ANNEXURE to ANTaR's submission to the

Senate Select Committee on the

Administration of Indigenous Affairs:

Extract from

Australians for Native Title and Reconciliation (ANTaR)

Submission to the Committee on the

Elimination of Racial Discrimination (CERD)

January 2005, pp15-22.

2 February 2005

Abolition of Aboriginal and Torres Strait Islander Commission (ATSIC)

In April 2004 the Federal Government announced that the Aboriginal and Torres Strait Islander Commission (ATSIC) – a body whose establishment in 1991 was welcomed by the [UN] CERD Committee[1] – would be abolished. As stated in the [Australian] NGOs' submission [to CERD][2], this breaches Article 5 (c) of ICERD by depriving Indigenous Australians of proper representation through the election of their own representatives and greatly reduces Indigenous participation in governance and decision-making. It is also a breach of Article 2 (1) (c) by introducing racially discriminatory legislation and policy changes to replace ATSIC.

The Government announced that it will also abolish the ATSIC Regional Councils as of 1 July 2005, thereby removing Indigenous representation and policy coordination at the regional level.

In announcing the Government's decision, Prime Minister Howard stated that "We believe that the experiment in elected representation for Indigenous people has been a failure", and that ATSIC had become "too preoccupied with what might loosely be called symbolic issues and too little concerned with delivering real outcomes for indigenous people".[3]

In ATSIC's place the Federal Government has established a government-appointed advisory body, the National Indigenous Council, which will meet four times a year and which has no legislative backing or defined authority.

There are many problems with the manner in which the Government has made these changes and with the nature of the changes themselves.

Obligations under the ICERD require that State parties ensure that 'no decisions directly relating to [indigenous peoples'] rights and interests are taken without their informed consent'.[4] Not only was the decision made without Indigenous consultation and consent, it was done in the context of strong Indigenous opposition.

Leaked Cabinet documents[5] also indicated that the changes were decided before the announcement to abolish ATSIC was made and long before the setting up of the advisory National Indigenous Council – the Government's alternative to ATSIC for obtaining advice from Indigenous people – indicating there was no intention on the Government's part to consult with Indigenous people in relation to the changes.

The decision to abolish ATSIC was not made on the basis of evidence either of the unworkability of ATSIC or that the proposed changes will be effective in achieving better service delivery to Indigenous people. In fact available evidence points to the contrary.

As stated in the NGO submission, abolishing ATSIC contradicts the government's own findings in its Review of ATSIC in November 2003 that:

> *"ATSIC should be the primary vehicle to represent Aboriginal and Torres Strait Island peoples' views to all levels of government and to be an agent for positive change in the development of policy and progress to advance the interests of Aboriginal and Torres Strait Island Australians."*[6]

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[1] The UN Committee on the Elimination of Racial Discrimination (CERD), which has oversight of the International Convention on the Elimination of Racial Discrimination (ICERD), to which Australia is a signatory.
[2] Australian Non-governmental Organisations' Submission to the Committee on the Elimination of Racial Discrimination, January 2005. Referred to subsequently as "the NGO submission".
[3] *The Age*, 16 April 2004. http://lists.riseup.net/www/arc/antar-news/2004-04/msg00072.html
[4] *General Recommendation XXIII (51) concerning Indigenous Peoples.* 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para 3.
[5] 'Government neglect... and we've got the letter to prove it', *National Indigenous Times*, 27 October 2004.
[6] Hannaford et al 2003, *In the Hands of the Regions – Report of the Review of the Aboriginal and Torres Strait Islander Commission*, Commonwealth of Australia, Canberra.

The *Social Justice Report* 2003,[7] and the Social Justice Commissioner's submission to the ATSIC Review team recommended an enhancement of ATSIC's power "by strengthening the scrutiny role of the national representative body over service delivery and program design by other government departments".[8] This was seen as critical in achieving the effective participation of Indigenous peoples in decision-making processes.

Most significantly, policy changes replacing ATSIC are not the result of any evidence-based process of research and analysis, underlining the ideological basis of the Government's actions.

