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Dithering Between Consultation and Consensus – Whereto with Advisory Bodies for Indigenous Peoples?

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Abstract

The establishment of permanent, national consultative bodies for Indigenous Peoples is rare, but insight can be gained from comparative experiences such as the Sámi Parliament of Finland, previous advisory bodies for Aboriginal People in Australia, and more recently progress by the Khoisan in South Africa. Advisory bodies for Indigenous Peoples at the national level are often the victim of competing expectations. Governments tend to approach advisory bodies as fora for consultation on terms that are, in essence, dictated by government with the outcome being little more than non-binding recommendations, whilst Indigenous Peoples seek a form of co-government arrangement whereby there is some legal or policy requirement for their advice to be actively sought and sincerely considered, even if such advice is not legally binding. Four questions are the subject of this article: (1) how should an advisory body be composed; (2) what should be the policy or functional areas on which consultation must take place; (3) what is meant by an obligation to consult or to negotiate; and (4) can laws or policies be judicially challenged if there was a failure to consult, or if there is a failure to give effect to the advice received from the advisory body? The conclusion is reached that the enforceability of good faith negotiation or consultation obligations is principally found in the conduct and goodwill of governments, rather than by way of judicial review and oversight. Courts are unlikely to evaluate the substance of negotiations whereby the merit or reasonableness of proposals and counter-proposals become a matter for judicial consideration. Courts have, however, shown a greater willingness to

consider procedural aspects of consultation such as the actions, behaviour, and conduct of the parties during the course of consultation, but with acknowledgment that at law good faith consultation does not necessarily imply a veto; it does not legally mandate an agreement; and it does not preclude a party standing firm in its position. It is noted that even in those cases where courts have enforced consultation obligations, actual consultation is usually directed at local projects that involve access to traditional lands, and not to general consultative rights or duties at a national level about national socio-economic policies.

Keywords: *Indigenous advisory body; free, prior and informed consent; consultation; the Voice; Sámi Parliament; Khoisan House.*

Introduction

Australia is entering the fifth decade since the first national advisory body for Aboriginal people[1] had been enacted in the 1970s. Between then and now three different national advisory bodies had been created for Aboriginal people and each one was abolished (De Villiers, 2019). Australia is now attempting for the fourth time to legislate for the creation of a national advisory body, proposed to be called the Voice. The past 6 years have been spent on discussing the various options for the Voice (Statement of Heart, 2017). Although a referendum has been called for 2023 to amend the Constitution to obligate Parliament to create the Voice, many questions remain to be settled about the Voice (De Villiers, 2022b). It is, on the one hand, surprising that Australia as one of the most advanced democracies in the world, has not yet been able to secure agreement on something seemingly as simple as an advisory role for Aboriginal people. On the other hand, few countries with Indigenous Peoples have established permanent, national advisory bodies for Indigenous Peoples, since consultation with Indigenous Peoples is usually directed at local and project-specific issues that affect their land, culture, and traditions, rather than about national policies (Tomaselli, 2016). In Australia, for example, the Native Title Act, 1993 contains elaborate consultation procedures and mechanisms to facilitate local consultation with Aboriginal people in areas where native title exists, or where it is being claimed. But, regardless of those local consultations, Aboriginal People have for long held the desire to be also consulted about national policies that affect them. The debates in Australia are reflective of international discourse about the recognition of the rights of Indigenous People. Questions such as the role of a permanent advisory body for

Indigenous People; the powers and functions of such a body; the standard of consultation to be applied; and the powers and functions of an advisory body are the subject of discussion in many parts of the world.

At the time of writing hopes were high to enact an advisory Voice for Aboriginal Australians during 2023/4. Account must however be taken that delineating the powers and functions of an advisory body is not as simple as it may seem at first glance. The terms 'advice'; 'consult'; and 'negotiate', or 'recommend', carry different connotations ranging from merely giving an opinion, to good faith negotiations, to actual consent. Useful lessons can be drawn from international experiences to give guidance to the establishment of the Voice in Australia, but in a similar vein, the debates and experiences in Australia also provide relevant insights to other countries that may seek to establish some form of national, permanent consultative body for Indigenous Peoples.

The establishment of permanent, national consultative bodies for Indigenous Peoples is rare, but insight can be gained from comparative experiences such as the Sámi Parliament of Finland,[2] past advisory bodies for Aboriginal People in Australia, and more recently progress by the Khoisan in South Africa.

There are principally four questions to be addressed by those seeking to develop a pathway to a national advisory body for Indigenous Peoples, namely:

(1) how should an advisory body be composed;

(2) what should be the policy or functional areas on which consultation must take place;

(3) what is meant by an obligation to consult or to negotiate; and

(4) can laws or policies be judicially challenged if there was a failure to consult, or if there is a failure to give effect to the advice received from the advisory body? [3]

Advisory bodies for Indigenous Peoples at the national level are often the victim of competing expectations, as has been evidenced in the case of Aboriginal people of Australia and the various efforts to accommodate the Sámi in the Nordic countries. Governments tend to approach advisory bodies as fora for consultation on terms that are, in essence, dictated by government with the outcome being non-binding recommendations, whilst Indigenous Peoples seek a form of co-government arrangement whereby there is a legal requirement for their advice to be actively sought and sincerely considered. On the one hand the sovereignty of parliament is emphasised, whilst on the other hand the traditional sovereignty of the Indigenous Peoples is sought to be restored (Heinämäki, Allard, and Kirchner, 2017). A compromise is not easily achievable. At law a parliament is unlikely to fetter its sovereignty and a government is unlikely

to reduce the scope of its policy discretions. The consequence is that, generally, an advisory body is likely to be dependent upon the goodwill and voluntary cooperation with government, rather than legal prescription, to ensure that indigenous interests are accommodated. Even in a case, such as South Africa, where houses for traditional leaders are nominally part of the legislative process, the actual powers of those houses are weak and at best advisory in nature (Du Plessis and Scheepers, 2017).

In practice and in law, generally speaking, the soft consultative power and public support of indigenous consultative bodies is greater than their hard, legal powers (Isa, 2021). This weak position unfortunately raises the spectre of a 'toy telephone', where advices are given and options are expressed by Indigenous advisory bodies, but with no certainty that those would be seriously considered (De Villiers, 2018).

In this article an attempt is made to answer the four questions posed above by reference to case studies concerning indigenous advisory bodies in Finland, South Africa, and Australia. It is not suggested that those are the only countries where consultation with Indigenous Peoples occurs, but few countries have established permanent, *national* consultative bodies for Indigenous Peoples. Whilst the notion of free, prior and informed consent (FPIC) as contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) is gaining ground within the context of voluntary, customary consultative practices at a *local* level, the establishment of a permanent *national* advisory body for Indigenous Peoples to be consulted about national socio-economic polices remains rare.

