Parliament of New South Wales

Legislative Council

Standing Committee on Social Issues

ABORIGINAL REPRESENTATION IN PARLIAMENT

ISSUES PAPER

The purpose of this Issues Paper is to provide the basis for written submissions to the Standing Committee on Social Issues

Issues Paper No. 3 April 1997

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Standing Committee on Social Issues

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Standing Committee on Social Issues

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Terms of Reference

Inquiry into Aboriginal Representation in Parliament

That the Standing Committee on Social Issues inquire into, and report on, the provision of legislation for dedicated Aboriginal seats in the Parliament of New South Wales.

Chair's Foreword

In over 200 years since white settlement and 30 years since Aborigines were counted in the national census there has never been an indigenous member of the New South Wales Parliament. The Standing Committee on Social Issues will examine these and other relevant issues for the Inquiry into Aboriginal Representation in Parliament.

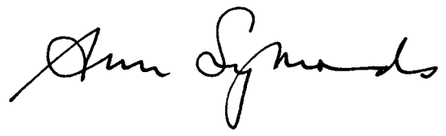
The Committee recognises that the issue of Aboriginal Representation in Parliament requires careful and thoughtful consideration. It requires extensive consultation with Aboriginal groups and individuals and considerable public input and participation.

To pursue these requirements the Committee is, in the first instance, releasing this Issues Paper into Aboriginal Representation in Parliament with a view to inviting written submissions from interested organisations and members of the public. The purpose of the Issues Paper is not to reflect the views of the Committee or individual Members. Its purpose is to stimulate responses to matters contained in the paper. It is anticipated that once the written submissions have been received, the Committee will hold public hearings on matters relevant to the Inquiry. It will then use the information gathered from the submissions and the hearings to assist in the formulation of recommendations for the final Report.

This Inquiry comes at a time when the rights and needs of indigenous people are an important consideration for all Australians. In its previous Inquiries the Committee recognised the terrible disadvantages still suffered by Aborigines, largely brought about by dispossession and discrimination. An examination of these issues for the current Inquiry is fundamental to determining what impact parliamentary representation, and other strategies, will have on the quality of life of Aboriginal citizens in New South Wales.

I would like to acknowledge the particular efforts of two members of the Committee, the Hon. Janelle Saffin and the Hon. Dr. Marlene Goldsmith for their contribution to the research of this paper. On behalf of the Committee, I would like to congratulate the Secretariat for their diligence and hard work and in particular, Senior Project Officer, Glen Baird who was largely responsible for the production of the Report.

I urge all individuals and organisations interested in the rights and needs of Aboriginal people, particularly with regard to political representation, to make submissions to the Committee on this important and timely issue.



Hon. Ann Symonds, M.L.C.
Committee Chair

Table of Contents

Introduction

1.1 BACKGROUND TO INQUIRY

On 20 September 1995, the Hon Franca Arena, MLC, moved in the Legislative Council

That this House:

1. *Being the oldest Parliament in Australia and in the State which saw the landing of Captain Cook, notes that as we approach the 21st century there has never been an indigenous member of the Parliament.*

2. *Notes that the New Zealand Parliament has had a number of dedicated Maori seats since the 19th century.*

3. *Requests the State Government to consider legislation to ensure that a number of dedicated Aboriginal seats be set aside so that the voice of the first Australians can be heard in this Parliament, the mother of all Parliaments in Australia.*

4. *Considers this action essential:*

   (a) *to address the injustices suffered by the indigenous people over the last 200 years and as a method of empowering Aboriginal Australians to influence and have control over their own destinies; and*

   (b) *given the indifference of all political parties in preselecting candidates of Aboriginal background for election to the Legislative Council and Legislative Assembly.*

5. *Calls for this legislation to be introduced as soon as possible after this important issue is debated in this House.*

The Hon James Samios, MLC subsequently moved that the question be amended by omitting paragraph 5 and inserting instead:

> 5. *Refers the provision of legislation for dedicated Aboriginal seats in the Parliament of New South Wales to the Standing Committee on Social Issues for inquiry and report.*

The amended motion was agreed to by the House. The insertion of the new paragraph five provides the Committee with its Terms of Reference, which are:

> *That the Standing Committee on Social Issues inquire into and report on the provision of legislation for dedicated Aboriginal seats in the Parliament of New South Wales.*

1.2 ABORIGINAL PEOPLE IN NEW SOUTH WALES

The 1991 census counted 265,459 Australians who declared themselves to be Aboriginal (238,575) or Torres Strait Islanders (26,884). This constituted 1.6% of the Australian population. In New South Wales, there were 65,133 people identifying as Aboriginal, a higher number than any other State or Territory, and 4,886 Torres Strait Islanders, who together comprise 1.2% of the state's population. While 27.3% of the nation's indigenous population live in New South Wales, they comprise a greater proportion of the population in the Northern Territory (22.7%); Western Australia (2.6%) and Queensland (2.4%) (Castles, 1993).

The Committee recognises that Aboriginal and Torres Strait Islander people continue to experience significant disadvantage in our community. The following data, drawn from the 1991 census unless otherwise stated, demonstrate the nature of this disadvantage:

- **Income**: Nearly two-thirds (64%) of indigenous adults had incomes under $12,000 a year compared with 45% for other Australians. In higher income brackets, 2% of indigenous Australians earned more than $35,000 a year compared with 11% of non-indigenous people (Council for Aboriginal Reconciliation, 1993:39).

- **Unemployment**: Was almost three times higher among indigenous Australians (31%) than non-indigenous Australians (12%). Participation rates in the labour force were also lower: 54% compared with 63% (Council for Aboriginal Reconciliation, 1993:39).

- **Employment:** Indigenous Australians who have a job are more likely to be in low-skill and low-status jobs. In 1991, 55% to 60% of all employed Australians were in middle-level occupations (tradespeople, para-professionals and semi-skills people), but the indigenous population has a significantly higher proportion of unskilled workers and a lower proportion of managers, administrators, and professionals (Council for Aboriginal Reconciliation, 1994:9).

- **Education:** Indigenous Australians have generally left school earlier, are much less likely to have qualifications (at all levels), and are less likely to be enrolled in post-secondary education than other Australians (Council for Aboriginal Reconciliation, 1994:9).

- **Housing**: Indigenous Australians live in more crowded conditions, with, on average, two more people per household than there are in non-indigenous households and over twelve times the likelihood of more than one family sharing the house (Council for Aboriginal Reconciliation, 1994:9).

- **Families:** The proportion of one-parent families with dependants was much higher amongst indigenous Australians (36%) than non-indigenous Australians (7%) (Council for Aboriginal Reconciliation, 1994:39).

- **Health:** Indigenous Australians' death rates are up to four times higher (depending on the State or Territory) and infant mortality three times higher than for other Australians. The life expectancy at birth for indigenous Australians ranges (depending on the State or Territory) from 53 to 61 years for men and from 58 to 65 years for women; this compares with 73 and 79 years respectively for the rest of the population. Young indigenous adults have a particularly high mortality rate.

  Indigenous Australians are disproportionately affected by diabetes, circulatory system and respiratory disorders, ear disease, eye disorders, cancer, urinary tract problems and physical injuries. Their hospital admission rates are twice

those of the rest of the population. A key factor underlying these health problems is the lack of clean water and sewerage facilities in many communities (Council for Aboriginal Reconciliation, 1993:10).

- **Imprisonment:** As at 30 June 1993, Aboriginal and Torres Strait Islanders were imprisoned in New South Wales at over 10 times the rate of their non-Aboriginal counterparts (Cunneen & McDonald, 1997:27).

The lack of parliamentary representation of Aboriginals and Torres Strait Islanders in New South Wales is therefore only one dimension of disadvantage. The Committee, during the course of this Inquiry, will consider what impact guaranteed parliamentary representation, and other political strategies, may have on the quality of life of the state's indigenous citizens.

1.3 OBJECTIVES OF THIS ISSUES PAPER

During debate on the motion in the Legislative Council which gave rise to reference of the issue of Aboriginal Representation to the Standing Committee, the efforts of a number of countries to incorporate the needs of their indigenous people for representation in their systems of government were discussed. New Zealand, Canada and the United States are frequently cited as models for the recognition of the rights of their indigenous populations.

The Committee determined that there would be considerable value in preparing an Issues Paper which outlined international developments in the representation of indigenous populations. In order to collect the relevant information, a number of study tours were conducted. A Senior Project Officer travelled to New Zealand to meet with government officials, Maori members of Parliament, and representatives of Maori organisations. Two Members of the Committee and a Senior Project Officer also travelled to Norway, Canada and the United States and met with Sami representatives, including the Vice-President of the Sami Assembly, tribal Members of the Maine legislature, and representatives of government and non-government agencies.

This Issues Paper presents detailed information on the recognition and development of indigenous people's rights and political representation in those countries.

In releasing this Issues Paper in conjunction with the Committee's call for submissions to this Inquiry, it is hoped that individuals and organisations interested in making submissions will consider whether elements of overseas approaches may be relevant in a New South Wales context. The Committee wishes to evaluate the appropriateness of a range of strategies for promoting the interests of Aboriginal people in New South Wales. **Submissions need not be restricted to the issue of dedicated seats for Aboriginal representatives in the New South Wales Parliament. This Issues Paper also presents examples of Aboriginal Parliaments, self-government, and self-determination, and the Committee welcomes submissions on these issues.**

Chapter One of this Issues Paper discusses historic developments addressing the interests of the state's Aboriginal people, including their political representation, and their current political status. A historic overview of previous attempts to achieve guaranteed parliamentary representation is also presented. Other options for increasing the autonomy and recognising the rights of Aboriginal and Torres Strait Islander peoples are also discussed.

Chapter Two provides a comparative perspective of dedicated seats for indigenous peoples around the world. The discussion focuses on the Maori seats in New Zealand and tribal representatives in the Maine state legislature in the United States. Proposals for dedicated seats at the national and provincial level in Canada are also considered.

Chapter Three considers alternatives to dedicated seats in meeting the political aspirations of indigenous people. The establishment of and proposals for indigenous parliaments are discussed, together with initiatives supporting self-determination and autonomy at a local or regional level.

Chapter Four provides a brief list of issues the Committee will consider during this Inquiry and upon which submissions are invited. While this list is not designed to be exhaustive, it is hoped these questions will elicit responses in the form of submissions.

This Issues Paper is only the first step in the Inquiry process, and provides a starting point from which those interested in this issue can make written submissions to the Committee. It is hoped the Paper will also provide a basis for the further exploration of the models and issues it raises in public hearings.

The Committee expects the process of consultation on this Inquiry to be extensive. The Aboriginal population in New South Wales is widely dispersed, with many communities living in remote areas. The Committee hopes to meet with Aboriginal representatives across the state in order to ensure that a wide cross-section of views on the issues are obtained.

This Issues Paper is not designed to reflect the views of the Committee or any of its Members; no substantive opinions are expressed, nor are any conclusions drawn. The final report of the Committee on this Inquiry, to be tabled at the conclusion of the consultation process, will state the views of the Committee and make recommendations.

Chapter One

Recent Political Developments for Aboriginal People

The Committee believes that an understanding of historic developments addressing the interests of the state's Aboriginal people, and of their current political status, is relevant to considering the benefits that dedicated seats in Parliament may bring.

The first section of this chapter presents an overview of the growing political and legal awareness of the rights of indigenous Australians since the 1960s.

Section 1.2 considers the history of the representation of Aborigines in Australian Parliaments. While no indigenous person has been elected to the New South Wales Parliament, there have been successful candidates in other jurisdictions, elected through the normal electoral process. The results achieved by recent candidates for election to the Legislative Council in New South Wales are also considered. Representation at the local government level is also discussed.

Section 1.3 discusses the existing representative bodies promoting Aboriginal interests in New South Wales: Aboriginal Land Councils and the Aboriginal and Torres Strait Islander Commission.

This current Inquiry by the Standing Committee is not the first forum in which the question of dedicated seats in Parliament for Aboriginal Members has been considered. Section 1.4 provides a historic overview of previous attempts to achieve this form of guaranteed representation.

The final section of this chapter considers options for increasing the autonomy of Aboriginal and Torres Strait Islander peoples outside the parliamentary forum, and the formal recognition of the rights of indigenous Australians.

1.1 A HISTORY OF ABORIGINAL RECOGNITION

When the continent was colonised by the British, the legal concept of *terra nullius* was used to assert British sovereignty. *Terra nullius* means a land without a sovereign or

which is not owned, but can be applied where there are people inhabiting the land with no legal or governmental system. For much of the subsequent period of white settlement in Australia, the original inhabitants of the land had little recognition or influence over any aspect of the development of the colonies or the nation, nor over their own lives. In *Aborigines and Political Power*, Bennett (1989:3) has noted

> *For many decades, the political influence of Aborigines was non-existent, primarily because they were usually denied the basic concession of equality with whites: they were rarely given full protection before the law, they suffered the indignities associated with forced movement around the country, they lacked the right to vote, and efforts to complain of their treatment often gave rise to white chastisement of 'cheeky' Aborigines.*

When the history of massacres committed by colonists and the forced removal of Aboriginal children from their parents by white authorities are also considered, the historic plight of Aboriginal people at the hands of European settlers is lamentable.

Unlike the historic situation of indigenous peoples in the United States and Canada, discussed in the Chapters which follow, there has never been a recognised treaty negotiated with Aboriginal people or Torres Strait Islanders in Australia. In 1835, John Batman negotiated a treaty granting him ownership of 600,000 acres of land around Port Phillip Bay. Both the New South Wales and Imperial governments refused to recognise the transaction, with the decision relying not on the doctrine of *terra nullius*, but on the Crown's exclusive right or pre-emption of the native title (Reynolds, 1992:131). A clear definition of native title was also contained in the Letters Patent establishing the colony of South Australia (Reynolds, 1996:28).

However, it has only been in the last thirty-five years that the rights of indigenous Australians have begun to be recognised in public policy and judicial determinations. The following time line provides a broad overview of some milestones in the political and social recognition of Aboriginal and Torres Strait Islander peoples:

- **1962:** The Commonwealth Parliament passed legislation giving "all aboriginal and Torres Strait Islander subjects of the Queen" the right to vote in Commonwealth elections.

- **1967:** A referendum question to amend the Commonwealth Constitution to remove restrictions on government policy-making for Aboriginal people and allow them to be counted in the census was passed with a record 90.77% YES vote.

- **1968:** The Federal Government appointed a Minister in charge of Aboriginal Affairs under the Prime Minister.

- **1970:** Aboriginal Legal Service established in Sydney.

- **1971:** Aboriginal Medical Service established in Sydney.

- **1972:** An Aboriginal Embassy was established in tents erected on the lawn of Parliament House in protest against the then government's refusal to recognise land rights.

  The incoming government established the Department of Aboriginal Affairs, appointed the first full-time Minister for Aboriginal Affairs, and created the National Aboriginal Consultative Council (NACC) as an elected policy advising body to the Minister.

- **1975:** The Commonwealth Parliament passed the *Racial Discrimination Act 1975*, implementing in law Australia's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination. Courts have subsequently held the Act protects native title land rights from extinguishment by the states.

- **1976:** The Commonwealth Parliament passed the *Aboriginal Land Rights (Northern Territory) Act 1976*, giving Aborigines title to most of the Aboriginal reserve lands in the Northern Territory and the opportunity to claim other land not already owned, leased or being used by someone else.

  The NACC was abolished and the National Aboriginal Conference was established and continued until its demise in 1985 (Weaver, 1993).

