



**REGIONAL ASSEMBLY TRANSITION PLAN**

**TORRES STRAIT REGIONAL AUTHORITY**

***Aboriginal and Torres Strait Islander Act 2005***

**July 2018**

## TSRA REGIONAL GOVERNANCE COMMITTEE

Chairperson - Mr Getano Lui Member for Iama

Mr Napau Pedro Stephen TSRA Chairperson

Mr Joseph Elu Member for Seisia

Mr John Abednego Member for TRAWQ

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## CONTENTS

	<b>Page</b>
(1) EXECUTIVE SUMMARY.....	4
(2) PREAMBLE.....	5
(3) PREFACE.....	6
(4) INTRODUCTION.....	6
(5) PREFERRED OPTION.....	8
(6) STATUS.....	9
(7) OBJECTIVE.....	9
(8) PRINCIPLES.....	10
(9) CATEGORY.....	10
(10) TRANSITION.....	11
10.1 PHASE 1 - Good Governance.....	12
10.2 PHASE 2 - Joint Statutory Agency.....	13
(11) MANDATE.....	14
11.1 Community.....	14
11.2 State and Commonwealth Government.....	15
11.3 United Nations.....	15
(12) FUTURE DIRECTION.....	16
(13) HISTORY OF LEGISLATIVE REFORM.....	17

## EXECUTIVE STATEMENT

Our Vision is Our Children's Future we can change.

“We no longer need to find resolve in only our conviction anymore then divinity in our inaction.” We can do something to right the wrong of the past, improve the present and protect the future.

Our hope instilled in this doctrine, creates a passage of right for our children to enjoy the same privileges as the average Australian child, devoid of any risk of inherent procedural injustice or systematic barrier that ill afford them Equity and Self Determination.

Aligning our Mindset to Rights to live a normal life without fear of reprisal or reprobation is incredibly challenging and it is equally challenging for those privileged to presume otherwise.

I have survived four decades of legislative reform and have timelessly proffer the same advice to Heads of States, Parliamentary Officials and Senior Bureaucrats yet as you can see from the Closing the Gap Evaluation Report, our situation remains Status Quo.

Our children are born into our nation burden of poverty, injustice and perpetual cycle of declining life expectancy in a very prosperous country. In this day and age our struggle to avoid leaving our children and their children with the same or even worse predicament than we suffered is a stark reminder of the failing humanity of our policies, system and most importantly our national standards. Manmade practices are easily eliminated.

Dealing with human lives justly allows an even greater reprieve of unconscionable privilege that can be legislated in the Australia Parliament and acknowledge throughout the Commonwealth, as an Act of Human Right and Justice.

In humility, we acknowledge and believe that God, in his infinite wisdom, had gifted the land, seas and air of the Torres Strait Islands (Zenadth Kes) to our Ancestors since time immemorial.

We therefore reaffirm our strong desire to exercise our inherent right to Self Determination, as we acknowledge that the Torres Strait Region ( Zenadth Kes ) is already practicing in a de facto way the roles and responsibilities to some extent of a Non-Self Governing Territory.

Mr Napau Pedro Stephen AM  
Chairperson  
Torres Strait Regional Authority

## PREAMBLE

Aboriginal and Torres Strait Islander peoples are recognised as the First Australians with affiliation to their land, sea, air country:

- Acknowledgement of Torres Strait Island traditional name Zenadth Kes.
- Acknowledgement of the Traditional KOD system of Governance.

Our Aspiration for Greater Autonomy has been at the heart of all policy and legislative reform since Torres Strait was annex by the State of Queensland.

Our autonomy is best described by the main principles of the United Nations Declaration on Indigenous Rights that include:

- self-determination
- participation in decision-making
- respect for and protection and protection of culture
- equality and non-discrimination

The Commonwealth and Queensland Government released a joint response mainly in support of the transition towards a Regional Assembly in 1989.

The provision of the Australian Government **2005 *Aboriginal and Torres Strait Islander Act*** a complementary legislation to the previous Queensland **1986 *Community Services Torres Strait Island Act***, currently enable State and Commonwealth Government departmental functions to be conferred upon the Torres Strait Regional Authority.

