

# An Advisory Body for Aboriginal Peoples in Australia – one step forward and two back?

By *Bertus De Villiers\**

**Abstract:** The Aboriginal Peoples of Australia have been demanding a form of constitutional recognition for many years. Whereas some other indigenous peoples in countries such as New Zealand, the USA and Canada have been partners to a ‘treaty’ at the time of settlement, Australia regarded the landmass as *terra nullius* (no person’s land) and never entered into a treaty with the Aboriginal Peoples. Recently a proposal was submitted to the federal government of Australia by Aboriginal Peoples for the Constitution to be amended to include an Advisory Council to be elected by Aboriginal Peoples. The proposed Council would not have law-making powers, but its advices would have to be considered by the federal parliament before it enacts legislation that impact on Aboriginal Peoples. This article considers two important questions that arise from the recommendation, namely firstly whether the Advisory Council should be established by the Constitution or rather by an Act of Parliament, and secondly what electoral system could be used for the election of representatives to the Council.

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## A. Introduction

The Aboriginal and Torres Strait Islander Peoples of Australia (‘Aboriginal Peoples’)<sup>1</sup> have recently submitted a proposal to the parliament of Australia for a ‘voice’ to be given to Aboriginal Peoples in the Constitution of Australia. The proposed ‘voice’ is to be an elected Advisory Council that would give advices to the federal Parliament; comment on draft legislation in the federal Parliament; and comment on and propose policy measures that may impact on the interests of Aboriginal Peoples.<sup>2</sup> The federal government has rejected

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- 1 The term ‘Aboriginal Peoples’ may create the impression that the indigenous people of Australia comprise one single, uniform culture with a single hierarchical leadership system. That is not correct. The term ‘Aboriginal Peoples’ is used for convenience to refer to the rich and diverse identities, languages, laws, customs and interests of the Aboriginal and Torres Strait Islander Peoples. The indigenous people of Australia are a highly heterogeneous community of ‘peoples’ with their own laws and customs rather than a single indigenous ‘people’.
- 2 The nature and scope of matters that would be referred by the Parliament for advice are yet to be clarified. It is not envisaged at this stage that the Advisory Council would have advisory involvement in the legislative process of states and territories. This may be a serious shortcoming since the

the proposal on the basis that according to its view, it is unlikely that the Australian electorate would support an amendment to the Constitution. The federal opposition has not rejected the proposal and it remains willing to pursue the proposal.

The proposal is, regardless of the rejection by the current government, a major step forward to break the hiatus that has characterised the relationship between Aboriginal Peoples and the rest of the Australian society for many decades. At the same time, however, the exact nature of the proposed Advisory Council; its composition; and the powers and functions of such a Council are yet to be settled and approved at a referendum (if the Constitution is to be amended). There is by no means certainty about the outcome of the process that lies ahead even if the proposal is put to the electorate in a referendum. The one step forward could easily become two steps back once the detail of the proposal is negotiated and the arduous process to amend the Constitution is started – particularly if the proposed amendment to the Constitution is rejected by the electorate.

There are inherent risks associated with ‘advisory bodies’ and particularly that an advisory body for Aboriginal Peoples may become a ‘toy telephone’<sup>3</sup> that may bring about high expectation; substantial costs but with little if any substantial impact on the legislative or policy process. The merit of the Advisory Body will ultimately be determined by it being a true and credible voice of Aboriginal Peoples, and whether federal Parliament would take its advices seriously.

A leading Aboriginal Leader and Member of the Parliament, Mr Pat Dodson, has explained the proposed Advisory Council as follows:

*“There is fundamentally one recommendation: and that is to have a voice entrenched in the constitution that can be a [Aboriginal] voice to the Parliament....And that is where the detail and the clarity around the nature, function and purpose of the entrenchment has to be clearly understood and explained to the public: that it has no veto capacity over the Parliament, it really doesn't have any binding capacity to the Parliament, it doesn't have a vote in the Parliament.”*<sup>4</sup>

states and territories legislate on a wide variety of matters that may fall within the scope of the policy areas that the Advisory Council may want to comment on.

3 In the mid-1930s a special council was formed for the African people of South Africa to express their views to government and the (White) Parliament. It was called the Natives' Representatives Council or more commonly, the ‘third house’ to the existing two-house Parliament. It comprised elected and appointed persons. The Council ultimately failed in its objectives – its advices were not heeded or taken seriously; it did not evolve into a co-legislature; and its members became discredited and disillusioned. ZK Mathews, a senior African leader at the time, compared the Council to a ‘toy telephone’ with a lot of talking on the one side, but no one listening at the other end. The Council was ultimately dissolved in 1959. See Paul Mosaka as quoted in *Mia Roth, The Rhetorical Origins of Apartheid: How debates of the Natives Representative Council, 1937-1950, Shaped South African Racial Policy*, Jefferson 2016, p. 175.

4 Emphasis added. ABC at <http://www.abc.net.au/7.30/content/2017/s4703437.htm> (last accessed on 30 November 2017).

The detail concerning the proposed Advisory Council is yet to be worked out and it seems now as if the detail would have to await a change of government, but from what has been stated so far the following can be gleaned:

- The Council is to be established by the Constitution;
- The detail of the Council's election, powers and function is to be set out in legislation;
- The Council is to be elected by Aboriginal Peoples;
- The Council is to give advice and express opinions at the national level in regard to matters that impact specifically on Aboriginal Peoples;
- The Council is to give advice to the federal Parliament.

Many questions remain unanswered and this article endeavours to contribute to answer some of those questions on the basis of international experiences. The two questions the subject of this article are: (a) should the Advisory Council be created by the Constitution or by ordinary legislation; and (b) by which mechanism should the Advisory Council be elected and how could membership issues be dealt with. It is the opinion of the author that an advisory council could be established by legislation rather than by an amendment to the Constitution and that the basis of elections should be freedom of choice without any form of 'testing' of Aboriginality or a separate voters roll for Aboriginal peoples. These two essential elements may provide a basis for parties to find common ground in the ongoing debate.

In order to address these questions I shall seek to derive insight from selected international comparative experiences where different forms of community representation is pursued by way of separate electoral processes. In the first part a brief overview is given of the background to the recommendations for the establishment of an Advisory Body; the second part considers main issues the subject of this paper, namely should an advisory body be created by constitution or statute; and what electoral system should be used to elect representatives; and finally recommendations are made on the basis of selected international case studies.