Experience shows that the real influence of Indigenous Peoples is often found within the context of good faith negotiations, shareholder pressure, conditions for funding, and public opinion, rather than by way of judicial review and oversight (World Bank Environment and Social Framework, 2016). There is nevertheless a growing body of international jurisprudence where courts have become more sensitive to consultation obligations with Indigenous Peoples (Barrie, 2021; Papillon, Leclair, and Leydet, 2020). But even in those cases where courts have enforced consultation obligations (e.g. Baleni case, 2019), actual consultation is usually directed at local projects that involve access to traditional lands, and not to general consultative rights or duties at a national level about national socio-economic policies (Kichwa, 2012). Ultimately, when viewed from the perspective of the legal powers and functions of a national consultative body for Indigenous Peoples, much remains to be done (Tomaselli and Cittadino, 2021).

An important caveat in the consultation process is that although courts increasingly give recognition to the importance of consultation with Indigenous Peoples when their interests are directly affected, the assessment of courts generally does not focus on the *merit* of proposals under discussion, but rather on the *adequacy of the process* that had been followed during the consultation process (Papillon, Leclair, and Leydet, 2020). Aboriginal people in Australia have, for example, experienced for more than three decades how their 'right to negotiate' in native title proceedings on their ancestral lands, is little more than a procedural right with benchmarks that are not too difficult to achieve for those seeking access to their lands, even if the outcome is not supported by the Aboriginal community (Bartlett, 2020). The Australian experience with native title negotiations reflects international precedents and shows that courts generally do not view good faith consultation as a veto over access to land; good faith and consultation do not mandate an agreement between the parties; and good faith and consultation do not preclude a party standing firm in its position (De Villiers, 2022c). In similar vein, the experiences of the Sámi Parliament of Finland point to the challenges to give practical and legal content to the obligation to negotiate.

In essence, international jurisprudence concerning consultation; good faith negotiation; or free, prior and informed consent, does not grant a veto to Indigenous Peoples and does not mandate an agreement with Indigenous Peoples (De Villiers, 2022c, p. 121). Although the Sarayaku case in South America (Kichwa, 2012) acknowledged the obligation to consult and the Baleni case in South Africa (Baleni, 2019b) mandated consent from the local community, it would be premature to suggest that the principle of free, prior, and informed consent has evolved into a universal legally-recognised norm under customary law.

In the following part, consideration is given to the statutory arrangements that give effect to the advisory bodies in Australia, Finland, and South Africa to develop a response to the four questions posed above. The methodology used is to undertake literature and jurisprudential review and comparison of important developments in the field of human rights and the application thereof to the right to be consulted of Indigenous People. The case law of international fora as well as municipal courts are assessed in order to ascertain if the right to free, prior, and informed consent has developed into a universal norm in general, and more specifically how the right has been operationalised in the context of national advisory bodies for Indigenous People.

1. Australia: 'consult' sounds so easy, what is then so difficult about it?

Australia may be one of the world's oldest and most stable democracies, but its institutional relationship with Aboriginal people is in its infancy. The political culture of the country is deeply divided between *recognition* of Aboriginal people as the original owners of the land with potential sovereign rights and *assimilating* Aboriginal people as part of the general body polity without any special communal rights or privileges. Although proposals for the enactment of an advisory Voice have been circulating for some time, the detail remains scarce and public opinion divided (De Villiers, 2017; 2018; 2022b). The recent discussions about the Voice have also so far not been able to address the questions the subject of this article, namely the composition of the Voice; the powers and functions of the Voice; the meaning of an obligation to consult; and the judicial reviewability of laws and policies that do not give effect to the advice that had been given by the Voice. Whilst at face value the creation of an advisory body seems simple, the detail causes ongoing uncertainty, principally because of the divergent expectations of the Voice (Final Report, 2021). The current government has attempted to side-step questions about detail by focusing on a constitutional mandate to create the Voice, to be followed by legislation to set out the detail.

The debates about an advisory body for Aboriginal people are not new to Australia. Several attempts have been made since the 1970s to create a national advisory body for Aboriginal People (De Villiers, 2019). But none of those have prevailed. Two common threads have run through the failures to sustain a consultative body: firstly, Aboriginal people view a representative body as a mechanism for bona fide consultation *and* self-government, whilst respective governments approached a consultative *solely* for limited advice-giving or the making of submissions or representations to government and parliament; secondly, Aboriginal people want their advices to have *binding* effect or at least to be seriously considered by government, whilst respective governments have emphasised the purely *advisory* functions of representative bodies with no clarity as to when and why consultation should occur, or the weight that ought to be attached to an advice.

The *first* consultative body for Aboriginal people was the National Aboriginal Consultative Committee (NACC) (1973-1977). The NACC comprised 41 elected Aboriginal representatives. The principal function of the NACC was to advise the government on policies that affected Aboriginal people. This was a general power of advice since the legislation did not contain a specific list of functional areas on which advice could be given. There was however no obligation on government to refer legislation or policies to the NACC for its

advice. Furthermore, whatever advice was received from the NACC could be treated by government at its discretion since there was no duty to consult or to consider advice in good faith. The NACC was established at a time of optimism about recognition of the rights of Aboriginal people. This optimism was reflected in the high voter turnout of around 78 per cent at the first election of the NACC.[4] A fault line between the government and NACC was however apparent since its inception. The NACC envisioned itself to be more than a mere advisory body. It described itself also in terms of a 'self-government'; the members served full-time; and the NACC was also referred to as a 'black parliament'. The government on the other hand approached the NACC principally from the perspective of public relations and a forum where opinions could be heard, and ideas exchanged. This fell way short of what Aboriginal people had envisaged.

Although the NACC at the time represented a major step forward in indigenous consultation internationally, the underlying disagreement of consultation versus co-government soon became a serious hurdle. In this context two important questions were unanswered, namely firstly, how reflective the advice adopted by the NACC should be of their Aboriginal constituents, and secondly, whether the NACC could give advices about any policy or bill, or whether it was limited to those matters that either directly impacted on Aboriginal people or polices that were otherwise referred to it by government. To Aboriginal people it was (and remains) important that the NACC should be consulted and give advice not only about narrow issues that affect the lands or culture of Aboriginal people, but also about general socio-economic issues of relevance to Aboriginal people. The opinion often expressed by Aboriginal people is that the socio-economic marginalisation from which the community suffers, prevents substantive equality. Aboriginal people saw (and continue to view) an advisory body as an institution whereby those general issues of service delivery and standards of living could be addressed.