Translation of the High Court Native Title Land and Sea Determination on Native Title Rights and Interest of Torres Strait Islanders, our inherent rite and lore are yet to be redefined by Commonwealth and State Statute.

Semblance of Local, State and Commonwealth Joint Authority created under Federal Legislation will assume the highest order of Commonwealth Territory jurisdictional powers stipulated by the Torres Strait Treaty in 1985.

Establish a Torres Strait Regional Assembly with local, state and commonwealth government functions by 2019 - 2020.

## PREFACE

The State and Commonwealth Government endorsed the establishment of Regional Assembly in 1997 that is to be executed under the Commonwealth **2005 Aboriginal and Torres Strait Islander Act** (2005 ATSI Act), **1985 Torres Strait Treaty** and the **Declaration of Indigenous Rights** that Australia is a signatory to, at the United Nations General Assembly.

The Torres Strait Regional Authority under **Section 5** of the **2005 ATSI Act** binds the Crown in the right of the Commonwealth, of States and Territory.

Other fundamental and important instruments also operate in contemplation of a Regional Assembly namely;

- *1984 QLD Community Services Torres Strait Island Act*
- 2009 Local Government Act Indigenous Councils

## INTRODUCTION

Torres Strait Islands traditionally known as Zenadth Kes occupies the sea country between two mainland areas, Australia ( Koei Dhawdhay) and PNG ( Moegi Dhawdhay) and that sea country is the recognised Native Land and Waters of Guda Maluyligal, Maluyligal, Kulkalgal, Kemer Kemer Meriam, Kaiwalagal Sea Faring Nations of Zenadth Kes .

The Statehood of Zenadth Kes was governed by Kod Systems an ancient form of traditional governing structure prior to colonisation. Our Aspiration to re-govern our own affairs has been recognised partly by the Westminster System in Australia over the past century.

As proud traditional owners of Zenadth Kes we have never ceded our rite of governing our affairs. From the outset, we have maintained our Aspiration in all ensuing legislative reforms governing in the Torres Strait and seize every just opportunity to reinstate our position. Initially at the Inaugural Torres Strait Island Council Meeting at Yorke Island in 1937 and later, assisting the international border for Australia and Papua New Guinea negotiations and again at the United Nation in the early nineties.

Since, there has been a succession of our legislative governing structural changes over time in the Torres Strait during the Segregation, Integration and Assimilation policies of the State of Queensland.

Our principle of unconditional freedom survived the era of the protector under the segregation policy at the turn of the last century moving to more conciliatory self-governing

structures today. Our conviction never wavered, although being awarded limited capacity to advise and be consulted only, still took over a century.

Still our drive for self-management and self-determination continued and was finally realised under the Whitlam and Fraser Governments in the seventies. The State subsequently transferred their power to manage essential services as well as entrust land through a Deed of Grant to Island Councils who reported directly to the State Minister in the eighties. Whilst there were still inadequate funding allocated to services devolved to island council, it didn't deter us from the opportunity of becoming more involved in managing our own affairs.

An opportunity arose when the Aboriginal and Torres Strait Islander Commission (ATSIC) was established by the Federal Government as an initiative to regionalise Commonwealth funding through local elected Indigenous entity. This was created under the portfolio of the Australian Government Aboriginal Affairs Minister in the nineties. The inception of the first tripartite system of authority was established. This system streamlined Commonwealth funds to State initiatives by duly appointing Community Council Chairs with State Service Responsibilities under the **1986 Queensland Community Services Torres Strait Islander Act (1986 TSI Act)** as board members on a Commonwealth Statutory Authority. Initially as ATSIC Regional Councils, who later became the Torres Strait Regional Authority (TSRA) Board under a complementary Federal **ATSI Act** of Parliament in 2005.

The MABO High Court Finding in 1992 confirmed Native Title over Land to Traditional Owners and a recent High Court Decision now also recognises our Native Title Rights and Interest over our Sea Country under Australia Law which provides more emphasis and opportunity to redefine our Rights of our region in the Assembly. In the Torres Strait Sea Claim, the High Court recognised that the Traditional Owners have a traditional and legal right to take the marine resources and use for any purpose including the right to take for trade and commerce.