- **1983:** The New South Wales Parliament passed the *Aboriginal Land Rights Act 1983*. The Act gave freehold title over existing reserves (4,300 hectares) to the residents, and allocated 7.5% of the state's land tax over fifteen years (to 1998) to purchase additional land. It also provided the right to claim Crown lands that were not being used or had no future use. The Act provided for the formation of Local Regional, and State Aboriginal Land Councils, discussed further in Section 1.3 below.

  The Act did not, however, provide any means for claiming former reserve land, or contain any recognition of traditional ownership of land.

  The NSW Aboriginal Land Council is currently preparing a submission to the Minister for Aboriginal Affairs regarding the extension of land tax funding beyond 1998.

- **1989:** The Commonwealth Parliament passed the *Aboriginal and Torres Strait Islander Commission Act 1989*. The role and functions of the Commission are outlined in Section 1.3 below.

- **1991:** The Final Report of the Royal Commission into Aboriginal Deaths in Custody was released, recommending reform of the custodial system and equity and social justice measures, including the empowerment of Aboriginal and Torres Strait Islander people through recognition of the right to self-determination.

  The Commonwealth Parliament established the Council for Aboriginal Reconciliation. The Council has 25 members, including 12 Aboriginal people and two Torres Strait Islanders. It seeks a "united Australia" with "justice and equity for all" promoted through programs of inter-cultural understanding and consultation, and community action and co-operation.

- **1992:** The *Mabo* decision of the High Court over title to Murray Island in the Torres Strait recognised the potential for native title to continue over some parts of the country where the connection with the land has been maintained and title has not been eliminated. The decision overturned the doctrine of *terra nullius*.

The High Court found that despite the assertion of British sovereignty at that time, customary owners of the lands retained title until it was extinguished by Crown action or other causes.

The Commonwealth Government appointed an Aboriginal and Torres Strait Islander Social Justice Commissioner as a member of the Human Rights and Equal Opportunity Commission, to promote discussion and awareness of human rights in relation to Aboriginal people and Torres Strait Islanders.

- **1993:** The Commonwealth *Native Title Act 1993* was passed, providing a process for determining whether or not native title exists and what rights and interests native title holders have in relation to claimed land. A Native Title Tribunal was established to receive and register claims, attempt to mediate negotiated agreements when claims are opposed, and make determinations if claims are unopposed or agreement is reached.

- **1996:** The Dunghutti people won the first native title land claim on mainland Australia over 12.4 hectares of land at Crescent Head in New South Wales. When the claim was registered in the Federal Court in February 1997, the Dunghutti handed title to the New South Wales government in return for a compensation settlement.

  The New South Wales Parliament passed the *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* enabling selected reserved lands of Aboriginal cultural significant to be revoked, with ownership vested on behalf of Aboriginal owners in an Aboriginal Land Council. The land is then leased back to the government to be reserved as a national park, and controlled by a Board of Management with Aboriginal owners in the majority (Smith, 1997).

  The *Wik* decision of the High Court found that pastoral leases do not extinguish the native title rights found to exist in the Mabo judgment. Native title could only be extinguished by a written law or act of government with a clear intention of extinguishment. The decision provides that native title rights

can co-exist with pastoralist rights to the extent of any inconsistency with those rights.

The Committee acknowledges that developments addressing the need for change have occurred under governments of both political persuasions. Despite these developments, questions of self-government and self-determination for Aboriginal people have not been resolved. Debate over proposed amendments to the *Native Title Act 1993* removing native title rights in certain circumstances continues, and most Aboriginal people continue to experience socio-economic disadvantage.

1.2 ABORIGINAL REPRESENTATION IN AUSTRALIAN PARLIAMENTS

The time line above shows that there have been a number of notable recent developments in recognising the rights and interests of indigenous Australians. However, Aboriginal people in New South Wales and the rest of Australia remain politically disadvantaged, and one indicator of this disadvantage is their underrepresentation in the political institutions of the nation.

1.2.1 The New South Wales Parliament

There has never been an Aboriginal member of either House of the New South Wales Parliament.

In recent Legislative Council elections, there have been groups of Aboriginal candidates running for election on a joint ticket. In the 1988 election, a three-candidate Aboriginal Team, headed by Millie Ingram, gained 0.44% of the primary vote, or 0.07 of a quota. In 1995, two candidates stood for the Indigenous Peoples Party and gained 0.25% of the primary vote, or 0.06 of a quota. The Aboriginal population in New South Wales is 1.2% of the state's total.

A number of candidates have stood for election in Legislative Assembly seats in New South Wales, including:

- Burnum Burnum, who contested the seat of North Sydney for the Australian Democrats in the 1988 by-election, gaining 3.23% of the primary vote;

- Len Roberts, who was the National Party candidate in the seat of Port Stephens in the 1991 election, gaining 11.41% of the primary vote;

- John Lester, who stood for the ALP in the seat of Clarence in the 1995 election, and gained 34.18% of the primary vote, and 41.71% of the two-party preferred vote.

The single member electorate arrangement in the Legislative Assembly constitutes a significant obstacle to achieving representation for the small and widely dispersed Aboriginal population in New South Wales. Electorates with the highest proportions of Aboriginal and Torres Strait Islander populations, based on 1991 census data, include the seat of Broken Hill, with 9.9%, and the seats of Dubbo and Barwon (in the Moree area), which each have 6.9%. In only two other electorates, Tamworth and Oxley (in the Kempsey area), do Aboriginal and Torres Strait Islander peoples constitute more than 3% of the total population.

1.2.2 Commonwealth Parliament

The only indigenous Australian ever to be elected to the Commonwealth Parliament was Liberal Senator Neville Bonner, who represented Queensland in the Senate from 1971 to 1983. He gained a reputation as an outspoken advocate of Aboriginal issues such as land rights, criticising the Queensland and federal governments of the day for their policies. After failing to gain preselection in a winnable place on the party ticket, he stood as an Independent candidate in the 1983 Senate election and was unsuccessful.

A number of other prominent candidates have stood for election to Federal Parliament, including:

- Galarrwuy Yunupingu, who contested the 1980 election as Independent candidate for the Northern Territory's House of Representative seat, and polled 5.59% of the primary vote;

- Burnum Burnum, who sought election as a New South Wales Senator in 1983 and 1984, gaining 4.22% of a quota and 1.11% of a quota in the respective elections (Bennett, 1989:121).

- Michael Mansell, who stood as an Independent in the Tasmanian Senate election in 1987, gaining 5.14% of a quota (Bennett, 1989:121).

1.2.3 Parliaments in other States and Territories

In terms of representation in State and Territory parliaments, Queensland, Western Australia and the Northern Territory are the only states and territories where Aboriginal candidates have been successful in gaining seats. Successful candidates in these legislatures have gained major party pre-selection.

At present, two members of the twenty-five member Northern Territory Legislative Assembly are Aboriginal, John Ah Kit, ALP member for Arnhem, and Maurice Rioli, ALP Member for Arafura. Ernie Bridge, the first Aboriginal member elected to the Western Australian Legislative Assembly in 1980 for the ALP, now serves as the Independent Member for the Kimberley electorate.

1.2.4 Representation in Local Government

The political representation of Aboriginal people at the local government level may also significantly impact on the welfare and development of their communities. Bennett (1989:123) suggests

> *In many ways, Aborigines have had least political influence upon government at the local government level. For many years they lacked a vote, yet could suffer the consequences of a failure by councils to provide adequate services, particularly those involving water.*

There has been an increasing awareness of the importance of representation at this level, with a growing number of candidates successful in New South Wales local government elections (Bennett, 1989:123). However, at present there are only eleven Aboriginals among the 1,807 elected councillors on the state's 177 authorities (Wainwright, 1997).

The Minister for Local Government has signed a memorandum of agreement with Kyogle Council to begin a pilot mentoring program which may be extended to other areas. Members of the local Aboriginal community have nominated a potential Aboriginal candidate for the next Council elections. A currently serving councillor will act as a mentor in order to give the representative of the Aboriginal community further understanding of the functioning of the Council and an incentive to seek election (Wainwright, 1997).

1.3 EXISTING REPRESENTATIVE ORGANISATIONS

In order to consider the desirability of dedicated seats in Parliament, the Committee believes it valuable to examine the existing representative mechanisms for Aboriginal people which provide them with a voice in decision-making at a governmental or regional level. The two central formal arrangements which provide Aborigines with democratically-elected representatives making decisions on their behalf are Aboriginal Land Councils and the Aboriginal and Torres Strait Islander Commission.

1.3.1 Aboriginal Land Councils

The *Aboriginal Land Rights Act 1983* established Local, Regional and State Aboriginal Land Councils in New South Wales. Local Aboriginal Land Councils are declared by the Minister administering the Act. Each Council maintains a roll of adult members of the Council, who elect a Chairperson and other officers. All adult Aborigines who reside in the area may make a written request to be enrolled, and others who have an association with that area may apply to the Council to be accepted as members. There are currently 117 Local Aboriginal Land Councils in New South Wales. The functions of Local Aboriginal Land Councils, as provided in Section 12 of the Act, include:

- to acquire land;
- to consider applications to prospect or mine for minerals on their land and make recommendation to the New South Wales Aboriginal Land Council;
- to make claims to Crown lands; and
- to upgrade and extend residential accommodation for Aborigines in their area.

The boundaries of Regional Aboriginal Land Councils are also constituted by the Minister. There are currently 13 Regional Aboriginal Land Councils which function to provide assistance, when requested, to Local Councils in the preparation of claims for Crown lands or negotiations on the purchase or sale of land, and in administrative matters.

The New South Wales Aboriginal Land Council is made up of an elected representative from each Regional Land Council area. The functions of the New South Wales Land Council include managing of invested funds; granting

administrative funds to Local and Regional Land Councils; acquiring lands and making claims on Crown land; determining proposed mining or mineral exploration agreements; ensuring Local and Regional Aboriginal Land Council elections are in conducted in accordance with the Act; conciliating disputes; and providing advice to the Minister on matters relating to Aboriginal land rights.

As at 30 June 1996:

- 5,863 claims for Crown land had been lodged;
- 4,542 had been finalised;
- 1,132 claims covering an area of 55,463 hectares of land had been granted;
- 1,544 claims remained under investigation by the Department of Land and Water Conservation (Department of Land and Water Conservation, 1996:32).

Of the money paid from land tax revenue, the Act required that 50% be invested, and the interest re-invested, with the remaining monies available for Land Council expenditures. It is estimated that by October 1998, there will be $530 million in the investment fund (NSW Aboriginal Land Council, 1996:9). The New South Wales Aboriginal Land Council is expected to be financially independent from 1999.

1.3.2 Aboriginal and Torres Strait Islander Commission

The Aboriginal and Torres Strait Islander Commission, or ATSIC, is the nation's major policy-making body in indigenous affairs, and administers Commonwealth government programs. It was established by the Commonwealth *Aboriginal and Torres Strait Islander Commission Act 1989*. The Act was passed in recognition of the past dispossession and dispersal of the Aboriginal and Torres Strait Islander peoples and their disadvantaged position in Australian society. Section 3 sets out the aims of the Act, which are:

- *to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;*
- *to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;*

- *to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and*
- *to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.*

The functions of ATSIC as stated in Section 7 of the Act include:

- *to formulate and implement programs for Aboriginal persons and Torres Strait Islanders;*
- *to monitor the effectiveness of programs for Aboriginal persons and Torres Strait Islanders, including programs conducted by bodies other than the Commission;*
- *to develop policy proposals to meet national, State, Territory and regional needs and priorities of Aboriginal persons and Torres Strait Islanders;*
- *to assist, advise and co-operate with Aboriginal and Torres Strait Islander communities, organisations and individuals at national, State, Territory and regional levels; and*
- *to advise the Minister on matters relating to Aboriginal and Torres Strait Islander affairs, including the administration of legislation, and the co-ordination of the activities of other Commonwealth bodies that affect Aboriginal persons or Torres Strait Islanders.*

Other functions include providing information and advice to the Minister on other matters as requested; taking appropriate action to protect Aboriginal and Torres Strait Islander cultural material and information that is regarded as sacred; and collecting and publishing statistical information, in co-operation with the Australian Bureau of Statistics, about Aboriginal and Torres Strait Islander peoples.

ATSIC is structured to enable indigenous Australians to make decisions about programs affecting them, and to participate in the decision-making processes of government.

ATSIC is currently made up of 35 elected Regional Councils across Australia, a Board of 19 Commissioners, and an administrative arm. The Regional Councils are divided into 17 zones, and a Commissioner is elected to the Board from each zone. Two further Commissioners are appointed by the Federal Minister for Aboriginal and Torres Strait Islander Affairs, who now also appoints a Chairperson from amongst all the Commissioners. Commissioners are responsible for developing national policies for all Aboriginal and Torres Strait Islander people.

The Regional Councils have between 10 and 20 members who are elected every three years. Elections are conducted by the Australian Electoral Commission under the provisions of the ATSIC Act and the Regional Council Election Rules made by the Minister. A person may only vote at a Regional Council ward election if that person is an Aboriginal person or Torres Strait Islander and their name is on the Commonwealth Electoral Roll, with their place of residence shown there as being within the ward concerned.

The Councils are required to meet at least four times a year. The Councils consult with their communities and work to improve the social, economic and cultural life of all indigenous Australians. The Board of Commissioners allocates funds to each region, and the Councils administer program expenditure.

ATSIC staff are Commonwealth public servants, and work to support the activities of Regional Councils and the Board of Commissioners, and administer national programs that have been excluded from Regional Council budgets. ATSIC has a central office in Canberra, State Offices in each capital city, and 28 Regional offices.

While ATSIC provides Aboriginal and Torres Strait Islander people with a voice in government policy-making and service delivery, it remains a part of the central system of the federal bureaucracy, rather than an autonomous, self-governing entity. In delivering the keynote address at a conference on Aboriginal Self-determination in 1993, the then Chairperson of ATSIC, Lois O'Donoghue (1994:12) stated

> *I am not suggesting that ATSIC is an instrument of self-government for Aboriginal and Torres Strait Islander peoples, although clearly its elected arm shares some of the features of government. It is, however, a very important representative body for our people and its structure can accommodate the variations in arrangements which exist at the different state, regional and community levels. So, in a range of ways, Aboriginal and Torres Strait Islander peoples are moving forward within the existing parameters of our federalist system, while at the same time seeking to accommodate Aboriginal and Torres Strait Islander aspirations of self-determination and self-governance.*

There have been calls for an independent, non-government sponsored national Aboriginal and Torres Strait Islander organisation to complement ATSIC, in recognition that ATSIC is a product of the national government (Perkins, 1994:42). Similarly, the Eva Valley Statement, produced following a meeting in 1993 to formulate a response to the High Court decision on Native Title, called for resources for a representative body to negotiate with the Commonwealth government. It was believed the form of the Eva Valley meeting - a meeting of delegates of legitimate Aboriginal organisations of all kinds from across the nation - was appropriate for a continuing body of that nature. A negotiating group was formed but members subsequently were mandated only to represent their own organisations, with a loose coalition of Aboriginal groups maintaining contact (Brennan, 1995:213).