## **B. Background to the recommendation for an Advisory Council**

There has been a debate in Australia for many years about the formal recognition of Aboriginal Peoples as the original owners and occupiers of the land. Since no treaty was entered into at the time of occupation of Australia in 1788,<sup>5</sup> there remains a strong opinion that ad-

5 The territory of Australia was regarded as *terra nullius* or no-person's land at the time of settlement. This erroneous categorisation of Aboriginal People's rights to the land was only acknowledged by the High Court in 1992 when the doctrine was rejected and the 'native title' of Aboriginal People was accepted. See *Mabo v State of Queensland (no2)* (1992) 175 CLR 1, HCA 23 and *Bryan A Keon-Cohen, The Mabo Litigation: A Personal and Procedural Account*, Melbourne University Law Review 35 (2000).

vocates for a treaty of some sort to be negotiated with Aboriginal Peoples.<sup>6</sup> The idea of a treaty has however not gained much ground in mainstream political discourse. The most pragmatic approach that is currently being advocated after an extensive consultation process amongst Aboriginal Peoples is for the establishment of an Advisory Council as a way to ‘recognise’ the place of Aboriginal Peoples in the Australian Constitution.

The discussions about the constitutional ‘recognition’ of Aboriginal Peoples have been ongoing for some time.<sup>7</sup> Although there is strong support for some form of recognition of Aboriginal Peoples, there are disagreements about what is meant by ‘recognition’; in what instrument should ‘recognition’ be contained (for example treaty, Constitution or Act of Parliament); should ‘recognition’ be principally symbolical or should it form the basis of reparation for past injustices by way of a separate institution for Aboriginal Peoples; and what practical benefits should flow from ‘recognition’?

The Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten, jointly appointed a Referendum Council on 7 December 2015 with the task to consult with Aboriginal Peoples about options for recognition and to make recommendations.<sup>8</sup> The Purpose of the Referendum Council was put as follows:

*‘The Referendum Council will advise the Prime Minister and the Leader of the Opposition on progress and next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander Peoples in the Constitution, as set out in these terms of reference.’<sup>9</sup>*

The Referendum Council was tasked to consult with Aboriginal Peoples across the country in an attempt to formulate a national consensus about the views of Aboriginal Peoples. The Referendum Council engaged in wide ranging meetings in the various regions to ascertain the view and preferences of Aboriginal Peoples. In its interviews and deliberations, the Referendum Council adopted four principles by which to assess any proposal put to it, namely: (a) does the proposal contribute to a more unified and reconciled nation; (b) does the pro-

6 Some of the state governments of Australia have been discussing options for a symbolical treaty with Aboriginal People within the particular state, but there seems to be little appetite at a federal level for a formal treaty that would be binding in international and national law. See ABC News, Victorian Government to begin talks with First Nations on Australia’s first Indigenous treaty, <http://www.abc.net.au/news/2016-02-26/victoria-to-begin-talks-for-first-indigenous-treaty/7202492> (last accessed on 30 November 2017).

7 This author has proposed that ‘cultural councils’ be considered to enable Aboriginal People to make and implement decisions with the status of laws in regard to their culture and traditions. See *Bertus De Villiers*, The protection of dispersed minorities: Options for Aboriginal People in Australia, *Heidelberg Journal of International Law* 74 (2014), pp. 105-140; *Bertus De Villiers*, Self-determination for Aboriginal People – is the answer outside the territorial square?, *The University of Notre Dame Australia Law Review* 16 (2014), pp. 74-106.

8 See <https://www.pmc.gov.au/indigenous-affairs/constitutional-recognition> (last accessed on 30 November 2017).

9 See Terms of Reference of the Referendum Council in <https://www.pmc.gov.au/resource-centre/indigenous-affairs/referendum-council-terms-reference>

posal accord to the wishes of Aboriginal Peoples and is the proposal to their benefit;(c) can the proposal gain the support of a majority of Australians; and (d) is the proposal technically and legally sound?<sup>10</sup>

The Referendum Council considered and widely consulted Aboriginal Peoples about 5 distinct options, namely:

- A joint statement – in the constitution or in legislation - that recognises Aboriginal and Torres Strait Islander Peoples as the First Australians.
- Amending the existing ‘race power’ of the Constitution (s61(xxvi)) or deleting it and inserting a new power for the federal parliament to make laws for Aboriginal and Torres Strait Islander Peoples.
- Insert a guarantee against racial discrimination into the Constitution.
- Deleting s25 of the Constitution (which contemplates the possibility of a state government excluding some Australians from voting on the basis of their race).
- Providing for a First Peoples’ Voice to be heard by federal parliament and the right to be consulted on legislation and policies that relate to Aboriginal and Torres Strait Islander Peoples.<sup>11</sup>

The Referendum Council, after arguably the most extensive consultation process ever within Aboriginal communities, made its recommendations in June 2017.<sup>12</sup>

The recognition debate culminated when Aboriginal representatives from across Australia met at the spiritual and geographical centre of Australia, Uluru, from 23-26 May 2017 to discuss the outcome of the national consultation process.<sup>13</sup> On 26 May 2017 a major step was taken in the recognition process when the delegates agreed on the *Uluru Statement from the Heart*.<sup>14</sup> The Statement is short but powerful and spells out the following vision:

*‘With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood. Proportionally, we are the most incarcerated Peoples on the planet. We are not an innately criminal Peoples. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.*

10 Commonwealth of Australia, Final Report of the Referendum Council, 30 June 2017, <https://www.referendumcouncil.org.au/final-report> (last accessed on 30 November 2017).

11 *Supra* note 10, p. 6.

12 *Ibid* note 10, pp. 46-138.

13 See <https://www.referendumcouncil.org.au/get-the-facts> (last accessed on 30 November 2017).

14 See <http://nationalunitygovernment.org/content/uluru-statement-heart> (last accessed on 30 November 2017).

*We seek constitutional reforms to empower our Peoples and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution.'*

The Uluru Statement is on the one hand simple yet ground breaking, but on the other hand it leaves many questions unanswered. The essentials of proposed recognition is set out as (a) a form of constitutional recognition that recognises and acknowledges the ancient and ongoing linkage of Aboriginal Peoples to the land; (b) a commitment to tackle the socio-economic deprivation Aboriginal Peoples suffer; and (c) a model for more effective consultation and co-governance for Aboriginal Peoples.<sup>15</sup> A preference was expressed for the consultative Voice to be enshrined in the Constitution rather than in ordinary legislation.

The preferred option put forward to the federal government and opposition is the creation of an elected, consultative body through which Aboriginal Peoples can express their views; be consulted by government and Parliament; and make inputs in legislation and policies that affect Aboriginal Peoples.<sup>16</sup>

The Final Report of the Referendum Council<sup>17</sup> which was handed to the Government and leader of the Opposition on 20 June 2017, made two major recommendations. The Recommendations are:

- (1) 'That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander Peoples as the first Peoples of Australia.
- (2) That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.'

The Referendum Council has put its weight behind a 'constitutionally entrenched Voice' for Aboriginal Peoples.<sup>18</sup> The Referendum Council preferred for the Advisory Council to be enshrined in the Constitution (hence requiring a referendum to amend the Constitution)

15 See for example <https://www.humanrights.gov.au/news/stories/uluru-statement-calls-first-nations-voice-constitution> (last accessed on 30 November 2017).