The underlying reason for ultimate failure of the NACC is principally found in the unresolved issue of advisory/consultative powers versus binding, law-making powers.[5] The then acting president of the NACC, Bruce McGuinness, stressed in a submission to the government at the time that the Council would resign rather than to be relegated to mere advisory powers. The government, on the other hand, saw the NACC as purely an advisory body (Elliot, 1974, p. 11). The unresolved challenge arising from the NACC, is that Aboriginal people envisage a representative body through which they can pursue a form of 'self-determination'; whilst the government saw the powers of the NACC as solely advisory, albeit

that government also used the term 'self-determination' when it spoke about the NACC. The dilemma was and remains obvious: both sides used the term self-determination but with no agreement what is meant by it. Such terminological confusion was not unique to the NACC. Miscommunication remains prevalent in discussions about the Voice, and even at an international level, similar confusion often arises about the meaning of terms such as self-determination, free, prior and informed consent; consult; sovereignty; and autonomy (Cassese, 1995; Alfredsson, 2019). The NACC was abolished in 1977.

The *second* attempt to establish an advisory body for Aboriginal people commenced in 1977 with the establishment of the National Aboriginal Conference (NAC 1977-1985). This was an indirectly elected body. The NAC could give advice to government, but it had, similarly to the NACC, no other self-governing, executive, or administrative powers. In a similar vein to the NACC, there was no statutory obligation on parliament or the government to refer policies or bills to the NAC for advice. There was also no requirement for government ministries or departments to consult with the NAC in the process of policy formulation. The success or failure of the relationship between the NAC and government was based on good faith and the discretion of national government ministers. This precarious basis for a relationship soon showed cracks because neither side could adjust to or accommodate the position of the other. In essence, good faith was absent other than when general statements were made for public consumption. The NAC was in effect restricted to communicate with government via the Department of Aboriginal Affairs and this not only limited access of the NAC to other ministries, it also absolved ministries from taking their own steps to consult with the NAC (Weaver, 1983, p. 102).

The statutory powers of the NAC were very limited. It could request meetings with government ministers, but in practice meetings were principally called by government and the agenda was usually set by government (AIATSIS NAC, 1983, pp. 11–13). There was, in effect, no legal obligation on any government department or on parliament to submit for comment or advice to the NAC policies, proposals, or bills that impacted on Aboriginal people. The experiences of the NAC and NACC highlight the risks that await an advisory body if the points of departure are not agreed. Whilst the NAC was most keen to promote self-determination and even a treaty between Aboriginal people and government, the government on the other hand approached it as a weak consultative body, or perhaps at best a discussion and public relations-forum (Jacobs, 1981).

Several factors contributed to the demise of the NAC, for example, the lack of an elected base eroded the credibility of the leadership; accountability of the NAC to Aboriginal people was poor; a rift developed between urban Aboriginal interests and rural Aboriginal interests; terminological confusion led to distrust between the parties since they often used the same terms but with completely different meanings attached; and ultimately the gap between expectation and realisation became a hurdle that was difficult to overcome. The NAC was abolished in 1985.

The *third* attempt to establish an advisory body for Aboriginal people commenced in 1990 with the Aboriginal and Torres Strait Islander Commission (ATSIC 1990-2005). This was part of the ongoing effort to accommodate the demand for self-determination and advice-giving of Aboriginal people (ATSIC Act 1989). ATSIC was elected and had representatives at the regional and national levels. ATSIC had a substantial budget and staff; it had administrative functions to administer certain policies as agent on behalf of government; and it could give advice to government. ATSIC did not have any lawmaking powers. As far as its advisory powers were concerned, there was no list of areas on which it had to be consulted and there was no obligation on government to consider any advice received in good faith. The principal influence of ATSIC was its soft power as well as the delivery of some essential services to Aboriginal people, particularly in rural areas.

The ATSIC Act included promising objectives for ATSIC, for example for it to facilitate participation by Aboriginal people in policy formulation; to promote Aboriginal self-government; and to ensure better coordination and cooperation between all governments in service delivery for Aboriginal people (ATSIC Act 1989, sec. 3). It was expected that the combination of democratically-elected institutions; executive and administrative functions; and advisory objectives of ATSIC would give Aboriginal people an opportunity to self-govern and co-govern. In essence, ATSIC's objectives were to develop policy proposals in limited functional areas that were of relevance to Aboriginal People; to make recommendations to government about policy issues of relevance to Aboriginal People; and to oversee and administer the implementation of some policies on behalf of Aboriginal People.[6] ATSIC was abolished in 2005.

For purposes of this article the following transpires from the consultative experiences of the respective three advisory bodies of Australia in response to the questions under consideration: (1) government and the respective consultative bodies had different views about the meaning of consultation; the subject matters on which consultation should take place; the

protocols for consultation; and the weight to be given to advices or consultations; (2) none of the consultative bodies had clarity about matters on which their advice ought to be sought or at what stage of the policy formulation or legislative process they would be consulted; (3) elected and appointed bodies were attempted, but both approaches displayed shortcomings because elected representatives felt they had an independent mandate akin to elected representatives of parliament, whilst appointed representatives suffered from weak rapport with their constituency; and (4) government policies or legislation could not be challenged on the basis of a purported lack of consultation or lack of adequate weight to advices since the consultative process was voluntary and not obligatory with no statutory mandate for policies or bills to be submitted for comment or for advices to be considered in good faith. Ultimately disillusionment on both sided eroded the trust that was required for the successful operation of an advisory or consultative body.

The ongoing efforts in Australia to establish the Voice continue to harbour the same uncertainties that gave rise to the collapse of the three previous advisory efforts. No legislation to give effect to the Voice, including the detail thereof, had been introduced at the time of writing (March 2023). Although there is wide public support for a voice that can give advice on behalf of Aboriginal people, the same lack of clarity that derailed the previous advisory bodies assail the proposed Voice. It is not clear how the causes for previous failures would be addressed this time around. The Albanese government, elected in May 2022, committed itself to a constitutional referendum within the current term of government to give effect to the Voice. A two-step process has been proposed whereby the Constitution would first be amended by way of referendum to authorise parliament to enact a Voice, and that legislation with all the required detail would thereafter be enacted to give effect to the mandate. The most recent proposal is for up to 35 Aboriginal regional bodies to be elected across the country for purposes of local and state consultations, with a national body indirectly elected from the regional bodies for purposes of national consultations (NIAA, 2021). Several questions remain outstanding before legislation about the Voice can be introduced, for example: why should the Constitution be amended if Parliament can already enact a Voice by way of legislation; what are the objectives to be achieved by the Voice; what is the legal effect of terms such as consult, recommend, advice, and free, prior and informed consent; when will advices be sought; what would be the legal effect of advices; and could laws and policies be judicially challenged on the basis that advices had not been sought or seriously considered (De Villiers, 2022b).

