

Submission
to the
Senate Select Committee on the
Administration of Indigenous Affairs

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Introduction

This submission is from the national body of Australians for Native Title and Reconciliation (ANTaR).

ANTaR is an independent, national, mainly non-Indigenous organisation that works in close partnership with Indigenous leaders and communities to achieve justice for Indigenous Australians including respect for their rights and cultures, and a genuine process of reconciliation that fully addresses matters of unfinished business.

Members of ANTaR's national association include state and territory ANTaR's and a number of national peak non-government organisations.¹

ANTaR is one of only two national organisations whose work is focused on reconciliation, the other being Reconciliation Australia.

As a mainly non-Indigenous organisation, ANTaR sees its role within the current inquiry as supporting appropriate processes and principles which should guide and be supported by the Committee in its deliberations, rather than to support or recommend specific arrangements or models for Indigenous representation and relations with governments.

ANTaR contends, as it did in its submission to the recent review of ATSIC, "that it is primarily a matter for Indigenous people themselves to determine the reform of ATSIC" via a process of negotiation with Government.²

However, given the refusal of the Government to enter into such negotiation the current inquiry by the Senate Select Committee provides a vital avenue for obtaining broad input into the issues under consideration, particularly from Indigenous people.

Summary and Recommendations

Australians for Native Title and Reconciliation (ANTaR) welcomes the opportunity to respond to the Committee's inquiry into the administration of Indigenous affairs, including the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004*.

ANTaR is deeply concerned about the Government's proposed legislation and related arrangements to return Indigenous affairs administration to mainstream departments and agencies.

The Government's proposals amount to the abandonment, without consultation and on spurious and contrived grounds, of three decades of policy development towards achieving full and effective Indigenous participation in decision-making affecting their lives. In particular ANTaR strongly opposes the Government's proposals on the basis that the changes:

- breach Australia's international obligations to its Indigenous Peoples, both as citizens and as First Peoples;
- do not have the informed consent of Indigenous Australians;
- contravene the findings of the Government's own review and those of other inquiries and reports;
- represent an inappropriate and failed model for addressing Indigenous disadvantage.

These fundamental objections expose the Government's proposals as politically-motivated and part of a pattern of Government action focused on thwarting the aspirations of Indigenous Australians to gain recognition of their rights and identity as Indigenous peoples. Such a conclusion is reinforced by the fact that the proposals are completely out of step with experience gained over the past three decades with respect to Indigenous affairs policy.

As with the issue of reconciliation, the Government's primary objectives appear to be to undermine political bipartisanship on the issue, to polarise community opinion, and attempt to force a reversal in the direction of Indigenous affairs policy.

The Government's dishonest and contradictory justification of its proposals will ensure that these changes will be rejected and strongly opposed, particularly by Indigenous people. The changes are a recipe for ongoing conflict in Indigenous affairs.

Like King Canute, John Howard will ultimately fail to turn back the tide of determination that exists to achieve justice for Indigenous Australians, including their right to a self-determined future.

The immediate and pressing issues before the Committee are the potential loss of a national representative Indigenous voice, and the avoidable damage and suffering to Indigenous lives and communities that will be the inevitable result of the Government's proposals.

This submission offers a number of recommendations to the Committee, detailed on the following page. The recommendations call for the rejection of the *Aboriginal and Torres Strait Islander Commission Bill 2004*, the retaining of an independent national Indigenous representative body, and for action to ensure appropriate participation, control and accountability with respect to Indigenous policy and service delivery. A recommendation also addresses the need for secure recognition as Indigenous peoples. Further explanation of ANTaR's concerns on which these recommendations are based is provided in the following sections.

Recommendations

Recommendation 1:

That the Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 should be rejected.

Recommendation 2:

That the Committee should strongly endorse the need for a sustainable, independent National Indigenous Representative Body that:

- *reflects the aspirations and values of Aboriginal and Torres Strait Islander peoples;*
- *is open, transparent and accountable to the Aboriginal & Torres Strait Islander peoples;*
- *is achieved with the informed consent of Indigenous peoples through inclusive processes that acknowledge their diversity and traditional authority structures.*

Recommendation 3:

That the Committee strongly endorses and reports on the need for governments, mainstream departments and agencies to be publicly accountable for the provision of services to Indigenous people and that such accountability must include proper benchmarks, rigorous monitoring frameworks and be directly exercisable by Indigenous people.

Recommendation 4:

That the Committee makes recommendation on the need to provide secure recognition as Indigenous peoples, including Constitutional recognition, to ensure that Indigenous rights and interests are protected from change without their consent.

Recommendation 5:

That the Committee examines and reports on alternative options for providing Indigenous participation and control in the delivery of services to the Indigenous community.

Recommendation 6:

That the Committee recommends that ATSIC's assets be preserved for transfer to a replacement national Indigenous representative body.