The Island Council lost their State Government functions although a precedent has been clearly set and replaced with Local Government mainstream municipality functions topped up with subsidies with the inception of **2009 Local Government Act Indigenous Councils**.

Moving to Assembly means a greater level of autonomy to discharge local, State and Commonwealth powers in one governing entity that is appropriately resourced for best practice and pursue excellence.

This is evident in principles of our Special and Unique Ailan Kastom that is essentially our Kod System which is now commonly recognised by Australia Judicial and Legislative System as our Inalienable Right.

## PREFERRED OPTION

Assembling one democratically elected REGIONAL GOVERNMENT for the Torres Strait and Northern Peninsula Area by virtue of a Special Legislation with concurring Statutory Powers, Function and Resources of the Commonwealth and State is in compliance with Recommendation 10 of the *New Deal Report House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs* tabled in Parliament in 1997.

### Key Principles

- Body of Joint Authority to be created under Special Legislation.
- Local, State and Commonwealth Government Powers, Functions, Resources conferred upon this Body.
- Members to absorb Discretionary Powers.
- Retain all Public Sector Funding to be devolved to its administration in accordance with its legislative responsibility.
- Streamline Duplication and retain Savings to be redirected in areas of need to “Close the Gap”.

This new Body of Authority will capture our Australian Citizenship and equally recognise the Rights of Torres Islander and Aboriginal people in accordance with United Nations *Universal Declaration of Human Rights Article 3* ‘Everyone has the right to Life, liberty and security of Person’ and other corresponding articles of the United Nations Conventions. Currently TSRA represent the Torres Strait and the Northern Peninsula Area (NPA) on the Australian Delegation at United Nations.

- Representation of Local Special Need and Funding Allocation
- Improved access to services and efficiency of public expenditure
- Increased transparency and eliminate duplication
- Improve effectiveness and efficiency of essential services
- Increase employment and economic independence

Furthermore, the intent to establish a Territory Government is an integral part of the continued dialogue of our Leaders which involves but is not limited to:

1. Special Territory Status
2. Progress Regional Assembly in as a special Commonwealth Territory under the 1985 Torres Strait Treaty.
3. Coordination, management of International, National and Local Jurisdictions powers and responsibilities as a Special Territory of the Commonwealth.
4. Direct Line Appropriation to Budgetary Process based on Functions and Responsibilities of a Non Governing Special Territorial Jurisdictional.
5. Recognised Special Needs and Culture of Torres Strait Islander and Aboriginal People residing in a Treaty Zone.

## STATUS

The United Nations Declaration of Indigenous Rights, 1985 Torres Strait Treaty and 2005 ATSI Act combined provide opportunities to establish an Assembly with Joint Statutory powers occupying a special Commonwealth Torres Strait Territory recognising both domestic and international obligations.

## OBJECTIVE

The objectives in the **Section 3 ATSI Act 2005** are in recognition of the past dispossession and dispersal of the Torres Strait Islander and Aboriginal peoples and their present disadvantaged position in Australian society:

- (a) to ensure maximum participation of Torres Strait Islanders and Aboriginal persons in the formulation and implementation of government policies that affect them;
- (b) to promote the development of self management and self sufficiency among Torres Strait Islanders and Aboriginal persons;
- (c) to further the economic, social and cultural development of Torres Strait Islanders and Aboriginal persons; and
- (d) to ensure coordination in the formulation and implementation of policies affecting Torres Strait Islanders and Aboriginal persons by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Torres Strait Islander and Aboriginal residents.

## PRINCIPLES

The ***United Nation Declaration of Indigenous Rights*** covers all areas of human rights as they relate to Indigenous peoples. This includes the fundamental and foundational human rights of Indigenous peoples, which can be categorised into four key principles:

- self-determination
- participation in decision-making
- respect for and protection of culture
- equality and non-discrimination

These set of rights are applicable to the overall structure, functions, systems and procedures of the assembly and can subsequently be used to inform the development of the organisation with special Commonwealth Departmental Authority in accordance with **Section 142AA(1) ATSI Act** absorbing and translating functions of Local, State and Commonwealth Governments.

