# Australians for Native Title and Reconciliation (ANTaR)
# Submission to the Committee on the Elimination of Racial Discrimination

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## Glossary

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| ANTaR | Australians for Native Title and Reconciliation |
| ATSIC | Aboriginal and Torres Strait Islander Commission |
| ATSILS | Aboriginal and Torres Strait Islander Legal Services |
| ATSIS | Aboriginal and Torres Strait Islander Services |
| CAR | Council for Aboriginal Reconciliation |
| CERD | International Convention on the Elimination of Racial Discrimination |
| DIMIA | Department of Immigration and Multicultural and Indigenous Affairs |
| EOC | Equal Opportunity Commission |
| HREOC | Human Rights and Equal Opportunity Commission |
| ICCPR | International Covenant on Civil and Political Rights |
| NSW | New South Wales |
| NT | Northern Territory |
| NTA | Native Title Act |
| PJC | Parliamentary Joint Committee |
| RDA | *Race Discrimination Act 1975 (Cth)* |
| QLD | Queensland |
| SA | South Australia |
| TAS | Tasmania |
| UN | United Nations |
| UNHRC | UN Human Rights Committee |
| VIC | Victoria |
| WA | Western Australia |
| WCAR | World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance |

## Executive Summary

This submission is provided by Australians for Native Title and Reconciliation (ANTaR) in response to Australia's thirteenth and fourteenth periodic reports to CERD.

ANTaR is an independent, national, mainly non-Indigenous non-government organisation that works in close partnership with Indigenous leaders in supporting the reconciliation process and Indigenous social justice in Australia.

Since the CERD Committee's last review of Australia's obligations under the International Convention on the Elimination of Racial Discrimination (ICERD) in 2001, progress on reconciliation, under the leadership of the Federal Government, has not only stalled, but has gone backwards in many significant respects. Support within the general community for Indigenous rights and aspirations is at a low point and Indigenous leaderships and communities are demoralised and increasingly marginalised from decision-making in relation to their lives. Reconciliation and the promotion of human rights for Indigenous Australians is widely regarded as no longer being on the government's national agenda.

This failure is not merely due to neglect, but is the result of a determined strategy by the Government to undermine the reconciliation process in line with its own agenda. The Federal Government has consistently adopted divisive responses to major issues in Indigenous affairs that have arisen since the Howard Government came to power in 1996. The Government has actively sought to influence public opinion against Indigenous people's efforts towards achieving human rights and reconciliation for Indigenous Australians, and to obstruct key goals and aspirations of Indigenous leaders and communities, that have been developed and documented over many decades in numerous reports and documents.

To this end the clearest evidence of the Australian Government's withdrawal from its commitments under ICERD is its actions in abolishing the Aboriginal and Torres Strait Islander Commission (ATSIC) – a body welcomed by the CERD Committee in its previous Concluding Observations.[1] This action has resulted in the removal of Indigenous representation through the election of their own representatives and greatly reduces Indigenous participation in governance and decision-making.

The Government's action has resulted in a reduction of Indigenous control of service-delivery, decreased numbers of Indigenous people employed in Indigenous administration, and reduced access to services for Indigenous peoples through the "mainstreaming" of Indigenous programs and service delivery. Particular concern relates to the alarming reduction in Indigenous employment in the Australian Public Service, having dropped to a 10 year low of 2.3% with a halving of the number of Indigenous trainees over the past two years. This puts into serious question the Government's claim that the change to mainstreaming will improve the 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.

The regressive nature of the changes is also reflected in the reduction in adequate consultation and participation of Indigenous communities and leaders in the development of relevant laws, policies and programs, as evidenced in particular by the radical change in policy on delivering services to Indigenous communities, based on the principles of 'mutual obligation', announced in November 2004.

The failure of the government to address critical issues necessary for the elimination of racial discrimination against Indigenous Australians is further reflected in its failure to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RDIADIC), the Bringing Them Home (Stolen Generations) Report, and the Council for Aboriginal Reconciliation (CAR) Final Recommendations. This is also reflected in the Government's policy response on

[1] CERD/C/304/Add.101

native tile, based on the Prime Minister's '10-point plan', which rejected the path of coexistence opened up by the Court's decision in *Wik* and instead focused on extinguishment and restriction of Indigenous native title rights, while confirming and enhancing the rights of pastoralists and other non-Indigenous land-holders. The UN criticisms of the native title legislation have remained unaddressed by the Australian Government.

Further, recent cases analysing the *Native Title Act 1998* (NTA) by the High Court have further entrenched the racially discriminatory operation of the NTA. In the Miriuwung and Gajerrong case, the High Court did not determine that native title was title to land *per se*, but a bundle of specific rights. This analysis is in opposition to Indigenous peoples' complex, profound and holistic relationship with their country, a holistic relationship that encompasses civil, political, economic, social and cultural rights. The 'bundle of rights' analysis significantly influences how native title can be proved and continue to be protected. On both a substantive and formal equality basis, it treats people in a racially discriminatory way. Instead of native title offering a possible solution to Indigenous peoples' dispossession and a basis for international self determination, cultural re-generation and pride, ANTaR submits to the Committee that, despite some positive outcomes in remote areas, native title has increasingly dissolved into another racially discriminatory State mechanism.

The Government's employment of 'practical reconciliation' as a policy has actively negated a rights-based approach and falsely promoted a formal equality standard for Indigenous Australians. This contradicts the substantive equality model adopted in human rights treaties to which Australia is party to and obliged to implement.

Although 'practical reconciliation' policies have focused on Indigenous health, by not addressing the underlying causes of inequality and racism, the Government has failed to adequately redress Indigenous health issues and inequality in the enjoyment of all other areas of economic, social and cultural rights.

- While 2.4% of the population, Indigenous people account for 20% of adult prisoners and 40% of juveniles in detention.[2]
- Indigenous unemployment is set to increase from 39% to 47% by 2006.[3] Unemployment of all Australians has steadily decreased since 1994, currently at 5.1%, the lowest in 28 years.[4]
- The average income for Indigenous people is 38% lower than for the total population.[5]
- Home ownership rates among Indigenous households are significantly lower than non-Indigenous households (32% compared to 69%). Households with Indigenous persons were more than twice as likely to be living in rental accommodation than non-Indigenous households. These are relevant factors in explaining inter-generational poverty among Indigenous people.[6]
- Fewer than 36% of Indigenous children finish high school compared with 73% of the overall Australian population.[7] 32% of Indigenous Australians did not complete year 10 schooling, compared to 18% of non-Indigenous Australians.

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[2] Human Rights and Equal Opportunity Commission 2004, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia*. www.humanrights.gov.au/social_justice/statistics/index.html.
[3] Ibid.
[4] Bloomberg, 12 January 2005, http://www.bloomberg.com/apps/news?pid=10000081&sid=ar4RZKVjo3YA&refer=australia
[5] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003, ww.aph.gov.au/senate/committee/clac_ctte/poverty/submissions/sub244.doc
[6] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003
[7] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003.

- Only 7% of children in remote communities have normal healthy ears (no infections or hearing loss).[8]
- About 45% of deaths among Indigenous males, and 34% of deaths among Indigenous females, occur before age 45, compared with 10% and 6% for non-Indigenous males and females respectively.[9] Most Indigenous children have single parents and lack other mature family role models such as grandparents.
- Indigenous children are over-represented in care and protection systems across Australia by 3.2 times the non-Indigenous rate.
- In NSW in 1991, Indigenous females were 6.2 times more likely to be the victim of domestic violence
- 44% of all Indigenous teenagers (aged 15-19 years) are likely to be at risk of entering into poverty, compared to 15% of non-Indigenous teenagers.
- Indigenous infant mortality rates are 2.5 times that of other Australian infants.[10]

> *"We're in a worse state of health now than we were before practical reconciliation became the mantra of the current government. In fact the gap between the life expectancy of Indigenous Australians and the life expectancy of non-Indigenous Australians has increased: the government says it is doing all the right things, but on the ground it is not happening, it is just not happening."* [11]

While it is estimated that Indigenous health is presently under funded by $452 million per annum,[12] the health crisis is compounded by the failure to adequately fund all areas of Indigenous disadvantage over decades. Indigenous health is not a discretionary expense. [13] Yet, despite record national budget surpluses the Government has failed to adopt the CERD Committee's recommendation to urgently provide sufficient resources to eradicate these disparities.