Background to the recommendations

1. International human rights obligations

Australia has an obligation to respect and protect the right of Aboriginal and Torres Strait Islander peoples to self-determination, human rights, and First Peoples' status and the inherent rights that flow from that status.

Australia has adopted a number of international treaties and obligations regarding the promotion and protection of these rights, including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The current bill and related changes will breach these obligations in a number of respects, particularly relating to the effective participation of Indigenous people in policy and decision-making affecting their lives.

The provision of independent Indigenous representation and participation in decision-making through the ATSIC structure represents a 'special measure' under Article 1(4) of ICERD for 'securing adequate advancement' of Indigenous Australians in the context of the significant, systemic inequalities and disadvantage they face.

ATSIC also represents a measure towards providing the right of self-determination to Indigenous peoples, as protected under Article 1 of the ICCPR; as well as rights to the enjoyment of culture and to the provision of services which accommodate the special needs of Indigenous people, as protected under these instruments.

Obligations under the ICERD also require that State parties ensure that 'no decisions directly relating to [indigenous peoples'] rights and interests are taken without their informed consent'.³

The decision to abolish ATSIC and replace it with an appointed advisory body therefore removes significant measures taken by Australia to meet its obligations to Indigenous peoples under international instruments, not only without their informed consent, but in the context of strong Indigenous opposition to the changes.

There is good reason to suggest that such arguments will be rejected by the Government. The Howard Government has been found by the UN in the past to be in breach of its International human rights obligations, most notably in relation to native title legislation and mandatory sentencing laws, but refused to accept the UN's findings.⁴ It is also opposed to the concept of self-determination, and has opposed use of the term in UN instruments, such as the Draft Declaration on the Rights of Indigenous Peoples.

In the case of the Government ignoring or breaching its international obligations, the parliament, in this instance through the Senate, must hold the Government accountable.

The current situation once again draws attention to an important broader issue facing Indigenous Australians and indeed, the nation: that **without secure recognition as Indigenous peoples, including Constitutional recognition, Indigenous Australians will remain vulnerable to the summary erosion of their rights and entitlements by governments hostile to their interests.**

The Committee is urged to make recommendations towards rectifying this significant deficiency in Australia's legal and constitutional arrangements.

2. Representation and self-determination

An important aspect of the right to self-determination is the right of Indigenous Peoples to determine who represents them at all levels. Indigenous people alone have the right to decide who should represent Indigenous people. No Government-appointed advisory structure can legitimately have that role.

The principle of effective participation enshrined in the various international instruments to which Australia is a signatory includes that Indigenous people must be able to effectively represent their views on policy, program and funding in any and all areas that impact on their lives. Effective participation is essential to the successful delivery of services and programs to Indigenous people (see 4 and 5 below).

In reducing Indigenous involvement to merely an advisory role, the Government will effectively remove the right of Indigenous people to meaningful involvement in decision-making affecting their lives and communities.

Importantly, the Government's own review of ATSIC endorsed the continuing need for elected Indigenous representation at international, national and regional levels. It found no compelling evidence to support the Government's conclusions that either ATSIC or the concept of Indigenous representation should be abolished.

The Government itself is inconsistent in its justification for the changes, which will introduce a significant disparity in the rights enjoyed by different sectors of the Indigenous community in Australia. In announcing the Government's decision to abolish ATSIC, Prime Minister Howard stated that *"We believe that the experiment in elected representation for indigenous people has been a failure"*.⁵ Yet the Government has made no move to abolish the Torres Strait Regional Authority (TSRA), which, like ATSIC, consists of an elected arm and an administrative arm and which has as its vision *"to empower the Torres Strait Islander and Aboriginal people living in the region to determine their own affairs..."*. The TSRA's primary goal in achieving that vision is to *"gain recognition of our rights, customs and identity as indigenous peoples"*.⁶

The government's position is therefore both contradictory and discriminatory. We now contemplate the absurd and unacceptable situation where one group of Indigenous people in Australia will have an elected representative body and power to determine their own affairs, while those same rights are to be totally denied to the majority of Indigenous Australians. Such an outcome cannot be justified.

3. Need for a National Indigenous representative structure

ANTaR believes that ATSIC's structure should be reformed to address its acknowledged deficiencies based on the recently concluded review process. However, if this option is rejected, priority must be given to establishing a new independent National Indigenous Representative Body. The structure of this body needs to address deficiencies outlined in the Review including an increased focus on regional and local roles, and issues of transparency and accountability.

The independent National Indigenous Representative Body should:

- reflect the aspirations and values of Aboriginal and Torres Strait Islander peoples;
- be open, transparent and accountable to the Aboriginal & Torres Strait Islander peoples;
- be achieved with the informed consent of Indigenous peoples through inclusive processes that acknowledge their diversity and traditional authority structures.