16 Although the exact nature, scope, composition, and functions of such a consultative body are yet to be considered, the deputy prime minister Barnaby Joyce was quick to say the idea of a third chamber of parliament (as a co-legislative chamber) 'would not fly' with the electorate. ABC News, <http://www.abc.net.au/news/2017-05-29/indigenous-chamber-parliament-wont-fly-barnaby-joyce-says/8568068> (last accessed on 30 November 2017). Since then the Prime Minister Turnbull has gone further to reject any proposal for an amendment to the Constitution. He was however silent about the possible enactment of an Advisory Council by way of federal statute.

17 *Ibid*, note 10.

18 *Ibid*, note 10, p. 14.

since it is believed that the likelihood of the advices being treated seriously by Parliament would be enhanced by a constitutionally provided institution.<sup>19</sup> The Referendum Council acknowledges that the detail to give effect to the proposed Advisory Council is yet to be negotiated – thus proposing an extensive period for further consultations before the matter can be put to a referendum.

In short, the core pillars of the proposed Advisory Council are as follows:<sup>20</sup>

- The Advisory Council would be created by the Constitution;
- The Council would be elected by Aboriginal Peoples and not appointed by government;
- The detail of the Council, its powers and its functioning would be contained in legislation to be enacted by the federal Parliament;
- The Council would have advisory, not co-legislative powers;
- The exact scope of advices and the circumstances when advices are sought by Parliament from the Advisory Council are yet to be negotiated; and
- The doctrine of parliamentary sovereignty would remain intact, which emphasises the advisory rather than legislative role of the Council.<sup>21</sup>

The Government initially welcomed the recommendations,<sup>22</sup> but on 26 October 2017 Prime Minister Turnbull announced unexpectedly that the proposal to amend the Constitution is not acceptable to government since it is unlikely to receive the required support from the Australian electorate.<sup>23</sup> He did not offer any explanation as to how he came to the conclusion, particularly in light of opinion surveys showing strong support for some form of constitutional recognition for Aboriginal peoples. The Prime Minister did not go so far as to rule out the possibility of an Advisory Council be created by federal statute.

The option for an advisory council of some sort remains however on the policy agenda for two reasons: firstly, the government has not ruled out a statutory advisory body, it only expressed opposition to a constitutional advisory body, and secondly the federal opposition

19 The Referendum Council said that its consultations show that the item that was the highest on the priority list of Aboriginal Peoples, was that of an ‘indigenous voice’. *Ibid*, note 10, p. 35.

20 *Ibid*, note 10, p. 36.

21 This summary was echoed by a senior Aboriginal leader, Noel Pearson, when he said: “This is not a third chamber, nor reserved seats. The proposal is for an indigenous voice to parliament – an institution set up in legislation, constitutionally guaranteed a say in indigenous affairs.” See *Noel Pearson*, Memo Richo: Facts count, not lazy fictions, *The Australian*, 8 August 2017.

22 See ABC News, Malcolm Turnbull defers decision on how Government will respond to Referendum Council, 5 August 2017, <http://www.abc.net.au/news/2017-08-05/pm-defers-decision-government-respond-referendum-council/8777620> (last accessed on 30 November 2017).

23 <http://www.abc.net.au/news/2017-10-27/indigenous-leaders-enraged-by-pms-referendum-rejection/9090762> (last accessed on 30 November 2017). Aboriginal leaders reacted with fury and Pat Anderson who co-chaired the Referendum Council said it was a ‘kick in the guts’ of Aboriginal Peoples. Opposition leader Bill Shorten said the rejection was ‘disappointing’ particularly after the extensive consultations that had preceded it.

and Aboriginal Peoples' leadership who made the recommendation, have not stepped away from a possible constitutional amendment.

### C. Issues to be addressed

In this following part consideration is given to two of the key issues yet to be settled by way of negotiations and how those may be addressed on the basis of comparative international experiences. The key issues the subject of this article are: (a) should the Advisory Council be created by the Constitution or by ordinary legislation; and (b) by which mechanism should the Advisory Council be elected and how could membership issues be dealt with.

The reason why the article focuses on these issues are firstly, that a change of government may again raise the question whether an advisory body should be created by the Constitution; and secondly, the Referendum Council paid scant attention to the system by which the Advisory Council should be elected. The Referendum Council acknowledged that the electoral system requires further deliberation.

In the following part these two questions and selected case studies are considered.

#### I. *Should the Advisory Council be created by Constitution or federal legislation?*

The recommendation of the Referendum Council is for the Advisory Council to be a creature of the Constitution, with detail about its election, powers and functions to be set out in subsequent legislation. The institution would therefore be of a constitutional nature, while the composition, powers and functions of the Council would arise from a statute.<sup>24</sup>

Three preliminary comments can be made in response to this proposal:

Firstly, the rationale and sentiment to have the Advisory Council enshrined in the Constitution is understandable, but the complexity to amend the Constitution may place the entire initiative at risk.<sup>25</sup> The Constitution requires the following formula to be amended: first, the proposed bill to amend the Constitution must be passed by absolute majority by both

24 This is one of the challenges if the Advisory Council is put to a referendum since all the details in regard to its establishment and functioning would need to be finalised before the referendum can be called. The risk of persons voting against the constitutional amendment for various, non-related, reasons is high. See for example how previous referenda in Australia failed, most notably the most recent in the regard to the 'republic', because of a variety of non-related objections. See in similar vein how constitutional referenda in Canada failed (Meech Lake (1987) and Charlottetown (1992)) because so many diverse interest groups found (divergent) reasons to vote against it. *Rainer Knopff & Anthony Sayers*, Constitutional politics in Canada, in: Raoul Blindenbacher / Abigail Ostien (eds.), *Dialogues on constitutional origins, structure and change in federal countries*, Montreal 2009, p. 18.

25 See s. 128 Constitution of Australia. The scepticism of Prime Minister Turnbull is on the one hand understandable, but on the other hand the unilateral manner in which he acted by rejecting a constitutional amendment was surprising.



houses of federal parliament; second, the approved bill must within 6 months be submitted for a referendum of which the outcome for approval must be a double majority, being a majority of votes as well as a majority of states (4 out of 6).<sup>26</sup> Thirdly, if the required majority is attained the bill is presented to the Governor General for assent. Due to the high threshold and the demonstrated reluctance of the Australian electorate to approve constitutional amendments, only 8 of 22 efforts to amend the Constitution since 1901 have been successful.<sup>27</sup>

It is a policy, political and legal question whether it is essential for the Advisory Council to be created by the Constitution, particularly in light of its (limited) advisory powers.