2. The Sámi Parliament of Finland – 25 years old, but ongoing uncertainty about the 'obligation to negotiate'

The Sámi Parliament of Finland is an elected body that is called 'Parliament', but it does not have sovereign legislative powers. It is, in essence, a body with mixed functions that can give advice about matters affecting the Sámi particularly in their Homeland; that can identify spending priorities that affect the Sámi; that can allocate resources delegated to it for specific projects; and that can advocate for the best interests of the Sámi in general. Allard cautions that the Sámi Parliament is "by no means to be confused with real 'parliaments'" (Allard, 2018).[7]

The 21 members of the Sámi Parliament are elected by registered voters of the Sámi community, and its day to day business is administrated by a 4-person executive board comprised by the Sámi (Sámi Parliament, 1995, sec. 13). The process to register as a Sámi voter is not without controversy and is currently being reviewed since the Sámi Parliament is of the view that it should have the final say about membership questions, whilst on the other hand disgruntled persons whose registration had been refused seek access to courts for judicial review (De Villiers, 2021). It is particularly in areas such as resource utilisation, land rights, grazing, culture, language rights, and education within the homeland that the Sámi Parliament is active.[8] The Sámi Parliament has been described as "an administrative unit or government agency within the national politico-bureaucratic structure" (Dahl and Tauli-Corpuz, 2020, p. 20).

The Sámi Parliament has a hybrid or *sui generis* character since it is called a parliament but it is not a legislature; it is more powerful than an NGO since it has formally statutory recognition with a right to negotiate; but it cannot veto any policies or laws; it has no taxing powers; and laws and policies cannot be legally challenged on the basis that negotiations had not occurred (De Villiers, 2020). At the time of writing efforts were continuing in Finland to clarify and, if possible, strengthen the role of the Sámi Parliament in the context of the negotiation obligation and its role to finally determine membership disputes.

The Human Rights Centre describes the consultative role and the limitations thereof of the Sámi Parliament as follows:

> In the interactions with the Government, the Sámi parliament as well as several Sámi NGOs often participate in hearings, give written statements and follow actively the relevant processes. The insufficient personnel resources of the Sámi Parliament,

> however, do not allow full participation in all matters relevant to the Sámi and their culture (Human Rights Centre, 2018, p. 2).

The general objective of the Sámi Parliament is to give "cultural autonomy" to the Sámi (Sámi Parliament, 1995, sec. 1(1)). Relevantly for purposes of this article, the government must "negotiate" with the Sámi Parliament when policies impact on the rights and interests of the Sámi in the area of the Sámi homeland (Sámi Parliament, 1995, sec. 9). The negotiation rights of the Sámi Parliament are soft and principally dependent on the goodwill of the government. The Sámi Parliament interacts with government departments primarily via the department of justice, but there are also bilateral relationships with other government departments on matters that are of mutual interest. The discretion if and when to engage the Sámi Parliament is however primarily those of the respective government departments. There is not an all-of-government approach whereby interactions between government departments and the Sámi Parliament are coordinated. Account must also be taken that the Sámi Parliament is not necessarily the sole body that can speak for the Sámi. When local Sámi communities, inside the Homeland or in other parts of Finland, are impacted by policy measures, they must also be consulted. As in the case with the Australian experience of the relationship between urbanised Aboriginal people and rural Aboriginal peoples, the relationship between the Sámi Parliament and individual Sámi communities is often complex.

The negotiation rights of the Sámi Parliament are primarily aimed at policies, measures, legislation, and activities that impact on the Sámi homeland. The delineation of negotiation rights of the Sámi Parliament to the Sámi homeland is not without criticism, since similarly to many other nations with Indigenous Peoples, many of the Sámi (estimated as much as 60%) reside in urban areas *outside* the Sámi homeland. How their rights and interests should be dealt as an indigenous and cultural community also remains the topic of ongoing discussion.

Substantial parts of the Sámi budget are, in essence, based on tied grants directed at priorities that have been identified and specific funds allocated by the national government. The allocation usually involves consultation with the Sámi Parliament. The Sámi Parliament does not have a taxing power and it cannot make binding recommendations about spending priorities. The limited budget of the Sámi Parliament is seen as a "constraint" on the ability of the Parliament to fulfil its negotiation functions (Stępień, Petrétei, and Koivurova, 2015, p. 134).

The most relevant aspect of the Sámi Parliament for purposes of this article is found in the statutory obligation of government to negotiate with the Sámi about matters that affect them

(Sámi Parliament, 1995, sec. 9). The obligation to negotiate mandates that public authorities "negotiate with the Sámi Parliament in all far-reaching and important measures which may *directly and in a specific way* affect the status of the Sámi as an Indigenous Peoples" (emphasis added) in regard to the following matters: community planning; management of public lands; mining; culture; teaching and education of an in Sámi language; and any other matter that impacts on the status of the Sámi language and culture (Sámi Parliament, 1995, sec. 9). This promising legal position has not borne out to be powerful in practice since there remains disagreement about if, and when, government should negotiate with the Sámi Parliament, and what the legal effect is of such negotiation, or the absence thereof. The weight given to the obligation to negotiate is inevitably dependent on human factors. Some ministries have in practice been open to a more inclusive approach to the Sámi negotiation rights, but this remains a discretionary stance. In practice, it is often therefore the style adopted by the head of a government department that determines the extent to which Sámi inputs are encouraged and the weight that is attributed to their advices (Stępień, Petrétei, and Koivurova, 2015, p. 134).

The matters about which consultation must take place must arise from within the Sámi homeland area. The Sámi Parliament may give self-initiated advices about any aspect of public policy that may impact the Sámi, but the obligation to negotiate does not apply to general socio-economic policies that impact on the Sámi (Allard, 2018). The Sámi Parliament may, like any NGO, make submissions and comments regarding general policies, but those are not treated under section 9 negotiations. This is similar to the situation of Aboriginal people in Australia, where some Aboriginal communities have the right to negotiate on what happens on their land pursuant to native title rights, whilst there is no right or obligation to negotiate about national socio-economic policies.

The negotiation rights of the Sámi Parliament are unique when compared to other indigenous consultative institutions internationally, but on proper analysis the rights remain only a "soft" form of co-decision-making (Tomaselli and Granholm, 2009, p. 167). The emphasis of section 9 has principally been at the level of "procedural requirements without an obligation to consent" (Carstens, 2016, p. 90). The Sámi Parliament is therefore an important international precedent, but it falls short of the standard that has been proposed by Anaya, namely that *consent* should be sought when an activity impacts on the land rights of Indigenous Peoples (Anaya, 2011, para. 40).