However, in considering the process of negotiation and agreement required for legal and constitutional change to the status of Aborigines in Australia, Brennan (1994:41) contends that

> *Even though ATSIC is not presently and universally acclaimed as the national voice of Aboriginal Australia, its system of democratically elected councils and its well-resourced bureaucracy appear to offer a suitable framework for diverse Aboriginal groups to be resourced and to be heard as Aborigines seek common ground among themselves so that their position may be strengthened within the political processes.*

1.4 CALLS FOR GUARANTEED REPRESENTATION

While the representative bodies discussed above provide some voice for Aboriginal people in policy-making and the management of their own affairs, calls for guaranteed representation in Parliaments at both the Commonwealth and State and Territory levels are frequently made. These calls are not a new development. Bennett (1989:4) notes that while there had been a history of civil disobedience by oppressed Aboriginal populations,

> *political activity that was easier for white politicians to understand emerged with the development of various pressure groups in the years after World War I.*

These groups began the calls for greater indigenous representation in the nations political systems which continue to this day, and which have been outlined in an earlier publication by the New South Wales Parliamentary Library (Griffith, 1995). The following time-line provides an overview of the demands for some form of guaranteed representation from both Aboriginal organisations and white politicians:

- **1937**: William Cooper of the Australian Aborigines' League in Victoria presented a petition to the King calling for guaranteed representation in the Commonwealth Parliament in the form of one seat in the House of Representatives (Bennett, 1989:4). The Federal government, arguing such an appointment was a constitutional impossibility, never forwarded the petition to the King.

- **1938**: The Aborigines' Progressive Association (APA), in response to the celebrations of 150 years of white settlement, held a protest meeting in Sydney on Australia Day, which they called the Day of Mourning. Five days later, an Aboriginal delegation met with and presented Prime Minister Lyons with a 10 point program for Aboriginal equality. The petition specifically demanded representation in the national Parliament for indigenous people as a method of empowering them to influence and have control over their own destinies (Council for Aboriginal Reconciliation, 1995:42).

  The Cabinet subsequently announced that since Aborigines could not vote, and no Federal government was likely to sponsor a referendum addressing that situation, Cabinet was unlikely to accept the principle of giving Aborigines a guaranteed place in Parliament (Bennett, 1989:6).

- **1949**: Doug Nichols wrote to Prime Minister Chifley calling for one Aboriginal Member of the House of Representatives to be elected by voters on a single Aboriginal roll. This call also was dismissed on the grounds that it was not permitted by the Constitution (Bennett, 1989:126).

- **1982**: The Western Australian Land Needs and Essential Services Committee made a similar call.

- **1983**: the Hon. Frank Walker, the then Minister for Aboriginal Affairs in New South Wales, proposed a reform of electoral laws allowing for one Aboriginal Senator in the Commonwealth Parliament to be elected from each state by voters registered on a separate electoral roll. He also advocated the creation of four Aboriginal electorates in the Legislative Assembly of New South Wales (Sydney Morning Herald, 1983:3).

  In the same year, the then Special Minister of State in the Federal Parliament, the Hon Mick Young, called for the ALP to consider affirmative action for Aboriginal candidates (Bennett, 1983:8).

- **1987**: The Northern Territory Legislative Assembly Select Committee on Constitutional Development considered and rejected Aboriginal seats in the Territory, or any new State, Parliament (1987:21). The Committee expressed a preference for a single member electorate system, with one person one vote and no distinction on the basis of race.

- **1988**: The concept of guaranteed representation received support in a number of submissions to the Constitutional Commission (1988:183). The National Aboriginal and Islander Legal Services Secretariat and the Public Interest Advocacy Centre argued that Aboriginal people should be represented in the Senate as an electorate, as if they constituted a state, for the purpose of electing a Senate representative; and the Aboriginal Development Commission supported the designation of a number of seats in the Senate for Aboriginal representatives to enable ready access to expert opinion on laws affecting Aboriginal people.

- **1993**: An Aboriginal Constitutional Convention held at Tennant Creek agreed that, if the Northern Territory becomes a state and has twelve seats in the Senate, seven of those seats should be allocated to Aboriginal representatives (Brown and Pearce, 1994:107).

- **1995**: The Report of the National Multicultural Advisory Council *Multicultural Australia: The Next Steps Towards and Beyond 2000* (1995), recommended a Select Committee of the Commonwealth Parliament be established to consider options for achieving greater representation of Australia's indigenous peoples in Parliament.

> Father Frank Brennan in *One Land, One Nation*, advocated reserving four seats for indigenous Australians in the Senate, including one Torres Strait Islander. People eligible to vote at ATSIC elections could have an additional vote for these Senate positions, or, alternatively, be able to choose whether to vote for these candidates or the general candidates from their state (Brennan, 1995:201).

The issue of indigenous representation has also been raised by both the Aboriginal and Torres Strait Islander Commission and the Council for Aboriginal reconciliation in reports to the Commonwealth Government on what constitutional, legislative, regulatory or administrative changes might redress the needs of Australia's indigenous people.

Recognition, Rights and Reform: a Report to the Government on Native Title Social Justice Measures presented the formal views of ATSIC (1995):

> *While it is difficult to define what the appropriate level of indigenous representation should be in the Commonwealth, State and Territory Parliaments and in Local Government, it is considered that measures should be taken now to institute political reform. These measures should include:*
>
> - *reserved seats in Parliament for indigenous Australians at both Commonwealth and State level;*
> - *ward structures in local Government areas having significant Aboriginal communities; and*
> - *conditions on Commonwealth Local Government funding which encourage greater indigenous representation on Councils* (ATSIC, 1995:49).

The Council for Aboriginal Reconciliation report *Going Forward: Social Justice for the First Australians* (1995) was produced in response to a request for the identification of appropriate measures to promote the cause of social justice for Aboriginal and Torres Strait Islander peoples.

During their consultation process, the report notes that proposals were "repeatedly raised" for guaranteed forms of political representation by the reservation of seats in national, State and Territory and municipal political structures. The Council recommended that, in any constitutional consultation process, an element should be

provided for an educational strategy on the possibility of separate indigenous seats, based on an indigenous electoral roll, in the House of Representatives and in the Senate.

At the conclusion of this process, the Government of the day would have to assess the level of public support for the proposal. The Council was of the view that it would be better not to proceed with a referendum on this issue unless there was broad support for the concept rather than undertake such a referendum and have a divisive political campaign which would damage the reconciliation process.

1.5 TOWARDS ABORIGINAL SELF-DETERMINATION

The Committee believes that the issue of dedicated seats in Parliament for Aboriginal people cannot be considered in isolation from other responses which may address the political situation of Aboriginal peoples. There may be a range of means of promoting the interests of the Aboriginal population in New South Wales, and each of these means requires attention in order to evaluate their potential for raising the social and political status of this group in our community. The Committee will consider what benefits political representation at the parliamentary level may offer, and also the value of initiatives promoting autonomy and self-determination at a local or regional level. Recent court judgments, such as the *Mabo* and *Wik* cases, are giving greater recognition to the rights of Aboriginal communities not only to claim title to land, but also to manage their own affairs. Charles Perkins (1994:41) has stated:

> *Mabo is also about self-determination - giving Aboriginal and Torres Strait Islander peoples the space and resources to enjoy our culture, to work out our own solutions and control our own lives.*

The Royal Commission into Aboriginal Deaths in Custody (1991:38) recommended that governments recognise that a variety of organisational structures have developed or been adapted by Aboriginal people to deliver services, including community councils, outstation resource centres, Aboriginal land councils and co-operatives and other bodies incorporated under Commonwealth, State and Territory legislation as councils or associations. The Commission suggested organisational structures which have received acceptance within an Aboriginal community are particularly important because they deliver services in an accountable manner, and acceptance of the role of such organisations "recognises the principle of Aboriginal self-determination". The Commission recommended that government should recognise such diversity in

organisational structures and that funding for the delivery of services should not be dependent upon the structure of organisation which is adopted by Aboriginal communities for the delivery of such services.

The following section considers recent developments promoting Aboriginal self-determination. International developments are discussed as models in Chapter Three.

1.5.1 The Torres Strait Regional Authority

When the *ATSIC Act 1989* came into effect, Island Councils were already in existence in the Torres Strait, elected under Queensland law. The original version of the *ATSIC Act 1989* provided that the ATSIC Regional Council for the Torres Strait would comprise the Chairpersons of each Council, supplemented by additional elected Councillors from other communities.

The *ATSIC Act 1989* was amended in 1993 to provide for the establishment of the Torres Strait Regional Authority as a legal body corporate, with more power than the former ATSIC Regional Council. A key function is to recognise and maintain the special and unique 'Ailan Kastom' of Torres Strait Islanders living in the Torres Strait area. This is the body of customs, traditions, observances and beliefs of Torres Strait Islanders living in the region.

The creation of the Authority has been welcomed as a move towards self-government. The Island Co-ordinating Council declared in 1993 that self-government is an inherent right and should be recognised in both state and federal government arrangements. A target date of 2001 was set to achieve this goal. The Council for Aboriginal Reconciliation has recommended that the Commonwealth give a commitment to an enhanced form of self-government in the Torres Strait, and that a special negotiating group be established to examine mechanisms to enhance the powers and operations of the Torres Strait Regional Authority as a basis for seeking to establish regional self-government by the target date (Council for Aboriginal Reconciliation, 1995:51).

The self-governing status of Norfolk, Christmas and the Cocos Keeling Islands is considered a model for forms of indigenous self-government within the framework of Australia's federal system.

1.5.2 Regional Agreements

The Commonwealth *Native Title Act 1993* makes provision for regional agreements as one basis for settling native title land claims. The preamble to that Act states that "Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to land claims and use of land for economic purposes." Tripartite agreements involving Commonwealth, a State or Territory and a structure representative of indigenous peoples would be enforceable under the general law of contract (Council for Aboriginal Reconciliation, 1995:48).

Consultations by the Council for Aboriginal Reconciliation (1995:47) revealed widespread support for the concept of regional agreements to enable Aboriginal and Torres Strait Islander peoples to have greater control over the design, operation and funding of services in a defined geographic area. The acquisition of land, land management, monetary compensation and heritage protection are among matters which could be included in any agreement. Regional agreements involve the ceding of powers by the Commonwealth and relevant State or Territory government of powers to an indigenous structure. This can occur within the existing constitutional framework, rather than being a recognition of sovereignty.

ATSIC have called for Commonwealth government recognition of the concept of regional agreements as a framework for establishing a range of formal relations and settling outstanding social justice issues, and for negotiations on a set of underlying principles and benchmarks (ATSIC, 1995:58). They have also called for the funding of pilot studies in conjunction with regional indigenous interests.

The Council for Aboriginal Reconciliation (1995:49) recommended funding be provided (and disbursed through ATSIC) for indigenous negotiating structures for a number of regional agreements, including in urban communities. Regional agreements in urban or settled areas could focus on contracts between Aboriginal and Torres Strait Islander communities or organisations and government authorities for the delivery of services such as health and education.

A first step towards a regional agreement has been achieved in the Cape York Regional Land Use Heads of Agreement signed in 1996 by representatives of resource industries, Aboriginal people and the environment movement. The Agreement will be considered by the Commonwealth and Queensland government.

1.5.3 Formal Recognition of Rights

The Constitutional recognition of the rights of Aboriginal and Torres Strait Islander peoples, and other options for a formal document of reconciliation, have also been considered in a number of forums in Australia.

At a national level, the 1988 **Constitutional Commission** did not recommend an amendment to the Constitution to confer a power on the Commonwealth to enter into an agreement or compact with representatives of Aboriginal and Torres Strait Islander peoples (Constitutional Commission, 1988:307).

The Electoral and Administrative Review Commission in Queensland (1993), in their Report on Consolidation and Review of the Queensland Constitution, recommended that the proposed Constitutional Convention consult further with Aboriginal people and Torres Strait Islanders in drafting a final constitution for Queensland. In response, the **Parliamentary Committee for Electoral and Administrative Review** (1994) recommended the specific constitutional recognition of Aboriginal and Torres Strait Islander peoples be considered further.

The **Northern Territory Legislative Assembly Select Committee on Constitutional Development** (1996) has developed a Draft Northern Territory Constitution that contains a preamble recognising the entitlement of the Aboriginal people of the Northern Territory to "self-determination in the control of their daily affairs." The Draft also contains a provision allowing Parliament to provide for the grant of Aboriginal self-determination through legislation.

The **Council for Aboriginal Reconciliation** (1993:51-54) has outlined a range of options for a formal instrument of reconciliation, including non-statutory, statutory and constitutional measures. Options include treaty negotiations or preliminary agreements for the recognition of rights of self-government for indigenous communities, which could also receive statutory or constitutional recognition; the recognition of indigenous peoples' rights in statutory or constitutionally-recognised Bills of Rights; Constitutional preambles acknowledging prior Aboriginal and Torres Strait Islander ownership of the continent and its islands; and constitutional recognition of sovereign, domestic dependent nationhood for Aboriginal and Torres Strait Islander nations.

1.6 CONCLUSION

While the Standing Committee's attention during this Inquiry will be focussed on the question of providing dedicated seats for Aboriginal Members in the New South Wales Parliament, **submissions on other means of promoting the interests of Aboriginal people in New South Wales will also be welcomed. This may include comment on existing representative organisations; legislative initiatives; or other formal means of recognising the rights of indigenous Australians in this State.**

Chapter Two

Dedicated Seats: A Comparative Perspective

2.1 INTRODUCTION

A number of parliamentary systems around the world include some form of dedicated representation for particular cultural groups. In some cases, this occurs in nations where the population is made up of several ethnic groups of considerable size, including:

- **Lebanon**, where each religious community is allocated a proportion of the 99 seats of the Chamber of Deputies in accord with the proportion of the population that group comprised in the 1932 census. Most of the 26 electoral districts are multi-member, and many have mixed religious populations and representation, with all voters in a voting district voting for all the seats (Crow, 1980:46).

- **Fiji**, where Fijian Indians slightly outnumber indigenous Fijians, both the 1970 and 1990 Fijian constitutions contained provisions for communal electoral rolls. The 1990 constitution allocates seats in a manner ensuring indigenous Fijian domination of the Parliament (Lawson, 1993).

In other nations, electoral arrangements are designed to ensure minority groups are represented in parliaments. These nations include:

- **India**, where the constitution provides for Scheduled Castes and Tribes to have proportional representation through reserved seats in the national and state legislatures. The President specifies scheduled castes and tribes for particular states by Presidential Order. However, members of other ethnic groups participate in the elections of these representatives in the reserved constituencies (Vanhanen, 1991:184). There are currently 79 seats in the House of People (Lok Sabha) reserved for scheduled castes and 41 seats reserved for scheduled tribes. If the President is of the opinion that the Anglo-Indian community is not adequately represented, the constitution empowers

the President to appoint up to two members of that community to the House of the People.

- **Zimbabwe**, where the 1980 constitution established a system whereby 20 reserved seats from a 100 seat House were allocated for whites, who represent only 0.5% of the voting population (Fleras, 1991:84)

- **Singapore**, which has a unicameral Parliament of 81 members, of whom 60 are elected from 15 Group Representation Constituencies (GRCs). Candidates in a GRC contest the election on a four-member group ticket, and each ticket is required to have at least one candidate belonging to a minority race. The successful ticket wins all four seats in a GRC. Nine GRCs have at least one member from the Malay community, and six have at least one member from the Indian or other minority communities.

It is the arrangements applying to Maori in **New Zealand** and Indian tribes in the U.S. state of **Maine** which are the most relevant in considering dedicated seats for Aborigines in New South Wales, since they provide seats for minority indigenous groups in legislatures which have electoral arrangements similar to those in New South Wales. These arrangements are discussed at length in this Chapter. In addition, it is also appropriate to discuss developments in **Canada**, since the issue has been considered at a both a federal and provincial level.

