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# Social Justice Report 2005

## CHAPTER 3 SUMMARY:

### **Progress in implementing the new arrangements for the administration of Indigenous affairs – ensuring effective participation in decision making**

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The primary focus for the federal Government in the first 12 months of the new arrangements in the administration of the Indigenous affairs was the abolishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the creation of new processes to engage with local Indigenous communities and coordinate mainstream delivery of services to Aboriginal and Torres Strait Islander peoples. The results so far are mixed, with some significant developments in promoting whole-of-government coordination, as well as some worrying gaps and challenges that have yet to be adequately addressed.

From a human rights perspective, Aboriginal and Torres Strait Islander people must be assured of the opportunity to participate effectively in all aspects of policy development and service delivery that impact upon them. This chapter identifies four requisites for ensuring effective participation:

1. *Representation* at local, regional, national and international levels.
2. *Participation* through agreement making and planning processes at all levels.
3. *Engagement* with Indigenous peoples, through coordinated service delivery across and between governments and through the development of an appropriately skilled public service.
4. *Accountability and transparency* through the existence of appropriate data collection, performance monitoring and evaluation processes.

#### ***Indigenous representation and the new arrangements***

Participation in decision making processes is central to a human rights based approach to development. Principles relating to self-determination, non-discrimination, equality before the law and minority group cultural rights have been interpreted as requiring governments to work with Indigenous peoples in a fair and open manner. Perhaps a first step in this process is to ensure that information is disseminated to Indigenous communities so that those communities can make decisions based on detailed knowledge. Indigenous communities need to be equal partners in any agreement or process that affects their communities. It is imperative therefore that the participation of Indigenous peoples be based on free, prior and informed consent.

There have been substantial efforts made in the first 12 months of the new arrangements to identify processes for engaging with Indigenous peoples. Despite this, significant gaps remain in Indigenous representation at local, regional and national levels. Also, no mechanisms have been established to ensure the distinct issues of Torres Strait Islanders on the mainland are addressed.

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The first priority must be to establish regional representative bodies which can link to local, as well as state and national levels. **Regional Partnership Agreements** can provide a solid basis for this to occur. Governments and communities have identified a number of representative models, most of which are based on connecting local services and decision making bodies, to a regional council or a state-wide forum. However, the federal Government has not yet outlined how it will support the proposed models. Addressing the absence of regional representation should be an urgent priority for governments in the next financial year.

While most of the focus throughout the last 12 months has been on developing local and regional representative models there has been very little consideration given to ensuring national level input of Indigenous peoples into policy making processes.

Concerns raised by the abolition of ATSIC include:

- establishing replacement processes for the participation of Indigenous peoples in Commonwealth-State framework agreements;
- the absence of requirements for government to consult with Indigenous organisations;
- facilitating Indigenous participation in national policy debates through linking local and regional levels structures to the national level; and
- negotiating with Indigenous peoples on the positions on Indigenous rights adopted by the governments in international fora.

The absence of a framework for Indigenous representation at all levels of decision-making undermines and contradicts the aims of the new arrangements. It restricts the ability of Indigenous people to participate in decision-making processes where they would have otherwise through the ATSIC Regional Council's.

### *Indigenous participation through local level agreement making*

An integral component of the new arrangements has been the negotiation of local level agreements within Indigenous communities. These are known as **Shared Responsibility Agreements (SRAs)**, which are based on mutual obligation principles. Early on, the federal Government set a target of finalising 50-80 SRAs by June 2005, which was met. The target for the 2005-06 is 100 SRAs.

This chapter considers how SRAs impact on the well-being of Indigenous peoples and whether they are consistent with human rights standards. SRAs have the potential to improve the enjoyment of human rights by Indigenous peoples in the following ways:

- by being based on local level negotiation and consultation, they could ensure the effective participation of Indigenous peoples in decision making that affects them;
- by tailoring services to the specific circumstances of the community, they could lead to culturally-appropriate service delivery and improved accessibility of mainstream services;
- by supporting the development of local enterprises that are culturally relevant, they could expand the existence of otherwise limited economic development opportunities in remote communities; and

- by being part of a comprehensive plan to address the needs and build the capacity of communities, they could lead to the empowerment of Indigenous communities.