Indigenous disadvantage is complex and grounded in a history of alienation: the 'symbolic' issues have intensely 'practical' expression. Practical reconciliation fails to recognise the history of discrimination against Indigenous peoples as well as their continuing rights as First Peoples.

The other areas of critical and urgent concern are deaths in custody, police harassment and racial violence. Recent serious incidents related to deaths in custody and public incidences of racial violence between Indigenous Australians and the State and non-Indigenous Australians have highlighted the dire consequences of the government's failure to implement the recommendations of the RCIADIC.

In 2004 the deaths of two Indigenous people, one in police custody (Palm Island) and the other while allegedly being pursued by police (Redfern), sparked riots by the local Indigenous communities. It is significant that in both cases the riots ensued because the Indigenous communities were in no doubt that police were responsible for the deaths, indicating a serious lack of confidence in police culture and practices towards Indigenous peoples. In the Palm Island incident, the death in custody in part resulted from the failure of police to follow procedure as recommended by the RCIADIC, with the seriously injured man being placed in a cell and not provided immediate medical treatment. Of further concern is that in Palm Island heavy-handed tactics by police have included the use of semi-automatic weapons and stun guns in raids on homes, greatly exacerbating tensions.[14] Within weeks of the Palm Island riot, a teenage boy

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[8] Fred Hollows Foundation Fact Sheet: *The Health Emergency 2004*.

[9] *UN Human Development Report 2003*.

[10] Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003*

[11] Patrick Dodson, speech at ANTaR Indigenous Health Rights Campaign, Sydney, 18 February 2004

[12] Access Economics 2004, *Indigenous Health Needs*, http://www.ama.com.au/web.nsf/doc/WEEN-63Q9J7

[13] Phil Glendenning, National President, ANTaR, 1 October 2004.

[14] *The Anger of the Aborigines*, Kathy Marks, http://www.eniar.org/news/toomelah.html

was caught attempting theft was stripped naked, tied, beaten, threatened with a shotgun and dragged by a rope around his neck for approximately 45 minutes while his teenage accomplice was tied to tree and forced to watch the attack.[15] In both cases the response from police and authorities to the community's reactions has been heavy-handed and discriminatory, further inflaming resentment and a breakdown in relations between police and the community.

These apparently escalating incidents of racial violence highlight the dangers represented by significant threats that in the near future institutions such as the Human Rights and Equal Opportunity Commission (HREOC) may be limited in their role and financial support by the Government. These institutions are necessary for investigating and providing adequate redress where Indigenous Australians do experience discrimination and for providing human rights education for the public, and any restrictions of this nature will undermine the critical role they play.

The historical discrimination faced by Indigenous Australians still goes unacknowledged by the Government in many ways, including the failure of the Government to say 'sorry ' to the Stolen Generations. The Government has also failed to address the repercussions of the issue of 'Stolen Wages'. All States, and Territories under Commonwealth jurisdiction, controlled the wages, savings and entitlements of Aboriginal workers and families to greater or lesser extents. Recent private research reveals a wealth of internal correspondence, Reports and Audit Reports consistently criticising systemic negligence, misuse and misappropriation by government of private monies and Trust funds. Losses have been calculated at upwards of $500 million. Evidence exposed for the NSW and Queensland systems underline the need for a National Inquiry. Government complicity in the impoverishment of Aboriginal wards must be assessed and full reparations, including for deceased victims, must be made.

This report demonstrates that the current Government's approach to Indigenous affairs in Australia, particularly in terms of the laws, policies and programs it develops and implements, need to be substantially revised to ensure they fulfil its obligations under ICERD and the commitments it made in the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. ANTaR urges the Committee to consider the following recommendations for the Australian Government.

[15] 'Rope put around neck of black teenager', *Sydney Morning Herald*, 2 December 2004.

## Recommendations:

It is strongly recommended that the Government:

**HREOC**

1. Continue to support, fund and promote HREOC's role including the individual mandates of the Indigenous Social Justice and Race Discrimination Commissioners.

**Reconciliation**

2. Implement the recommendations of the Final Report of the Council for Aboriginal Reconciliation and provide strong leadership in achieving meaningful reconciliation, genuinely embraced by both the Indigenous population and the population at large.

**Stolen Generations**

3. Implement the recommendations of the *Bringing Them Home* Report including the issuing of a national apology to those affected by removal policies and the setting up of a reparations tribunal.

**ATSIC**

4. Ensures 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.

**Racial Discrimination in laws and policies**

5. (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)

**Indigenous Health**

6. As a matter of urgency, make available sufficient resources to provide:

   (i) Primary health care on the basis of need, through Aboriginal community controlled health services and better access to mainstream services;

   (ii) A significant increase in the health workforce, particularly of Indigenous background;

   (iii) Comprehensive early intervention and prevention programs;

   (iv) Significant improvements in educational and employment outcomes, and housing and infrastructure provision.

   (v) Governments must consult and work with Indigenous leaders and communities to change the founding causes of poor health in Indigenous communities.

**Native Title**

7. Amend the Native Title Act 1998 in accordance with non-racially discriminatory standards.

**Stolen Wages**

8. Launch a national inquiry into the stolen wages issue.

**Deaths in custody, police practices and racial violence**

9. Implement in full the recommendations of the Royal Commission into Aboriginal Deaths in Custody and resume reporting against the recommendations.

## Introduction

This submission is provided by Australians for Native Title and Reconciliation (ANTaR) in response to Australia's thirteenth and fourteenth periodic reports to CERD.

ANTaR is an independent, national, mainly non-Indigenous non-government organisation that works in close partnership with Indigenous leaders in supporting the reconciliation process and Indigenous social justice in Australia.

Members of ANTaR's national association include State and Territory ANTaR's and a number of national peak non-government organisations. ANTaR is advised by and works in close cooperation with an Indigenous Reference Group comprised of prominent Indigenous leaders and individuals.[16]

ANTaR is one of only two national organisations whose work is focused on reconciliation, the other being Reconciliation Australia. ANTaR is linked to a network of over 200 local reconciliation groups.

ANTaR is also a contributing organisation to a separate submission to CERD from Australian Non-governmental Organisations, coordinated by the Human Rights Network of the National Association of Community Legal Centres (referred to hereafter as 'the NGO submission'). ANTaR's submission provides additional information on Indigenous-related issues covered in the NGO submission as well as information on some issues not included in that submission.

It should also be noted that the NGO submission includes information and recommendations on some issues not covered in ANTaR's submission, such as the lack of entrenched guarantees against racial discrimination, racial vilification, mandatory sentencing, access to justice for Indigenous women and Indigenous right to housing. ANTaR strongly supports the information and recommendations contained in the NGO report concerning these issues.

This report is structured on a thematic basis with reference to CERD Articles and includes recommendations for action by the Australian Government.

Diminishing role of HREOC

As noted in the Australian Government report to CERD, the Human Rights and Equal Opportunity Commission (HREOC) is one of the principal means by which Australia implements ICERD. The NGO submission outlines deleterious changes proposed by the Federal Government to the structure and powers of HREOC through the Australian Human Rights Commission Legislation Bill 2003. ANTaR strongly endorses the concerns and recommendations regarding HREOC in the NGO submission, particularly in relation to the Indigenous Social Justice Commissioner.