Secondly, even if the Constitution is amended to provide for an Advisory Council, the flexibility that may be needed to adjust aspects of the Council as time progresses may be inhibited due the rigidity of the Constitution. The Constitution may therefore lock in a particular model which, even if it is shown to be unsuccessful or ineffective in time to come, may be complex, if not impossible, to amend. Australians may, if the Constitution is amended, find themselves with an Advisory Council which in years to come may be difficult if not impossible to remove from the Constitution or amended to address shortcomings.

Thirdly, although the proposal is that sovereignty of Parliament should remain unfettered, the reality is that the advices given by an elected body which is created by the Constitution may in due course be construed by the judiciary in a manner that in effect curtails the sovereignty of Parliament, even if just in procedural - 'right to be consulted'- matters. The current intention that the Council would not become part of the legislative process, may not necessarily constrain the judiciary of the future if complaints are lodged that advices given by the Council have not been properly considered by Parliament, or that Parliament had failed to submit legislation for comment to the Council.

There are two useful international case studies to refer to in regard to this particular issue, the Sami Parliament of Finland and the Houses of Traditional Leaders in South Africa.

#### Sami Parliament – a 'parliament' not being a Parliament

The Sami is a small, indigenous group of which the members spread across Finland, Norway, Sweden and Russia which are their traditional areas of hunting, fishing and living.<sup>28</sup> The Sami Parliament in Finland is of interest to the Australian discussion.

In light of the dispersed living patterns of the Sami and their integration with the rest of the population, a combination of territorial and cultural autonomy had to be devised to enable the Sami community to protect and develop their culture and in particular their lan-

26 See Referendum (Machinery Provisions) Act 1984.

27 See [http://www.aec.gov.au/elections/referendums/Referendums\\_Overview.htm](http://www.aec.gov.au/elections/referendums/Referendums_Overview.htm) (last accessed on 30 November 2017).

28 See *Ulla Aikio-Puoskari & Merja Pentikainen, The Language Rights of the Indigenous Sami in Finland*, Rovaniemi 2001.

guage.<sup>29</sup> Although the Constitution recognises the Sami as indigenous Peoples and the right of the Sami to use their language, to promote their culture and to engage in self-government, the details are left to be regulated by statute.<sup>30</sup> Finland recognises the right of the Sami to ‘self-determination’, albeit that the nature and scope of the ‘right’ is not necessarily clearly defined.<sup>31</sup>

The Sami Parliament, with its 21 elected members, has a territorial and non-territorial jurisdiction.<sup>32</sup> The Sami Parliament is however more akin to an advisory body albeit it is called a ‘parliament’. Although being referred to as a ‘parliament’, the principal role of the Sami parliament is not to legislate but rather to serve as a forum where the Sami express their opinions; comment on draft legislation; and recommend priorities for the allocation of government grants.

The members of the Sami Parliament are elected for a term of 4 years. The Sami Parliament is a creature of an Act and not of the Constitution.<sup>33</sup> The Sami Parliament can determine its own procedures, albeit that some basic requirements about its operations are set out in the Sami Parliament Act.<sup>34</sup> The Sami Parliament elects a board that is responsible as a quasi-executive to coordinate its functions.<sup>35</sup>

The core of its jurisdiction is what is known as the Sami-homeland, but its decisions about culture, language and education are also applicable to the Sami where ever they live in sufficient concentrations in Finland.<sup>36</sup> Any Sami on the Sami Electoral Register can stand for election in the Sami Parliament and participate therein.<sup>37</sup>

- 29 S. 121 of the Constitution of Finland: ‘In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.’
- 30 See ss. 17 and 121 Constitution of Finland and the subsequent Act on the Use of the Sami Language when dealing with Authorities (Finish Official Gazette SSK 8/3/1991).
- 31 *Mattias Ahren*, Indigenous Peoples’ status in the international legal system, Oxford 2016; *Mattias Ahren, Martin Scheinin & John B. Henriksen*, The Nordic Sami Convention: International Human Rights, Self-determination and other Central Provisions, Journal of Indigenous Peoples Rights 3 (2017).
- 32 Chapter 3(1) *Act on the Sami Parliament* (974 of 1995), <http://www.finlex.fi/en/laki/kaannokset/1995/en19950974.pdf> (last accessed on 30 November 2017); *Ludger Müller-Wille*, The Sami Parliament in Finland: A model for ethnic minority management?, Inuit Studies (1979), pp. 63-72.
- 33 S. 1(1) of the Sami Parliament Act provides as follows: ‘The Sámi, as an indigenous people, have linguistic and cultural autonomy in the Sámi homeland as provided in this Act and in other legislation. For the tasks relating to cultural autonomy the Sámi shall elect from among themselves a Sámi Parliament.’
- 34 *Ibid*, note 29 Chapter 3.
- 35 S. 13 *Ibid*, note 29.
- 36 *Michael Tkacik*, Characteristics and forms of autonomy, International Journal on Minority and Group Rights 15 (2008), p. 375; *Bertus De Villiers*, Protecting minorities on a non-territorial basis – recent international developments, Beijing Law Review 3 (2012), pp.170-183.
- 37 *Lauri Hannikainen*, Autonomy in Finland: The territorial autonomy of the Aland Islands and the cultural autonomy of the indigenous Sami People, Baltic Yearbook of International Law 2 (2002), p. 189.

The Sami Parliament Act places the Sami Parliament under the jurisdiction of the Ministry of Justice for purposes of administrative and financial arrangements.<sup>38</sup> The Sami Parliament Act sets out the powers, functions and duties of the parliament. In essence, the Sami Parliament must be consulted in regard to 'all far reaching and important measures which may directly and in a specific way affect the status of the Sami as an indigenous Peoples.'<sup>39</sup>

There are several aspects of the Sami arrangements that may be relevant to the Australian debate, namely: The Sami are recognised in the Constitution but the Parliament is created by legislation; the Parliament is elected but it has principally advisory powers; and the Parliament has often expressed concern that its advices are either not sought or not being properly considered by the national parliament. The legal arrangements of the Sami Parliament illustrate how an advisory body could be created by statute rather than by the constitution, while it serves the purpose of acknowledging indigenous Peoples and giving advice about matters that affect their laws and culture. This means it has been relatively simple to amend the Sami Parliament Act since the inception more than 20 years ago since the Parliament is not created by a constitutional instrument.

#### South African House of Traditional Leaders

In contrast with the statutory base of the Sami Parliament, the South African Constitution recognises the institution, status and role of traditional leadership in South Africa subject to the provisions of the Constitution.<sup>40</sup> The Constitution of South Africa goes beyond what is proposed for the Advisory Council in Australia. The Constitution of South Africa anticipated additional legislation to regulate the institution of traditional authorities,<sup>41</sup> and it also allows the judiciary to, where appropriate, take into account and apply traditional law.<sup>42</sup> Indigenous law in South Africa may be recognised by the judiciary to the extent that it is not in conflict with the Constitution. Reference is particularly made in the Constitution to the recognition of traditional authorities and the important role they fulfil at the level of local government in governance and service delivery.<sup>43</sup>

38 *Ibid*, note 29 Chapter 1(2).