Finally, as stated in the NGO submission (p34):

> *"the government's attempt to abolish ATSIC flies directly in the face of the CERD Committee's recommendations. The Committee expressed concern in March 2000 at the inequality experienced by Indigenous peoples in Australia and recommended that the government not institute "any action that might reduce the capacity of ATSIC to address the full range of issues regarding the Indigenous community".[9] The Committee further called upon states to "ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decision directly relating to their rights and interest are taken without their informed consent".[10]*

The problem of a lack of informed consent also applies to the Government's replacement for ATSIC, the National Indigenous Council (NIC). The Social Justice Commissioner noted that the replacement of ATSIC with the NIC "raises concerns of a lack of compliance with Australia's human rights obligations", notably Article 5 of ICERD and Article 1 of the International Covenant on Civil and Political Rights.[11] The Commissioner noted that the change *"means that the government only has to talk to select Indigenous people when it chooses to and only on issues that it wishes to engage"*, and that an advisory council *"will also be more easily sidelined by the government if it presents views which are not consistent with those of the government."*[12]

At the time of writing, the Government's Bill to abolish ATSIC's national and regional councils has been held up by the Senate which initiated an inquiry into the Bill and the administration of Indigenous affairs. However, with the Government set to take control of the Senate after 1 July 2005, the legislation is certain to pass.

The Government's actions with regard to abolishing ATSIC represent serious breaches of ICERD Articles 1 (4), 5 (a) (c) and ANTaR urges strong action by the CERD Committee in relation to Australia's international obligations.

Recommendation: ATSIC
It is recommended that the ATSIC Bill be subject to urgent review, including consultation with Indigenous peoples to achieve an outcome based on their informed consent. The Government must ensure adequate participation of Indigenous peoples in the development of laws, policies and programs effecting them, including establishing and funding adequate structures for participation in governance.

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[7] Aboriginal and Torres Strait Islander Social Justice Commissioner 2003, *Social Justice Report.* www.humanrights.gov.au/social_justice/.
[8] Aboriginal and Torres Strait Slander Social Justice Commissioner, 7 July 2004, *Submission to the Senate Select Committee on the Administration of Indigenous Affairs.* www.hreoc.gov.au/social_justice/submissions/Submission_July_2004.html.
[9] CERD/C/304/Add.101, 19/04/2000, para 11.
[10] Committee on the Elimination of Racial Discrimination, *General Recommendation XXII – Indigenous people,* 18 August 1997, UN Doc: A/52//18, annex V, para 4(d)
[11] Aboriginal and Torres Strait Islander Social Justice Commissioner, 7 July 2004, *Submission to the Senate Select Committee on the Administration of Indigenous Affairs.*
[12] Ibid.

Racial discrimination in legislation and policy

Mainstreaming of Indigenous policy and funding

The abolition of ATSIC has far reaching detrimental implications for Indigenous Australians in terms of the introduction of further racial discrimination in legislation and policy affecting Indigenous peoples, and is a breach Article 2 (1) (c) of ICERD.

As part of the process of abolishing ATSIC, the Federal government moved in 2004 to remove ATSIC's responsibility for the administration of Indigenous funding. Initially this responsibility was passed to a newly-created body, Aboriginal and Torres Strait Islander Services (ATSIS), formed from ATSIC's administrative wing. In late 2004 all Indigenous funding and programs and all of ATSIS's staff were transferred to mainstream departments.

The return to mainstream control of Indigenous funding and service delivery has introduced a number of racially discriminatory effects. Foremost is the loss of Indigenous control, representing the removal of a significant measure towards providing self-determination for Indigenous Australians.

Accompanying this has been a reduction in Indigenous employees, particularly at a senior managerial level, involved in the national administration of Indigenous affairs (see also following section). In 2002, prior to the recent changes, there were 34 senior managers employed by ATSIC, 22 of whom were Indigenous. In 2004 only 20 senior managers remained employed in Indigenous affairs administration within the Australian Public Service, only one of whom is Indigenous.[13]

This alarming reduction in Indigenous participation in Indigenous affairs administration exacerbates already serious problems resulting from the lack of cultural understanding and sensitivity of mainstream departments in the provision of services and in the administration of Indigenous-specific funding to Indigenous service-delivery organisations. It has been well-documented that Indigenous Australians access mainstream services to a much lesser degree than other Australians.[14] There are many factors involved, including racial discrimination. Returning all control to mainstream agencies will result in increased racial discrimination in the provision of services to Indigenous Australians.