A recent United Nations Advisory Note has recommended that the status of the Sámi negotiation-obligation should be enhanced to give greater certainty about *when* advice is

sought, and the *weight* attached to the advice. The negotiations obligation is, in effect, often narrowly construed by government departments (UN Advisory Note, 2018, para. 22). The Advisory Note also proposed that section 9 should be wider in scope and ensure that the Sámi as a people have the capacity, legal rights, and prerogatives to preserve their culture and co-exist under a viable mechanism of devolved power, in accordance with Finnish constitutional tradition (UN Advisory Note, 2018, para. 18). Whilst the sentiment expressed by the Note may be widely shared, giving legal and practical effect to it to comply with the international principle of free, prior, and informed consent, is the subject of ongoing negotiations.

The complaints raised by the Sámi about the vagueness of the negotiation obligation are not dissimilar to those complaints that plagued the Australian Aboriginal advisory bodies and are likely to affect the Khoisan consultation in South Africa. The Sámi complain that negotiations are not frequent enough; negotiations are not in reality negotiations between equal parties within the true meaning of the word; that the weight attached to the advice of the Sámi are solely at the discretion of government; and that the spirit of the 'obligation to negotiate' is not adhered to (Stępień, Petrétei, and Koivurova, 2015, p. 130). These concerns are consistent with the causes that contributed to the demise of the previous advisory bodies in Australia. Time will tell if the proposed Voice can find a lasting solution to these issues.

In a report to the UN Human Rights Committee the following critical observation was made in 2019 about the lack of substantive compliance with section 9:

> At the same time some branches of the government manifestly fail to respect the obligation to obtain free, prior and informed consent of the Sámi in legislative and administrative processes that may affect them (UN, 2019, Issue 2).

There is no judicial mechanism in Finland to ascertain whether negotiation had indeed been required about a specific policy or bill and if so, whether negotiation had been undertaken consistently with the legislation and if so, whether the negotiations had taken place in good faith. It is therefore not surprising that Tomaselli and Granholm have come to the conclusion that "the current needs of the Sámi cannot be accommodated by the Sámi Parliament alone" (Tomaselli and Granholm, 2009, p. 180). Efforts are ongoing to clarify and strengthen the position of the Sámi Parliament, but it remains challenging to find a legally secure position between the current obligation to negotiate on the one hand, and a veto of some sort on the other hand. Government would not agree to a veto, whilst the Sámi Parliament says the current situation is untenable.

The dilemma to give more weight and certainty to Sámi advices without curtailing the sovereignty of the national parliament is obvious: on the one hand parliament cannot lightly fetter its own sovereignty or delegate its lawmaking powers to the Sámi Parliament, whilst on the other hand the Sámi Parliament is not representative of the general electorate of Finland and it cannot therefore make binding decisions, unless on very narrow and limited matters that directly impact on the survival of the Sámi culture.

The following useful recommendations were made by the Expert Mechanism of the United Nations in 2018 in order to secure more practical and legally enforceable content to the obligation to negotiate for the Sámi Parliament:

1) pre-negotiation trust building initiatives;
2) good faith in the conduct of the consultation;
3) adequate resources to the Sámi Parliament;
4) equality of arms through the consultation period;
5) balanced capacity of the parties to engage throughout the process;
6) culturally appropriate methods of negotiation;
7) impact assessments (human rights, cultural, environmental, and social) to be carried out when development projects are anticipated;
8) a limitation on measures or projects which may cause "significant harm" to the Sámi people's right as an Indigenous Peoples to practice their language, culture and traditional livelihoods and include a definition of what constitutes "significant harm" including "cumulative harm" from competing land use forms (in consultation with the Sámi Parliament), beyond which development projects may not be undertaken;
9) protocols to be drawn up at the end of a process including agreements reached and in the case of opposing views the reasons why they were not taken on board; and
10) a mechanism to monitor agreements and provide redress for non-compliance (UN Advisory Note, 2018, para. 29).

In light of the experiences of the Sámi Parliament, the following responses can be offered in regard to the four questions posed in the introduction to this article: (1) the obligation to negotiate remains ambiguous, with substantial discretion in the hands of ministers and department heads about the nature, timing, extent, duration and weight of negotiations; (2) the functional areas within which consultation must occur are statutorily listed, but negotiation obligations cannot be judicially enforced; (3) the Sámi Parliament is elected by members of the Sámi who register without the registration impacting on the right of Sámi to vote in popular elections, but there remains a debate about how to determine who is a Sámi and the forum that

should be able to determine Sámi membership; and (4) concerns of the Sámi Parliament about lack of negotiations cannot give rise to judicial review.

3. The Khoisan – ancient people seeking to be heard in contemporary society

The Khoisan, as the oldest living inhabitants of southern Africa, migrated into the subregion around 150,000 to 250,000 years ago (Kim, Ratan, and Perry, 2014).[9] They are the oldest living Indigenous Peoples of southern Africa (Morris 2002). The Khoisan insist that they are not to be called tribal people but as indigenous – thereby referring to their 'first' status. With the arrival of African tribes and later European settlers, the Khoisan became displaced from their traditional lands. Their loss of land, culture, and identity had been so sweeping that there is little left of their ancestral practices, indigenous organisation, language, and customs. They share in this respect the experiences of the Aboriginal people of Australia, albeit that displacement and assimilation have had an even greater impact on the Khoisan and their culture, language, and traditions.

The rights and interests of the Khoisan was not on the agenda of the negotiations that led to the new democratic constitution of South Africa in 1996. The reasons being that the Khoisan had no systematic traditional institutions of community government; they had no land that they exclusively occupied; they have become integrated with other communities, in particular the Coloured community over many decades; and many of them speak Afrikaans as their home language rather than a Khoisan language. It is therefore not surprising that their interests as a distinct community did not feature on the national negotiation agenda. It is only after the enactment of the new constitution that the Khoisan actively started advocating for their rights as a community. They relied principally on their status as an indigenous community, or perhaps *the* Indigenous Peoples of South Africa (Boezak, 2017, p. 259).

The Khoisan finally received some statutory recognition when, in 2019, Parliament enacted in 2019 the Traditional and Khoi-San Leadership Act, 2019 (Khoisan Act, 2019). The Khoisan Act does not only deal with the Khoisan, but the Act also regulates the rights of other indigenous and tribal communities. After the enactment of the Khoisan Act there had been indications that the Act may be challenged in the Constitutional Court (Pikoli, 2019). There were particularly concerns about the subjugation of women by the traditional authorities, and the conflation of Indigenous Peoples and traditional people as they were they had the same status (Baloyi, 2019). The control given by the Khoisan Act to indigenous and tribal authorities

over land also raised concerns of a new form of apartheid-homeland system based on ethnicity. Raber went so far to describe the Act a "victory for Bantustan politics of authoritarianism and ethnicity" and a "defeat for democracy" (Raber, 2019).