This body should have primary roles in representation and advocacy, be the principal source of Indigenous policy advice to government, and have control over the provision of Indigenous-specific services.

The details of the model and structure for a national Indigenous representative body are matters for negotiation with Indigenous peoples and should only be determined on the basis of their informed consent.

It is clear that regardless of the outcome of the next election, Indigenous Australians will not abandon their aspirations for a self-determined future. The Labor Opposition has committed itself to negotiate with Indigenous Australians a replacement national Indigenous representative body with enhanced regional autonomy. A way must therefore be found to convince the Coalition parties, whether in the short or long term, of the absolute necessity for and inevitability of such a body in the architecture of the relationship between Indigenous Australians and the nation.

4. Reforming administration of Indigenous affairs policy

Addressing the current unacceptably high levels of disadvantage faced by Indigenous Australians and providing a sound economic base for the future development of Indigenous communities should be national priorities.

However, these should not be seen as the sole objectives of Indigenous affairs policy, as the Government has sought to suggest with its 'practical reconciliation' policy approach. The Government has sought by sleight-of-hand to suggest that so-called 'practical' issues and 'symbolic' or rights issues are mutually exclusive. They are not and we should not be fooled by such a false dichotomy.

Experience both in Australia and overseas has shown that not only is the 'practical' versus 'symbolic' divide a false dichotomy, but that 'practical' measures in the absence of parallel action on rights issues are counter-productive.

In Australia, a recent study by ANU's Centre for Aboriginal Economic Policy Research (CAEPR)⁷ compared the performance of the Keating and Howard Governments on improving the well-being of Indigenous Australians both in absolute terms and relative to non-Indigenous Australians. The Keating Government pursued parallel 'rights' and 'practical' policies while the Howard Government's emphasis was entirely on 'practical reconciliation' policies. The results showed little difference in 'practical' outcomes after seven years of 'practical reconciliation' policies but a further widening of the gap in well-being between Indigenous and non-Indigenous Australians.

The Commonwealth Grants Commission (CGC) report on Indigenous Funding 2001⁸ and the Productivity Commission's Review of Government Service Provision⁹ have shown that Indigenous people are poorly served by mainstream services. The CGC report highlighted the problems in mainstream service-delivery caused by our complex federal system and the need for "the full and effective participation in decisions affecting funding distribution and service delivery".

Experience from overseas echoes these findings. The US Harvard Project on American Indian Economic Development found that the most important factors in successful economic and social development of Indigenous communities have included the effective exercise of sovereignty in making their own decisions, and capable and culturally appropriate Indigenous institutions of governance.¹⁰

In other words, the Howard Government intends to abandon one of the key requirements for ensuring improved outcomes for Indigenous people – the ability to exercise decision-making

via culturally-appropriate Indigenous institutions. It is little wonder that ‘practical reconciliation’ has been a failure.

Having ignored all such evidence the Government now seeks to *extend* its failed ‘practical reconciliation’ policies by returning all Indigenous programs and service-delivery to mainstream departments and agencies. Its justifications have raised a further false dichotomy – between mainstream *delivery* and Indigenous *control* of services – which requires comment here.

The Government’s unfair blaming of ATSIC for the failure to address Indigenous disadvantage has been critical to its argument that Indigenous control of policy and service delivery should be abandoned in favour of mainstream control. This enabled Prime Minister Howard to argue, as reported in *The Courier Mail* on April 1 that:

... the way forward for indigenous Australia was to deliver programs and services to disadvantaged communities in "a mainstream way", rather than through a separate body operating at arm's length from the government.

Howard’s target is the evil of ‘separatism’,¹¹ however such arguments have also had the effect of suggesting that mainstream *delivery* and Indigenous *control* are mutually exclusive. They are not.

Both mainstream and Indigenous-specific programs are required to meet the needs of Indigenous Australians. It is not an ‘either’ ‘or’ choice, but one of how to appropriately develop and deliver such services. Mainstream departments and agencies can and should deliver Indigenous-specific services where appropriate as well as cater for Indigenous people in mainstream programs. However, the development and delivery of mainstream services must be responsive to Indigenous community and cultural needs. And the way to do this in order to achieve effective outcomes, as indicated above, is to provide effective Indigenous participation and control. It is here that an independent National Indigenous Representative Body has an important role.

For example, Professor Larissa Behrendt has proposed that such a body could be funded to outsource service delivery programs to mainstream and other agencies. This would have the benefit of freeing the body to concentrate more effectively on policy-making functions and to direct and monitor the delivery of programs.¹²

Such options have already been rejected in advance by the Government, having decided on spurious evidence that Indigenous control is unworkable. However, the Committee is strongly urged to canvass and report on alternative options for providing Indigenous participation and control in the delivery of services to the Indigenous community.