Mainstream departments have proved to be unresponsive in addressing such discrimination.[15] In part this is due to the failure of Government Ministers to ensure that their departments improve mainstream service delivery to Indigenous people. For example, a leaked letter from the Minister for Indigenous Affairs to the Prime Minister revealed that despite the Prime Minister's direction to Portfolio Ministers in December 2000 to undertake a major review into how mainstream government programs could be better delivered to Indigenous communities, "almost without exception they [the Portfolio Ministers] did not".[16]

These documents also revealed the lack of any evidence base for the changes the Government was making. It is clear that the Government is acting on an ideological basis.

In addition to problems of discrimination in access to mainstream services, Indigenous service-delivery organisations now face considerable problems in dealing directly with mainstream departments in securing funding and accounting for expenditure previously sourced through ATSIC. Anecdotal evidence suggests that many Indigenous organisations have already experienced difficulties since the transfer of their programs to mainstream departments.

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[13] 'Ivory Tower: Government's whitewash of black affairs' *National Indigenous Times*, 20 January 2005.
[14] Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Commonwealth of Australia 2001.
[15] Ibid.
[16] Letter dated April 2 2003, quoted in the *National Indigenous Times*, October 27 2004.

Further negative impacts are set to accompany the Federal Government's introduction of competitive tendering for Indigenous-specific services. Portrayed to the public as a measure to ensure efficiency in the expenditure of taxpayers' money, the change introduces the potential for a reduction in the extent of Indigenous participation in and control of service delivery through the loss of Indigenous service delivery organisations and a reduction in the number of Indigenous people employed in service delivery where non-Indigenous tenderers secure contracts.

This is already happening in relation to the provision of Indigenous legal services (see NGO submission, p18-19). Currently mooted by the Federal government is the introduction of competitive tendering for CDEP funding – an Indigenous 'work-for-the-dole' scheme. The CDEP scheme, previously administered by ATSIC, operates in both urban and rural/remote areas. Particular concern has been expressed that urban CDEP groups will be taken over by mainstream employment agencies.[17]

In addition to the loss of Indigenous participation in and control of service-delivery (and hence self-determination capacity), is the likelihood that non-Indigenous service providers will lack cultural expertise and sensitivity in delivering services, further discriminating against Indigenous clients through reduced or impaired access to services. As raised in the NGO submission (p19), proposed guidelines for tenderers for the provision of Indigenous legal services place a low rating on "demonstrated capacity to provide an accessible and culturally sensitive service".

The NGO submission points to a number of negative impacts of the proposed changes with respect to Indigenous legal services, including:

- Disadvantaging Indigenous organisations by providing funding in arrears;
- Reducing 'detention in custody' to a low priority category for Indigenous people;
- Restricting access to legal services for Indigenous people on a second or further charge of a crime of violence of a similar nature. (p19)

Decreasing Indigenous employment in the Australian Public Service (APS)

A recent report[18] on employment within the Australian Public Service (APS) shows a concerning drop in the number of Indigenous people working in the APS, having dropped to a 10 year low of 2.3% in 2004. Disturbingly, the percentage of people leaving the APS who are Indigenous is more than twice this rate, at 4.9% indicating a worsening trend. Worse still, the report covers the period up to June 30 2004 and so does not take into account changes as a result of the transfer of staff from ATSIC and ATSIS to mainstream government departments. Anecdotal evidence suggests that many Indigenous public servants have chosen to leave the APS as a result of the break up of ATSIC.[19]

Reasons for the exodus include that Indigenous employees are being transferred to mainstream departments which they see as having little commitment to the Indigenous programs gained from the break up of ATSIC.[20] Anecdotal evidence also suggests that Indigenous specific selection criteria have been removed for many positions transferred to mainstream departments from ATSIC/ATSIS.[21] In addition to this, over the past two years there has been a halving of the number of Indigenous trainees entering the APS, dropping the intake to the lowest on record.[22]

This alarming situation suggests a breach of Article 5 (e) (i) of ICERD, and will have significant negative implications for the Government's policy to mainstream Indigenous policy and service delivery. It puts into serious question the Government's claim that the changes will improve the

[17] 'Aborigines claim heavier obligations than whites', *The Australian*, 29 December 2004.
[18] *State of Service Report 2003-04*, Commonwealth of Australia, 2004. http://www.apsc.gov.au/stateoftheservice/0304/#
[19] 'State of Service report backs anecdotal evidence', *National Indigenous Times*, 8 December 2004, p4.
[20] Ibid.
[21] Ibid
[22] 'Ivory Tower: Government's whitewash of black affairs', *National Indigenous Times*, 20 January 2005.

tackling of Indigenous disadvantage and represents a more than total reversal of the gains in Indigenous participation achieved under ATSIC prior to the Howard Government.

