for Aboriginal and Torres Strait Islander Research (the Code),<sup>70</sup> which forms part of the Australian framework for the responsible

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<sup>66</sup> For example, the Maori Crown relations framework guide and Crown engagement with Maori framework: Te Arawhiti - The Office for Maori Crown Relations, *Te Arawhiti - Tools and Resources*, 2021, viewed 12 March 2021, <https://www.tearawhiti.govt.nz/tools-and-resources>.

<sup>67</sup> Maggie Walter, one of the leading scholars on Indigenous data sovereignty, notes that there are five categories of data failure: 'BADDR: Blaming, Aggregate, Decontextualized, Deficit and Restricted'. See M Walter, 'The voice of Indigenous data: beyond the markers of disadvantage', *Griffith Review*, vol. 60, 2018.

<sup>68</sup> When Nyamba Buru Yawuru (NBY) attempted to gain information on its client population, it found that information from the ABS and government agencies was unreliable and unable to inform specifically on the Yawuru population. Although Yawuru's development of its own data is a pioneering example of community-led data generation, the challenges that NBY faced also speak to the need to reform data gathering at the national level. See J Taylor, B Doran, M Parriman & E Yu, 'Statistics for community governance: the Yawuru Indigenous population survey of Broome', *CAEPR Working Paper*, no. 82/2012, 2012, pp. 8, 11–13.

<sup>69</sup> J Taylor et al, *Statistics for Community Governance: The Yawuru Indigenous Population Survey of Broome* (Working Paper No 82/2012, Centre for Aboriginal Economic Policy Research, 2012).

<sup>70</sup> AIATSIS, *Code of Ethics for Aboriginal and Torres Strait Islander Research*, 2020 <https://aiatsis.gov.au/research/ethical-research/code-ethics>.

and ethical conduct of research.<sup>71</sup> The Code includes specific provisions in relation to data and also provides a general framework for Indigenous leadership of research.

AIATSIS is part of a national collaboration on Indigenous data, working closely with the Indigenous Data Network, Maïam nayri Wingara Indigenous Data Sovereignty Collective and Australian Research data Commons, among others. After a whole-of-government research and evaluation strategy for policies and programs affecting Indigenous Australians was announced in 2017, the Australian Government asked AIATSIS to develop an Indigenous Knowledge Exchange platform that will provide an accessible and comprehensive platform to house and access research and data relating to Aboriginal and Torres Strait Islander peoples.<sup>72</sup> This is an important opportunity and resource for Local and Regional Voices to share information and learnings. However, it requires long-term investment to be dynamic and successful so as to meet the needs of local communities.<sup>73</sup> The platform is augmented by a community based grants program for communities to identify for themselves the research and data they require

## Regions

### **Recommendation 14: That regional boundaries be defined by Indigenous constituencies before establishing their number.**

The determination of regional boundaries is likely to have one of the biggest impacts upon the success of the Local and Regional Voices. There is a significant risk that determining the number of regions before deciding what those regions are will result in the formation of culturally inappropriate groupings. Culture should be a paramount consideration in the determination of regional boundaries and the number of Local and Regional Voices, and is not captured by ‘historical approaches’, many of which are informed by settler concepts, geographies and needs.<sup>74</sup> Factors such as Australian political boundaries, while necessary consideration, are rarely effective proxies for the ways in which communities see and organise themselves.<sup>75</sup>

The arbitrary delineation of electoral boundaries under the NAC, for example, was identified as a significant contributor to the organisation’s problems.<sup>76</sup> These problems

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<sup>71</sup> The two other key framework documents are the Australian Code for Responsible Conduct of Research 2018 and the National Statement on Ethical Conduct in Human research 2018, authored by the Australian Research Council, National Health and Medical Research Council and Universities Australia

<sup>72</sup> AIATSIS, *Knowledge exchange platform*, AIATSIS, 2021, viewed 11 March 2021, <https://aiatsis.gov.au/research/indigenous-research-exchange/knowledge-exchange-platform>.

<sup>73</sup> The original fund to establish the platform and grants program expires in 2021-22.

<sup>74</sup> For example, as evident in the drawing of boundaries of local government shires in remote Aboriginal communities: Tran & Stacey, “‘Wearing two hats’: the conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities’.