The need for a national Indigenous representative body with control over Indigenous service delivery is not inconsistent with current processes to improve the benchmarking, coordination and monitoring of mainstream service delivery, particularly in addressing disadvantage, such as work of the Council of Australian Governments (COAG) and the Productivity Commission.

However, further attention needs to be given to ensuring effective Indigenous participation in such processes. Options for achieving this should be canvassed by the Committee. Recent suggestions have included making the national Indigenous representative body a member of COAG or providing for it to be represented at COAG meetings. A further suggestion has been that there could be an ‘Indigenous estimates’ process (see below).

ANTaR does not propose to recommend particular models to the Committee as we regard that such details should be the product of negotiations with Indigenous people themselves.

It should also be noted that the current initiatives occurring through COAG on reporting, benchmarking, monitoring and coordination, including the whole-of-government community trials, are still in their early stages and prospects for effective outcomes remain uncertain. For example, the *2003 Social Justice Report* noted in relation to the Ministerial Council Action Plans which are central to COAG's commitment to an integrated framework for addressing disadvantage, that "Even the most sophisticated of these action plans...does not meet the attributes necessary for adequate benchmarking".¹³ Increased priority on such initiatives is required, particularly in relation to Indigenous participation.

5. Accountability

Governments, mainstream departments and agencies must be publicly accountable for the provision of services to Indigenous people. The lack of accountability of governments, mainstream departments and agencies in the delivery of services to Indigenous people has been identified by numerous inquiries as a significant impediment to improving service delivery and outcomes for Indigenous Australians.

This lack of accountability has also enabled governments to scapegoat ATSIC as responsible for the failure to improve outcomes for Indigenous Australians even though ATSIC only controlled 15% of Indigenous expenditure, with governments controlling the remaining 85%, delivered through mainstream departments and agencies.

To be effective, accountability mechanisms must include the development of proper benchmarks, rigorous monitoring frameworks and the ability for Indigenous people to exercise such accountability.

The Government recently put to ANTaR that the current Senate estimates process provides sufficient opportunity for Indigenous people to hold government's accountable, stating that "...Indigenous people can have their concerns addressed through contacting the relevant Minister or members of the [Estimates] Committee should they have issues or questions". The Government also stated that the proposed Government-appointed National Indigenous Council would also have a role in monitoring performance.¹⁴

ANTaR regards the Government's position as being inadequate to ensure appropriate accountability.

6. ATSIC's assets

The establishment of a new National Indigenous Representative Body will require the provision of resources and assets and it is therefore important that the current assets of ATSIC be preserved for transfer to the new body. If ATSIC's current assets are disbursed to mainstream departments it will be more difficult to reinstate them at a later date.

The Committee should recommend that the current assets of ATSIC be preserved for transfer to the replacement representative body.

Endnotes

¹ See ANTaR's website for details: [Http://www.antar.org.au](http://www.antar.org.au)

² Comments of the ATSIC Review Panel Discussion Paper, ANTaR, August 2003. Available online at <http://www.antar.org.au>.

³ *General Recommendation XXIII (51) concerning Indigenous Peoples*. 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para 3.

⁴ See <http://www.antar.org.au/cerd.html>

⁵ *The Australian*, 16 April 2004. <http://lists.riseup.net/www/arc/antar-news/2004-04/msg00069.html>

⁶ See <http://www.tsra.gov.au/www/index.cfm>. Accessed 5 August 2004

⁷ *Monitoring 'practical' reconciliation: Evidence from the reconciliation decade, 1991-2001*. J.C. Altman and B.H. Hunter, Discussion Paper 254, Centre for Aboriginal Economic Policy Research, ANU, Canberra.

⁸ Commonwealth Grants Commission 2001, *Report on Indigenous Funding 2001*. Canberra.

⁹ SCRGSP (Steering Committee for the Review of Government Service Provision) 2003, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra.

¹⁰ See <http://www.ksg.harvard.edu/hpaied/overview.htm>.

¹¹ Howard has consistently linked criticism of 'separatism' with the equally deliberately misleading argument of 'equal rights for all' which ignores the international standard of 'substantive equality'. In the same interview Howard commented: "I think the real alternative is to treat everybody equally and perhaps maintain programs that look out for disadvantage where that disadvantage exists" (*Courier Mail* 1 April 2004). This appears to demonstrate only qualified support for special measures to address disadvantage.

¹² Prof Larissa Behrendt, 2003. 'ATSIC Bashing', *Arena Magazine*, Vol 67, Oct-Nov, pp27-29.

¹³ *Social Justice Report 2003*, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC. p38.

¹⁴ Letter from the Office of the Minister for Immigration and Multicultural and Indigenous Affairs, 12 July 2004. Response to ANTaR on questions relating to Indigenous affairs policy.