Although the Bill has lapsed, in part due to strong objection by human rights groups, ANTaR draws the Committee's attention to the statement in the Australian Government's State report that it "remains committed to pursuing legislative reform to the structure of [HREOC]". ANTaR is concerned that the government will reintroduce changes which will significantly weaken the protection of human rights in Australia.

The actions of the Government in relation to HREOC breach ICERD Article 2 (d) and Article 6.

**Recommendation: HREOC**
That the Government continue to support, fund and promote HREOC's role including the individual mandates of the Indigenous Social Justice and Race Discrimination Commissioners.

[16] See ANTaR's website for details: http://www.antar.org.au – 'About ANTaR'.

## Reconciliation

Reconciliation process stalled

In its previous concluding observations, the CERD Committee recommended:

> *"that the State party take appropriate measures to ensure that the reconciliation process is conducted on the basis of robust engagement and effective leadership, so as to lead to meaningful reconciliation, genuinely embraced by both the Indigenous population and the population at large."* [17]

The Committee also expressed concern about "the apparent loss of confidence by the indigenous community in the process of reconciliation".[18]

Since that time, progress on reconciliation under the leadership of the Federal Government has not only stalled, but has gone backwards in many significant respects. Support within the general community for Indigenous rights and aspirations is at a low point and Indigenous leaderships and communities are demoralised and increasingly marginalised from decision-making in relation to their lives. Reconciliation is widely regarded as no longer being on the government's national agenda.

This failure cannot be regarded as simply due to neglect, but is the result of a determined strategy by the Government to undermine the reconciliation process in line with its own agenda. The Government has actively sought to influence public opinion against Indigenous people's efforts towards reconciliation and to obstruct key goals and aspirations of Indigenous leaders and communities that have been developed and documented over many decades in numerous reports and documents[19]. It has largely rejected the Documents of Reconciliation and Final Recommendations produced by the Council for Aboriginal Reconciliation (CAR) through extensive consultation with both Indigenous and non-Indigenous Australians. Significantly, it also rejected the opportunity to continue a formal statutory reconciliation process when the term of CAR expired at the end of 2000. Instead responsibility for progressing national reconciliation was relegated to a small, under-resourced, not-for-profit body, Reconciliation Australia (RA).

One of the most critical signifiers of the Government's lack of commitment to progressing a meaningful and sustainable reconciliation process is its refusal to say "sorry" (see separate section on 'the apology' below). Indigenous and non-Indigenous Australians have repeatedly called on the government to apologise to the stolen generations. A formal apology is seen as a benchmark step necessary before reconciliation can move forward, and the failure of the government to make the apology is evidence to many Indigenous and non-Indigenous Australians of the lack of sincerity of the Howard Government towards achieving reconciliation.[20]

It is also apparent that the issue represents a road-block to progress on reconciliation which the current Prime Minister is unlikely to remove, having provided public support to those who have sought to challenge and negate the history of dispossession, violence and discrimination

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[17] CERD/C/304/Add.101, paragraph 12.
[18] Ibid.
[19] For instance, *Report of the Royal Commission into Aboriginal Deaths in Custody*, 1991; *Going Forward: Social Justice for the First Australians*, Council for Aboriginal Reconciliation, 1995; *Recognition Rights & Reform: Report to Government on Native Title Social Justice Measures*, ATSIC, 1995; *Indigenous social justice – strategies and recommendations*, HREOC, 1995; *Bringing Them Home*, HREOC, 1997. Indigenous submissions to government include: the Yirrkala Bark Petitions, 1963; the Barunga Statement, 1988; Eva Valley Statement, 1993; Kalkaringi Statement, 1998.
[20] It should be noted that a recent Senate Inquiry into children placed in institutional care over the last century recommended a formal apology from governments, churches and charities to those children who were abused, and for the establishment of a national reparations fund. *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*. Commonwealth of Australia, 2004. http://www.aph.gov.au/senate/committee/clac_ctte/inst_care/report/

against Indigenous peoples in Australia[21], precipitating what has been termed Australia's 'History Wars'.

Federal Government's divisive approach on Indigenous affairs

Central to the stalling of reconciliation at the national level has been the Federal Government's consistently divisive responses to major issues in Indigenous affairs that have arisen since the Howard Government came to power in 1996.

*Native Title*[22]

One of the first major Indigenous affairs issues faced by the incoming Howard Government was the High Court's *Wik* decision. The Government responded by promoting racially-discriminatory attitudes and policies with respect to native title, helping to inflame community division with alarmist rhetoric about a 'crisis' in land management and by legitimising racially prejudiced views in the community.

In late 1997 the Prime Minister in effect summarised what he appears to regard as his broader objective regarding Indigenous affairs with his comments on native title that "the pendulum has swung too far in one direction" and that he was seeking "to bring it back to the middle".[23]

The Government's policy response, based on the Prime Minister's '10-point plan', rejected the path of coexistence opened up by the Court's decision and instead focused on extinguishment and restriction of Indigenous native title rights, while confirming and enhancing the rights of pastoralists and other non-Indigenous land-holders.

The government subsequently sought to deflect criticism of the racially-discriminatory nature of its 1998 Native Title Act Amendments by a number of UN Committees, including the CERD Committee, by arguing that the Committees were illegitimately compromising Australia's national sovereignty and recommending a review of the UN Treaty Body system. The UN criticisms remain unaddressed by the Australian Government.

Indigenous Australians were further disadvantaged in relation to native title by the Howard Government's repudiation of an agreement struck between Indigenous negotiators and the Keating Government to develop a Social Justice Package as the third component (along with the *Native Title Act 1993*, and the Indigenous Land Fund) of a package of measures in response to the High Court's recognition of native title in its *Mabo* judgement. Indigenous submissions to the Government on the social justice package (produced prior to the Howard Government coming to power)[24] emphasised the need for comprehensive approaches to Indigenous social justice which incorporated both rights and disadvantage issues.

*The apology*

The landmark *Bringing Them Home* report was submitted in 1997, early in the Howard Government's first term. The Government's response was to reject the major recommendations of the report, that a national apology to the stolen generations be made; and that a tribunal be set up as an alternative to litigation, to consider compensation claims by those affected by removal policies. Prime Minister Howard was prominent in publicly opposing these recommendations.

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[21] See for example, 'Swing of the pendulum', *Sydney Morning Herald*, 30 August 2003; 'Sorry, but the PM says the culture wars are over', *Sydney Morning Herald*, 10 September 2003.
[22] See also separate section on Native Title at p28.
[23] John Howard, ABC Television, 4 September 1997.
[24] *Going Forward: Social Justice for the First Australians*, Council for Aboriginal Reconciliation, 1995; *Recognition Rights & Reform: Report to Government on Native Title Social Justice Measures*, ATSIC, 1995; *Indigenous social justice – strategies and recommendations*, HREOC, 1995.

In doing so, the Government appears to have deliberately sought to turn community opinion against the idea of an apology through the misrepresentation that a national apology would imply the guilt of current generations not involved in the policies of forced removals. (Such an implication was never suggested in *Bringing Them Home* and was not an issue in apologies subsequently made by every State and Territory parliament in Australia).

Even more disturbing was the Government's submission to a Senate inquiry in 2000 in which it was argued that there was no stolen generation.[25] The callous nature of the claim had a profound effect on those affected by removal policies and the episode represented a low point in relations between the stolen generations and the Government.