Conversely, SRAs also have the potential to restrict the enjoyment of human rights by Indigenous peoples in the following ways:

- if they impose conditions on Indigenous peoples' access to services, where such services are otherwise available to other sections of the community without condition;
- if SRAs make the progressive realisation in the enjoyment of rights for Indigenous peoples contingent upon conditions being met (this is particularly relevant given the existing state of inequality experienced by Indigenous peoples); and
- if they make Indigenous peoples access to core minimum entitlements conditional, as these matters require immediate effect and are not subject to negotiation.

### **Free, prior and informed consent**

A key principle that emerges throughout the considerations for agreement making is that of *free, prior and informed consent*, which represents a synthesis of the obligations to ensure effective participation. The elements of this principle include the lack of coercion, intimidation and manipulative actions; that consent has been sought in advance and consultation processes have been respected; information is provided on the scope of the activity; and that consultation and participation are undertaken in good faith.

The public debate about SRAs has generally been based on very limited information. The Social Justice Commissioner's Office has been provided with copies of SRAs as well as visiting many communities involved in SRAs to talk with them about their experiences in making them. This has confirmed that great care must be taken in passing judgement on individual agreements based solely on media reports.

The following guideline of principles suggests that SRAs may still potentially breach human rights even if it provides a benefit that is over and above essential services, if it is provided in a manner that is discriminatory or makes addressing existing inequalities contingent upon the completion of mutual obligation principles.

### ***Human rights standards relating to the process of SRA making***

1. Non-discrimination and equality.
2. Effective participation.
3. Transparent government frameworks.
4. Indigenous representation.
5. Accurate and appropriate reporting and data collection.
6. Adopting a long term approach to planning and funding.
7. Capacity building.

### ***Human rights standards relating to the content of SRAs***

In addition to the principles relating to the *process* of engagement, there are a number of principles that are relevant to the *content* of SRAs to ensure that they are consistent with human rights standards, in particular those set out in the International Covenant on Economic Social and Cultural Rights (ICESCR).

Those principles can be summarised as:

1. Non-discrimination and equality before the law.
2. Special measures and legitimate differentiation of treatment.
3. Progressive realisation of rights.
4. Core minimum obligations.
5. Respecting, protecting and fulfilling rights.

Human rights standards require that:

- the government takes whatever steps are necessary;
- strategies should reflect extensive genuine consultation with, and participation by, all of those affected; and
- the government can demonstrate that the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources.

Over the next 12 months, the Social Justice Commissioner's Office will focus on agreements that involve commitments about subject matter relating to the delivery of basic entitlements or essential services. This is to ensure that the obligations made in such agreements amount to positive measures to fulfil human rights and do not place restrictions on the accessibility of basic entitlements.

The SRA process is clearly an evolving one. Presently the SRA process appears to lack some of the key elements necessary to ensure appropriate engagement of Indigenous communities. In particular, there are not transparent frameworks for government accountability, with an absence of sufficient benchmarking or targets in many agreements. Although recent guidance provided by the Office of Indigenous Policy Coordination (OIPC) in developing relevant and appropriate key indicators, aligned with *Overcoming Indigenous Disadvantage* is a step in the right direction.

### ***Government engagement with Indigenous peoples***

A key element that will determine the success of the new arrangements is the ability of governments to effectively engage with Indigenous people. This chapter details the challenges to achieve this, including:

- ensuring that public servants have the appropriate skills to engage with communities;
- improving the coordination of activities and services at the federal level, as well as with the state, territory and local governments; and
- improving the accessibility of mainstream services, and the coordination of mainstream and Indigenous specific services.

The appointment of Ms Pat Turner as Aboriginal and Torres Strait Islander Employment Coordinator at the Australian Public Service Commission (APSC) indicates an increased focus on these issues by the Australian Public Service (APS).

Another welcome development was the launch of the APS's *Employment and Capability Strategy for Aboriginal and Torres Strait Islander Employees* which, among other things, aims to provide pathways to employment by removing barriers and supporting employees. The strategy specifically aims to increase the number of Aboriginal and Torres Strait Islander people in the public service and build the capacity of the APS generally to provide more effective service delivery to Indigenous people.

A key feature of the new arrangements is the placement of staff from across mainstream departments into Indigenous Coordination Centres (ICCs) in regions across Australia. This approach involves a significant shift in how mainstream departments provide service delivery for Indigenous communities. It will require that staff is suitably skilled to undertake the diverse requirements expected of them and to consider best practice models for the integration of activities of different departments within an ICC.