<sup>75</sup> A Redmond, ‘Identifying the relevant level of a society in Australian native title claims’, *Anthropological Forum*, vol. 21, no. 3, 2011, pp. 287–305.

<sup>76</sup> HC Coombs, *The role of the National Aboriginal Conference: report to the Hon. Clyde Holding, Minister for Aboriginal Affairs*, Australian Government Publishing Service, Canberra, 1984.

stem from the fact that groups that had not, and did not wish to, work together were forced to do so. When Minister for Aboriginal Affairs Gerry Hand (1987–1990) engaged in nation-wide consultations for ATSIC, he revised his original proposal of 28 regions to 56 and then 60 regions, arguing that this new number ‘reflect[s] Aboriginal and Torres Strait Islander requests and recognise[s] historical, cultural, linguistic and other important factors’.<sup>77</sup> Diane Smith argues that the eventual decision to reduce this to 36 regions in 1993 likely had much to do with ‘containing the political consequences of cultural diversity’.<sup>78</sup>

The suggested number of 25–35 regions appears to reflect recommendations of the 2003 ATSIC review, which endorsed the then 35 regions that formed ATSIC as the basis of the organisation,<sup>79</sup> but this number may not capture appropriate cultural groupings. For example, there are five distinct island clusters in the Torres Strait region,<sup>80</sup> and six regions that make up Noongar Nation (itself just one of many cultural groups in Western Australia).<sup>81</sup> The suggested number of one and four to seven regions for the Torres Strait and Western Australia respectively, is, therefore, likely to result in potentially unworkable delineations. A ‘soft’ rather than hard cap on Local and Regional Voices per state/territory could guide the development of regions that are chosen by Indigenous groups themselves without forcing groupings that are culturally inappropriate or counter-effective.

**Recommendation 15: That cultural fit take precedence in the establishment of regional boundaries, even if this results in groupings that are not aligned with state and territory borders.**

The breakdown of regions according to state and territory jurisdictions, with an exception for the Torres Strait Islands, may also raise problems. As noted in the *Interim Report*, it is important not to ‘undermine existing structures that work well and cut across legitimate state and territory jurisdiction’.<sup>82</sup> Although alignment with state and territory boundaries is important for practical and funding purposes (with the states responsible for the delivery of many Indigenous policies and programs), it is important that cultural

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<sup>77</sup> See Commonwealth Parliamentary Debates, House of Representative Hansard, No. 7, April 1988, p. 2177, cited in D Smith, ‘From cultural diversity to regionalism: the political culture of difference in ATSIC’, in P Sullivan (ed.), *Shooting the banker: essays on ATSIC and self-determination*, North Australia Research Unit, Australian National University, Casuarina, Northern Territory, 1996, pp. 17–41, p. 24.

<sup>78</sup> Smith, ‘From cultural diversity to regionalism’, p. 36.

<sup>79</sup> J Hannaford, J Huggins & B Collins, *In the hands of the regions - a new ATSIC: report of the Review of the Aboriginal and Torres Strait Islander Commission*, The Review Panel, Canberra, 2003, p. 5.

<sup>80</sup> Torres Strait Regional Authority, ‘Community Profiles’ viewed 31 July 2012, <https://www.tsra.gov.au/the-torres-strait/community-profiles>.

<sup>81</sup> Reflected in the six ILUAs signed as part of the South West Native Title Settlement – Ballardong People, Gnaala Karla Booja, South West Bojarah, Wagyl Kaip and Southern Noongar, Whadjuk People and Yued.

<sup>82</sup> National Indigenous Australians Agency, *Interim report*, p. 65.

considerations take priority.<sup>83</sup> Alternative arrangements should be accommodated where a cultural approach to defining regions results in groupings that cross state and territory borders. This may be relevant to, for example, the Miriuwung Gajerrong people whose territory covers the Western Australian-Northern Territory border, the Yorta Yorta people (whose land covers parts of Victoria and New South Wales) and the Ngaanyatjarra Pitjantjatjara Yankunytjatjara traditional owners, a group which spans the central desert region and crosses the Western Australian, Northern Territory and South Australian borders. The highly successful Indigenous Desert Alliance similarly works across these borders. Breaking up desert Country along state and territory boundaries would likely be arbitrary, if not counterintuitive and ineffective.