*Parliamentary Motion of Reconciliation*

In late 1999 the Government rushed the *Motion of Reconciliation* through the Federal Parliament. The haste of the gesture, combined with a lack of community consultation and the omission of an apology to the stolen generations, ensured that it became a divisive issue. (In comparison, CAR spent years on careful and extensive community consultation in producing its *Draft Declaration Towards Reconciliation*). The deficiencies of the resulting motion and the flawed process leading to it resulted in it being opposed by many Indigenous and non-Indigenous Australians, negating its value as a meaningful reconciliation initiative.

*Referendum on Preamble to the Constitution*

Also in late 1999, the Prime Minister took a divisive approach towards a referendum on a new preamble to the Constitution, which was to provide the first Constitutional reference to Indigenous peoples. Drafted behind closed doors by the Prime Minister and without proper consultation, particularly with Indigenous people, and containing politically partisan content, the preamble was guaranteed to be a contentious issue, thus ensuring the referendum would fail. It is a measure of the Prime Minister's divisive handling of the issue that Indigenous leaders, despite supporting the need for a preamble, welcomed the failure of the referendum.[26]

*Declaration Towards Reconciliation*

CAR's aspirational document of reconciliation, the *Declaration Towards Reconciliation,* was released in May 2000, amidst media comment about the Prime Minister's opposition to key clauses. The Prime Minister even released his own version on the day. Thus, despite the fact that the Declaration was the product of an extensive and lengthy national consultation process undertaken by CAR (a body itself made up of a wide and representative cross-section of Australian society), media coverage and debate focussed on the opposition of a single individual - the Prime Minister. One of the Prime Minister's major concerns was that the document should reflect a formal equality view of 'equal rights' and 'the same laws' for all (see also below at page 14) which contradicts the substantive equality model adopted in human rights treaties to which Australia is party to and obligated to implement.

*Treaty process*

2000, the final year of the CAR's term, saw the re-emergence of calls for a treaty process in Australia. CAR's Final Report, delivered in December 2000, recommended the Commonwealth "put in place a process which will unite all Australians by way of an agreement or treaty".

The Prime Minister dismissed out of hand consideration of the initiative, even though polling showed that Australians were open to considering the idea and that support was particularly strong amongst younger Australians of 16-25 years.[27] Arguments used against the idea of a

[25] See http://www.aph.gov.au/library/intguide/SP/Stolen.htm
[26] *Koori Mail*, 17 November 1999: 'Leaders welcome preamble failure'.
[27] An AC Nielsen poll in November 2000 found 53% in support of a treaty. See 'Surge in support for treaty with Aborigines', *Sydney Morning Herald*, 8 November 2000. An earlier Saulwick Poll, in June 1998, found 44.6% in favour and 39% opposed. http://assda.anu.edu.au/polls/D0670.html;

treaty included the furphy that treaties can only be struck between sovereign states[28] – again pitched at unfounded non-Indigenous prejudice and fear concerning the possibility of a separate Indigenous state.

Rejection of the Council for Aboriginal Reconciliation's Final Recommendations

The Final Report and recommendations of the Council for Aboriginal Reconciliation, delivered in December 2000, were the result of one of the most extensive public consultation processes ever carried out in Australia. The report recommended comprehensive action to address the many areas of 'unfinished business', including legal measures to recognise and protect Indigenous rights, actions to address Indigenous disadvantage, and initiatives to advance reconciliation within the general community. CAR's recommendations included:

- The Commonwealth Parliament prepare legislation for a referendum to insert a new preamble to the Constitution recognising Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.
- Section 25 of the Constitution be removed and a new section introduced making it unlawful to adversely discriminate against any people on the grounds of race.
- All Commonwealth and State parliaments recognise that the land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties.
- Recommending draft legislation to provide a formal framework to sustain the reconciliation process, including "to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved".

The Federal Government released its formal response[29] to CAR's Final Report in September 2002 – almost two years after CAR's report was handed to the Government. The tardy, incomplete and inadequate nature of the response is indicative of the Government's lack of priority on reconciliation.

The Government's response was dominated by generalised statements of commitment to reconciliation with most of CAR's recommendations receiving virtually no substantive response. No detailed program of implementation for reconciliation, long-term strategies, targets, benchmarks or performance monitoring frameworks were provided. The response served to undermine the thrust of CAR's Final Report to put in place a framework for implementing the goals identified in the first formal phase of reconciliation.

The majority of CAR's recommendations were rejected by the Government, mostly on spurious or fallacious grounds. This included rejection of an apology to the stolen generations and consideration of a treaty, as discussed above. The Government also rejected consideration of a new preamble to the Constitution on the basis that the 1999 referendum on the issue had been rejected (see also above). This reasoning neglected that it was the Government's divisive handling and unilateral approach to the 1999 referendum which was the primary reason for its failure.

The only areas of CAR's recommendations to receive substantive support from the Government were those related to addressing Indigenous disadvantage and for removal of the discriminatory section 25 of the Constitution. On the latter, the Government provided no plan or time-line for action and to date no further action has been taken by the Government.

In relation to Indigenous disadvantage the Government's support focused on two main aspects: the Council of Australian Governments' (COAG) initiatives and a more generalised approach to

[28] The Government consistently ignores a large body of expert opinion to the contrary as well as the fact that a number of countries, eg Canada, have successfully negotiated modern treaties with their Indigenous peoples.
[29] Commonwealth Government 2002, The *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge.* /www.atsia.gov.au/media/reports/2609_reconcil.pdf.

addressing Indigenous disadvantage based on what the Government termed 'practical reconciliation'. The COAG initiatives are positive and welcome, though not without problems related to implementation. The Committee is encouraged to consider the analysis by HREOC of the COAG initiatives in its recent *Social Justice Report 2003*.

The Government's 'practical reconciliation' policies, however, have been divisive and racially-discriminatory, premised on a rejection of rights or 'symbolic' issues and the promotion and use of a formal equality standard, which by definition will result in discriminatory effects on Indigenous peoples.

Rejection of a rights-based approach: 'practical reconciliation' and formal equality

The Howard Government's rejection of the social justice and human rights components of reconciliation which were emphasised in the work of the Council for Aboriginal Reconciliation is expressed through the use of its own term – 'practical reconciliation' – to distinguish the Government's approach.

However, in wrongfully portraying 'practical' and so-called 'symbolic' issues as mutually exclusive, the Government has misrepresented the nature and role of rights. It wrongly fails to acknowledge that so-called 'symbolic' issues have fundamentally practical and tangible implications. 'Practical reconciliation' presents an assimilationist 'formal equality' standard and casts the recognition of cultural difference and human rights as counter-productive to addressing Indigenous disadvantage.

The Government's continuing promotion of formal equality standards is exampled in its response to the CAR Final Report where it is stated:

> *"The Government is committed to common rights for all Australians…Neither the Government nor the general community, however, is prepared to support any action which would entrench additional, special or different rights for one part of the community."* [30]

In the Australian context such statements resonate with deep-seated racially prejudiced attitudes within the broader Australian community concerning Indigenous rights. Such attitudes represent one of the most significant barriers to achieving reconciliation and were central to the success of the racist One Nation Party, which not so coincidentally, came to prominence in 1998 at the very time the Howard Government was making amendments to the *Native Title Act*. For instance, One Nation Party Leader, Pauline Hanson, said in 1998:

> *"No one group of Australians must be given rights over another. All Australians must be treated equally and the same."*

Within this context, the Government's uncompromising rejection and criticism of 'rights' or 'symbolic' issues has had the effect of turning public opinion against Indigenous leaders and rights advocates by suggesting that those who support a rights approach are ignoring the more urgent 'practical' needs of Indigenous people. While this has been articulated as a 'practical' versus 'symbolic' divide, with the latter criticised as offering nothing of substance, it is a virtually meaningless distinction. Human rights, including the recognition of cultural difference, have intensely practical implications, particularly for the lives of disadvantaged peoples.