39 *Ibid*, note 32 s. 9. The authorities are, however, not bound by advices or the views of the Sami Parliament.

40 Art. 211(1) of the Constitution of South Africa.

41 Refer for example to the following legislation and policy measures: National House of Traditional Leaders Act (1997), the Municipal Structures Act (1998), the White Paper on Traditional Leadership and Governance (2003) and the Communal Land Rights Act (2004).

42 Art. 211(3) of the Constitution of South Africa.

43 Art. 212(1) of the Constitution of South Africa.

The institution of traditional leaders is therefore seen in South Africa as part of the general system of government, rather than merely advising in regard to certain matters.<sup>44</sup>

Whereas in Australia the emphasis is placed on the ‘advisory’ powers of the proposed Council, in South Africa traditional leaders are part of the three spheres of government. It is therefore not surprising that the Constitution of South Africa contains such elaborate provisions in regard to traditional authorities, their powers and functions.

The rationale for acknowledging the status of traditional authorities in South Africa was explained as follows in a report commissioned by the Office of the Presidency:

*“Although the institution had continued to exist under apartheid, the thrust for recognition of the need to formalise the role and legitimacy of traditional leaders in the democratic system of government is the acknowledgement that the institution had been significantly undermined and manipulated by the previous colonial and apartheid administration.”<sup>45</sup>*

The Constitution provides for houses for traditional communities in all of the provinces where such authorities are present (7).<sup>46</sup> It means in effect that the traditional leaders are recognised as a form of government at local, provincial and national levels.<sup>47</sup> Any legislative arrangement that may affect traditional communities must be referred to the relevant house of traditional leaders for advice and comment. The respective provincial legislatures are however not bound by the advices received.

At the national level in South Africa provision is made for the National House for Traditional Leaders.<sup>48</sup> The National House of Traditional Leaders is formed through of the provincial Houses of Traditional Leaders each electing three senior traditional leaders from each province.<sup>49</sup> At least a third of the representatives must be women unless a lower quota is set by the relevant minister.<sup>50</sup> The House has a term of 5 years and its functions include promoting the role of traditional leadership in a democratic dispensation; enhance unity and understanding between communities; and advice government on matters concerning traditional leadership and indigenous law.<sup>51</sup> The House must meet at least once per quarter while

44 Dolly Bizana-Tutu, Traditional leaders in South Africa: yesterday, today and tomorrow, Cape Town 2008, [http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2268/Bizana-Tutu\\_MPHIL\\_2008.pdf?sequence=1](http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2268/Bizana-Tutu_MPHIL_2008.pdf?sequence=1) (last accessed on 30 November 2017).

45 Pearl Sithole & Thamsanqa Mbele, Fifteen year review on traditional leadership: A research paper, Human Sciences Research Council, Cato Manor 2008, p. 18.

46 Art. 212(2) of the Constitution of South Africa.

47 S. 17 of the Traditional Leadership and Governance Framework Act 10 of 1997.

48 S. 2 of the National House of Traditional Leaders Act 22 of 2009.

49 S. 3 of the National House of Traditional Leaders Act.

50 S. 3(4) of the National House of Traditional Leaders Act.

51 S. 11 of the National House of Traditional Leaders Act.

the national Parliament is in session, but more regular meetings can be convened.<sup>52</sup> The Parliament is not bound by the advices received.

The constitutional status of the House of Traditional Leaders is akin to what is being proposed for the Aboriginal Peoples, but the lack of influence of the House as well as the cost of its management, have been controversial in South Africa. The House highlights the credibility deficit of a constitutional instrument of which the powers are weak and ineffective.

### Observations

The way in which traditional leaders in South Africa are recognised is quite different from what happens in Finland and what is proposed for the Advisory Council in Australia.

In Finland the Sami Peoples as a community of traditional people are recognised in the Constitution at a symbolical level and for the uniqueness of their culture and laws, but the specifics of the Sami Parliament are set out entirely by statute. No mention is made in the Constitution of the Sami Parliament. The Sami Parliament is principally an advisory body, albeit that it can also set priorities for spending in areas that affect the Sami culture. In South Africa the traditional authorities are recognised in the Constitution and the houses for traditional leaders in effect form part of the system of government. Additional legislation has been enacted to clarify their powers and functions, but the institution of traditional leaders is recognised by the Constitution, albeit that the advices given by the houses of traditional leaders are not binding on Parliament.

Although the Referendum Council has recommended that the Advisory Council for Aboriginal Peoples be created by the Constitution, the following reasons can be forwarded for the Council to be created by statute rather than by the Constitution: (a) the complex amendment procedures of the Australian Constitution, compared to the relative simplicity to enact or amend a statute, would make the effort to establish the Council via the Constitution very arduous and uncertain; (b) the rigidity of the Constitution and the complexity to make adjustments as time progresses would leave little room to improve the functioning of the Council if over time fine-tuning or even abolition of the Advisory Council is required; and (c) the principal powers of the Advisory Council is proposed to be non-legislative and hence a statutory institution with advisory powers may ultimately be more appropriate than an institution created by constitutional amendment.

### *II. Electoral system for the Advisory Council*

The Referendum Council does not specify in which way the members of the Advisory Council would be elected. The answer to this question is more complex than merely choosing an appropriate electoral system or using a variation of the existing Australian electoral

52 S. 8(4) of the National House of Traditional Leaders Act.

system. At the core of the question is what the electoral system is intended to deliver and how does a person 'qualify' to be a voter? Is the electoral system aimed at a representative system whereby elected Aboriginal persons would be able to liaise with their respective communities by way of a type of geographical first past the post, ward-system, or will political parties form the core of the system with a type of proportional representation scheme which inevitably shifts the focus to party headquarters away from communities? This is not a question that can be solely resolved only by negotiators at the national level, but would require careful consideration by Aboriginal communities.

Aboriginal communities would have to be consulted about the electoral system for the Advisory Council because the affiliation of the different Aboriginal Peoples is generally linked to the 'country' from where they originate.<sup>53</sup> Aboriginal peoples are generally reluctant to comment on matters that fall in another community's 'country'. It can be argued that there is no national Aboriginal political 'identity' that can be divorced from the rights and interests that Aboriginal Peoples have in relation to their 'country'. At the general political level Aboriginal Peoples are not homogenous and they do not support the same political party or agree on socio-economic issues. The electoral system for the Advisory Council should therefore be tailored specifically to coincide with the functions of the Council as an advisory body. The pros and cons of different electoral systems necessitate further consultation and deliberation in light of the nature of the advisory functions that are proposed for the Council.