Improved coordination between state and territory governments will be necessary in order to ensure the success of the new arrangements. This is a central undertaking by all governments through the *National Framework of Principles for Government Service Delivery to Indigenous Australians* as agreed to by COAG in June 2004. It includes the signing of **bilateral agreements** between the federal, state and territory governments. As at June 2005, one bilateral agreement had been signed between the Northern Territory and the Commonwealth Government. The agreement commits both governments to work together in partnership with Indigenous people to overcome disadvantage.

Negotiations continue on bilateral agreements in the other states and territories.

### ***Reforms to the Community Development Employment Program scheme***

Perhaps the most significant development over the past year has been the reform to the Community Development Employment Program (CDEP) scheme. The reform to the CDEP is integral to the whole-of-government approach to delivering services, especially carrying out the details of SRAs. The CDEP will be largely responsible for performing many of the activities agreed to under SRAs - from essential service delivery activities (such as garbage collection) to community development activities (such as building community halls and basketball courts).

The reform to the CDEP scheme highlights the potential of aligning Indigenous specific services with the mainstream. One of the main principles of the new arrangements is the government's desire to see Indigenous people relying less on passive welfare and participating in mainstream employment. The lifting of Remote Area Exemptions (RAEs) is another aspect to this approach and one that will impact on the operations of some CDEPs.

The government has said that it will take local conditions and employment opportunities into account rather than being too prescriptive in their approach to outcomes. However, the lack of consultation during the development of the reforms is not consistent with communities and government being equal partners in this process.

The focus on welfare reform also needs to be broadened to consider long-term challenges to the sustainability of Indigenous communities. This includes educational opportunities, the opportunities provided by the availability of new forms of technology and housing, as well as economic development and employment.

### *The accountability and transparency of the new arrangements*

Now that the new arrangements have been in place for over 12 months it is critical that steps be taken to ensure that the government's intended policy and program goals are properly monitored and outcomes appropriately evaluated.

Progress to date has been slow in ensuring that the new arrangements are subject to rigorous and transparent monitoring processes. The absence of sufficient processes amounts to a failure of government accountability.

One of the main concerns is the lack of evaluation of the **COAG trial sites**. This is especially concerning given that the new arrangements are largely based on the COAG trial model. This concern was expressed in the *Social Justice Report 2004* and there are still no formal evaluations of the trials 12 months later.

However, the Social Justice Commissioner has been advised by the OIPC that the terms of reference for the independent evaluations have now been finalised and are expected to be produced in early 2006. The Commissioner is particularly concerned by the statements of some governments and departments which suggest that in some trials the baseline data for the evaluations still does not exist. This concern has been confirmed by two independent community initiated reports on the Shepparton trial site, which found that the lack of baseline data and milestones established by the trials has made it difficult to know whether success has been achieved.

The lack of progress and lack of transparency on this issue has the potential to undermine the credibility of the trials. This would be a great shame, given that there are positive lessons to be learned from these major initiatives.

The concerns I have in relation to the COAG trial sites are also relevant to the new arrangements. The new arrangements require rigorous monitoring and evaluation, especially the collection of performance information and data to support decision-making and to measure inputs and outputs.

At present, **data collections and performance information** systems do not provide information on a consistent or comparable basis. Furthermore, there is also very little information available that can identify the extent of usage of, or barriers to, mainstream services by Indigenous people. The absence of consistent and comparable data can result in inefficiencies, duplication and lack of accountability.

However, there have been a number of positive developments aimed at addressing a number of issues relating to performance information. The Australian Government Indigenous Management Information System (AGIMIS) is being developed by the OIPC in order to collect data and provide reports to monitor investment by government. The challenges for the project are consistency and compatibility of data. The system also needs to have an ability for data to be related to Indigenous socio-economic outcomes.

There is currently little information to show progress on a variety of measures through the new arrangements. We are also unlikely to see an analysis of the 2006 Census data until 2007 or 2008 and analysis of the next National Aboriginal and Torres Strait Islander Social Survey (NATSISS) until 2008. The latest report on *Overcoming Indigenous Disadvantage* by the Productivity Commission Steering Committee for the Review of Government Service Provision reflects on data that pre-dates the new arrangements on most indicators. The report also identifies the strengths and weaknesses of current data collection sources such as Census data, the NATSISS and administrative data.