In addition to this the Government has been untruthful about its own failure to address Indigenous disadvantage, instead blaming the Aboriginal and Torres Strait Islander Commission (ATSIC) for this failure. This is despite the fact that responsibility for Indigenous education and health, for instance, did not reside with ATSIC, but with mainstream departments. ATSIC administered only 15% of all Indigenous funding and was only intended as a supplementary provider of Indigenous services (see also the following section on ATSIC).

[30] *Commonwealth Response to The Council for Aboriginal Reconciliation Final Report*, September 2002.

Consequently, the Government's employment of 'practical reconciliation' as a policy has actively negated a rights based approach and encouraged a polarisation in community attitudes. This has undermined the critical task of uniting community attitudes and understanding with respect to the rights of Indigenous peoples.

The above has provided evidence of actions by the government over a wide spectrum of issues relating to reconciliation and Indigenous affairs which have contributed to a stalling and eroding of the goals of national reconciliation.

ANTaR believes that the Government's actions raise concerns for the CERD Committee in terms of the Government's responsibilities under ICERD Articles 2 (1) (a), (e), 4 (c), 5 (d) and 7.

The following sections detail how the government's actions in abolishing ATSIC and putting in place alternative arrangements for the administration of Indigenous affairs have introduced further serious breaches of Australia's obligations under ICERD.

**Recommendation: Reconciliation**
That the Government implement the recommendations of the Final Report of the Council for Aboriginal Reconciliation and provide strong leadership in achieving meaningful reconciliation, genuinely embraced by both the Indigenous population and the population at large.

**Recommendation: Stolen Generations**
That the Government implement the recommendations of the *Bringing Them Home* Report including the issuing of a national apology to those affected by removal policies and the setting up of a reparations tribunal.

## 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 CERD Committee – would be abolished. As stated in the NGO submission, 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".[31]

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'.[32] Not only

[31] *The Age*, 16 April 2004. http://lists.riseup.net/www/arc/antar-news/2004-04/msg00072.html
[32] *General Recommendation XXIII (51) concerning Indigenous Peoples.* 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para 3.

was the decision made without Indigenous consultation and consent, it was done in the context of strong Indigenous opposition.

Leaked Cabinet documents[33] 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."* [34]

The *Social Justice Report* 2003,[35] 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".[36] 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".*[37] *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".*[38]

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.[39] The Commissioner noted that the change *"means that the*

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[33] 'Government neglect… and we've got the letter to prove it', *National Indigenous Times*, 27 October 2004.
[34] 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.
[35] Aboriginal and Torres Strait Islander Social Justice Commissioner 2003, *Social Justice Report.* www.humanrights.gov.au/social_justice/.
[36] 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.
[37] CERD/C/304/Add.101, 19/04/2000, para 11.
[38] 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)
[39] Aboriginal and Torres Strait Islander Social Justice Commissioner, 7 July 2004*, Submission to the Senate Select Committee on the Administration of Indigenous Affairs.*

*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."* [40]

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.

## 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.[41]

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.[42] There are many factors involved, including racial discrimination.

[40] Ibid.
[41] 'Ivory Tower: Government's whitewash of black affairs' *National Indigenous Times*, 20 January 2005.
[42] Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Commonwealth of Australia 2001.

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.[43] 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".[44]

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.

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.[45]

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)

<u>Decreasing Indigenous employment in the Australian Public Service (APS)</u>

A recent report[46] 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

[43] Ibid.
[44] Letter dated April 2 2003, quoted in the *National Indigenous Times*, October 27 2004.
[45] 'Aborigines claim heavier obligations than whites', *The Australian*, 29 December 2004.
[46] *State of Service Report 2003-04*, Commonwealth of Australia, 2004.
http://www.apsc.gov.au/stateoftheservice/0304/#

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.[47]

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.[48] Anecdotal evidence also suggests that Indigenous specific selection criteria have been removed for many positions transferred to mainstream departments from ATSIC/ATSIS.[49] 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.[50]

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 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…"* [51]

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."* [52]

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."* [53]

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."* [54]

[47] 'State of Service report backs anecdotal evidence', *National Indigenous Times*, 8 December 2004, p4.
[48] Ibid.
[49] Ibid
[50] 'Ivory Tower: Government's whitewash of black affairs', *National Indigenous Times*, 20 January 2005.
[51] Senator Aden Ridgeway, the only Indigenous member of Federal Parliament, speaking on SBS Television, 'Living Black Indigenous Leaders Forum', Saturday 8 January 2005.
[52] 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.
[53] Ibid. Professor Lowitja O'Donoghue is a professorial fellow at Flinders University and was the Founding Chair of ATSIC.
[54] The 7.30 Report, ABC Television, 15 April 2004.

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 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 [55]

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.[56]

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.

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.[57] Some community members have expressed concern that the funding agreement was unfair, and gives the impression that they don't care for their children.[58] 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".[59] 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.[60]

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".[61] 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.

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[55] SBS Television, *Living Black Indigenous Leaders Forum*, 8 January 2005.
[56] Shared Responsibility Agreement: Provision of fuel bowsers to Mulan Aboriginal Community.
[57] 'Routine routs eye disease', *The Australian*, 10 December 2004.
[58] 'Rules unfair say proud Mulan people', *The Age*, 10 December 2004.
[59] 'No deal on our rights, group says', The Age, 15 December 2004.
[60] Ibid.
[61] Media Release, Senator Aden Ridgeway, 15 December 2004.

**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)

## Indigenous health and related socio-economic disadvantage

Evidence of Australian government racial discrimination in relation to Indigenous health

In its previous concluding comments the Committee stated:

> *"Serious concern remains at the extent of the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights. The Committee remains seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialized State. The Committee recommends that the State party ensure, within the shortest time possible, that sufficient resources are allocated to eradicate these disparities."* [62]

The NGO submission quotes a selection of the damning statistics depicting the continuing crisis in Australian Indigenous health.[63] Indigenous health represents the most serious and urgent inequality facing Indigenous Australians, exacerbated by continuing failure to address inequality in the enjoyment of all other areas of economic, social and cultural rights. The magnitude of this crisis is genuine and stark. Indigenous Australians experience a health reality worse than people in many third world countries[64] despite that:

- Australia is one of the richest countries in the world with an enviable health system;[65] and
- non-Indigenous Australians, enjoy the second highest longevity in the OECD and Australia was recently listed as the fourth most desirable nation in which to live, behind Sweden, Finland, and Iceland.[66]

> *"We're in a worse state of health now than we were before practical reconciliation became the mantra of the current government. In fact the gap between the life expectancy of Indigenous Australians and the life expectancy of non-Indigenous Australians has increased: the government says it is doing all the right things, but on the ground it is not happening, it is just not happening."* [67]

[62] CERD/C/304/Add.101, 19 April 2000.
[63] Australian Non-governmental Organisations' Submission to the Committee on the Elimination of Racial Discrimination, January 2005, pages 50-51.
[64] Dr Bill Glasson, President, Australian Medical Association (AMA), speech at ANTaR Indigenous Health Rights Campaign Launch, Sydney, 18 February 2004.
[65] Dr Bill Glasson, President, Australian Medical Association (AMA), speech at ANTaR Indigenous Health Rights Campaign Launch, Sydney, 18 February 2004.
[66] Dr Loius Peachey, President, Australian Indigneous Doctors Association (AIDA), speech at ANTaR Indigenous Health Rights Campaign Launch, Sydney, 18 February 2004.
[67] Patrick Dodson, speech at ANTaR Indigenous Health Rights Campaign, Sydney, 18 February 2004

While it is estimated that Indigenous health is presently under funded by $452 million per annum,[68] such inequality exists in all areas of social and economic disadvantage impacting on health that the total costs to fix the problem are much higher. The cost is so high because of the failure to adequately fund Indigenous health and other areas of Indigenous disadvantage over decades. Indigenous health is not a discretionary expense. [69]

> *"The time has past to quibble over statistics and costs. The time has past for pointing the finger. It's time – now – for action. This requires inspirational leadership and funding – an unknown quantity of funding.* [70]

Australia spends over $60 billion annually on health.[71] The additional funding required to achieve equitable health outcomes for Indigenous people amounts to less than 1% of this total expenditure.