Special attention must be given to Recognition and Maintenance of our special and unique Ailan Kastom of Torres Strait Islander that take into consideration Aboriginal Culture of First Nation Peoples living in the Torres Strait in accordance **Section 142A(1)(a) ATSI Act** at all time during the transition to an Assembly.

## CATEGORY

1. United Nation Convention and International Treaties obligations recognising Torres Strait Islanders and Aboriginal First Nation Peoples Rights to be vested in the Assembly.
2. Judicial rulings of the High Court on the continued existence and recognition of Native Title Rights and Interests to be vested in the Assembly.
3. The Commonwealth function that can be formally transferred to the Assembly is finance and policy plus the coordination and monitoring of current Commonwealth agencies in the Torres Strait.
4. The State Government function transferrable to the Assembly is in areas of service delivery of state agencies operating in the Torres Strait.
5. The Local Government municipality function to be vested in the Assembly.

## TRANSITION

The Commonwealth and Queensland Government released a joint response in June 1998 to support the report inclusive of a number of recommendations to move to an assembly. The TSRA Board formally advise the State and Commonwealth Government under **Section 142E(2) ATSI Act** of its Policy Decision to move to an Assembly and seek the State and Commonwealth commitment to transition relevant Departmental Functions to a joint Statutory Agency.

The Commonwealth of Australia **ATSI Act 2005** merges the Right of Torres Strait Islanders under **Article 5 United Nations Declaration on Indigenous Right** to be executed under **Section 142 A(1)(a) ATSI Act** in the operations of the Assembly. In that the Prime Minister can confer Departmental Function on TSRA to further the Social, Economic and Cultural Development of Torres Strait Islander, or Aboriginal People living in the Torres Strait.

### PHASE 1 - Good Governance

Good Corporate Governance is achievable in better aligning discretionary powers of the Board with its Statutory Obligation to effectively discharge Commonwealth Government responsibilities according to the Act.

Consolidate the Board's Powers and align the administration Delegations Structure to enable the Board the capacity to make policy decision and discharge its powers according to respective State and Commonwealth Laws. The Board's authority in its current form have discretionary powers that can be enhanced accordingly under **Section 142B ATSI Act** that gives the Minister powers to approve performance of functions conferred on TSRA by State or an internal territory laws.

The TSRA is able to execute its powers to perform all its functions under **Section 142B ATSI Act** Powers of TSRA (including functions conferred on the Authority by the Minister).

The Authority structural alignment and corresponding powers to the board to ensure good governance can be determined by the Minister under **Section 142R Constitution of Torres Strait Regional Authority (TSRA)** to ensure the Board such discretionary powers to perform these functions effectively.

These powers will enable TSRA capability to preside over both State and Commonwealth functions including the setting of local policies directions, receive state and commonwealth funds, coordinate performance and outcomes of the public sector programs and monitoring and evaluation of standards, practices and systems of all commonwealth and state services operating within the Torres Strait region.

The new policy function will need to be scoped and developed in a business and operational plan that will inform the restructure of the Assembly to take on the coordination of all tiers of Government policy function and alignment of their performance desirable outcomes.

This process can be in place to commence operating in the next financial year 2019/20.

## PHASE 2 - Joint Statutory Agency

A Joint Statutory Agency will have carriage of responsibilities of Functions of Local, State and Commonwealth Government, incorporation of judicial rulings on the legal recognition of Native Title Rights and Interests, International Treaty and Conventions Obligations directly affecting Torres Strait.

The formation of Regional Assembly with joint statutory powers and functions of Local, State and Commonwealth Governments replacing the Board will form the basis of a new Commonwealth Complementary Legislation that will repeal the **ATSI Act 2005** to be in place 2020/2021.

Provision in the current **ATSI Act 2005** was written to compliment the State of **Queensland Torres Strait Islander Community Services Act 1984**. This Act divests State Government functions for management of essential services and land use to the Island Coordinating Council. Each Island Community Council Chair previously sat as duly appointed Members of the TSRA Board under the Commonwealth **ATSI Act 2005**.