Recent comments from Indigenous leaders about mainstreaming

Senator Aden Ridgeway:
"The reality is ... that the Government is hell-bent on this ideology about mainstreaming. That is about disempowering. It's about taking away an effective national voice..."[23]

Professor Mick Dodson, former Social Justice Commissioner:
"The Government commissioned a report two years ago to try and ascertain why Indigenous people are not accessing mainstream services. And they've shelved that report. It's hidden, almost. [The report] *indicates for a whole range of reasons, including racial discrimination, as to why people don't access mainstream services. It's really a problem people don't access mainstream services. I don't see how handing over the whole box and dice to bureaucrats who've failed us in the past is going to increase the level of access. And there is this underlying assumption that everybody is accessing mainstream services now. That's just simply not true and the Government have a report to say so."*[24]

Professor Lowitja O'Donoghue, Inaugural chair ATSIC:
"Mainstreaming is not going to help that situation [lack of Indigenous representation]. *Because they're starting all over again. They haven't seen a black fella before in their lives, let alone provide sensitive services and so on that are required. We are at the crossroads. And we're not going forward, we're going backwards. And are we going to let that happen? No, we can't."*[25]

Noel Pearson, Cape York Partnerships.
"We're going to take two steps backwards and return to the old mainstreaming disaster in Aboriginal affairs...This is complete folly. We had mainstreaming long before ATSIC...and that produced failure...I think the Prime Minister is completely wrong when he assumes that mainstreaming is the solution...What we need is for Aboriginal people to take charge of their own problems."[26]

Shift in Indigenous policy focus to 'mutual obligation' and 'shared responsibility agreements'

In November 2004 the Federal government announced a further radical change in policy on delivering services to Indigenous communities, based on the principles of 'mutual obligation'. The change is a further consequence of the government's move to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC). (See above).

Mutual obligation is a policy approach originally introduced by the Federal Government in relation to mainstream welfare recipients. Contrary to the ordinary meaning of the term, in practice mutual obligation policies have been characterised by a punitive approach towards those who breach 'mutual obligation' conditions imposed by the Government. Introduction of mutual obligation in Indigenous affairs has been justified as necessary for addressing the high rate of Indigenous people on unemployment and other welfare programs.

The current focus of the government's mutual obligation policy is the creation of 'shared responsibility agreements' between individual Indigenous communities and the Federal government, in which government funding to communities is made conditional on behavioural

[23] Senator Aden Ridgeway, the only Indigenous member of Federal Parliament, speaking on SBS Television, 'Living Black Indigenous Leaders Forum', Saturday 8 January 2005.
[24] Ibid. Professor Mick Dodson is the Chairman of the Australian Indigenous Leadersip Centre, Australian National University and is a former HREOC ATSI Social Justice Commissioner.
[25] Ibid. Professor Lowitja O'Donoghue is a professorial fellow at Flinders University and was the Founding Chair of ATSIC.
[26] *The 7.30 Report*, ABC Television, 15 April 2004.

change and other commitments from the community. This approach is actually or potentially racially discriminatory in that shared responsibility agreements:

- are not being applied in relation to non-Indigenous communities and would not be regarded as appropriate by such communities;
- may exclude any guarantee of Indigenous rights or cultural understanding;
- introduce coercive and inappropriate elements to the provision of services by:
  - placing Indigenous communities in a position where they must bargain for certain rights to which they are entitled as of right both as citizens and as Indigenous peoples, and;
  - pitting under-resourced and effectively powerless local communities against the Federal government via mainstream departments. (This is also contrary to the principles of informed consent);
- include Indigenous program funding previously administered by ATSIC within an Indigenous-controlled and culturally appropriate framework.

Indigenous leaders have expressed concern over the way in which mutual obligation and shared responsibility agreements are being introduced into the Indigenous community. Their concerns include:

- the racially discriminatory nature of the agreements being proposed;
- similarities with past failed practices during the paternalistic 'native welfare' era;
- the denial of being able to make decisions about matters relevant to their own lives;
- the denial of self-determination that such agreements represent, and;
- concern that the Government is not prepared to uphold its own responsibilities to mutual obligation, particularly in relation to the provision of services, resources and infrastructure to Indigenous communities.