The election of the Advisory Council may require a separate electoral roll for Aboriginal Peoples or elections through a process of self-identification. The concept of a 'separate' electoral roll is no longer common in contemporary democratic societies. The experiences under *apartheid* in particular where forced group classification, including separate electoral rolls, was forced onto individuals on the basis of their race, dealt a death knell for the concept of a separate voters roll for an ethnic community.

Choosing an appropriate electoral system is a particularly complex challenge not only because of the suggestion of a separate electoral process for a particular racial group, but also because questions that arise as to how an individual's 'Aboriginality' is determined so as to ascertain whether a person is included in or excluded from participation in elections for the Advisory Council. The Referendum Council was silent on these questions, which illustrates the extent of work required before any proposal can be put to the Australian electorate.

53 Much has been written about the spiritual connection between Aboriginal People and the land, generally referred to as 'country'. The following quotation of Palyku woman Ambelin Kwaymullina is a useful summary: 'For Aboriginal peoples, country is much more than a place. Rock, tree, river, hill, animal, human – all were formed of the same substance by the Ancestors who continue to live in land, water, sky. Country is filled with relations speaking language and following Law, no matter whether the shape of that relation is human, rock, crow, wattle. Country is loved, needed, and cared for, and country loves, needs, and cares for her peoples in turn. Country is family, culture, identity. Country is self.' As quoted in <https://www.creativespirits.info/aboriginalculture/land/meaning-of-land-to-aboriginal-people> (last accessed on 30 November 2017).

The following case studies may be useful examples of how the issue of community representation has been dealt with by other countries:

### The Maori in New Zealand

In *New Zealand* 7 seats in the national Parliament are reserved for the Maori Peoples.<sup>54</sup> The seats are distributed on the basis of geographical residential and density patterns of the Maori.<sup>55</sup> The philosophical basis for the reserved seats is found in the Treaty of Waitangi (1840) entered into between the Crown and Maori leaders according to which the Crown acknowledged the existing rights of the Maori and undertook to protect it.<sup>56</sup> The *Maori Representation Act 1867* set the initial basis for separate representation of the Maori Peoples.<sup>57</sup> The current arrangement is that persons of Maori descent, regardless of the degree of descent, can elect to have their names registered on the General or Maori roll.<sup>58</sup> The Electoral Option coincides with the nationwide census which takes place every 5 years. An elector may change his/her preference after each census.<sup>59</sup> There is no legislative requirement that the candidates for the Maori seats must be Maori in origin.<sup>60</sup> The system is entirely

- 54 For useful background see *Puao-Te-Ata-To*, Report for the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare, Wellington 1986; Sarah McClelland, Māori Electoral Representation: Challenge to Orthodoxy, *New Zealand Universities Law Review* 17 (1997), pp. 272-291.
- 55 S. 45(1) Electoral Act 1993 at <http://www.legislation.govt.nz/act/public/1993/0087/latest/whole.html#DLM308513> (last accessed on 30 November 2017).
- 56 In a publication by the Parliament of New Zealand the background to the recognition of separate Maori representation can be summarised as follows: ‘As a consequence of the effective exclusion of Māori from formal political participation during the 1850s and 1860s, Māori began to direct their political energy to the development of their own tribal and supra-tribal organisations. Supported by their understanding of their political rights under the Treaty of Waitangi, as well as those seemingly granted under Section 71 of the NZCA, [Constitution of New Zealand] Māori endeavoured to seek political representation, a degree of political autonomy, or both, over the ensuing decades.’ The origins of the Maori seats, Wellington 2009, <https://www.parliament.nz/en/pb/research-papers/document/00PLLawRP03141/origins-of-the-m> (last accessed on 30 November 2017).
- 57 S. 6 Maori Representation Act 1867. See *Taiaroa & Ors v Minister of Justice & Ors* (04/10/1994), HC, Wellington, CP 99-94, p. 69.
- 58 S. 76(1) Electoral Act. The delineation is therefore by way of cultural association, rather than hereditary acceptance. See *Elizabeth M. McLeay*, *Political Argument About Representation: The Case of the Māori Seats*, *Political Studies* 28 (2008), p. 47. Prior to 1974 various attempts were made to clarify who would qualify as a Maori voter, for example at one stage those persons with more than half Māori descent were not allowed to vote in a European electorate, while those individuals with less than half Māori descent did not qualify to vote in a Māori electorate. Between 1893 and 1975, only those of exactly half of Māori descent were able to choose whether to vote in a Māori or European electorate.
- 59 S. 77(1) Electoral Act.
- 60 Until 1967 only Maori candidates were eligible for election to the reserved Maori seats, but that limitation was removed by the Electoral Amendment Act of 1967.

based on self-identification.<sup>61</sup> This means that the decision of a person to register on the Maori roll is entirely personal and cannot be challenged or ‘tested’.

### Self-identification in South Tyrol

In the province of *South-Tyrol* in the north of Italy, unique arrangements are made to accommodate the interests of the German, Italian and Ladin communities in provincial institutions and bureaucracy.<sup>62</sup> Elections for the provincial legislature take place within the context of separate, proportional community representation. Voters identify themselves on the basis of the language community with which of the communities they most closely associate. Self-identification with one of the language communities in South Tyrol is not limited to elections but is also required for purposes of other areas such as public housing, and employment in the civil service. The declaration of language in essence sets the basis for an “ethnic [language based] quota system”.<sup>63</sup>

The election of community members in South Tyrol by the respective language groups inevitably means that candidates for election must declare their language association prior to an election. The candidates must declare their membership (or affiliation) to one of the language group because at the end of the election government is formed according to the proportional principle whereby each community is represented in accordance with the size of turn-out at the election. Political parties have no legal responsibility to ensure that a person does indeed belong to the language community with which he/she claims to associate. Nobody controls whether a person’s declaration reflects his/her “true” membership in a specific language group. In fact, an Italian, for example, is free to declare himself as member of the German language group or vice-versa. It is however practice that a political party would not place a person on a party-list if the person is not accepted as belonging to a particular community, but there is no statutory requirement for acceptance of a community to be tested or ascertained.

Language identification, which started formally in 1981, takes place at each census when every resident of South Tyrol is required to declare to which language group he/she belongs or associates. If a person fails to declare their community affiliation, such a person does not qualify for appointment in public positions, public housing and various other so-

61 See The Royal Commission on the Electoral System, Report of the Royal Commission on the Electoral System: Towards a Better Democracy, Wellington 1986.

62 For a general overview and discussion see *Bertus De Villiers*, Power-sharing options in complex societies – possible lessons from South Tyrol for young democracies on ways to protect ethnic minorities at a regional level, *Journal on Ethnopolitics and Minority Issues in Europe* 16 (2017), pp. 1-31.