For purposes of this article the most relevant aspect of the Khoisan Act is that it provides for the establishment of national and provincial houses for the Khoisan with, amongst others, advisory functions. The Khoisan Act seeks to "enable the Khoisan to promote, preserve and develop their cultural heritage with state funding and to make use of the state's infrastructure" (Boezak, 2017, p. 267). The failure of the Act to separately recognise indigenous leaders from tribal leaders has drawn criticism from the Khoisan. It must be noted however that the status of Indigenous Peoples versus traditional people has been an issue during the discussions leading to UNDRIP and that as a compromise, international instruments do not draw a legal distinction between indigenous and traditional. The Khoisan have also expressed concern that since they do not have exclusive possession to land, the land management objectives that are sought to be achieved by the Act would not be for their benefit (Veracini and Verbuyst, 2020, p. 269).

The Khoisan Act provides that the premier of a province may recognise a Khoisan community "after consultation" with the provincial legislature – implying that the opinion or advice of the provincial parliament must be sought, but not its concurrence (Khoisan Act, 2019, sec. 5(3)). A Khoisan Council may be then instituted for such a community, with the principal function being to give advice about matters that impact on the Khoisan (Khoisan Act, 2019, sec. 20). A Khoisan Council is required to meet at least every three months and its decisions apply to the members of the Khoisan community (Khoisan Act, 2019, sec. 18(7)). A Khoisan Council does not have law making powers. This leaves open what the status at law would be of decisions of a Khoisan Council. On proper assessment it is likely to be regarded as a "resolution" rather than an enforceable decision, regulation or law.

The functions of a Khoisan Council are *theoretically* wide-ranging and include the following: administering the affairs of the community; facilitating development of the community; giving advice to local governments are about the needs of the community; making recommendations "after consultation" to government about interventions that may be required in the community; participating in development programmes; and promoting cooperative government (Khoisan Act, 2019, sec. 20). These functions are however broadly formulated and lack specificity about *actual* consultation or decision-making or executive powers. There are no legally enforceable obligations on the respective levels of government to liaise with the

Khoisan, or to negotiate, or consult with them in good faith, or to give due weight to their advice. The symbolism of the Khoisan recognition may be high, but the substance of an obligation to consultation is not within the meaning of "consultation".

National and provincial houses for traditional and Khoisan leaders are established to represent the Khoisan leadership at local, provincial and national level (Khoisan Act, 2019, chap. 3) The duties of the respective houses are set out in the Khoisan Act (Khoisan Act, 2019, secs 36; 49). In regard to its consultation rights, the National House for the Khoisan "must" consider bills referred to it for comment by the national parliament; it "may" advise the national government about matters that affect the Khoisan; it "may" advise any government minister about a matter that has been referred to it by the minister; it "may" cooperate with other levels of government to promote the interests of the Khoisan; and it "may" perform any task delegated to it by government or pursuant to legislation (Khoisan Act, 2019, sec. 36(2)). The same functions may be executed by any provincial house established for the Khoisan (Khoisan Act, 2019, sec. 49). Bills under consideration by Parliament "must" be referred to the National Khoisan House "for comment" only *if* the matter "directly affects" the Khoisan communities (Khoisan Act, 2019, sec. 39(1)). The Khoisan House must make any comments within 60 days from the date of referral (Khoisan Act 2019, sec. 39(1)(b)). There is no statutory obligation on the advice to be binding or considered in good faith.

The referral of draft legislation to the Khoisan House is an important step in a consultation process, but it is notable that limited time is allowed for comment; limited time is available to consult internally with the Khoisan community; and most importantly the Khoisan can only "comment", since there is no requirement for good faith consultation, negotiation, or serious consideration of the comment provided by the Khoisan.

Section 39(1) of the Khoisan Act grants a procedural right that may affect the validity of an Act if draft legislation had not been sent to the Khoisan House. But the effect of the subsection has not been tested. There are two levels where the provision may impact on the legislative process: firstly, the legislative process can be injuncted for failure to refer the bill to the Khoisan; and secondly a case can be made that a step in the legislative requirement had not been met and therefore the Act may be declared unconstitutional. The latter will depend on the approach adopted by the Constitutional Court, but I would suggest that in light of provisions of international law and the approach that has recently been adopted in South Africa by several courts about prior, informed consent of local communities, that the Constitutional Court would be highly critical if a bill that impacts on the customs of the Khoisan is not referred for

comment. One must however also be realistic that it would be rare for a bill to impact on the Khoisan so explicitly as is suggested by the Khoisan Act. The strength of section 39(1) is the obligation to refer; but the weakness is that there is inadequate clarity *when* a bill so affects customary law that it must be referred; the *time* for comment is minimal; the timing when comment is sought is entirely in the hands of Parliament; and even if it is referred the traditional leaders can only *comment*.

The Khoisan House may from an institutional design perspective be a step forward, but the powers and functions from a consultation perspective are weak and the government and parliament retain absolute discretion about what to refer; when to refer it; and how to weigh the comment.

For purposes of this article, the following transpires from the consultative structures contained in the Khoisan Act in response to the questions under consideration: (1) there is no obligation to consult with the Khoisan, only an obligation to submit bills for comment to the Khoisan House if the Khoisan community is directly affected. Although the comment power may enable the Khoisan an opportunity to more effectively advocate for their interests, the statutory balance is clearly skewed in favour of government who can decide when to refer a bill or policy; government need not consult with the Khoisan but only receive comment; the time for comment is very restricted with little if any opportunity for Khoisan leaders to consult internally with affected Khoisan communities; and the weight, if any, attributed to comment is solely in the discretion of government and parliament; (2) the functional areas within which consultation may occur are statutorily listed but those are done in the form of general policy statements that are not adequately specific to give any certainty to the Khoisan as to when they could expect to be invited to give comment; (3) the appointment of the Khoisan leaders is a complex process that involves a form of recognition by government which is distinguished from the Australian and Finnish experience that is primarily based on elections; and (4) the advisory function of the respective Khoisan houses is severely restricted to give "comment" on bills but with no requirement to be consulted; to negotiate in good faith; or for advices to be seriously considered with an open mind.

Conclusion: whereto with indigenous advisory bodies?

Four questions were posed in the Introduction about aspects of the composition, powers, and functions, and judicial status of consultative bodies for Indigenous Peoples and their advice.

Those questions encapsulate the most essential issues that impact on the practical utilisation of advisory or consultative bodies for Indigenous Peoples. This article endeavoured to respond to those questions on the basis of recent experiences with national indigenous advisory bodies in Finland, Australia, and South Africa. The following responses are proposed to address those questions:

Question 1: composition of a consultative body

The essential consideration that must be taken into account in the composition of an indigenous consultative body is that the appointment or election of representatives must primarily be that of the indigenous community. The decision about who should represent them is a logical extension of the right to self-determination and autonomy. A consultative body can be elected or nominated based on hereditary considerations, or a combination. International law emphasises the sovereign right of an indigenous community to decide who should represent them in negotiations. Indigenous groups may, however, not necessarily internally agree on the manner of appointment or election of representatives. There may for example be tension between traditional and urbanised communities about elections vis-à-vis traditional forms of representation.