1. The dual responsibility assigned to the Council Chair as member of the Island Coordinating Council with responsibilities for management of state government services under State Laws and as member of a commonwealth statutory board in charge of divesting commonwealth program funds, creates a precedent for modelling a system of how state and commonwealth functions would operate as one joint statutory agency.

International obligations under the *Torres Strait Treaty 1975* and other United Nations Covenants and Conventions can be performed under **Section 142C (4) ATSI Act** that also set a precedent for current powers vested in the Commonwealth authority to be exercised in and out of Australia.

1. This would include the establishment of International Affairs function to service obligations required under the *Torres Strait Treaty 1975* and other United Nations Covenant, International Convention on the Elimination of All Forms of Racial Discrimination, World Intellectual Property Organization etc.

2. The Treaty also provides protection for Customary Right and Interest of Traditional Inhabitant living under different jurisdiction defined by the protected zone of the Treaty.

Translation of the High Court Finding that has implication for Native Title Rights and Interest in the Torres Strait is still pending.

1. Whilst the High Court found in favour of Native Title Rights including the right to take and use marine resources for trade and commercial purposes, these Right and Interests have not been incorporated into and have not been formally acknowledged in the Treaty definition of Traditional Inhabitant.

Concurrent international, national, state and local government events and reforms informing the rights and interest of Torres Strait Islanders and Aboriginal First Nation peoples in the Torres Strait now exceed the capacity of governments' multi-jurisdiction approach.

1. The anomalies are excessive and the immediate cost to rectify the discrepancies outweigh the cost of implementing bad practices but over the long run, the growth needed to build on poor ineffective systems and procedures to redress bad practices will continue to increase.
2. The alternative is to have one joint statutory authority in a Regional Assembly with Local Government, State and Commonwealth functions vested in it under a new complementary act that recognised the separation of Local, State and Commonwealth Authority powers in performing its functions.

The process of legislative reform will build on Phase 1 in the transition to a single entity assembling all the functions of Local, State and Commonwealth in a Regional Assembly created by a complementary Federal Act of Parliament repealing the **2005 ATSI Act** that takes effect in 2020.

The awards of the TSRA electoral boundaries shadow the international border communities of Saibai, Boigu and Dauan to the north and Seisia and Bamaga to the south in **Article 3** of the *Torres Strait Treaty's* Territory. The Treaty creates a Commonwealth Torres Strait Zone for the purpose of administering bilateral arrangements in the Torres Strait between Papua New Guinea and Australia citing the existence of special Commonwealth Territorial boundaries complementing domestic laws and traditional rights of practices.

## MANDATE

The right to Greater Autonomy are predicated on critical initiatives that legally, political, administratively endorses Torres Strait Regional Assembly.

### Community

The Leaders Forum was hosted by the Coalition Mayor Pedro Stephen of Torres Shire Council (TSC), Mayor Fred Gela of Torres Strait Island Regional Council (TSIRC), Mr Joseph Elu the Chair of Torres Strait Regional Authority (TSRA) and Mayor Bernard Charlie of Northern Peninsula Area Regional Council (NPARC) who formed the Executive. Invitations were extended to Hon. Member for Cook David Kempton MLA and Hon. Member for Leichhardt Warren Entsch MLA who passed on their apologies.

This body of work is developed around the Ethical and Moral Obligations of the Commonwealth of Australia and the State of Queensland to introduce a cohesive stable Government Structure that afford the Torres Strait Islander and Aboriginal peoples of Torres Strait and Northern Peninsula Area (NPA) an equitable standard of living enjoyed by the average Australian. Australian Socio-Economic Indexes for Area (SEIFA) places Torres Strait and NPA in the High Percentile of Disadvantage Socio-Economic Group with Third World Health Status despite all the State and Commonwealth investments into the region. The worsening of this trend necessitates a whole of Torres Strait and NPA governance approach to collectively produce a model of Good Government with State and Commonwealth Powers, Function and Resources conferred upon it to effectively preside over the Affairs of all constituents in Torres Strait and NPA. An effective body of authority that can redress poor social determinants, better manage public sector resources and control public expenditure. Most importantly improve the longevity and quality of life in this region.