Another weakness resulting from the demise of ATSIC is the lack of structures currently in place to provide a framework to consult with Indigenous peoples. Data collection can only be effective when it involves Indigenous peoples' being consulted.

A further concern is the inconsistent provisions and unclear processes for measuring outcomes within SRAs. The OIPC have informed the Social Justice Commissioner's Office that SRAs will be initially evaluated on a limited basis by OIPC in the first half of 2006 - but not independently. However, the OIPC has acknowledged the role of independent streams of evaluation such as: the Office of Evaluation and Audit (Indigenous Programs); the Australian National Audit Office; and the Aboriginal and Torres Strait Islander Social Justice Commissioner.

The evaluations conducted by the Office of Evaluation and Audit (Indigenous Programs) and the Australian National Audit Office relate to specific Indigenous programs and system wide operations of the new arrangements.

One accountability framework mechanism available is the *Overcoming Indigenous Disadvantage* report, which will be produced every two years. The report will document the outcomes for Indigenous people and is intended to provide information to governments so they can assess whether their policy interventions are having the intended impact. By developing a range of key indicators, the *Overcoming Indigenous Disadvantage* reporting framework embodies a vision, committed to by all governments, that Indigenous people will one day enjoy the same overall standard of living as other Australians. They will be as healthy, live as long, and participate fully in the social and economic life of the nation.

At present there is no correlation between many programs and activities under the new arrangements and the key indicators developed by the *Overcoming Indigenous Disadvantage* reporting framework. SRAs to date are weak on addressing data limitations or ensuring rigorous, sustainable links to the reporting framework. These links need to be implemented. Applying benchmarks and monitoring frameworks means that processes which provide for the effective participation of Indigenous peoples' in decision making are transparent.

## **Recommendations and follow up actions**

This chapter contains two recommendations and five follow up actions.

**Recommendation one:** the federal Government, in partnership with state and territory governments, prioritise the negotiation of regional representative arrangements with Indigenous peoples. Representative bodies should be finalised and operational by 30 June 2006 in all Indigenous Coordination Centre regions.

**Recommendation two:** the Office of Indigenous Policy Coordination, in consultation with the Aboriginal and Torres Strait Islander Social Justice Commissioner, agree to *Guidelines to ensure that Shared Responsibility Agreements comply with human rights standards* relating to the process of negotiating SRAs and the content of such agreements.

Over the next 12 months, the Social Justice Commissioner will follow up on certain issues and concerns identified throughout this chapter. These follow up actions are:

1. Consider the adequacy of processes undertaken by all governments to consult and negotiate with Indigenous peoples and communities on policy development, program delivery and monitoring and evaluation processes.

2. To work in partnership with non-government organisations and Indigenous community organisations to promote understanding of the rights of Indigenous peoples in the making of Shared Responsibility Agreements.

3. Monitor the Shared Responsibility Agreements process, including considering the process for negotiation and implementation of SRAs;

- considering whether the obligations contained in agreements are consistent with human rights standards or place restrictions on the accessibility of basic entitlements or essential services; and
- establishing whether the government has fulfilled its commitments in SRAs, through providing appropriate support to communities to ensure that the proposed benefit in an SRA is realised by the community.

4. The Social Justice Commissioner will examine approaches adopted by the government to improve the accessibility of mainstream services to Indigenous communities and individuals. This will include:

- conducting consultations and case studies with the participation of select urban, regional and remote Indigenous communities, to identify best practice as well as barriers to the accessibility of mainstream services;
- examining the role of solution brokers in Indigenous Coordination Centres and in the negotiation of Shared Responsibility Agreements (for example, by considering the percentage of funding allocated through SRAs from mainstream programs, as opposed to Indigenous specific funding or the SRA flexible funding pool); and
- considering the impact of reforms to the CDEP Scheme, including changes to align the program more closely with mainstream employment programs.

5. The Social Justice Commissioner will continue to consider the adequacy of monitoring and evaluation processes for the new arrangements. This will include considering efforts by all governments to integrate the Overcoming Indigenous Disadvantage Framework into policy and review processes, through the establishment of benchmarks and targets; as well as monitoring progress in the

COAG whole-of-government trials and the outcomes of the formative evaluations of these currently underway.