A relevant consideration to determine the manner of appointment or election is to take into account the powers and functions of the consultative body. For example, if representatives are elected, but the body only gives advice, the consultative body and those serving on it may be discredited if the advice is not given serious consideration by government. If, however, the representatives are appointed, the consultative body may suffer a lack of legitimacy within the indigenous community due to inadequate processes to internally consult with the community. The Australian experience highlights the challenges faced by elected and nominated indigenous bodies. Although the Sámi Parliament is elected, issues remain about the role of the Sámi Parliament about matters outside of the Sámi homeland; and the interaction between the Sámi Parliament and Sámi residing outside of the Sámi homeland.

Question 2: Consultation powers

It is challenging to delineate with any certainty the typical functions that ought to be the subject of consultation with an indigenous body. It seems as if the dichotomy of what Indigenous Peoples desire; what is legally possible; and what is politically achievable, is nowhere as clearly illustrated as in the consultation powers of an indigenous body. This is recognised by ILO 169 when the words “may affect them directly” are used as a guide to ascertain whether a policy

measure should be referred for consultation (ILO 169, 1989 a 6; p. 7). In general, those policies or legislation that are likely to impact only on Indigenous Peoples predominantly or disproportionately ought to be referred to them for consultation. But within these words hide wide discretions. The provisions for consultation may not be adequately broad for Indigenous Peoples since pursuant to UNDRIP and ILO 169 those consultations relate to relatively narrow issues that may impact directly on Indigenous People and their ancestral land. This is while Indigenous People may seek a wider scope of policies or legislation to be referred to them. Regardless of attempts in international law and state constitutional law to develop more specific legal guidelines for referrals, the decision to engage an indigenous community in consultation remains highly discretionary and firmly within the hands of the executive.

The obligation to consult or to negotiate, in general, does not include an obligation on government to refer general socio-economic policies that may also impact on Indigenous Peoples but not only on them. For example, if the ratification of a treaty by the national parliament affects Indigenous People but not in such a manner that it relates only or principally to them, there is arguably no obligation in international law for them to be consulted. This does not mean an advisory body cannot make representations about general socio-economic issues to parliament or government, but those representations are then treated as similar to submissions by an ordinary NGO and not pursuant any obligation to negotiate.

Perhaps *the* most challenging aspect to design functional consultative mechanisms for Indigenous People is to strike a balance between the desire of Indigenous Peoples to co-govern, in contrast to the willingness of governments to merely inform and nominally consult.

Question 3: legal meaning of obligation to consult

The meaning at law of the obligation to consult with an indigenous advisory body or indigenous community is to be ascertained from the context in which it is used. There is no binding definition in international law about what the meaning is of the 'right to be consulted' or FPIC. Although there has been *ad hoc* recognition of consultation obligations within municipal law in regard to specific projects, generally the right to consultation or FPIC is often expressed as if it is a judicially-enforceable entitlement, whilst in fact it is a promissory ideal. FPIC has not been adequately defined or widely adhered to in order to be regarded as a justiciable basis to challenge legislation or policies pursuant to customary international law. There is clarity on what consultation *does not* mean – it does not imply a veto of policies or legislation unless a veto is specifically granted by statute. General principles have crystallised from the meaning

of the right for be consulted, for example negotiation or consultation in good faith. Those principles are generally referred to in literature as FPIC. But it must be noted that what constitutes good faith is ascertained in the context of the consultation; the nature of the proposal or project the subject of the consultation; the circumstances of countries; the specific statutory framework; the conduct of the parties; but it cannot be objectively or definitively be prescribed by way of fixed criteria.

Elements of consultation in the context of FPIC include that –

- the advice of Indigenous Peoples must be freely given on the basis of relevant and complete information about a proposal that was provided to them in a timely manner prior to the commencement of a project or the enactment of a policy;
- the advice of Indigenous Peoples is required in regard to policy, administrative, and legislative measures that may affect them directly or disproportionately but with acknowledgement that reasonable minds may disagree as to when consultation is mandated;
- the mechanisms or processes for consultation can be *ad hoc* or of a more permanent nature by way of local, regional, or national consultative institutions;
- Indigenous Peoples can, in accordance with their right to self-determination, decide on the most appropriate mechanism by which they want to participate in consultation, be it by way of an elected, appointed, or hereditary body; and
- government or a proponent of a development has a moral duty endorsed by good practice to provide adequate resources to Indigenous Peoples to enable them to effectively consult internally with their community; to seek advice and expert and legal opinion; and to participate in consultation. There is, however, no legal obligation on government or a developer to fund the indigenous community to enable them to participate effectively in consultation.

In practical circumstances these principles are not consistently applied, as is evidenced from the three case studies. For example, there is no statutory prescription when the Sámi Parliament is to be consulted; the duration of consultation; or the weight to be given to advice. In a similar vein Australia has attempted, and failed, at three consecutive occasions to establish a consultative body for Aboriginal People, but divergent expectations about the meaning of consultation; disagreement about the overlap between consultation and joint decision-making; and lack of clarity about legal obligations to consult, have caused the failure of the respective bodies. The most recent proposal (at the time of writing) is that the proposed Voice would be

able to make representations to parliament and government, without any reference to terms such as negotiate or consult, or what weight should be given to a representation. In regard to the Khoisan Houses in South Africa there is no obligation to consult, merely an obligation to inform.

The case studies demonstrate the reluctance of governments to legally commit to any form of binding consultation or good faith negotiation obligations. Ultimately, when viewed from the perspective of legal powers and functions of a national consultative body for indigenous people, much remains to be done.

Question 4: judicial review due to lack of consultation

As a general principle, it is not disputed that neither ILO 169 nor UNDRIP provides a general legal remedy for the laws or policy measures that have been enacted to be judicially reviewed on the basis of a purported failure by government or parliament to consult with or give proper regard to the advice of a consultative body. In some instances, for example the Baleni case, reliance is placed on specific statutory requirements that impose more stringent obligations of consultation. But even in those cases where it was held that a justiciable duty to consult exists, such a duty relates principally to policies that affect the ancestral lands of Indigenous People, and not to general socio-economic policies (Tomaselli and Cittadino, 2021). Conditions imposed are usually project-based and do not give rise to general consultative entitlements at a national level about general socio-economic policies. Since international law is not clear about the nature of the right to be consulted, judicial review of a failure to consult is generally not available, albeit that from a political or social licence perspective there may be political and social consequences if a government fails to consult. The obligations arising under ILO Convention 169 bring about a legal obligation to consult for those States that have ratified it, but this cannot be construed as a universal legal norm. The notion of FPIC endorsed by UNDRIP is a useful guide, but cannot be regarded as a legal norm pursuant to customary law.