In 2004/05 there is a $5.3 billion dollar national budget surplus, rising to $25 billion over four years. Indigenous health would be an obvious place for some of that extra $25 billion, particularly concerning the urgency of the need as expressed in the recommendations of the CERD Committee. Yet while non-Indigenous Australians were promised billions of dollars in additional benefits during the recent Federal election campaign, Indigenous Australians were offered only $46.5 million in increased expenditure over four years. The 2004-05 Federal Budget provided only 2.5% of the additional funding required for Indigenous health estimated by Access Economics.

In addition, continuing to under fund Indigenous health is not an economically sensible use of government funds. Under present arrangements Indigenous health costs will continue to rise dramatically, mainly due to increased reliance on expensive tertiary health care solutions (hospital care, kidney dialysis, etc). Tertiary health care costs already consume half of all government funding on Indigenous health (compared with just over one third of non-Indigenous health spending), reflecting the lack of accessible, cost-effective primary and preventive health care services for Indigenous Australians.

Proposed solutions

> *"Good work has been done already, thanks to a handful of inspired dedicated people and, on occasion, budgets that fit the bill for research and development. Policy must urgently translate into expanded services, improved accessibility and training."* [72]

The crippling shortage of trained health workers at all levels – Indigenous health workers, Indigenous doctors, and support staff such as planners, managers and accountants – is cited in the NGO submission.[73] These gaps in the workforce could be filled by non-Indigenous workers. But the evidence from Canada, the USA and New Zealand shows the best way to improve the health of Indigenous populations is through the training and support of Indigenous individuals to bring about change.

> *"The AMA has advocated for the urgent establishment of a National Training Plan to meet this need: a minimum of 150 tertiary training places per year for Indigenous students on an annual basis commencing in this financial year. The current differentials in Indigenous/non-Indigenous health professional ratios need to be halved in the next 10*

[68] Access Economics 2004, *Indigenous Health Needs*, http://www.ama.com.au/web.nsf/doc/WEEN-63Q9J7

[69] Phil Glendenning, National President, ANTaR, 1 October 2004.

[70] Dr Bill Glasson, President, Australian Medical Association (AMA), speech at ANTaR Indigenous Health Rights Campaign Launch, Sydney, 18 February 2004.

[71] Australian Institute of health and Welfare, 2001-02, includes Federal and State spending

[72] Dr Bill Glasson, President, Australian Medical Association (AMA), speech at ANTaR Indigenous Health Rights Campaign Launch, Sydney, 18 February 2004.

[73] Australian Non-governmental Organisations' Submission to the Committee on the Elimination of Racial Discrimination, January 2005, pages 50-51.

*years. There is no excuse for Australia's delay… So far, not enough has been translated into expanded and adequately staffed health services capable of meeting Indigenous health needs and preventing disease. It is important for all to be clear that change is possible. The facts suggest enormous potential for improvement."*[74]

Governments must also address access for Aboriginal and Torres Strait Islander people to mainstream health services, like the Pharmaceutical Benefits Scheme (PBS), the Medical Benefits Schedule (MBS) and public hospitals. Many Indigenous Australians find it hard to navigate an alien health structure that too often lacks cultural sensitivity. Mainstream health systems have to be modified to make sure all Australians get access to the health care they need.

Other measures besides mainstream health services are required to address the Indigenous health crisis. Having delivered 1.34 million episodes of primary health care in 2001-2, Aboriginal community-controlled health services have proved to be a critical element in reducing the many barriers experienced by Indigenous Australians to accessing mainstream health services.[75]

Further development and strengthening of the sector is required. For example, the recent Coordinated Care Trial[76] involving the pooling of Northern Territory and Commonwealth health funding to the Aboriginal-controlled Katherine West Health Board, has been a clear success.[77] The Board, which directly manages Indigenous health services for the entire region, has delivered significant improvements in health care.

Such new approaches complement existing Aboriginal controlled health services, such as the Nganampa Health Council,[78] which has provided comprehensive primary health care services to the Anangu Pitjantjajara lands for over 20 years.

These success stories demonstrate the importance of Aboriginal control based on principles of self-determination and effective community governance. They also demonstrate the importance of governments adopting a cooperative approach based on meaningful negotiation with and participation of Indigenous communities.

Indigenous disadvantage and the social determinants of health

Practical reconciliation gives emphasis to Indigenous Australians having the same life chances as other Australians. The government claims that practical reconciliation is closing the gaps, but in fact Indigenous Australians have not shared in the benefits of national economic growth from 1996-2001.

Indigenous disadvantage is complex and grounded in a history of alienation: the 'symbolic' issues have intensely 'practical' expression. Practical reconciliation fails to recognise the history of discrimination against Indigenous peoples as well as their continuing rights as First Peoples.

Living circumstances and quality of life are the fundamentals of health and life expectancy for all people, regardless of culture or location. The likelihood of serious ill health and short life escalates in direct relation to social and economic disadvantage.

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[74] Public Report Card 2003 – Indigenous & Torres Strait Islander Health – Time for Action, speech by Dr Kerryn Phelps at the AMA 15th National Conference 2003.

[75] www.naccho.org.au

[76] The Coordinated Care Trials were an initiative of the Council of Australian Governments (COAG) to achieve greater coordination in the delivery of health care services. The focus of the Indigenous CCTs was on reforming local health care systems through community based organisations managing a pool of funds provided by Commonwealth, State and Territory governments. The results have been encouraging. See http://www.mja.com.au/public/issues/177_09_041102/est10526_fm.html.

[77] *Better Health Care: Studies in the Successful Delivery of Primary Health Care Services to Aboriginal and Torres Strait Islander Australians*, Commonwealth of Australia 2001, pp 82 - 83.

[78] www.nganampahealth.com.au

The following key indicators of Indigenous social and economic disadvantage show the breadth and extent of factors impacting on Indigenous health and of the inequality between Australia's Indigenous and non-Indigenous populations.

*Incarceration*[79]

While 2.4% of the population, Indigenous people account for 20% of adult prisoners and 42% of juveniles in detention. The adult figure represents an marked increase from 14% since the 1991 Royal Commission Into Aboriginal Deaths in Custody (RCIADIC) in 1991. Expressed as a rate of over-representation, Indigenous people nationally are currently incarcerated at 16 times the rate for non-Indigenous people in Australia.

In the year 2001 alone, nearly one in five Indigenous males in NSW appeared in Court charged with a criminal offence. For Indigenous males aged 20-24 years, this rate increased to over two in five. Indigenous women are incarcerated at a rate 19.3 times that of non-Indigenous women, representing the greatest relative increase in Indigenous incarceration since the RCIADIC in 1991.

The rate of over-representation of Indigenous people in Western Australia is 22 times the non-Indigenous rate. Recent statistics for the Northern Territory also indicate that Aboriginal people constitute between 75-78% of all prisoners, and up to 82% of juveniles in detention in the Territory.

Indigenous juveniles (up to age 18) remain over-represented in criminal justice processes. In 2002, juveniles were detained at a rate almost 19 times that of non-Indigenous juveniles. This compares to a rate of 13 times the non-Indigenous rate in 1993. Juvenile rates of detention have declined since 1998.