Concern that the Government won't uphold its own responsibilities is supported by the fact that the policy has not been accompanied by any increase in Government expenditure. Appendix 1 provides recent public comments from a number of Indigenous leaders about these issues. Senator Aden Ridgeway, Australia's only Indigenous member of Federal Parliament, has also pointed out the irony of the Government's focus on Indigenous responsibility while at the same time removing the Indigenous structures through which responsibility can be exercised:

> *"There's a huge irony here ... on the one hand* [the Government is] *trying to get Aboriginal communities to behave in a certain way and use this term 'responsibility at the grassroots' while they're knocking over our structures at the national and regional levels, where we do have avenues at the moment - before they get destroyed - where we could actually be exercising that responsibility as well."* 8 Jan 2005 [27]

The first shared responsibility agreement publicly announced, between the remote Indigenous community of Mulan and the Federal Government, has realised a number of these concerns. The agreement requires hygiene (showering and face-washing of children), rubbish, pest control and anti-petrol sniffing measures by the community in exchange for a $172,260 Federal Government contribution towards petrol bowsers for the community and Western Australian Government regular health checks of children and "monitoring and review" of the clinical health services at the community.[28]

A major criticism of the agreement is that it breaches human rights obligations in making government responsibilities for the provision of health measures conditional. Criticism also points to the inappropriateness of linking the provision of petrol bowsers with child health.

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[27] SBS Television, *Living Black Indigenous Leaders Forum*, 8 January 2005.
[28] Shared Responsibility Agreement: Provision of fuel bowsers to Mulan Aboriginal Community.

A further discriminatory impact is that the agreement focuses attention on Indigenous behaviour as "the problem" requiring government intervention, and deflects scrutiny from government neglect and policy failure. In fact, the community itself initiated the face washing measures 18 months previously with significantly improved outcomes already achieved.[29] Some community members have expressed concern that the funding agreement was unfair, and gives the impression that they don't care for their children.[30] On the face of it, the Mulan agreement appears to have taken a community's initiative in exercising self-determination in solving their own problems and unnecessarily made it subject to a conditional agreement, the terms of which act to confirm non-Indigenous negative stereotyping of Indigenous behaviour. Such stereotypes are being used to justify coercive and racially discriminatory government intervention.

In contrast to the Mulan agreement, Western NSW Indigenous communities involved in the second round of mutual obligation agreements announced, refused to trade their civil liberties for government assistance. Murdi Paaki Regional Council chairman, Sam Jefferies stated: "They will never use their citizenship rights, their basic human entitlements, to bargain for any resources out of the Commonwealth or state".[31] The Murdi Paaki agreements cover programs to encourage children to remain at school, training and work for young people as night patrol officers and administrative trainees and computer resources.[32]

Also in contrast to the Mulan agreement, the Murdi Paaki agreements are "the product of years of hard work by the ATSIC Murdi Paaki Regional Council and other Aboriginal organisations in Western NSW".[33] It should be noted by the CERD Committee that the Federal government intends to abolish the ATSIC Regional Councils as of 1 July 2005.

These two examples highlight the difference between agreements struck in the context of the active participation of Indigenous communities via independent, appropriately-resourced representative bodies, and those in which the lack of effective power and capacity of individual communities makes it more likely that resulting agreements will reflect the political and policy priorities of the Government. This represents the difference between self-determination and paternalism.

ANTaR believes that the changes in the administration of Indigenous affairs as detailed above raise serious concerns in terms of the Australian Government's responsibilities under ICERD Articles 1 (4), 2 (1) (a), (c), (d), 3, 5 (a), (c), (e) (i) and 6.

Recommendation: Racial Discrimination in laws and policies

That the Government:

(i) Refrain from introducing laws, policies and programs that deny Indigenous people their rights to participation and that prejudice Indigenous Australians in accessing resources and services necessary to meeting their basic human rights.

(ii) Put in place measures to address the reduction of Indigenous peoples in Indigenous administration within the Australian Public Service and to increase their employment.

(iii) Apply a rights based approach to eliminate racial discrimination and positively recognise rights of Indigenous Australians, including special and concrete measures (i.e. Indigenous controlled governance and program structures)

[29] 'Routine routs eye disease', *The Australian*, 10 December 2004.
[30] 'Rules unfair say proud Mulan people', *The Age*, 10 December 2004.
[31] 'No deal on our rights, group says', *The Age*, 15 December 2004.
[32] Ibid.
[33] Media Release, Senator Aden Ridgeway, 15 December 2004.