63 *Elisabeth Alber & Carolin Zwilling*, South Tyrol, Autonomy arrangements in the world, 2016, [http://www.world-autonomies.info/tas/styrol/Documents/South%20Tyrol\\_\\_2016-01-15.pdf](http://www.world-autonomies.info/tas/styrol/Documents/South%20Tyrol__2016-01-15.pdf) (last accessed on 30 November 2017).



cial contributions.<sup>64</sup> The arrangements underwent a review in 2005 whereafter the anonymous declaration of association with a language community is only used for purposes of determining the size of a language group is attached to the census.

This principle of self-identification is not without controversy since not all South Tyrolese necessarily associate exclusively to one of the three language communities; many persons originate from mixed families where more than one language identity is maintained; and some individuals do not wish to declare their language association at all.<sup>65</sup>

### Sami elections in Finland

The elections for the *Sami Parliament* are conducted on the basis that only persons who are ‘Sami’ may participate in it.<sup>66</sup> A Sami is defined as: ‘a person who considers themselves to be Sami and who speaks or has spoken Sami at home, or whose parents or grandparents speak or have spoken Sami at home, or has a parent who is or has been on the Sami parliament electoral register.’<sup>67</sup> The whole of the country serves as a single constituency. Due to the relatively weak political organisation of the Sami there is an absence of strong party political structures to agitate for policies that could benefit the Sami.<sup>68</sup>

Finish legislation establishes the legal basis upon which the Sami are identified, namely firstly, self-identification which entails the subjective expressions and intentions of an individual to associate and be associated with the Sami Peoples; and secondly, an objective element whereby the closeness of a person to the Sami community is dependent on whether one or both of his/her parents spoke the Sami language or one or both parents learnt Sami as their first language.<sup>69</sup> There is some complexity to define at a practical level who is a Sami and who is not.<sup>70</sup>

64 See *Elisabeth Alber & Francesco Palermo*, Creating, studying and experimenting with bilingual law in South Tyrol: lost in interpretation?, in: Xabier Arzoz (ed.), *Bilingual higher education in the legal context: group rights, state policies and globalisation*, Den Haag 2012, p. 292.

65 De Villiers *ibid*, note 62, p. 18.

66 *Ulla Aikio-Puoskari & Merja Pentikainen*, The language rights of the indigenous Sami in Finland: under domestic and international law, Lapland 2001, Annex 1.

67 Art. 1 Sami Parliament Act.

68 See Research Centre of Wales “Sami in Finland” (2016) at <https://www.uoc.edu/euromosaic/web/document/sami/an/i1/i1.html> (last accessed on 30 November 2017).

69 Finish Official Gazette SSK 17/7/1995/974.

70 For a discussion about the process of ‘Sami identification’ refer to *Tanja Joona*, The definition of Sami Person in Finland and its application, in: Christina Allard / Susann Funderud Skogvang (eds.), *Indigenous rights in Scandinavia: autonomous Sami law*, London 2016, pp. 155-172. Joona [159] discusses how ‘inclusion’ as a Sami and ‘exclusion’ from being a Sami has become ‘problematic’.

Membership of the Sami is therefore flexible and ‘soft’ around the edges since speaking of the Sami language is such a key prerequisite for qualifying as ‘Sami’.<sup>71</sup>

### Community affiliation in Brussels

In *Brussels*, the capital of Belgium and the European Union, the concept of community autonomy has been in the process of development since the 1970s. Belgium comprises two uni-lingual regions, Flanders and Wallonia. The third region, Brussels, is multi-lingual with Dutch, French and German being spoken. These language communities live intermingled in Brussels and their autonomy arrangements cannot be secured by way of local government self-government arrangements.<sup>72</sup> Elaborate arrangements have been developed for the communities to share power within Brussels and also to be afforded autonomy to take care of their respective cultural, language and recreational needs.

The French and Flemish (Dutch speaking) communities each has autonomy by way of an elected statutory cultural council for purposes of decision-making over language and cultural affairs. The cultural councils are democratically elected; they constitute a formal level of government; they have wide-ranging powers of government; they function within the realm of public law; and they coordinate activities with other governments through an elaborate system of intergovernmental relations. Persons residing in Brussels can choose which of the community’s services they attend, provided they accept that the language in which the service is offered is that of the particular community.<sup>73</sup>

For purposes of election to the regional authority of Brussels, each candidate must indicate to which community he/she belongs. The names of the candidates appear on separate lists – one for each of the linguistic communities. In order to be nominated to become a candidate for a specific community, a person must submit a nomination form signed by at least 500 members of the community for which he/she seeks election. No candidate may appear on the list of more than one community. Voters can decide for which of the communities they vote. There are no separate voters lists and the choice of a voter to vote for a specific community list is not disclosed and cannot be challenged by anyone.

Although the Constitution recognises the two cultural communities that exercise jurisdiction in Brussels, individuals are not ‘classified’ in any way into one of the two communities. Since it would be so difficult and controversial to ‘classify’ individuals into one of

71 There is some complexity to define at a practical level who is a Sami and who is not. See Research Centre of Wales, Sami in Finland, 2016, <https://www.uoc.edu/euromosaic/web/document/sami/an/i1/i1.html> (last accessed on 30 November 2017).

72 See for general reference *Kris Deschouwer*, Kingdom of Belgium, in: John Kincaid / G. Alan Tarr (eds.), *Constitutional origins, structure and change in federal countries*, Toronto 2005, p. 48; *Andre Lecours*, Belgium, in: Ann Lynn Griffiths (ed.), *Handbook of federal countries*, Toronto 2005, p. 58.

73 *Bertus De Villiers*, Protecting minorities on a non-territorial basis – recent international developments, *Beijing Law Review* 3 (2012), pp.170-183.

the linguistic communities, it was decided when cultural autonomy was commenced to rather classify the institutions that offer services.<sup>74</sup> The right of individuals to associate with a linguistic community of their choice is therefore protected. The freedoms of choice and association of individuals in regard to their attendance and use of a particular service provided by a community are also protected. Individuals can therefore choose which of the services of the respective communities they use and no individual can be prevented from attending or receiving the services of another community (although the language in which those services are offered will be that of the specific community). In other words, a person can attend a Flemish school but a French hospital provided that he/she accepts that the language of service will be that of the community who manages the facility. The choice to attend the services of a specific community is not binding and not permanent.<sup>75</sup>

#### A failed experiment – the Aboriginal and Torres Strait Islander Commission

The *Aboriginal and Torres Strait Islander Commission* (ATSIC)<sup>76</sup> of Australia was an advisory and administrative body for Aboriginal Peoples which was created in 1990 and abolished in 2005.<sup>77</sup> ATSIC had elements of self-government for Aboriginal Peoples, but it never had the legality, credibility or legitimacy of an elected government with legislative and executive powers and it failed to be an effective advisory or policy body.<sup>78</sup> In essence ATSIC's brief was to develop policy proposals in limited functional areas; to make recommendations; and to oversee the implementation of some policies on behalf of Aboriginal Peoples.<sup>79</sup> Although representatives of ATSIC were elected on a regional basis, ATSIC never functioned as a "government" for Aboriginal Peoples and its credibility as a voice for Aboriginal Peoples was limited. It was, at best, a weak development and consultative agency

74 Group Coudenberg, *The new Belgium institutional framework*, Brussels 1989, p. 32.

75 Frank Delmartino, *Hugues Dumont & Sébastien Van Drooghenbroek*, Kingdom of Belgium, in: Luis Moreno / César Colino (eds.), *Diversity and unity in federal countries*, Montreal 2010, p. 49.