*Unemployment*

Indigenous unemployment is set to increase from 39% to 47% by 2006.[80] Unemployment of all Australians has steadily decreased since 1994, currently at 5.1%, the lowest in 28 years.[81]

22% of Indigenous males are unemployed compared to 8% of non-Indigenous males; and 18% of Indigenous females compared to 7% of non-Indigenous females.

1 in 6 Indigenous people classified as employed work on Community Development Employment Projects (CDEP, a 'work for the dole' equivalent program). 53% of Indigenous people in rural areas earn their income through CDEP.[82]

*Income*

The average income for Indigenous people is 38% lower than for the total population.[83]

*Housing*

[79] Human Rights and Equal Opportunity Commission 2004, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia*. www.humanrights.gov.au/social_justice/statistics/index.html.
[80] Ibid.
[81] Bloomberg, 12 January 2005, http://www.bloomberg.com/apps/news?pid=10000081&sid=ar4RZKVjo3YA&refer=australia
[82] *The Australian*, Saturday 7 Feb. 2004, p.3.
[83] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003, ww.aph.gov.au/senate/committee/clac_ctte/poverty/submissions/sub244.doc

Home ownership rates among Indigenous households are significantly lower than non-Indigenous households (32% compared to 69%). Households with Indigenous persons were more than twice as likely to be living in rental accommodation than non-Indigenous households. These are relevant factors in explaining inter-generational poverty among Indigenous people.[84]

Indigenous households were almost 3 times as likely to report their homes to be in need of major repair, and a higher proportion of non-Indigenous households reported no need for repair.[85]

As detailed in the NGO submission, Indigenous Australians also face significant discrimination in relation to private rental, public housing and the regulation of public space. This includes exclusionary practices, excessive up-front cost demands and a higher incidence of evictions from housing. Indigenous people are also persistently over-represented in homeless statistics.[86]

*Education*

Fewer than 36% of Indigenous children finish high school compared with 73% of the overall Australian population.[87] 32% of Indigenous Australians did not complete year 10 schooling, compared to 18% of non-Indigenous Australians.

The overall literacy results for 2000 indicate that 92.5% of year 3 and 87.4% of year 5 students achieved the national reading standards. The comparative Indigenous student performance indicates that 76.9% of year 3 and 62.0% of year 5 students achieved minimum reading standards. Similarly results apply to numeracy standards.[88]

Only 7% of children in remote communities have normal healthy ears (no infections or hearing loss).[89]

*Family*

About 45% of deaths among Indigenous males, and 34% of deaths among Indigenous females, occur before age 45, compared with 10% and 6% for non-Indigenous males and females respectively.[90] Most Indigenous children have single parents and lack other mature family role models such as grandparents.

Indigenous children are over-represented in care and protection systems across Australia by 3.2 times the non-Indigenous rate. This over-representation increases with the seriousness of the intervention, with Indigenous children placed under care and protection orders and out-of-home care at 5.9 and 6.3 times the non-Indigenous rates respectively.[91]

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[84] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003

[85] Australian Institute of Health and Welfare, 2003, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, ABS 4704.0

[86] Australian Non-governmental Organisations' Submission to the Committee on the Elimination of Racial Discrimination, January 2005, pages 47-50.

[87] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003.

[88] The Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Reference Committee, Inquiry into Poverty and Financial Hardship in Australia*, July 2003.

[89] Fred Hollows Foundation Fact Sheet: *The Health Emergency 2004*.

[90] *UN Human Development Report 2003*.

[91] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003, www.aph.gov.au/senate/committee/clac_ctte/poverty/submissions/sub244.doc

In NSW in 1991, Indigenous females were 6.2 times more likely to be the victim of domestic violence, 2.9 times more likely to be the victim of sexual assault and 1.9 times more likely to be the victim of murder than non-Indigenous females. (In WA in 1991 Indigenous women were 13 times more likely to be the victim of assault).[92]

*Teenagers at risk of poverty*

44% of all Indigenous teenagers (aged 15-19 years) are likely to be at risk of entering into poverty, compared to 15% of non-Indigenous teenagers. This situation worsens further in remote and very remote regions of Australia. The rate of risk of poverty is calculated according to the number of people that are either not in full-time work or education or combining part time work and education.[93]

*Infant Mortality*

Indigenous infant mortality rates are 2.5 times that of other Australian infants.[94] Infant mortality rates for Indigenous Australians are almost twice as high as those of the NZ and US Indigenous populations.

Recent Census data indicates that many indicators of socio-economic well-being have either declined or have not grown as quickly for Indigenous Australians as for the non-Indigenous population (hence increasing the inequality gap between Indigenous and non-Indigenous Australians).[95] This remains a significant contextual factor for addressing Indigenous peoples' health status and family and community well-being, and contact with criminal justice processes.

Health and Mutual Obligation

The Federal government's introduction of the concept of mutual obligation has focused on Indigenous health, however, Indigenous leaders and people working in Indigenous health and associated areas of disadvantage have grave concerns that the notion of 'mutual' is really missing from the Government's arrangements.[96]

*"If they mean - if you get your kids to go to school, we'll fix up the school, we'll put the money in there, or if you wash the kids' faces we'll fix up the clinic, we'll give you a decent clinic, we'll make primary health care available to you, we'll spend the extra $450 million a year that's required to bring our primary health system up to scratch. If that's what it means, if the Government is actually putting its money where its mouth is, well, sure I want to talk about that. But if it's just one way - that you guys have to send your kids to school, regardless of the nature or quality of the school, you have to keep your kids clean regardless of the availability of a decent clinic with decent health professionals, all these things that most other Australians take for granted that are supplied by the Government. We can't take that for granted, because they're not there."*[97]

There is also concern that efforts from the grassroots communities to make substantial changes become linked to the provision of basic services that are the fundamental responsibility of

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[92] Human Rights and Equal Opportunity Commission 2004, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia*. www.humanrights.gov.au/social_justice/statistics/index.html.

[93] Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Community Affairs Committee Inquiry into poverty and financial hardship in Australia*, July 2003, www.aph.gov.au/senate/committee/clac_ctte/poverty/submissions/sub244.doc

[94] Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003*

[95] Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission of Australia, *Submission to the Expert seminar on Indigenous Peoples and the administration of justice*, Madrid, Spain, 12-14 November 2003

[96] 'Living Black' SBS TV, Saturday 8 January 2004

[97] Mick Dodson, Chairman, Australian Indigenous Leadership Centre, Australian National University speaking on 'Living Black' SBS TV, Saturday 8 January 2004

governments anyway, and that are provided to non-Indigenous Australians as a matter of course.[98]

Such concerns have been realised in the first publicly announced shared responsibility agreement where funding for basic infrastructure and the provision of government health checks were made conditional on health prevention measures by the community (see above at p21).

The relevant Articles to which the above issues relate are ICERD Articles 2 (1) (a), (2), 5 (e).

**Recommendations: Indigenous health**

The Federal government must, as a matter of urgency, make available sufficient resources to provide:

- Primary health care on the basis of need, through Aboriginal community controlled health services and better access to mainstream services;

- a significant increase in the health workforce, particularly of Indigenous background;

- comprehensive early intervention and prevention programs;

- significant improvements in educational and employment outcomes, and housing and infrastructure provision.

Governments must consult and work with Indigenous leaders and communities to change the founding causes of poor health in Indigenous communities.

## Native Title

ANTaR supports the submission to the Committee by the Aboriginal and Torres Strait Islander Social Justice Commissioner and urges the Commission to review the commentaries referred to in that submission, particularly those included in the Commissioner's Native Title Reports.

ANTaR in particular draws the Committee's attention to the following points:

- The Australian High Court's recognition of native title in the landmark *Mabo* decision was made within the international human rights framework of non racial discrimination. In their reasoning, the High Court stated that Australia's common law cannot remain 'frozen in an age of racial discrimination' and the High Court explicitly referred to Australia's international treaty obligations concerning non racial discrimination in relation to property rights and our ascension to the first Option Protocol to the ICCPR as a basis for this analysis.