In essence, the enforceability of good faith negotiation or consultation obligations is principally found in the conduct and goodwill of governments, rather than by way of judicial review and oversight. Even if there is a duty to consult, courts are unlikely to evaluate the substance of negotiations whereby the merit or reasonableness of proposals and counter proposals become a matter for judicial consideration. Courts generally show a greater willingness to consider procedural aspects of consultation such as the actions, behaviour, and conduct of the parties during the course of consultation, but with acknowledgment that good

faith consultation does not imply a veto; it does not mandate an agreement; and it does not preclude a party standing firm in its position.

Whereto then with indigenous advisory bodies? The foregoing highlighted the complexity to find common ground between the desire of Indigenous People to give binding advice compared to the unwillingness of governments and parliaments to limit their sovereign discretions. Whilst international law does not mandate a veto for Indigenous People and states are unlikely to consent to any consultation obligation that is akin to a veto, there are potentially substantial benefits in advisory bodies – be it locally or nationally. The advisory bodies give a voice to Indigenous People; it allows them to consult and to represent; to advocate; to influence public opinion; to pressure shareholders and financiers; to be lobbyists; to build capacity of their community; to develop leadership; and to self-determine. These functions may not amount to effective co-government, but they are to be preferred to being silent and without a voice.

Notes

[1] In this article the term Aboriginal people is used, but it is acknowledged that other terms are also used in reference to the Indigenous Peoples of Australia, for example Indigenous Peoples, First people, and First Nations. It is also noted that the Torres Strait people are included in the reference to Aboriginal people. I have suggested that one of the first advices that may be sought from the Voice is to make a recommendation to government on an appropriate term to be used when referring to Australia's Indigenous Peoples (De Villiers, 2022b).

[2] I select the Sámi Parliament of Finland since that has been the longest in operation (in its initial form since 1973) and the topics the subject of this article deals with have been raised in Finland during that time. There are also arrangements in Norway and Sweden for the Sámi, but those have not had the practical experiences of the Sámi Parliament in Finland. The Sámi Parliament of Finland has been described as follows: "The Sámi Parliament is not an authority but an independent institution, legal person, under public law. It promotes the general interests of the Sámi people." (Human Rights Centre, 2018) Although the word 'parliament' is used, the Sámi Parliament does not have sovereign legislative powers since it is principally an administrative and advisory body that represent the interests of the Sámi within the Sámi homeland.

[3] It must be noted that these questions are raised within the context of a national, permanent advisory body for Indigenous Peoples. The questions for purposes of this article do not relate to *ad hoc* consultation in the case of project-specific initiatives where permanent or *ad hoc* negotiation bodies may be established by local indigenous communities for purposes of dealing with persons seeking access to their traditional lands. It is acknowledged that ILO 169 and UNDRIP as well as several regional instruments require consultation and free, prior, and informed consent from Indigenous Peoples when their lands and interests are affected (e.g. Tomaselli and Cittadino, 2021). Australia has extensive statutory arrangements and policies to facilitate consultation with Aboriginal people when their traditional lands are affected (AIATSIS, 2016; ILUA/Right to Negotiate, 2020; Bartlett, 2020; De Villiers, 2022a). Such local consultation is to be distinguished from national consultation about national socio-economic policies. It is also noted that within several Australian states there are efforts under way to create a state-based advisory body for the local Aboriginal people (McCubbing, 2022). Most recently the state of South Australia has announced the creation of a state-based advisory voice. It is not clear yet how these state- and local-based initiatives will intersect with the proposed national Voice. On the one hand the state-based consultation-efforts are to be welcomed, but there is also the risk of competing interests; intra-indigenous conflict; and burgeoning bureaucracies that may give rise to a preverbal joint decision-making and consultation trap.

[4] This was the highest percentage voter participation that any elected body for Aboriginal people had ever achieved. Since then, voter turnout had been diminishing and in the final elections of ATSIC only around 30 percent of eligible voters participated.

[5] The Minister of Aboriginal Affairs, Gordon Bryant, said plainly at the launch of the NACC the following about the power-relationship between the government and the NACC: "Sometimes the Government takes the advice, sometimes it doesn't" (Bryant, 1973).

[6] ATSIC had as many as 1250 public servants (of which around 500 were Aboriginal) working for it to administer policies and a budget of around 1 billion Australian dollars.

[7] There are also Sámi parliaments in Norway and Sweden, but for purposes of this article the advisory powers of the Sámi Parliament in Finland are most relevant since section 9 of the Sámi Act places an obligation on the national parliament to negotiate with the Sámi Parliament. The over 25 years' experience of the Sámi Parliament is therefore the focus of this article. About the arrangements in other states for the Sámi see, for example, Mörkenstam and others in regard to the Sámi Parliament in Sweden (Mörkenstam, Gottardis, and Roth, 2012) and the analysis of the Sámi parliaments in Norway and Sweden (Heinämäki, Allard, and Kirchner, 2017). The role of the respective Sámi parliaments is "substantially limited", but the three parliaments nevertheless "represent a rather unique example worldwide" (Tomaselli and Granholm, 2009, p. 149; p. 164). The Sámi parliaments have been referred to as an "extenuated version of indigenous self-determination" (Carstens, 2016, p. 83). The status of the Sámi Parliament in Finland is in some respects not dissimilar to the status of the other Sámi parliaments in Norway and Sweden. In Norway, where there is not a statutory obligation to consult, the voluntary Consultation Agreement of 2005 has laid the basis for practical consultation (Heinämäki, Allard, and Kirchner, 2017, p. 328). In Sweden, the Parliament of Sweden adopted legislation on 26 January 2022 whereby consultation is required

with the Sámi on matters of significance. Examples of policy areas that may require consultation are land use, enterprise issues, reindeer husbandry, fishing, hunting, predator animals, mines, wind power, forestry issues, cultural issues, place names, and biodiversity on reindeer grazing grounds, as well as issues related to Sámi preschools, education and research, and elderly care specifically for the Sámi. Although the consultation must take place in good faith, it does not grant a right of veto (Sweden Consultation, 2022).

[8] "The task of the Sámi Parliament is to look after the Sámi language and culture, as well as to take care of matters relating to their status as an Indigenous Peoples" (Sámi Parliament, 1995, sec. 5(1)).

[9] Although this article does not consider the adequacy of the term 'Khoisan', it is noted that the term collectively refers to several indigenous communities and that the use of such a generic term is not necessarily endorsed by all the subgroupings (Khoisan Act, 2019, sec. 1(1)).

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