2.2 THE NEW ZEALAND MODEL

2.2.1 The Maori in New Zealand

Maori constitute between 12% and 13% of the New Zealand population. The Treaty of Waitangi was signed by the Governor and 41 Maori chiefs at Waitangi in 1840, and subsequently by a total of 540 chiefs. The English translation of the Treaty was for some time interpreted as the Maori handing over absolute sovereignty to the British Crown. More recently, the Treaty has been re-interpreted through a combination of statute, the findings and recommendations of the Waitangi Tribunal, and the courts, and the Maori right to *tino rangatiratanga*, or full chiefly authority over lands and possessions, has gained increased recognition (Sharp, 1992).

Unlike the situation in New South Wales, a number of Maori MPs have been elected to general electorates, with many having been successful in constituencies where Maori do not form a large proportion of the population (Royal Commission, 1986:99).

In addition to the representation they have achieved through the traditional political processes, a number of dedicated seats have existed for Maori in the House of Representatives for over 125 years. The first-past-the-post system in New Zealand provided for Maori representation by reserving four seats for those Maori who registered on a separate Maori electoral roll. These seats covered the entire country, overlapping non-Maori constituencies, and were known as Eastern Maori, Northern Maori, Southern Maori and Western Maori. With the introduction of the Mixed Member Proportional (MMP) electoral system in 1996, a fifth seat, known as Central Maori, has been created.

At present, there are a total of 15 Maori members of the New Zealand parliament in a 120 seat House. Two votes are now cast by electors - the first for a local member in a General or Maori constituency seat, and the second for the party of the voters' choice for the party-list seats. The total number of seats a party has in parliament is proportional to the percentage of votes the party wins in this second vote.

2.2.2 History of Maori Seats

In 1852, legislation was passed granting the franchise to all males over the age of twenty-one years who owned or leased land of a specified minimum value. While this included Maori males, most were effectively excluded from the franchise since most Maori land was communally owned and unregistered.

It was believed the individualisation of land titles through the Native Land Court would effectively franchise Maori (O'Connor, 1991:175). It later became apparent that this process was not proceeding at a rate sufficient to satisfy the political aspirations of Maori. Separate representation already existed for special interest groups who did not meet the property qualifications in the form of Goldfields and Pensioner Settlements electorates. In 1867, the Maori Representation Act was passed. The preamble recognised that Maori had been unable to be registered to vote, and that temporary provisions should be made to protect their interests.

Four Maori seats were created, with an intended life span of only five years. These arrangements were extended for a further period in 1872, and made permanent in 1876. In 1871, the Member for Eastern Maori successfully passed a motion proposing Maori representation in the Legislative Council, and thereafter there were usually two appointed Maori representatives in the Council until its abolition in 1950 (Sorrenson, 1986:B23-24).

When the seats were introduced, those with half or more Maori ancestry were required to register on the Maori roll (unless they were property owners), and those with less than half on the "European" roll. From 1896 (after female suffrage had been introduced and the property qualification abolished), those with half-Maori and half-European ancestry could choose to register on either roll. In 1975, references to fractions of descent were removed. The Electoral Act now provides that a Maori, or a descendant of a Maori, is able to register as an elector of either a Maori electoral district or a general electoral district. Self-identification, rather than degree of descent, is therefore the main criterion of Maori identity.

The number of Maori seats had been fixed at four since 1867, regardless of the size of the Maori population, or, since enrolment on the Maori electoral roll was made optional, regardless of the number of Maori opting for the Maori roll. Later bills and petitions supporting increases in Maori representation were unsuccessful (Sorrenson, 1986:B-24).

In 1986, the recommendations of the Royal Commission on Electoral Reform included the abolition of the four Maori seats. It was expected that the Mixed Member Proportional (MMP) electoral system would provide an adequate means for representing minorities, especially Maori voters.

Of the submissions received by the parliamentary Committee examining the draft electoral law bill, an overwhelming majority supported the retention of Maori seats until Maori themselves decided whether they should be abolished or changed.

A further process of consultation was instituted, and Maori were successful in arguing against the loss of the guaranteed Maori seats. The report of the Electoral Law Committee noted the significant amount of concern regarding Maori representation and more fundamental constitutional issues concerning the status of Maori and the implications of the Treaty of Waitangi expressed in submissions (Electoral Law Committee, 1993:6).

It was also recommended that the number of Maori seats should be based on the electoral population. With the introduction of MMP, the number of Maori seats is adjusted in proportion to the same quota as general seats.

From the 1930's until the election in 1993, the four Maori seats had been safe for Labour, in alliance with the political-religious Ratana movement. All five Maori seats are now held by New Zealand First.

2.2.3 Administration of the Maori Seats

- **Voter Registration**

The choice between enrolling on the Maori roll or General roll is exercised at the time of registering to vote. The enrolment form questions all enrollers as to whether they have Maori ancestry. Those with such ancestry are then asked to nominate the roll on which they wish to be placed (see Appendix I). No information on the benefits or disadvantages of each option is provided.

While registering to vote has been mandatory since 1956, legal sanctions for non-registration are not pursued. There is evidence that eligible Maoris are over-represented among those not enrolled to vote, and may number over 35% of the total (Waitangi Tribunal, 1994:25).

In a survey of 1,411 respondents not registered on any electoral roll, 44% indicated they couldn't see the point of enrolling, and, of that group, 52% indicated they had not enrolled because enrolling made no difference for Maori, or that Pakeha controlled the system.

Cultural differences may also be a factor discouraging registration, as Maori prefer to deal with issues in a face-to-face or hands-up manner. During consultations by the Electoral Reform Project Steering Committee in 1993, there were also suggestions that Maori had difficulty filling out electoral forms, that advertising campaigns were misguided and face-to-face consultation and assistance was needed (Electoral Reform Project Steering Committee, 1993:29).

Voting at elections in New Zealand is not compulsory. Traditionally, non-voting has been particularly high among Maori and Pacific Islanders, with lower voter turn-out consistently recorded in the Maori seats when compared to the general seats. Voter

turn-out has also been low for those Maori who choose to register on the general roll instead of the Maori roll. This may largely be accounted for by the disproportionate number of Maori among the socially marginalised groups, such as low income earners and home renters (Mulgan, 1994:252).

■ The Maori Electoral Option

A Maori voter is only able to transfer from one type of electoral district to another during a two-month period shortly after each five-yearly population census, known as the Maori Electoral Option. A Maori option card gets sent to every person who indicated they were of Maori descent when they registered to vote, allowing them to elect to change from one roll to the other. If the card is not returned, the voter remains on the roll on which they were last registered.

A special Maori Option was held in conjunction with the reform of the electoral system (Appendix II). Maori electors had two months from 15 February 1994 to choose whether to register on the Maori electoral roll or the general roll for the first MMP election. At the conclusion of that Electoral Option, the number enrolled on the Maori roll had increased from 104,414 to 136,708. This increase resulted in the creation of a fifth Maori seat. However, 127,826 people who said they were of Maori descent remain enrolled on the general roll.

A number of Maori groups disputed the outcome of the 1994 Maori Electoral Option. The Waitangi Tribunal found that government funding to inform Maori of their democratic entitlements and responsibilities was inadequate. However, the Court of Appeal held that reasonable (if imperfect) steps had been taken to publicise and explain the Electoral Option. Parliament's Electoral Law Committee (1996) has since recommended that the Option period be extended to four months; that a publicity campaign be conducted concurrently with the Option; and that funding be sufficient, with the Committee consulted in that regard for future exercises of the Option.

Maori voters choosing to register on the general roll may support the Maori seats, but believe their vote counts more in what may be a marginal general seat, or that they can be better served by the local M.P. who may have more time to devote to local issues. Since the Maori seats can no longer be regarded as safe for any party given the outcome of the 1996 election, this may encourage voters to move back to the Maori roll.

■ Electorates and Boundaries

With the introduction of MMP, the number of South Island general constituencies has been set at 16, allowing for the calculation of an electoral quota based on that island's population. There are currently 44 North Island general constituency seats, five Maori seats, and 55 list seats.

The Government Statistician determines the number of Maori seats by:

- calculating the ratio of the number of people registered on all the Maori electoral rolls compared to the total number of people on all the electoral rolls, General and Maori, who said they were of Maori descent when they last enrolled; and

- applying that proportion to the total number of people (adults and children) who said they were of Maori descent at the most recent population census.

The resulting figure is the Maori electoral population, which is then divided by the South Island electoral quota to give the number of Maori electorates.

Many Maori argue that the number of Maori seats should simply be based on data on the Maori population obtained from each five-yearly census, in the same way that electoral populations in general electorates are calculated. Some also believe enrolment should occur at the time of the census.

After the number of Maori seats is established, a Maori Electoral Quota is then calculated to determine the electoral population which should be in each electorate. The Representation Commission is then responsible for dividing New Zealand into the ascertained number of electoral districts. When the Commission is determining Maori electoral districts, the seven member Commission is supplemented by three further members: the Chief Executive of Te Puni Kokiri (the Ministry of Maori Development), and two Maoris appointed by the Governor-General on the nomination of the House, one to represent the Government and one to represent the Opposition. The Representation Commission is required to take into account community of interest among members of Maori tribes in setting electorate boundaries.

- **Polling Day Arrangements**

In New Zealand, not all polling places are able to issue Ordinary Maori votes to people enrolled on the Maori roll. At those polling booths that do have provisions for Maori voters, tables and ballot boxes for this purpose are set aside from ordinary voting tables. If a voter is voting at a polling place within their electorate that does not have Maori Ordinary voting facilities, a "Tangata Whenua" vote is made, with polling officials completing relevant details on a declaration before issuing voting papers. If voters are outside their electorate, a "special" vote must be made, in which case the declaration form to be completed by the voter is the same as that applying to voters on the general roll voting outside their electorate.

2.2.4 An Evaluation of the Maori seats

Some commentators question the extent to which Maori interests have been protected by the provision of dedicated seats within the electoral system. Historically, the four seats did not provide equal representation on a population basis (O'Connor, 1991:176). Some commentators therefore conclude the origins of the Maori seats are "less than reputable", preventing anything more than a marginal effect on the composition of the House of Representatives (Mulgan, 1989a:137).

The Maori voice was often ineffective in matters of vital importance to them, such as Native Land Acts which facilitated settler purchase and the loss of Maori land (Sorrenson, 1986, B-26).

While there have been a number of notable achievements by Maori Ministers (see Sorrenson, 1986:B-xx-36), the report of the Royal Commission on the Electoral System concluded that

> *even in the few brief periods when one of their number has held the portfolio of Maori Affairs, the policies and legislative measures which have been adopted by successive Parliaments have rarely given full effect to Maori concerns* (Royal Commission, 1986:91).

The Royal Commission also spoke of separate representation reinforcing

> *the political dependency of the Maori people and their exposure to non-Maori control over their destiny and future* (Royal Commission, 1986:90-91).

Would Maori interests have been better served without separate representation? It is clear that the Maori seats have ensured a Maori voice is heard. Maori members representing general electorates have to be sensitive to the interests of the Pakeha majority and have not been able to devote themselves wholeheartedly to specifically Maori interests in the same way as Members of Parliament for the Maori seats can. Pakeha Members representing general seats have no formal links with Maori voters living in their electorates, since many Maori voters are on a separate electoral roll (Mulgan, 1989a:137).

Many Maori believe this is changing, and no Member can now afford to ignore Maori interests. The current interpretation of the Treaty of Waitangi has resulted in significant inroads in policy terms, and is increasingly being accepted by all political parties.

The Royal Commission found it difficult to arrive at a precise assessment of the extent of the Maori MPs' influence on policy. The Commission did, however, note that almost all candidates for election in Maori constituencies understand the problems of their people in ways that non-Maori may not, and are sympathetic advocates in the political arena and in representing Maori in dealings with Government departments and other official organisations affecting their interests (Royal Commission, 1986:89).

There are, however, a number of weaknesses often identified in the current arrangements applying to the Maori seats, including:

- the small number of Maori M.P.s, making it difficult to scrutinise all legislation, and resulting in issues and policies disadvantageous to Maori being passed through Parliament (Dibley, 1993:77);

- difficulties for members in Maori seats in servicing their constituents due to the large size of their electorates. For example, there are 41 general electorates within the boundaries of the seat of Southern Maori. While Members in Maori electorates receive a slightly higher Electorate Allowance, they do not regard this as sufficient to compensate for the extra travelling involved;

- the constraints of party allegiance, making it difficult to speak out strongly on Maori issues for fear of alienating the Pakeha supporters of their party; and

- the administration of the Maori Electoral Option and the Maori Roll, which pose substantial difficulties.

Despite these difficulties, the final submission from the Electoral Reform Project Steering Committee to the Select Committee on Electoral Reform concluded:

> *There is virtual unanimity in Maoridom regarding the need to retain the present four Maori seats* (Electoral Reform Project Steering Committee, 1993:22).

The Electoral Reform Project Steering Committee, comprising representatives of Maori organisations, concluded that guaranteed Maori representation was seen as linked to Maori rights, identity, and status (Electoral Reform Project Steering Committee, 1993:38). The Maori M.Ps have also come to be regarded as people of importance, and bring authority or "mana" to a Maori occasion (Dibley, 1993:64). The Royal Commission found Maori had made separate representation something of their own: "It had been indigenised" (Sorrenson, 1986:B-57).

However, neglect of Treaty of Waitangi guarantees has meant that the Maori Members have been burdened with the responsibility of protecting constitutional rights, with few resources and "the weight of the system against them" (Royal Commission, 1986:86). The report of the Royal Commission listed a number of ways in which Maori rights could be better addressed, including the devolution of some of the Parliament's own functions and finance to local, regional or national Maori organisations; and greater legal recognition of the Treaty of Waitangi.

2.3 UNITED STATES

2.3.1 Native Americans in the United States

In the United States, the self-identified Aboriginal population is close to 2 million people, who comprise less than 1% of the total population. There are 516 federally recognised Indian tribes. There are 287 reservations encompassing 22.68 million hectares of land held in trust, and almost all land settlements have been concluded.

From 1777 to 1871, United States relations with individual Indian nations were conducted through treaty negotiations, in contrast to the experience of the Aboriginal people of Australia. These "contracts among nations" created unique sets of rights

benefiting each of the treaty-making tribes. Those rights, like any other treaty obligation, represent "the supreme law of the land", and protection of those rights is a critical part of the federal Indian trust relationship.

2.3.2 Representation in U.S. Legislatures

■ The Insular Territories and Congress

In the United States, the dependencies of Guam, Puerto Rico, Virgin Islands and American Samoa are guaranteed a representative to Congress. These elected delegates, like the delegate from the District of Columbia, have floor privileges and votes on committees, but not votes on the floor of the House.

These delegates were entitled to vote in the Committee of the Whole in the last Congress, but this arrangement was discontinued by the Republicans. There are difficulties in formalising voting power for these delegates as there are concerns regarding the skewing of the current political balance, as most are Democrat strongholds.

■ Native American Representation in Congress

In 1975, the American Indian Policy Review Commission, a congressionally sponsored research project, considered the election of an Indian Congressional delegate, but made no recommendation on the issue (National Indian Policy Centre, 1993:23).

During the last Congress, the delegate from American Samoa introduced a bill to establish a dedicated Congressional seat for a Native American delegate, but the bill was never debated.