**Recommendation 16: That regions, while geographically-based, accommodate diasporas.**

While regions are necessarily geographically-defined (and appropriately so given the centrality of connection to Country to Indigenous economic, political, social, spiritual and personal life), any Voice must be cognisant of the complexities of Indigenous 'community'. The Local and Regional Voice proposals recognise the needs of historical peoples, however, there is no similar recognition of the need to accommodate cultural diasporas. For example, over 85% of Torres Strait Islanders live on mainland Australia but retain close cultural ties to the Torres Strait and would likely wish to be involved in a local and regional voice for the Torres Strait.<sup>84</sup> This could be achieved by defining regions by residence and cultural affinity, rather than by residence alone. Engagement with the Gur A Baradharaw Kod Torres Strait Sea and Land Council (GBK), the peak native title body for the Torres Strait, may be beneficial in determining how other groups manage this balance. In their recent annual report, the Gunditj Mirring Corporation, the PBC for the Gunditj mara people, mapped their membership across Australia as a useful illustration of the cultural ties that extend outward from country.<sup>85</sup>

**Recommendation 17: That the operations of Local and Regional Voices be properly funded.**

As with any Voice, funding must be comprehensive and address the ongoing damage that has been done to Indigenous culture, governance and social structures through successive government policies. The *Interim Report* refers consistently to the support that Local and Regional Voices will provide to directing funding priorities and directions, and

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<sup>83</sup> T Bauman, D Smith, R Quiggin, C Keller & L Drieberg, *Building Aboriginal and Torres Strait Islander governance: report of a survey and forum to map current and future research and practical resource needs*, AIATSIS, 2015.

<sup>84</sup> See Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020*, Report, 2020, p. 12.2. According to Smith, 'Diaspora people often reject a distinction between their connection and those of local families, asserting that, regardless of location, they hold equal interests in (and connection to) the country of their forebears'. See B Smith, "'Local" and "diaspora" connections to Country and kin in central Cape York Peninsula', *Land, Rights, Laws: Issues of Native Title*, vol. 6, 2, no. 2, 2000.

<sup>85</sup> Gunditj Mirring Traditional Owner Corporation, 2020, *Annual report 2019-20*, pp. 36-39, viewed 7 May 2021 <https://www.gunditjmirring.com/governance>.



also contemplates funding community meetings to finalise Local and Regional Voice design.<sup>86</sup> However, it directs little attention to how Local and Regional Voices will themselves be funded on an ongoing basis.

Patchy and changing funding and policy environments have undermined many community and cultural-based organisations. In particular, the tendency to fund a large number of Indigenous programs across multiple departments, issuing numerous, relatively small, grants has led to high administrative burdens and inefficiencies.<sup>87</sup> In contrast, the highly successful (and over-subscribed) Indigenous Protected Areas program provides for dedicated consultation funding over a two-year period that coincides with effective decision making and planning.<sup>88</sup> Proper funding of Voice arrangements through a predictable and manageable income stream is therefore essential.

Funding for community-led local and regional voice structures could form part of a comprehensive settlement package. Overseas approaches to funding could also provide a model. For example, Canada's 2019 *Collaborative Self-Government Fiscal Policy* establishes a framework for developing fiscal agreements between Canada and each First Nations government with a view to ensuring sufficient and sustainable funding on a principled basis. This could also form the basis of any transitional arrangements to a broader reparative process.

## Transitional groups

**Recommendation 18: That transitional arrangements be properly funded with graduated measures towards implementation.**

In many cases, the issue within Indigenous organisations is not a lack of governance, but a lack of support and recognition for the right kinds of governance, leading to compromised structures which have adapted as discussed above (recommendations 11-12). The interim report accepts that in some cases whole-of-community governance structures of the type contemplated by the Voice may not exist, in which case transitional arrangements would be necessary. There is a lack of clarity around what 'transitional groups' are designed to achieve, and how long they are intended to operate for. Consultation for an interim group might end up taking as long as consultation for the actual Voice. Accessible community resources should be developed that actually lay out the practical nature of how these governance groups operate – this can be part of

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<sup>86</sup> National Indigenous Australians Agency, *Interim report*, p. 105.