76 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

77 Refer for example to Australian Human Rights Commission (2005) "Statement on ATSIC", <http://www.humanrights.gov.au/news/media-releases/statement-atsic> (last accessed on 30 November 2017).

78 For the objectives of ATSIC see s. 3 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

79 Refer to ATSIC's objects and functions in ss. 3 and 7 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). See *Angela Pratt & Scott Bennett*, *The end of ATSIC and the future administration of indigenous affairs*, Current Issues Brief no. 4 2004-5, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/CIB/Current\\_Issues\\_Briefs\\_2004\\_-\\_2005/05cib04](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04) (last accessed on 30 November 2017).

with limited powers.<sup>80</sup> At a political level ATSIC had some policy influence, but it could not independently formulate or implement policy. The causes for ATSIC's failure are varied, but central among those were the lack of legitimacy, low credibility, insufficient checks and balances; and the absence of a statutory basis for ATSIC to be a responsible, representative and credible *government* for Aboriginal Peoples.<sup>81</sup>

The system whereby representatives to ATSIC were elected, was as follows: there was no separate voters roll which meant that those persons who regarded themselves as 'from the Aboriginal race'<sup>82</sup> could elect to vote without having to prove their association or acceptance of association. Casting a vote in the ATSIC election was not a substitute or a prerequisite for voting in general elections at local, state and federal levels. The general voters roll was used for purposes of identification of voters, but otherwise the decision to participate in an ATSIC election was entirely by choice of the individual. In contrast to federal and state elections where voting is compulsory, there was no obligation on any person to participate in ATSIC elections. Australia was divided into regions (35) for purposes of the ATSIC elections every 3 years. The overall participation rate for ATSIC elections never exceeded the 30% mark nationally.<sup>83</sup> In 2002, the last election of ATSIC around 54 000 persons participated, which was around a quarter of those eligible.<sup>84</sup>

## Observations

These examples of community electoral systems have the following in common: firstly, no provision is made for a separate voters' roll whereby a person is excluded from voting with the rest of the population; secondly, there is no obligation on a person to participate in a community election process; and thirdly, an individual's association with a community is subjective and is not tested or subject to a review. These communalities, when applied to the proposed Advisory Council, can provide useful guidance. Provision could be made for an electoral process whereby (i) candidates are nominated on the basis of a certain number of signatures; (ii) the choice of an individual to participate in elections for the Advisory Council is entirely voluntary and based on free association; (iii) the decision of an individu-

80 See *Will Sanders*, ATSIC's achievements and strengths: implications for institutional reform, Centre for Aboriginal Economic Policy Research 2004, <http://caepr.anu.edu.au/sites/default/files/Publications/topical/SandersATSICAchievement.pdf> (last accessed on 30 November 2017).

81 *Bertus De Villiers*, The protection of dispersed minorities: Options for Aboriginal People in Australia, *Heidelberg Journal of International Law* 74(1) (2014) pp. 105-140.

82 Ss. 3 and 101 Aboriginal and Torres Strait Islander Commission Act 1989.

83 The possible reasons for the low voter turnout have been the subject of debate. See for example *Larissa Behrendt*, The abolition of ATSIC – Implications for democracy, *Democratic Audit of Australia* (2005), <http://apo.org.au/node/2807> (last accessed on 30 November 2017).

84 See *Will Sanders*, Participation and Representation in the 2002 ATSIC Elections, *Australian Journal of Political Science* 39 (2004), pp. 175-195; *Will Sanders, John Taylor & Kate Ross*, Participation and Representation in ATSIC Elections: A 10 Year Perspective, *Australian Journal of Political Science* 35 (2000), pp. 493-513.

al to cast a vote cannot be challenged on the basis of some test of Aboriginality; and (iv) voting for the Advisory Council does not preclude an individual from participating in general elections at local, state and national levels.

#### **D. Recommendations**

In light of the case studies analysed above, the following recommendations can be made in regard to the two issues the subject of this article, namely (a) should the Advisory Council be created by the Constitution or by ordinary legislation; and (b) by which mechanism should the Advisory Council be elected and how could membership issues be dealt with:

- (i) The Advisory Council should be established by Act, rather than by the Constitution. This is consistent with the powers of the Council to make recommendations; it circumvents the need for a constitutional amendment; and it allows for amendments and refinement to the Council as time passes.
- (ii) The Act which establishes the Advisory Council should contain all the detail in regard to its objects; powers, composition; elections; and procedures.
- (iii) No separate voters roll should be utilised for elections for the Council. This is consistent with experiences in Finland, South Tyrol, Belgium and ATASIC where community representation is secured without the need for a separate voters roll.
- (iv) The decision of an individual to cast a vote in an election for the Advisory Council should be voluntary; at the sole discretion of the individual claiming to be from Aboriginal descent; and non-reviewable and non-justiciable. This is consistent with the principle of freedom of association and avoids litigation about the 'Aboriginality' of a person.
- (v) There should be no record kept of a person's decision to participate in the election of the Advisory Council. This would ensure that no direct or indirect discriminatory effects can arise as result of a person's decision to cast or not to cast a vote.
- (vi) The electoral system should include a geographical element to ensure that elected representatives can speak with Aboriginal Peoples and for Aboriginal Peoples about their interests in country and related issues. This is consistent with the nature; organisation and laws and customs of Aboriginal communities.

#### **E. Conclusion**

The proposed Advisory Council for Aboriginal Peoples has many hurdles to cross and detail to be worked out before a proposal can be placed before the federal Parliament. In this article two important aspects were considered, namely firstly whether the Advisory Council should be a creature of the Constitution or of a federal statute, and secondly what type of electoral system should be devised. The article recommends that that the Advisory Council be created by statute and that a ward-based, freedom of association system without a separate voters' roll be pursued. These proposals have resonance in international case studies such as New Zealand, South Africa, South Tyrol, Finland and Belgium. The proposed Ad-

visory Council may represent a major step forward, but if the detail regarding its composition, functioning and powers are not clarified, it may be two steps back if the proposal is rejected by the Australian electorate.