There are currently two Native American Senators. While there have been representatives in the past, and there has been an Indian Vice-President, there are currently no Native American members of the House of Representatives.

Navajo comprise more than 50% of constituents in some electoral districts in Arizona yet they have no representative at a federal level. Electoral boundaries transect reservations, making it more difficult to elect representatives. All eight tribes in one

Congressional district in Arizona have met to discuss how they can have a greater impact in elections. Some tribal elections coincide with national elections, which encourages participation. Voter turn-out for general elections in other tribes is low.

The lack of Congressional representation is identified as a crucial issue by some American Indians. While the Committee system has provided a means of input, the current power brokers are seen as hostile to Indian interests. Non-native members of Congress must appeal to the bulk of their constituents and Indian lobbyists are vulnerable to being "sold out" in negotiations.

The issue of parliamentary representation has not been seriously considered by the peak representative group, the National Congress of American Indians. Many consider that any proposal for introducing parliamentary representation would give governments an excuse for not dealing with tribal leaders, and be contrary to tribal sovereignty. At a federal level, it would be difficult to select a token number of Congressional representatives to speak for all tribes and Alaskan villages.

- **State Legislatures**

Representation in state legislatures is also contentious because of the history of Indian-state relations. While there is debate regarding participation in state governments, many recognise tribal members are citizens of both states and tribal nations, and need to have their voices heard. In Arizona, for example, Navajo have elected two state House of Representative members and one Senator. Indian nations actively approach these state representatives for support.

In the state of Washington, a bill was introduced in 1991 to provide for Indian delegates, in recognition of the "unique government-to-government relationship" between tribes and the state and the "important historical and cultural perspective" they would bring to the legislature. The bill provided for two non-voting delegates in the House of Representatives, and two in the Senate. The means of election were to be left to the tribes, and the bill provided that such elections could, for example, be limited to election by the chairs of the tribal councils. The bill was never enacted.

However, in one state, Maine, dedicated seats are provided for representatives of two Indian nations.

2.3.3 Representation in Maine

The state of Maine provides legislative representation by way of a representative from the two largest tribes, the Penobscot and the Passamaquoddy, but the representatives have no voting rights. Maine also has Mi'kmaq and Maliseet tribes, who do not have parliamentary representation. A majority of members of the recent Task Force on Tribal-State Relations (1997:6) recommended that the Maine Legislature also offer and fund the opportunity for these tribes to have a tribal representative.

While Indian tribes in Maine have been sending representatives to the state legislature since early last century (1823 for the Penobscot and 1842 for the Passamaquoddy), legislation formalizing the election of Indian representatives was enacted for the Penobscot tribe in 1866, and for the Passamaquoddy in 1927. This arrangement was discontinued in 1941, when legislation ousted the elected representatives from the chamber, and they became little more than paid lobbyists. Seats in the House and speaking privileges were re-established in 1975.

The state constitution provides for 151 members, so Indian members are regarded as "non-constitutional" members. They are seated by House Rules, rather than by statute. These Indian delegates may not vote on legislation, but enjoy all other privileges of a member of the state legislature. However, they do not receive the same salary as other members, but are paid at a daily rate for attending the House. They also receive the same allowances for meals, housing, constituent services and travel expenses as other members of both houses.

The Joint Rules of the Maine Legislature have recently been amended to allow Indian representatives to sponsor bills of concern to their tribes and for land claims. The rule limits sponsorship to Indian-specific legislation, so other sponsors will continue to be sought if there is any doubt in this regard. In addition, Members may now serve on Committees as non-voting members. The Passamaquoddy member serves on the Judiciary Committee, and the Penobscot representative on the Natural Resources Committee.

There is no restriction on the issues the tribal representatives can speak about. Obtaining a vote on the floor of the House is the goal of the tribal members, and would require constitutional amendment.

The tribal representatives are currently non-partisan. The incumbent Passamaquoddy representative has an open invitation to attend the caucus of both parties, which was not the case in the past.

Other Indian tribes and nations in the U.S. feel that such participation in state legislatures may compromise their sovereignty. Since parliamentary representation is not new to the tribes in Maine, and they have played a considerable role in the development of the area since European settlement, many view such participation as an expression of their sovereignty.

■ Administration of the Tribal Seats

Tribal elections have been imposed by the state since 1852. The Passamaquoddy parliamentary representative is elected during elections for the reserves' tribal Council, Governor and Lieutenant Governor. Representation alternates between the two Passamaquoddy reservations, and members are elected to serve for two parliamentary terms (four years). However, a referendum is proposed to allow representatives to run as incumbent members for a second term. The Penobscot have one reserve, and the parliamentary representative can stand for a number of terms.

Ballot booths are provided on reserve, and off-reserve absentee voting facilities are available. The tribes manage their own electoral rolls and check qualifications for registration as a tribal member.

■ An Evaluation of the Tribal Seats

Even before the recent change to the House Rules allowing Indian members to sponsor legislation, the members had been successful in lobbying other members to sponsor their bills, and have proven powerful on the floor of the House. While the Indian members are not fully empowered due to their lack of voting rights, their ability to be on Committees enables them to have a prominent role in public hearings and in making public statements. The members have had a "moral authority" guaranteeing them a seat in decision-making forums, and encouraging government accountability. They are able to use their positions as an entree to other decision-makers of the state, depending on the skills of the individuals concerned.

Recent achievements have included ensuring the Indian Tribal State Commission is reviewed. However, a bill providing for special provisions in the review of projects by the Board of Environmental Protection if they affected reservations was defeated.

The Penobscot representative considers it very difficult to sit in the House and contribute to debates and not be able to vote, and believes non-voting is a way of keeping the tribal representatives "in their place", making representation a half-way measure. While tribal representatives may dominate discussion in Committees before Members' votes are cast, they are unable to "horse-trade" on issues due to the lack of a vote. The two tribal representatives collaborate on issues affecting both tribes, and assist in lobbying for votes on issues affecting one tribe.

There are mixed feelings about representation, with some tribal members not wanting to be seen as part of the state system, and others taking a pragmatic approach, recognising federal and state assistance is required to maintain their community. Without parliamentary representation, more unfavourable legislation may pass, and the tribes would be forced to operate in a more litigious mode, with associated costs to the community.

Since all state members are part-time, the House sits for only part of the year, and members have no staff or offices, the main role for the tribal representatives is one of leadership. However, they are becoming increasingly effective and are learning to use their positions in a more assertive and activist way.

The tribal representatives are regarded by the people as more important than their other elected representatives, whom they are reluctant to approach. While the Penobscot number approximately 2,000, they are widely spread. The non-native local member represents approximately 7,000 people, of whom 600-700 would be Penobscot. When decisions between Indian and non-Indian interests must be made (for example, on environmental vs industry issues), they will support the majority of their (non-Indian) constituents.

There have been many discussions on incorporating tribal culture into the parliamentary process, such as through flags or the morning prayer, which has been delivered by tribal spiritual people. It is widely acknowledged that the presence of tribal representatives provides an opportunity to educate other members and the community on Indian issues.

2.4 CANADA

2.4.1 Aboriginal Peoples in Canada

In Canada, 1993 figures suggest the self-identified aboriginal population was 1,201,216 representing 4% of the total population and including status Indians as defined by the Indian Act, non-status Indians, Inuit and Metis (mixed Indian/European people tracing their ancestry to the Red River area of Manitoba). There are 605 federally-recognised Indian bands.

2.4.2 Representation in Canadian Legislatures

- **Federal Parliament**

There have been a number of aboriginal representatives in the Canadian Parliament, including three representatives from constituencies with a non-aboriginal majority. There are currently three aboriginal members of the House. However, to achieve representation in proportion to their population, approximately 12 aboriginal members are required.

Several political parties have attempted to encourage aboriginal political participation, The Liberal Party, for example, has an Aboriginal Peoples' Commission, which supports mechanisms ensuring greater representation in the parliament.

The issue of increasing aboriginal representation has received considerable attention at the federal level in Canada. The Congress of Aboriginal Peoples was one of the first organisations to propose dedicated seats for aboriginal peoples in the early 1980s. The Congress represents non-status Indians and Metis, and following the re-instatement of 110,000 as status Indians, is also representing off-reserve Indians.

In 1990, Senator Len Marchand (1990), a member of the Okanagan Indian Band and former Minister in the Trudeau government, produced a paper entitled *Aboriginal Electoral Reform - A Discussion Paper*. During subsequent hearings of the Royal Commission on Electoral Reform and Party Financing, it became apparent that the issue of aboriginal representation required further study. The Royal Commission then established a working group known as the Committee for Aboriginal Electoral Reform, comprising current and former indigenous members of Parliament, and chaired by Senator Marchand. The Committee was asked to consult with the

aboriginal community concerning Aboriginal Electoral Districts to determine whether the Royal Commission should make a recommendation on the subject. After consultations, the Committee issued a report, *The Path to Electoral Equality* (Committee for Aboriginal Electoral Reform, 1991) to the Commission.

This report recommended a guaranteed process for aboriginal representation in the House of Commons, rather than guaranteeing seats. The number of Aboriginal Electoral Districts in each province was to depend on the number of people registering on a separate roll, divided by the province's electoral quotient. This arrangement could be achieved with the consent of both Houses, and therefore was in line with the decision not to make recommendations that would require constitutional change.

The Royal Commission on Electoral Reform and Party Financing (1992) subsequently recommended that up to eight Aboriginal Electoral Districts be created in the House of Commons. The House Committee on Electoral Reform implemented a number of the Royal Commission's initiatives, but ignored others, including aboriginal representation.

Also in 1992, the Charlottetown Accord proposed guaranteed representation in the Senate, with aboriginal seats in addition to provincial and territorial seats. The possibility of a double majority in relation to matters materially affecting Aboriginal people was also raised, with details to be discussed further by governments and representatives of aboriginal peoples. The provisions for constitutional reform in the Charlottetown Accord were rejected in the referendum of that year (Russell, 1993).

The Royal Commission on Aboriginal Peoples, established in 1991, also considered dedicated seats. During consultations, the issue of parliamentary representation was raised by some national organisations, but not at the community level. The Commission's final report, released in 1996, does not support special representation. It was suggested that special representation creates a small, marginalised group with little real clout. While they can speak on issues, there were concerns regarding the image of, and effective, tokenism in the House.

The Royal Commission instead recommended the creation of an Aboriginal Parliament, discussed further in Chapter Three.

The Assembly of First Nations, the peak national representative body for status Indians, does not support aboriginal representation, particularly at the provincial level, as they believe First Nations should deal directly with the Crown as equal partners.

■ Provincial Representation

The level of aboriginal representation in governments has generally been lower at the provincial level, with the exception of northern constituencies in Saskatchewan, and more recently in Manitoba and Alberta. Quebec has created a new electoral district for an area with a considerable Inuit population. In Saskatchewan, one northern town is to be removed from a riding to create a gerrymander for the aboriginal population.

Dedicated seats have been considered in a number of provinces. In 1991, the Premier of New Brunswick requested the Representation and Electoral Boundaries Commission to inquire into aboriginal representation. The Commission's 1992 report, Towards a New Electoral Map for New Brunswick, was referred to the Select Committee on Representation and Electoral Boundaries, who recommended the Commission undertake no further consultation until requested by the aboriginal community. No such request has been made and interest in the issue appears to have waned (Niemezak, 1994:17-18).

In early 1994, the Native Affairs Minister of Quebec indicated support for amendments to the electoral act to provide up to two designated aboriginal seats (Niemezak, 1994:18). This proposal has not been further developed.

■ Nova Scotia

Proposals for dedicated seats have advanced somewhat further in the province of Nova Scotia. There are 13 bands of Mi'kmaq Indians in Nova Scotia. Traditionally, treaties in the eastern provinces were for peace and friendship rather than lands, but some lands have been set aside by the federal government.

In 1991, the then Premier of Nova Scotia instituted a Select Committee on Establishing an Electoral Boundaries Commission. During the Committee deliberations, the Supreme Court of Canada, in ruling on a case regarding an electoral

redistribution in Saskatchewan, rejected a strict population equality requirement for representation. The Court found that provincial legislatures were bound to ensure "effective representation" through relative, rather than absolute, parity of voting power. While this rejects the US conception of absolute equality of voting power, the court left the concept of relative parity largely undefined.

The Select Committee recommended the establishment of a Commission, and indicated the current 52 seats should be retained, but minority representation for the black and Acadian communities should be considered, together with the option of adding an additional Mi'kmaq seat.

The Commission reported in 1992, and developed an entitlement system for justifying the move to effective representation based on relative parity of voting power. Five smaller "protective constituencies" were devised to encourage minority representation, one for the black community, three for Acadian communities and one for isolated northern communities. While this did not guarantee seats for the minority groups, as they only constituted 30-35% of the population after redistribution, it did make it easier for representatives to be elected.

In considering an additional Mi'kmaq seat, the Commission consulted widely. Two days of talks were held with representatives of the bands and Mi'kmaq organisations. The majority of those attending the conference were in favour of some form of Mi'kmaq representation in the legislature. Those opposing representation believed involvement with the government may compromise the sovereignty of the Mi'kmaq, and the primary relationship should be with the federal government. Self-determination and treaty recognition were seen as the first priorities, with exchange of representatives between the two governments a subsequent goal. Others were critical of the ability of the party system to meet the needs of the Mi'kmaq people, citing the experience of Indian members in provincial and Canadian legislatures, and some believed one representative would be inadequate. Many supported the concept of a treaty delegate, with non-voting rights, in the legislature. The conference agreed that further discussion at the community level was required, with the Grand Council given an opportunity to consider the matter.

The Commission recommended a guaranteed aboriginal seat not be created at that time, at the request of the Mi'kmaq community, but that the House of Assembly adopt a procedure for further consultation.

The original bill dealing with the recommendations of the Commission did not include any such reference, but as a result of subsequent representations and hearings, the bill was amended at the third reading stage and the final legislation did contain a recognition of the goal of an aboriginal seat. Section 6 of the House of Assembly Act states:

> (1) The House hereby declares its intention to include as an additional member a person who represents the Mi'kmaq people, such member to be chosen and to sit in a manner and upon terms agreed to and approved by representatives of the Mi'kmaq people.
>
> (2) Until the additional member referred to in subsection (1) is included, the Premier, the Leader of the Official Opposition and the leader of a recognised party shall meet at least annually with representatives of the Mi'kmaq people concerning the nature of the Mi'kmaq representation in accordance with the wishes of the Mi'kmaq people, and the Premier shall report annually to the House on the status of the consultations.

Formal meetings have not been held every year. Following the meetings that have been held, the Premier's reports have simply stated a meeting occurred, various views were expressed and no consensus was reached. While organisations representing band chiefs have not pursued the issue, the Native Council (representing off-reserve Indians) has indicated its ongoing support. It appears the issue is not moving ahead because of commitment to, and rapid progress in, areas of self-government.

2.5 CONCLUSION

This Chapter has outlined a number of international jurisdictions where dedicated seats exist or have been considered for indigenous peoples. In New Zealand, the existence of voting Maori members is widely accepted as a means of ensuring Maori interests are represented in the parliament. In the United States, non-voting tribal delegates in the Maine legislature are also considered to offer some opportunity to protect tribal interests. In other jurisdictions, however, guaranteed parliamentary representation, particularly in state jurisdictions, is seen as contrary to tribal sovereignty. In other nations, such as Canada, the focus appears to have moved away from debate over dedicated seats to the promotion of and struggle for self-government initiatives, discussed further in the next Chapter.