Three models were proposed by the Executives to bring about greater measure of transparency and accountability to both the Constituents and Government. Firstly an Assembly, made up of all four governing entities to form one Government Body that has Local, State and Commonwealth Functions conferred upon it with one qualification: not to be misconstrued as a Super Council. The second option is along the principle of realigning the Electoral Boundaries in establishing Northern Cape and Torres Electorate and finally Transition to a Territory Status.

### State and Commonwealth Government

The '*TORRES STRAIT ISLANDERS: A NEW DEAL A Report on Greater Autonomy for Torres Strait Islanders 1997*' report was tabled on the 25<sup>th</sup> August 1997 at the 38th Parliament

(May 1996 - August 1998) Standing Committee on Aboriginal and Torres Strait Islander Affairs. This report explored the desire and viability of regional autonomy that highlighted the Regional Assembly establishment would facilitate this transition, as outlined in Chapter 4 of the report:

- *Chapter 4 – A Regional Assembly*  
*The report identified the Regional Assembly as a potential single institution representing both Commonwealth and State statutory representation, functions and powers for the Torres Strait region.*

The Commonwealth and Queensland Government released a joint response in June 1998 in support of the report inclusive of a number of recommendations. The first recommendation supported the transition towards a Regional Assembly as outlined below:

- *Recommendation 1 - The Committee recommends that the Commonwealth Government negotiate the establishment of a joint statutory agency (the 'Torres Strait Regional Assembly') with the Queensland Government to represent all residents of the Torres Strait area and to replace the Island Coordinating Council, the Torres Strait Regional Authority and the Torres Shire Council.*

This joint recommendation highlights that this process would require Departmental functions, systems and procedures of the Commonwealth, State and Local Government to be vested in the Assembly complementary to the jurisdiction of the Torres Strait Special Commonwealth Territory specified in the *Torres Strait Treaty 1975* and all its enduring powers.

The Commonwealth *ATSI Act 2005* contains functions and powers that are currently within TSRA which will facilitate transition of Departmental functions from both State and Commonwealth Government to be vested in a Regional Assembly.

## United Nations

### DECLARATION OF INDIGENOUS RIGHT 1979

In 2009, the Australian Government adopted the ***United Nations Declaration of the Indigenous Rights*** as a framework for better recognising and protecting the rights of Torres Strait Islander and Aboriginal Australians. This declaration emphasis upon Indigenous people pursuing development that encompass their right to self-determination as outlined in Article 4.

- **Article 4** - *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.* This article item highlights governance development that will enable a positive shift in Social, Economical, Cultural and Developmental Policy and Programs currently held by other mainstream Commonwealth and State Government Statutes.

## FUTURE DIRECTION

Over the years, new legislation purports to create opportunities towards reinstating our Rights that have been taken away from Torres Strait Islander and Aboriginal people since 1770 yet we are no closer to realising a future that is clear of past injustice. That is if new legislation based on old policies do not take in to account the consequences of the diminishing rights of Australia First Nation Peoples.

Whilst moving to Assembly offers us a single line of accountability, making the powers to be more accountable is without exception an integral part of transparency and public accountability.

Shared responsibility comes with shared liability as well as shared benefits and ultimately shared accountability. And this can only be manifested under the realms of progressive justice not regressive legislations.

In conclusion, hopefully our children will never have to repeat our struggle to safeguard their children from suffering the same fate our parents strive to protect us against.

## HISTORY OF LEGISLATIVE REFORM

*1903 Local Government Act*

*1939 QLD Torres Strait Island Act*

*1939 QLD Aboriginal Act*

*1965 QLD Aboriginal and Torres Strait Islander Act*

*1984 QLD Community Services Act*

*1989 Commonwealth Aboriginal and Torres Strait Islander Commission Act*

*1985 Torres Strait Treaty*

*1993 Local Government Act*

*1993 Amendment ATSIC Act to set up the Torres Strait Regional Authority*

*2005 Aboriginal and Torres Strait Islander Act TSRA*

*2009 Local Government Act Indigenous Councils*