<sup>87</sup> Australian National Audit Office, *Capacity development for Indigenous service delivery*, Auditor-General Report, 26 of 2011–12, no. 26 of 2011–12, 9 February 2012.

<sup>88</sup> D Smyth, 'Indigenous protected areas in Australia', *Parks*, vol. 16, no. 1, 2006, pp. 14–20; SVA Consulting, *Consolidated Report on Indigenous Protected Areas Following Social Return on Investment Analyses*, Department of Prime Minister and Cabinet, 2016.

capacity building and resource development. This might also avoid being too prescriptive, while also acknowledging existing models.<sup>89</sup>

## Implementation flowchart and scenarios<sup>90</sup>

**Recommendation 19: That a broader survey of existing models and their challenges be undertaken to provide potential models for Local and Regional Voice structures.**

AIATSIS also notes that the *Interim Report* tends to hold up the NSW OCHRE Local Decision Making groups and Empowered Communities as exemplars of governance that would fit well with the requirements of the Local and Regional Voice.<sup>91</sup> However, we note the following challenges that have been highlighted in the first evaluation of the OCHRE Local Decision Making program:<sup>92</sup>

- The NSW Local Decision Making Model ‘is inherently unequal in that it is being led by government’ and ‘there is criticism that the resources do not match the goals of the Local Decision Making model—particularly given the geographic scale and the Accord priorities of the regions involved’.<sup>93</sup>
- The NSW Local Decision Making Model has not resolved tensions with other forms of Aboriginal governance, nor the issue of representation at the regional level: ‘The LDM model is dependent on Aboriginal people in communities trusting that the regional assembly/alliance represents their interests. The evaluation found that keeping open the lines of communication between local communities and regions is a significant challenge for the model and requires adequate resourcing’.<sup>94</sup>

The current survey of local and regional models contained in the *Interim Report* is constrained. It should be expanded and developed for use by communities designing their Local and Regional Voice. We note that many PBCs perform strong regional governance roles, and that there are particular examples of success that should be explored. These include the development of GBK.

GBK was formally established in 2012 as the peak regional body representing the 21 PBCs in the Torres Strait. GBK’s directorship is made up of the Chairs of each constituent

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<sup>89</sup> The Centre for First Nations Governance in Canada has useful guidance on developing transitional governance arrangements. See further: <https://fngovernance.org/get-beyond-the-indian-act>.

<sup>90</sup> National Indigenous Australians Agency, *Interim report*, pp. 103–114.

<sup>91</sup> National Indigenous Australians Agency, *Interim report*, p. 138, and especially ‘Scenario 1’ on p. 104.

<sup>92</sup> As far as we aware, there have been no equivalent evaluations of the Empowered Communities program available to the public. For a critical assessment of the Empowered Communities framework, see E Klein, ‘Empowered Communities: review of the Empowered Communities Design Report’, CAEPR Topical Issue, no. 1/2015, 2015.

<sup>93</sup> Katz et al, *OCHRE evaluation synthesis report: Stage 1 final report*, p. 13.

<sup>94</sup> Katz et al, *OCHRE evaluation synthesis report: Stage 1 final report*, p. 14.

PBC, and it supports PBCs to fulfil their responsibilities to manage land and sea in accordance with Ailan Kastom (island custom).

Preliminary ideas for the organisational structure were developed through a series of workshops, with the first one held on Mer Island. Key aims of the organisation included taking a lead role over the land and sea unit and native title unit functions of the Torres Strait Regional Authority, as well as the development of subcommittees to deal with housing, fisheries and traditional knowledge management amongst other areas. In order to progress with the governance arrangements, an interim board was established consisting of PBC chairs which was known as a working group. One of the core aims of the body was to increase bargaining power in key areas of concern and interest to the PBCs.

The PBCs in the Torres Strait advocated for the use of different decision making models that were flexible and responsive to the type of decision that was being made, whether it be consensus decision-making, majority decision-making or where no consultation was required.

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