The Committee recognises that direct comparisons cannot be made between indigenous peoples, or governmental systems, of various nations. What is appropriate for one group in one nation may prove inappropriate elsewhere. However, **the Committee welcomes submissions which consider whether elements of the electoral arrangements discussed in this Chapter would be appropriate in a New South Wales context, and what benefits may flow to the Aboriginal community in this state if they were implemented.**

Chapter Three

Aboriginal Parliaments, Self-Government and Self-Determination

Proposals for dedicated seats in national or state parliaments are only one aspect of the search for greater recognition of the rights of indigenous peoples around the world.

The first section of this Chapter examines the representation of indigenous people at a national level in several countries, and focuses on the establishment of and proposals for indigenous parliaments, either as part of the existing political structure or as advisory bodies with control over certain areas. These moves can be seen as an acknowledgement of the rights of indigenous peoples to have some form of self-government. However, a degree of continuing dependence on the national government may mean that self-government aspirations are not fully realised by these formal arrangements.

The following section looks at the concepts of self-determination for indigenous peoples, and examines autonomy at a local or regional level as a means of meeting their aspirations. As the submission from the Electoral Reform Project Steering Committee (1993:6) to the New Zealand Select Committee on Electoral Law noted

> *the international trend in terms of recognising the political rights of indigenous peoples has moved away from simply acknowledging "rights to participate" in national political systems, and is now calling for States to recognise the rights indigenous peoples have to self-determination, autonomy and self-government.*

3.1 INDIGENOUS PARLIAMENTS

3.1.1 Norway

■ The Sami in Norway

The Sami, formerly called the Lapps by the Scandinavians, are an indigenous minority group in Norway, Sweden, Finland and Russia. They have their own settlement areas, languages, culture and history.

In Norway and Sweden, reindeer husbandry and its affiliated occupations have been an exclusive right of the Sami. In Sweden, however, a recent court decision has overturned the customary Sami right to access winter grazing areas on both private and state forest land. In Finland, those areas earlier owned by the Sami are now administered as public land, where all local people are entitled to herd reindeer, hunt and fish.

Sami people were discriminated against early this century by laws restricting the sale of land to those who could speak Norwegian. Today, approximately 70% (40,000 - 45,000) of Sami live in Norway, and are largely concentrated in Finnmark in the north of the country.

■ The Sami Assembly

In 1984, the Sami Rights Commission proposed that a Sami Assembly be created. The Sami Act was subsequently passed in the Norwegian Parliament (the Storting), in 1987, and established the structure, responsibilities and powers of the Sami Assembly.

The Assembly consists of 39 members, with three members elected from each of the 13 constituencies which cover the entire country. Representatives are elected by direct ballot by Sami people registered in the Sami electoral register. Those entitled to register must sign a declaration that they consider themselves to be Sami, and either use the Sami language at home or have a parent or grandparent who does or has done so. Eligible voters for the Sami Assembly also vote in elections for the Storting.

Elections are held the same day as elections to the Storting. Members are elected for a term of four years. Each municipality has a Committee responsible for co-ordinating elections.

All persons included in the Sami electoral register have the right to propose candidates. A proposal for a list of candidates must be signed by at least 15 Sami with the right of proposal. All those entitled to stand are obliged to accept nomination unless they are exempted by provisions of the Act. Proportional representation is the method of election when more than one list of candidates is approved in a constituency. In other cases, election is by majority vote.

In 1993, there were approximately 7,500 Sami on the register. Approximately 75% of eligible Sami vote in elections, which is comparable to the turn-out for national elections. Prior to the last two elections, an extensive education campaign was conducted through the media, and Sami organisations were also funded for this purpose. There is a perception that such a campaign will be required prior to each election. It is estimated there may be 25,000-30,000 potential voters. The need to further build Sami identity is recognised, and it is hoped that an enrolment of 12,000-13,000 may be achieved for the September 1997 election.

While mainstream political parties are represented in the Sami Assembly (e.g. there are nine members of the Labor party), the largest party (with 22 members) is the Association of Norwegian Sami. The Sami Parliamentary Council consists of the President and the Vice-President (the only full-time Assembly members) and three other members, and acts like a Cabinet. While these members have no official portfolios, issues such as education, fisheries, and reindeer husbandry are informally allocated.

The Assembly meets four times a year for one week at a time. The budget for the Assembly is allocated each year by the Norwegian government. The government grants most of the funds for specific purposes, such as for Sami language development, which limits the freedom of the Assembly to develop new initiatives and gain appropriate funding. The Sami Assembly has responsibility for the Sami Development Fund; the Sami Cultural Council; the Sami Language Council; and the Sami Heritage Council.

The Sami Assembly has an unlimited right to raise whatever questions the body itself considers to be of relevance to the Sami people, and bring matters before public authorities and private institutions. The Act also states that other public bodies

should give the Sami Assembly the opportunity to express an opinion before they make decisions on matters coming within the scope of the business of the Sami Assembly.

The Assembly reports each year to the Storting. The reports cover different issues of importance and recommends action. The Storting discuss the report, and may respond by introducing legislation or through other political action or the allocation of resources. While there is no obligation on the government to respond, a convention has been established in this regard.

Every four years the government publishes a White Paper on Sami policy, which is discussed in both the Storting and Sami Assembly, and the views of members the Sami Assembly may be taken into account.

The Section for Sami Issues in the Ministry of Local Government and Labour is currently reviewing the Sami Act. All the proposed amendments have been considered by the Sami Assembly, who initiated the review process. One amendment may be to extend the qualification to enrol on the Sami register to those who had a great grandparent who used the Sami language.

Local communities, which may be up to 95% Sami, currently have some control over issues such as fishing and hunting through local government agencies. The second report of the Sami Rights Committee will extend Sami control over land and water by granting local government agencies more power, and granting the Sami Assembly more influence in decisions on areas such as mining and power plants. Part of the Committee proposes a veto power for the Assembly on such decisions, and they may gain majority support for this proposal.

Sweden and Finland also have Sami Assemblies. Sweden has only one constituency comprising the entire country, and held its first election in 1993. Having the entire nation as one constituency poses considerable logistical difficulties for parties and candidates contesting the election. Finland has had a Sami Parliament since the 1970s, but it has recently been re-organised and now is recognised in legislation for the first time.

■ Evaluation of the Sami Assembly

The major achievement of the Sami Assembly of Norway is the provision of a representative parliament, on a democratic basis, for the Sami people, which gives them a greater voice. The Sami Assembly has been essential to ensuring the status of the Sami as a recognised people within the territory of the nation. All Norwegians, including the media, are now aware that the Sami have a voice through the Assembly, and Sami interests can no longer be ignored or dismissed. The President has become a well-known political figure; has influence within the central government; and acts as a cultural ambassador on a national, Nordic and international level.

The democratic and open nature of the electoral system, and the small constituencies, mean the Assembly and its members are very close to the Sami people. The fact that the King opens the Sami Assembly has overcome some reservations regarding the status of the Assembly. While major achievements of the Sami Assembly include taking responsibility for Sami cultural, language and industry development, it is recognised that improvements in the quality of life of all Sami may take time. Fundamental issues of land and water rights, and self-determination in areas such as health and education, must also be addressed through other means.

There is criticism of the absence of any description of the status of the Sami Assembly in the Sami Act. The powers of the Sami Assembly were deliberately left open when it was established. The Sami Assembly has since been reluctant to state its own goals, so the relationship with the government has been gradually developing through small steps. However, it appears the national government is continuing to give the Assembly more authority, with growing national understanding of Sami issues. There is a political dialogue underway, and instruments exist making this necessary, such as the annual report of the Assembly being forwarded to government.

There is a moral and political, rather than legal, obligation on Ministries to respond to decisions of the Sami Assembly. The Sami Assembly has been successful in ensuring they are consulted by the Ministry for Agriculture on the preparation of White Papers on reindeer herding; receive all information on hearings; and have time to prepare a response. This relationship is being replicated by other Departments. The Government's first White Paper on Sami policy stated that the opinion of the Sami Assembly would form one fundamental basis of government policy.

3.1.2 New Zealand

The Electoral Reform Project Steering Committee (1993:6) submission to the Select Committee on Electoral Law suggested that an ongoing process of consultation was necessary to consider issues such as:

- a separate Maori parliament;
- whether more traditional Maori systems of government can be amalgamated with the Westminster system; and
- achieving equal partnership in terms of sharing power rather than the traditional Westminster model which equates the majority with power (Electoral Reform Project Steering Committee, 1993:34).

Throughout New Zealand's history, there have been a number of Maori political movements seeking forms of self-government. One of the most notable was the Kotahitanga movement, which took tangible form when one chief summoned what is regarded as the first Maori Parliament at Orakei in 1879. This movement gathered force in the 1880s, and in 1891 the Arawa people petitioned the Queen to recognise a separate Maori Parliament. The proposed Parliament was based on a Westminster model, and was to be composed of 96 members elected from districts based on tribal boundaries, with an upper house of 50 members (intended to be Chiefs) chosen by the lower house. This Maori Parliament held its first session at Waipatu in 1892, and continued to meet annually in different Maori settlements for the next eleven years.

In parallel with this development, the supporters of the Maori King, known as the Kingites, decided to set up their own parliament at Maungakawa in 1894.

Attempts to have the Kotahitanga Parliament recognised by the pakeha Parliament were unsuccessful. The subsequent decline of these autonomous political movements was largely a result of opposition from later Maori members of the pakeha Parliament, and the introduction of the Maori Councils Act in 1900, which provided for limited local autonomy (Sorrenson, 1986:B-39).

There are currently a number of national pan-Maori organisations in New Zealand promoting the interests of Maori, including the New Zealand Maori Council, established as an advisory body in 1962. The Council currently represents 14 district

Maori councils. The Council has been responsible for initiating a number of court challenges against the government to protect Maori interests. A pan-tribal National Maori Congress was formally constituted in 1990 by 37 iwi (tribes), and now has over 40 member iwi. The Congress has been involved in the development of equitable means of disposing of Crown assets; the representation of Maori on international bodies; and the expansion of social and economic projects.

There have been a number of calls for constitutional reform to provide for new models of Maori representation at the parliamentary level. These range from increased representation in the current Parliament to the creation of a Maori Parliament with control over the entire country (Reeves, 1995:6-7).

The Royal Commission on Electoral Reform and Party Financing considered the re-establishment of an upper house or senate in New Zealand as one option for electoral reform. At the National Electoral Reform Bill Hui (meeting), participants called for 50% Maori representation if that option were to be introduced (Electoral Reform Project Steering Committee, 1993: Appendix 3:7,9,17,26). Maori would argue that since the Treaty of Waitangi established a partnership arrangement, anything less than equal representation would breach Treaty obligations (Reeves, 1995). There was also support for the concept of a Maori Parliament, including calls for a Maori Commission to oversee its establishment (Electoral Reform Project Steering Committee, 1993, Appendix 3:11). Proposals for a separate Maori Parliament have been supported by the New Zealand Maori Council and the Maori Congress Executive (Durie, 1995:51).

Others have proposed a separate Maori Parliament to co-exist with the present House of Representatives, with a bi-cultural third house. Professor Winiata, who has been instrumental in reforming the Anglican Synod in New Zealand, has gone on to recommend constitutional reform using the same model. As a national model, the proposal involves a Tikanga (all things) Maori House of approximately 25 members, and a Tikanga Pakeha House, with approximately 75 members. Each House would determine its own procedures, and both could initiate legislation. In addition, there would be a Treaty of Waitangi House which could comprise members drawn from each House and additional elected members. For motions to be successful, they would need to be consistent with the Treaty of Waitangi; be passed by each Tikanga House; and have majority support among both the Maori and Pakeha members of the Treaty House. It is expected that a Commission will be appointed to examine the proposal, review the outcome of reform in the Church, undertake a process of national consultation, and produce recommendations to be considered in 1998.

3.1.3 Canada

A number of representative bodies exist at the national level in Canada. For example, the Assembly of First Nations (formerly the National Indian Brotherhood) is the national organisation of the First Nations in Canada, and comprises elected and appointed Chiefs. The AFN exists to promote the restoration of the nation-to-nation relationship and to ensure any transitional steps benefit that general goal. The Assembly undertakes an advocacy and lobbying role, but the government is often resistant to a truly consultative approach to policy.

The Royal Commission on Aboriginal Peoples (1996) recently recommended the immediate creation of an Aboriginal Parliament as an advisory body, which can be achieved without constitutional change through an Aboriginal Parliament Act.

The Commission's report recommends the federal government, in partnership with representatives of national aboriginal peoples' organisations, first establish a consultation process to develop an Aboriginal Parliament. Major decisions respecting the design, structure and functions of the Aboriginal Parliament would rest with the aboriginal peoples' representatives.

The report proposes a 36-seat parliament initially, with two aboriginal constituencies per province and territory, and regions with greater aboriginal populations receiving additional seats. This parliament could review all legislation that affects, or impacts on, aboriginal people.

It is proposed that the Minister for Indian Affairs meet with the Parliament on a regular basis. The Parliament should also monitor the progress of the Commission's recommendations, and have the capacity to undertake independent research. Elections would be held at the same time as national elections. It is hoped such an advisory body would significantly raise the profile of aboriginal issues in the debate on national questions.

At a later stage, the Commission recommends a constitutional amendment to create a House of First Peoples as a new chamber of parliament with legislative authority in certain specific areas. The Commission does not spell out this legislative role in great detail, but anticipates a veto on matters affecting aboriginal people, with a majority in the House of Commons and the House of First Peoples required to pass such legislation.

It is envisaged that as aboriginal nations rebuild themselves, representation in the Aboriginal Parliament would shift from representation by province to representation by nation. The constitutionally entrenched House of First Peoples could have 60 to 80 members.

- **The Northwest Territories**

The Northwest Territories, in the Canadian Arctic, has a diverse population mix. Inuit comprise 35% of the population; 23% are Dene or Metis (Dene are the Indians of the Western Arctic, and Metis are of mixed Dene-white origins); and 42% are non-native. Recent negotiations have focused on allowing aboriginal peoples a form of self-government within a public government structure.

In the eastern part of the Northwest Territories, reform of government institutions was negotiated in parallel with Inuit land claims, and the creation of the new territory of Nunavut was agreed to by all parties in settlement agreements. National and provincial legislation has subsequently been introduced. Nunavut will come into being as a territory of Canada on 1 April 1999, and Iqaluit has been chosen by plebiscite as the future capital.

The Inuit did not demand Aboriginal self-government, which other groups in Canada are pursuing, as they believed it would prove more acceptable to the federal government to have a form of public government under the Canadian constitution, with human rights guaranteed. However, since Inuit will be in the majority in Nunavut the division of the Northwest Territories will effectively provide a form of self-government.

Land claims and agreement on systems of government in the remaining part of the Northwest Territories have progressed at a slower pace, and the area is yet to be named. When Nunavut is created, approximately half of the population of the remaining area will be aboriginal. A Constitutional Working Group has tabled a Draft Constitution Package in the current Northwest Territories Legislative Assembly, comprising a draft new federal act and a draft Companion Aboriginal Self-Government Agreement for the western Territory. The draft constitution provides for a Legislative Assembly of 22 members divided into two parts: a 14 member General Assembly, elected by the entire population; and an eight member Aboriginal People's Assembly. In addition, at least two positions in the six-member Cabinet would be reserved for members of the Aboriginal People's Assembly.

The draft proposal guarantees a seat in the Aboriginal People's Assembly for each of the territories' eight distinct aboriginal peoples who have land claim agreements, on-going land claim or self-government negotiations, or treaty processes. Aboriginal individuals who are beneficiaries, or are eligible to be beneficiaries, of treaties or land claim agreements would be eligible to vote for one of the eight members.

When new laws or policies are being discussed, it is envisaged that all 22 Legislative Assembly members will share the ideas of their constituents, allowing concerns to be raised at an early stage. Legislation would have to be passed by majorities of both assemblies to become law. A bill that failed to pass could be subsequently passed by a two-thirds majority of the combined assemblies.

Amendments to the Constitution of Canada are required to provide for House of Commons and Senate representation for each new territory.

3.2 SOVEREIGNTY AND SELF-DETERMINATION

This Section discusses moves towards greater autonomy which have been achieved by indigenous peoples around the world. Garth Nettheim (1994:73) has noted that three strands are discernable in claims for autonomy put forward by indigenous peoples to national governments and the international community. These are sovereignty, self-government and self-determination.

In international law, sovereignty is interpreted as a continuing independence from governmental, executive, legislative or judicial jurisdiction of a foreign state. Nettheim notes that Australian courts will not consider the argument that the prior sovereignty of Aboriginal people was wrongfully usurped and still exists, as the acquisition of sovereignty by the Crown is an 'Act of State' which is nonjusticable within the national court system.

Self-government claims involve a subordinate form of sovereignty of particular peoples. In the United States and Canada, these claims are considered to fall within the constitutions of the respective nations, and are discussed in further detail in the sections which follow.

Nettheim (1994:73) considers self-determination "the modern and more promising basis for asserting the political rights of indigenous nations in international law".

Self-determination is usually regarded as the right of indigenous peoples to negotiate their political relationship with the state and have effective control over matters that are of most concern to them.

Article 3 of the Draft Declaration of the Rights of Indigenous Peoples 1993 states

> *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development* (United Nations Commision on Human Rights, 1993).

The right to self-determination is also provided for in the United Nations Charter, and both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to which Australia is a party. State parties have an international obligation to promote the realisation of the right to self-determination.

3.2.1 New Zealand

During the period of contact with Europeans, the Maori have striven for recognition of their rights as the original inhabitants of New Zealand. In the decade following the Royal Commission on the Electoral System, Maori have made some significant political advances. The Waitangi Tribunal now has retrospective jurisdiction to 1840 to hear claims and make binding recommendations on Maori ownership of land and the management of forest assets.

Maori fishing rights have been protected by the Crown-financed Maori acquisition of Sealord Products Ltd, the largest fishing company in New Zealand. The 1995 Waikato-Tainui settlement provided for the transfer of 40,000 acres of Crown-owned lands to the Tainui in recognition of the illegal confiscation by Europeans in 1863, and for a monetary settlement in recognition of the lost opportunity of land use over the last 130 years.

The previous Labour Government, which was defeated in 1990, also attempted to augment Maori influence over limited areas of political decision-making through the traditional Maori tribal units, the iwi. These initiatives included the Runanga Iwi Act 1990, which attempted to devolve administrative implementation away from the Department of Maori Affairs to incorporated iwi bodies. While the concept of

devolution had received general approval, there was considerable opposition to the form of devolution created by the Act, and the role and purpose of runanga iwi (McLeay, 1991:38-41). The Act was repealed by the incoming National government, but some runanga were established and now act as incorporated societies.

3.2.2 United States

In the 1830s, the US courts developed the concept of "domestic dependent nations". Under this concept, external sovereignty was ended, but internal sovereignty (self-government) remained. Tribal government powers are, however, subject to qualification by treaties, by express legislation of Congress and by court rulings.

While they may receive federal grants, tribes in the United States generally consider themselves self-governing. Many have judicial, executive and legislative branches of government, acting as sovereign nations, making by-laws and ordinances while attempting to comply with relevant federal laws. In the area of criminal law, agreements between agencies have been established to provide for 10 major crimes which have been identified by the US Congress as being outside tribal jurisdiction.

Under a policy of Indian self-determination, which was first announced in 1970 by President Nixon, the government encourages and supports tribal efforts to govern themselves and to provide needed programs and services on the reservations. The federal government certifies the register of membership for tribes, who set varying qualifications for membership based on lineage. Tribes who do not receive federal recognition are not recognised as sovereign governments and receive no federal programs.

Approximately 50% of tribes exercised some sort of self-determination under the *Self Determination Act 1975* through contracts with the federal government for hospitals, schools and gaols. The newer self-government initiatives, provided for in the *Tribal Self-Governance Act 1994*, involve one compact and grant of funds allowing the tribes more decision-making freedom. This constitutes a move from paternalistic management to the transferring of funds administration to the tribes. Since being established as a pilot project, an increasing number of tribes are participating each year.

Self-government in the 557 federally-recognised tribes varies considerably, from tribes with substantial administrative infrastructures, natural resources and systems of justice that include appellate courts, to tribes relying on tax-free petrol and tobacco sales for income, and having a CFR (Code of Federal Regulations) court run by the Interior Department. Economic and other benefits received by on-reserve Indians also vary considerably depending on the success and resources of the reservation.

Taxation is seen as an evolving area. In the 1970s the Navajo passed laws regarding property, business and mineral taxes, which were subsequently challenged in the courts but the inherent rights of tribes were upheld. Approximately 50 tribes now have such arrangements, but companies on reservations are subject to dual taxation systems.

- **Hawaiian Sovereignty**

In 1893, the United States overthrew the Hawaiian government. When Hawaii was annexed, approximately 1.8 million acres of crown and government lands were ceded to the United States. These lands were transferred to the new state of Hawaii in 1958 to be held as a public trust to benefit native Hawaiians. In 1993, the United States Congress passed a resolution apologising for the overthrow of the Kingdom of Hawaii, and recognising the unrelinquished inherent sovereignty and right of self-determination of the Native Hawaiian people.

Native Hawaiians comprise approximately 20% of the State's population. There are currently 11 native Hawaiians in the state legislature, and native Hawaiians have held positions of influence, including Speaker of the House and President of the Senate.

A State-sponsored plebiscite has been held regarding native Hawaiian Sovereignty. The Hawaiian Sovereignty Elections Council was created through state legislation and conducted a postal ballot in 1996. The Native Hawaiian vote asked "Shall the Hawaiian People elect delegates to propose a Native Hawaiian government?" Approximately 80,000 people of Hawaiian ancestry were sent ballots during July and August, and approximately 38% of ballots mailed were returned and ruled eligible to be counted. Over 73% of these indicated a desire to proceed in restoring sovereignty. The second stage of the process will involve electing delegates to a convention. At the convention, various models of sovereignty will be studied, including historical constitutions and contemporary suggestions from sovereignty advocates. The

proposal(s) that emerge(s) from the convention will be submitted to native Hawaiians for ratification, and if ratified will form an operational basis for the Hawaiian government.

A number of representative organisations already exist in Hawaii, including the Office of Hawaiian Affairs, governed by a board of nine elected trustees; Ka Lahui; and the Nation of Hawaii. Some believe state involvement in the Native Hawaiian Vote sought to undercut their sovereign status, and prevent efforts for UN recognition.

3.2.3 Canada

The Cree-Naskapi (of Quebec) Act 1984 was the first Indian self-government legislation in Canada. The Act gave most of the powers exercised by the Minister of Indian Affairs and Northern Development under the Indian Act to the Indian bands, The Act established new legal and political regimes in the form of local governments accountable to the Cree and Naskapi people, and a Cree-Naskapi Commission to investigate complaints or representations from communities or individuals regarding the exercise of the Act, and report on the implementation of the Act.

In 1995, the Government of Canada released its policy on the recognition of the inherent right of self-government and formally launched the negotiating process which will enable aboriginal peoples to implement their inherent right to self-government. Self-government arrangements will proceed at a pace to be determined by aboriginal peoples. As a first step, federal government representatives will meet with aboriginal groups and the relevant province or territory to establish a process for negotiations acceptable to all parties. By the end of 1996, approximately 85 negotiating tables representing approximately half of the First Nations and Inuit communities were under way.

Self-government rights may be protected in new treaties under the Constitution; as part of comprehensive land claim agreements; or as additions to existing treaties. Indian, Inuit and Metis people have different needs and circumstances, so the exercise of their inherent right may take different forms, such as through their own governments on their own land base; within wider public government structures, such as in Nunavut (discussed in Section 3.1.3 above); or through other institutional arrangements.

The costs of Aboriginal self-government will be shared among federal, provincial/territorial and Aboriginal governments and will be the subject of negotiation. Parliament, provincial legislatures and Aboriginal groups will need to ratify self-government agreements.

The Department's self-government policy has been rejected by the Assembly of First Nations, as it is viewed as a form of municipal government and delegated authority only, placing First Nations under the power of the provinces. The policy only allows for First Nations to have three pre-defined powers, with other powers which are allowed conditionally, and a further list of powers which cannot be exercised, such as control of the economy. The Assembly wants full sovereignty for First Nations, with constitutional recognition; land rights; and the restoration of culture.

3.3 CONCLUSION

This Chapter has considered developments in overseas jurisdictions which provide alternatives to dedicated seats as a means of promoting the interests of indigenous peoples. The establishment of the Sami Assembly, and calls for similar or more powerful Aboriginal Parliaments in New Zealand and Canada, involve a recognition of self-governing or power-sharing rights. The continued evolution of the recognition of the sovereign or self-governing rights of Indian nations in the United States and Canada has provided increased opporuntities for aboriginal self-determination in those nations.

The Committee welcomes submissions which discuss the efficacy of Aboriginal Assemblies and inititiatives fostering self-government and self-determination for promoting the interests of Aboriginal people in New South Wales. This would enable the Committee to compare and contrast what can be achieved for the Aboriginal community in this state through various means, including, as one alternative, dedicated seats in parliament.

Chapter Four

Conclusion

The Social Issues Committee invites the public to submit written submissions on the subject of Aboriginal representation in Parliament. The Committee would like to hear from as wide a group as possible, particularly from amongst the Aboriginal community in New South Wales. Both individual and organisational submissions are welcomed. In addition to Aboriginal individuals and groups, the Committee welcomes opinion from other relevant government and non-government organisations; constitutional, electoral and legal experts; academics; political parties; and any other interested citizens. The Committee appreciates that the introduction of dedicated parliamentary seats would constitute a substantial reform of the parliamentary system of New South Wales, and the issue should be discussed and considered extensively before such changes are contemplated by the Committee.

4.1 CURRENT PARLIAMENTARY ARRANGEMENTS IN NEW SOUTH WALES

In examining the provision of dedicated seats, distinct considerations apply in the respective Houses of Parliament. The New South Wales Parliament consists of two Houses, a Legislative Council, or Upper House, of 42 Members, and a Legislative Assembly, or lower House, of 99 Members. In Legislative Council elections, the state of New South Wales is regarded as a single electorate, with Members elected through a system of proportional representation with a single transferable vote, also known as the quota preferential method (Green, 1995:5). Members of the Legislative Council are elected to serve the equivalent of two terms of the Legislative Assembly. Since New South Wales has legislation guaranteeing fixed four-year terms, this means Members serve for eight years. Half of the Legislative Council Members face re-election at each election.

Section 7A of the New South Wales *Constitution Act 1902* provides that a referendum of all electors in the state is required before a bill proposing certain changes to the Legislative Council can be passed. Proposed amendments which would require a referendum of this nature include changes to the number of Members, their term of service, and the conduct of Legislative Council elections.

Members of the Legislative Assembly are elected in single-member electorates through an optional preferential system of voting. Varying the numbers of Members and changing electoral boundaries does not require referendum.

4.2 ISSUES TO BE CONSIDERED

While the Committee does not wish to be prescriptive regarding the issues to be raised in submissions, some preliminary areas relevant to a consideration of the issue of the provision of dedicated seats are listed below:

- **In relation to Legislative Council representation**, options would include having either additional **voting** or **non-voting** Member(s) of the Legislative Council elected by Aboriginal voters on a separate electoral roll. Alternatively, the Aboriginal Member(s) could have **limited voting rights**: for example, only on issues affecting the Aboriginal population, although delimiting such issues from general legislation would be highly problematic.

  If the Aboriginal Member(s) was to have a **vote** in the House, the range of issues to be considered would include:

  - whether Aboriginal voters would be restricted to voting for the Aboriginal Member; be able to choose which vote to exercise; or be able to exercise two votes, one on the general Legislative Council ballot paper and one on an Aboriginal ballot paper. For example, in elections for the New Zealand House of Representatives, Maori voters elect to register on either the ordinary roll or the Maori roll, and vote in either general or Maori electorates respectively. An alternative approach may be to have a signifier on a single electoral roll indicating a voter is Aboriginal, allowing them then to choose which vote to exercise, or to exercise the second vote.

    In any scenario, a mechanism for establishing an Aboriginal electoral roll, or codifying a common electoral roll, would need to be established. Rather than guaranteeing a certain number of seats, a seat(s) could be provided once a specified enrolment level was reached on a new Aboriginal electoral roll, as was recommended in Canada;

  - whether the dedicated seat(s) could be drawn from the existing 42 seats in the Legislative Council, or whether numbers in the House would need to change;

  - the term of office of such a Member(s). Would at least two Aboriginal seats be required, elected at alternative elections, to be consistent with existing electoral arrangements?

    In any of these scenarios, constitutional amendment through referendum would clearly be required. The likelihood of success of any such referendum, and the education process required, should also be considered.

  A seat(s) for a non-voting Member of the Legislative Council, such as is in the US state of Maine, is also an option. Issues to be considered in this scenario in a New South Wales context include:

  - whether such a Member(s) is elected by registered Aboriginal voters at the time of state elections, as an additional vote, with new registration arrangements instituted as discussed above;

  - whether other means of election are possible through, for example, ATSIC mechanisms;

  - whether the Member(s) could be directly appointed by the Governor, the government of the day, a vote of the Legislative Council or some other means;

  - the legislative or constitutional means by which this arrangement could be implemented.

- **In relation to a voting Member(s) of the Legislative Assembly**, the following issues require consideration:

  - how an Aboriginal electorate(s) could be created. In New Zealand, the entire country is divided into five Maori electorates, which overlap general electorates;

- whether dual or multi-member constituencies could be created in certain areas.

The same range of options discussed above regarding the electoral roll would be applicable for Legislative Assembly ballots for either a voting or non-voting Member(s). The option of a direct appointment could also apply to a non-voting Member(s) of the Legislative Assembly.

- Are there **other means of encouraging the election of Aboriginal candidates**, such as:

  - lower quotas for Aboriginal parties in Legislative Council elections;

  - redistributions in Legislative Assembly electorates in areas with substantial Aboriginal populations;

  - imposing quotas on political parties for certain numbers of indigenous candidates, or requiring parties to encourage Aboriginal candidates in other ways;

  - introducing a mentoring system for potential Aboriginal candidates;

  - increasing rates of registration and voting amongst Aboriginal communities;

  - changing the state's political culture and improving opportunities for Aboriginal people though education and other means.

- **Before any particular models of dedicated seats are considered, there are also a number of broad philosophical issues and questions which are relevant, including:**

  - whether protecting minority interests through giving them disproportionate voting power violates a fundamental tenet of the democratic system - equality of voting power - or whether other concerns override this. There are a number of democratic electoral systems where a strict one-person one-vote equality is not observed,

including the British House of Commons, and upper Houses in Australia, the United States and Canada (Farrell, 1992:57);

- the special claims of Aboriginal people to dedicated seats, over other minority interests;

- at what tier of government (Federal, State, or Local) it is most appropriate to focus attention on providing dedicated seats;

- what changes in the quality of life of Aboriginal citizens could be anticipated through the provision of dedicated seats;

- the symbolic potential of dedicated seats as a gesture of reconciliation;

- the potential for dedicated seats to be a tokenistic response to Aboriginal concerns, and to marginalise Aboriginal issues;

- whether in a system dominated by political parties, Aboriginal members would be successful in placing their concerns on the parliamentary agenda;

- whether the adversarial system of parliamentary and party politics in New South Wales is compatible with Aboriginal cultural responses to problem-solving and decision-making;

- the relevance of Parliament and the imposed Westminster system to Aboriginal communities;

- whether the provision of dedicated seats would reduce the status and power of existing representative organisations providing advice to government, such as ATSIC; and

- whether the provision of dedicated seats as a symbolic gesture would divert attention from or reduce support for self-government and self-determination initiatives.

- **Finally a range of strategies present themselves as alternatives to the provision of dedicated parliamentary seats.** These include:

  - reform of existing representative organisations for Aboriginal people, or the establishment of new bodies, to further self-government aspirations;

  - the establishment of an Aboriginal Parliament, at a state or national level, either as an advisory body with limited self-government functions, as in the case of the Sami Assembly, or as a body with a legislative role, such as in proposals for a Tikanga Maori House in New Zealand; the Aboriginal People's Assembly in the western Northwest Territories; or the constitutionally-recognised House of First People recommended as a long-term objective at the federal level in Canada.

    The benefits or disadvantages of such approaches at a state level, when compared to the existing form of a national representative advisory body (ATSIC) providing control over certain areas, would require consideration.

  - formal instruments of reconciliation, through non-statutory, statutory and constitutional measures, as outlined by the Council for Aboriginal Reconciliation (1993:51-54). At a state level, non-statutory measures could include negotiating regional agreements and the scrutiny of bills to ensure they have sufficient regard to Aboriginal customs, traditions, and human rights. Statutory initiatives could include a recognition of Aboriginal self-government rights. Constitutional changes could include the addition of a preamble acknowledging prior Aboriginal ownership of the state and its subsequent substantial extinguishment; entrenchment of justiciable rights of self-government in certain areas; and recognition of self-government structures.

4.3 NEXT STAGES OF INQUIRY PROCESS

The Committee invites submissions on any of the issues identified above, or any other related topics or considerations. Submissions should be forwarded to:

The Secretariat
Legislative Council Standing Committee on Social Issues
Room 812
Parliament House
Macquarie Street
SYDNEY NSW 2000

Further information may be obtained by contacting the Secretariat on telephone: (02) 9230-3078.

The closing date for submissions is **30 June 1997**, although late submissions may be accepted if prior arrangements have been made.

All submissions should clearly state your name; the name of your organisation and your position in it where applicable; your residential or business address; and a telephone and facsimile number where available.

After submissions are received, the next stage of the Inquiry will include public hearings and briefings. The purpose of these hearings will be to seek further information and gauge the opinions of both the Aboriginal and non-Aboriginal citizens of New South Wales. Those making written submissions may be approached to give evidence at the Committee's public hearings, but the Committee also plans to travel throughout the state to ensure that as many people as possible are aware of the Committee's Inquiry and have an opportunity to express their views.

Once the Committee has completed the consultation stage of the Inquiry, it will issue a final report containing its recommendations. The report will be a public document tabled in Parliament, and under the resolution establishing the Committee, the Leader of the Government in the Legislative Council is required to report to the House within six months on any action to be taken by the Government on the Committee's recommendations.

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Appendix One:

Application for Registration as a Parliamentary Elector

New Zealand Parliament

Application for registration as a Parliamentary elector

- **first read carefully the information for electors printed on this card.**
- **then, if you are qualified to apply for registration, fill in and sign this application.**

SN

FN

official use only EC RI MB EO

My details are: (print in BLOCK letters)

Title (e.g., Mr/ Mrs/Miss/Ms)

Surname or family name

Given or christian names

Flat/House No.

Street/Road

Suburb

Town, City or Locality

Have you lived for at least the last month at the above address? *Answer YES or NO here ➤*

If you answer NO, or if you live overseas, please fill in the back of the card

Postal address

Occupation

Are you a New Zealand Maori or a descendant of a New Zealand Maori? *Answer YES or NO here ➤*

Birth date / / day month year

Contact telephone number

Sign in **ONE** of the boxes below **BUT** before signing, note that there are two types of electorate:

General and **Maori**

Only a New Zealand Maori or a descendant of a New Zealand Maori may have the option of choosing between a General electorate or a Maori electorate — **see Information for Electors printed on this card.**

Everyone else must register for a General electorate.

General	**Maori**
1. My details are given correctly on this card.	1. My details are given correctly on this card.
2. I believe that I am qualified to apply to be registered as an elector.	2. I believe that I am qualified to apply to be registered as an elector.
3. I apply to be registered as an elector of a General electorate.	3. I am a New Zealand Maori or a descendant of a New Zealand Maori.
	4. I apply to be registered as an elector of a Maori electorate.
Signature	Signature
date / /19	date / /19

You must sign and date this card yourself unless you are physically disabled. If you are physically disabled, see Information for Electors printed on this card.

INFORMATION FOR ELECTORS

Registration Compulsory
If you are qualified to register as an elector, the law requires you to do so.

Qualifications
You are qualified to register if you -
(a) Are a New Zealand citizen or a permanent resident of New Zealand; and
(b) Are 18 years of age or over; and
(c) Have at some time resided continuously in New Zealand for 1 year or longer; and
(d) Are not disqualified under the Electoral Act 1993.

Your electorate will be the last in which you have resided continuously for 1 month or, if you have never resided continuously in any one electorate for 1 month, the one in which you now reside or have last resided. You reside at the place where you choose to make your home. Refer to section 73 of the Electoral Act 1993 and section 7 of the Immigration Act 1987 for the meaning of "permanent resident of New Zealand".

Disqualifications
You are NOT qualified to register if -
(a) You are a New Zealand citizen who is outside New Zealand and you have not been in New Zealand within the last 3 years; or
(b) You are a permanent resident of New Zealand who is outside New Zealand and you have not been in New Zealand during the last 12 months; or
(c) You are, under the Criminal Justice Act 1985, detained in a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
(d) You are detained, because of a conviction, in a penal institution or a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
(e) You are named on an electoral Corrupt Practices List.

Limited exceptions to the disqualifications set out in paragraphs (a) and (b) are provided in section 80(3) of the Electoral Act 1993 for persons such as public servants who are on duty outside New Zealand.

Truth
You must satisfy yourself that the statements in the application are true.

Signing the application
You MUST sign the card YOURSELF unless you are physically disabled. If you are physically disabled, the application may be signed on your behalf -
(a) By a person who holds power of attorney from you and who indicates on the form that you are a physically disabled person, or
(b) By a registered elector who signs by your direction and who indicates on the form -
(i) That you are a physically disabled person, and
(ii) That the form is being signed by your direction.

Change of address
Every time you change your address, you must give your new address to the Registrar of Electors. Change of address forms are kept at every New Zealand Post Shop.

New Zealand Maori Option

- If you are a New Zealand Maori or a descendant of a New Zealand Maori, you may have the option of choosing between a General electorate or a Maori electorate. Everyone else must register for a General electorate.
- The option is available to you if -
  (a) You have never registered as an elector before; or
  (b) You were not registered as an elector on 15 February 1994 and you have not registered since.
- If you have since 14 February 1994 registered for any Maori electorate or any General electorate, you cannot, until 1997 change the type of electorate for which you chose to be registered.

He huarahi rehita pooti e tuhera atu ana ki te iwi Maori tuturu o Aotearoa ake nei

- Mehemea koe he tangata Maori no Aotearoa tuturu, a, he uri tuku iho ranei koe no tera momo, ka tuhera te huarahi pooti ki a koe, ara ki tetahi rohe pooti o to hiahia, ara, Rohe Pooti Whanui (General Electorate), Rohe Pooti Maori ranei. Ko etahi atu hunga me rehita rawa mo tetahi Rohe Pooti Whanui (ara, General Electorate).
- Kei te tuhera atu tenei huarahi ki a koe mehemea: -
  (a) kahore koe ano kia rehita pooti i mua atu, a,
  (b) kahore koe i rehita pooti i te ra 15 Hui Tanguru, 1994, a, mai i taua wa kaore ano kow kia rehita noa.
- Mehemea koe i rehita mo tetahi rohe pooti, ahakoa Rohe Pooti Maori, Rohe Pooti Whanui ranei, i muri mai te ra 14 Hui Tanguru 1994, e kore rawa koe e ahei ki te whakarereke, ki te whakawhiti ranei, i te wahanga o to rohe pooti o naianei, a, ma te tae rawa ki te tau 1997.

Please give the title (if any) by which you wish to be addressed. ➤

Please give your names. ➤

Please give your residential address. ➤

If your postal address is different from the above, please show: — ➤

Your date of birth and telephone number will not be shown on the published roll. ➤

Appendix Two:

Maori Electoral Option 1994

New Zealand Parliament

Maori Option 1994

To the Elector, from the Registrar of Electors

If you are a New Zealand Maori or a descendant of a New Zealand Maori, this card lets you choose, before the close of 14 April 1994, the type of roll (Maori or General) you want to be on. The next time you may choose will be in 1997.
If you wish to change your type of roll, you must, before the close of 14 April 1994, fill in this card and post it back in the envelope provided.
If you need help, ask at any New Zealand Post Shop.

SN SURNAME
FN FIRST NAMES
Official use only EC 001 RI 123 456 789
MB 123 456 789

Your name is on the roll for this electorate: SAMPLE

Your full names and postal address are recorded as:

SURNAME
FIRST NAMES
PO BOX 1234
SAMPLE TOWN 1234
SAMPLE CITY 1234

Your residential address is recorded as:

1234 SAMPLE STREET
SAMPLE TOWN
SAMPLE CITY

Your occupation is recorded as: SAMPLER
(This may be printed in shortened form)

Your date of birth is recorded as: 12 MTH 1912
(This will not be shown on the published roll)

If any of your above details need changing, use the panels on the back of the card to make the changes.

Maori Option

Before the close of 14 April 1994 you may choose whether you want to be on a Maori roll or on a General roll.

At the moment you are on a GENERAL roll.

If you wish to change the type of roll you are on, enter, in the box below, either the word **Maori** or the word **General**.

I am a New Zealand Maori or a descendant of a New Zealand Maori and I want to be on a _____ roll.

You must sign and date this card yourself.

.....
Signature of Elector

Date...../...../ 1994 Contact telephone no. .....

Now that you have signed and dated this card, please post it today in the envelope provided.
If you do not wish to change your type of roll and your details are correct, do nothing.

Kia Ora,

This year the Maori Option is being held from 15th February to 14th April 1994. During this time, New Zealand Maori and their descendants can choose which type of Parliamentary electoral roll they want to be on - the Maori Roll or the General Roll.

Normally this option is only available once every five years. This option is being provided now because of the change in the electoral system to MMP. Under MMP the number of Maori seats will be determined by the number of Maori on the Maori roll.

Presently you are on the General Roll. If you want to remain on the General Roll, and all of the information on the card above is correct, you don't need to do anything more.

If, however, you want to change to the Maori Roll, or update any of your details shown, you must complete and send back your above card to reach the Registrar of Electors no later than 14th April 1994.

For help filling out your Maori Option Card, see over or call us free on 0800 800 610 between 9am and 5pm, Monday to Friday (excluding public holidays) or ask at any New Zealand Post Shop.

Yours sincerely,

Murray Wicks
for Chief Registrar of Electors.

PS: If you have friends or relatives who have not received a Maori Option Card, give them the enclosed leaflet or encourage them to call free on 0800 800 610.

SEE OVER FOR STEP-BY-STEP INSTRUCTIONS

Where details are wrong on the front of the card, print below, in BLOCK letters, the correct details:

my title (e.g., Mr/Mrs/Miss/Ms) should read:

my surname or family name should read:

my full given or christian names should read:

my postal address should read:

my residential address should read:

Flat/House no: .....

Street/Road: .....

Suburb: .....

Town, City or Locality: .....

If this is a New Zealand address, follow this line

If this is an overseas address, follow this line

my occupation should read:

my date of birth should read:

/ /
day month year

for New Zealand Post Limited use

date stamp

ROE 42

People living overseas - details needed

If you live overseas, please give the following details so that you can be registered for the correct electorate.

I was last in New Zealand on / /19
I moved overseas on / /19

The addresses in New Zealand at which I resided within the last 12 months before moving overseas are:

Address	**period of residence**
Flat/House no. ..... Street/Road ..... Town, City or Locality	from / /19 to / /19
Flat/House no. ..... Street/Road ..... Town, City or Locality	from / /19 to / /19

People living in New Zealand - change of address

If you have shown a new residential address, have you lived at that address for at least the last month? Answer YES or NO here ☐

If you answer NO, please answer the questions below.

I moved to my present residential address on / /19

The other addresses at which I have resided within the last 12 months are:

Address	**period of residence**
Flat/House no. ..... Street/Road ..... Town, City or Locality	from / /19 to / /19
Flat/House no. ..... Street/Road ..... Town, City or Locality	from / /19 to / /19

Maori Option 1994. Your Choice.

If you want to stay on the same roll type, no action is required.

However, please check your details are correct. If they are not, then please correct them on this side of the card, sign and date on the front of the card and return in the POST PAID envelope.

If you want to change the type of roll you are on and your details are correct:

1. Enter in the box provided the roll type you wish to change to.
2. Sign and date your card and return in the POST PAID envelope.

If you want to change the type of roll you are on and your details need updating:

1. Enter in the box provided the roll type you wish to change to.
2. Correct the details on this side of the card, sign and date on the front of the card and return in the POST PAID envelope.

Te Kōwhiringa Māori 1994 Kei a koe te Tikanga

Mena e hiahia ana koe kia waihongia tō ingoa ki te momo rāngi ingoa pōti kei runga koe i nāianei, kāore kē atu he mahi hei mahinga māu.

Heoti, tirohia mena e tika ana ngā kōrero mōu. Mehemea kei te hē, kāti, whakatikahia i tēnei taha o te kāri, ka whakamau i tō moko me te rā o te marama ki mua o te kāri, kātahi ka whakahoki mai i roto i te kōpaki POST PAID.

Mena e hiahia ana koe ki te tīni i te momo rārangi ingoa pōti kei runga koe, ā, e tika ana ngā kōrero mōu:

1. Kuhuna atu te momo rārangi ingoa pōti e hiahiatia ana e koe ki roto i te pouaka kua whakaratohia māu.
2. Whakamaua tō moko me te rā o te marama ki tō kari, ā, ka whakahoki mai i roto i te kōpaki POST PAID.

Mena e hiahia ana koe ki te tīni i te momo rārangi ingoa pōti kei runga koe, ā, e hiahiatia ana e koe, ā, e hiahia ana koe kia whakatikahia ngā kōrero mōu ki ērā o te wā nei:

1. Kuhuna atu te momo rārangi ingoa pōti e hiahiatia ana e koe, ki roto i te pouaka kua whakaratohia māu.
2. Whakatikahia ngā kōrero mōu kei tēnei taha o te kāri, ka whakamau i tō moko me te rā o te marama ki mua o te kāri, kātahi ka whakahoki mai i roto i te kōpaki POST PAID.