- Aspects of the original *Native Title Act 1993* sought to implement procedures for recognition and protection of native title based on non discriminatory principles, whilst other aspects of the Act were clearly racially discriminatory in their treatment of native title with respect to non indigenous property rights. Significantly, indigenous leaders were for the first time active participants in the negotiation of this Act.

- The *Native Title Amendment Act 1998* significantly expanded the racially discriminatory aspects of the Act and the negotiations over these amendments excluded any negotiation with the indigenous leadership and was in fact passed with their explicit opposition. The discriminatory status of these amendments has been documented by the Committee and by other UN human rights Committees. The primary response by Australia to the criticism of these Committees has been to propose a review of the UN treaty body system.

[98] Larissa Behrendt, Professor of Law and Indigenous Studies at University of Technology, Sydney, speaking on 'Living Black' SBS TV, Saturday 8 January 2004

- Recent cases analysing the NTA by the High Court have further entrenched the racially discriminatory operation of the NTA. In the Miriuwung and Gajerrong case, the High Court did not determine that native title was title to land *per se*, but a bundle of specific rights. This analysis is in opposition to indigenous peoples' complex, profound and holistic relationship with their country, a holistic relationship that encompasses civil, political, economic, social and cultural rights. The 'bundle of rights' analysis significantly influences how native title can be proved and continue to be protected. On both a substantive and formal equality basis, it treats people in a racially discriminatory way.

- To prove native title, the High Court requires the following:

    - that the native title rights and interests claimed arise under traditional laws and customs which existed at sovereignty;
    - those rights claimed must be the same as the rights at sovereignty and it appears to not be possible for a vibrant indigenous legal system to create new rights not derivative from such rights identified at sovereignty;
    - the indigenous community claiming those rights must be the same community as the community which enjoyed the claimed rights at sovereignty.

- In a nutshell, the community claiming native title must essentially have remained 'frozen in time' during the past 210 years and be in a position to prove such continuity, despite the devastating impact of European colonisation.

- Once native title has been proved, the High Court has established principles for identifying how non-indigenous interests can extinguish native title. Most significantly, the High Court mandated a complex and in some instances arbitrary regime which effects widespread extinguishment of native title, despite argument before it that the relationship between native title interests and other non indigenous property interests could be determined upon co-existence principles. For example, it appears almost certain that the High Court has determined that national parks which cover a significant percentage of Australia (eg 8% in Western Australia) fully extinguish native title on the grounds that they are reserved and vested for public use, despite the obvious possibilities of co-existing indigenous and non indigenous interests in such parks.

- This extinguishment regime is racially discriminatory. It does not afford indigenous people the fundamental common law right, extended to all other property holders, protecting land against alienation without a process of compulsory acquisition. Further it does not provide for the constitutional guarantee and common law presumption that extinguishment of property rights will be relieved by compensation. Compensation is only available in limited circumstances post 1975, when the *Racial Discrimination Act 1975* was enacted. This does not deal with the vast majority of grants that have legally extinguished native title.

The High Court's analysis of the NTA is a mixture of the racially discriminatory aspects of the common law and the NTA as amended. However, such a position can be simply remedied by the legislature.

Instead of native title offering a possible solution to indigenous peoples' dispossession and a basis for international self-determination, cultural re-generation and pride, ANTaR submits to the Committee that, despite some positive outcomes in remote areas, native title has increasingly dissolved into another racially discriminatory State mechanism.

ANTaR urges the Committee to take a strong stand on Australia's international obligation to remedy this situation by appropriately amending the NTA in accordance with non-racially discriminatory standards.

The Government's actions with regard to native title represent breaches ICERD Articles 2 (1) (c), 5 (a), (d) (v), (e) (vi), and 6.

**Recommendation: Native Title**
That the Government amend the Native Title Act 1998 in accordance with non-racially discriminatory standards.

## Stolen wages and entitlements [99]

The NGO submission outlines information concerning the 'stolen wages' and entitlements of Indigenous workers, referring mainly to the situation in the state of the New South Wales. However, the issue of 'stolen wages' and entitlements is not confined to NSW but occurred to differing degrees in all Australian states and territories. The following provides detail of the 'stolen wages' issue in Queensland – the only other state where significant research and government action has occurred.

Queensland governments controlled the earnings and personal property of thousands of men, women and children who were forcibly contracted to work at reduced wage rates. This system pertained to the period from 1905 to 1971. From the early 1930s up to 80 per cent of savings (unpaid wages) were frozen in investments to provide revenue for the government; impoverished wards were thereby trapped in destitute and unhealthy circumstances leading to rates of sickness and early deaths many times the rate in the wider community.

Child endowment, workers compensation, pensions and inheritances were all intercepted for government control. The government imposed levies on accounts without people's knowledge or consent to develop Trust funds. People had no control over their private savings nor did they see evidence of transactions on their money. In the early 1970s many then found little remained in their accounts.

Recent private research reveals a wealth of internal correspondence, Reports and Audit Reports consistently criticising systemic negligence, misuse and misappropriation by government of private monies and Trust funds. Losses have been calculated at upwards of $500 million. Regulations in 1905 stated that the government agents (defined as protectors of Aborigines) were deemed to be public accountants under the *Audit Act of 1874*; legislation, regulations and *Annual Reports* affirm that full records and accounts would be kept of all monies. Yet governments have refused ever to provide any public accounting of their financial management.

In May 2002, the Queensland government alluded to the massive amount potentially missing or lost from Aboriginal wages and savings, yet it offered sums of only $2000 or $4000 per person as full and total reparations, contingent on relinquishment of all rights to pursue legal redress. The government will not supply to all claimants the records it holds of their finances; people are thereby prevented from making informed decisions. The government refuses to acknowledge the legitimate claims of descendants of thousands of people whose money was controlled but who died before the May 2002 offer; yet these descendants suffered and continue to suffer emotional, financial and circumstantial losses because of the impoverishment of their parents.

While some victims of this financial mismanagement seek legal redress, largely through the offices of pro bono lawyers, pressure continues for a broad-based political solution. The Queensland government must fund a full and independent accounting of all available evidence. An independent professional arbiter must then be appointed to calculate appropriate reparations.

[99] This section is based on the work of Dr Rosalind Kidd, whose research in relation to the administration of Aborigines in Queensland first brought focus on the issue of stolen wages in Australia. See http://www.linksdisk.com/roskidd/site/Speech25.htm

All states, and territories under Commonwealth jurisdiction, controlled the wages, savings and entitlements of Aboriginal workers and families to greater or lesser extents. Evidence exposed for the NSW and Queensland systems underline the need for a National Inquiry. Government complicity in the impoverishment of Aboriginal wards must be assessed and full reparations, including for deceased victims, must be made.

The Government's actions as detailed above represent breaches of ICERD Articles 2(1) (a), (c), 5 (a), (e) (i) and 6.

**Recommendation: Stolen Wages**
That the Government launch a national inquiry into the stolen wages issue.

## Deaths in custody, police harassment and racial violence

The situation in Australia with regard to deaths in custody and racial violence and discrimination has deteriorated since the CERD Committee noted improvements in these areas in its most recent Concluding Observations.[100]

The NGO submission mentions the "unusual and disturbing upturn in racial and religious violence and threats of violence" in Australia.[101] It also points to continuing problems regarding Indigenous deaths in custody and noted that despite the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), its recommendations have largely not been acted on by governments and that the Federal Government stopped funding to report on the implementation of the RCIADIC's 339 recommendations in 1997.

Recent serious incidents related to deaths in custody and public incidences of racial violence between Indigenous Australians and the State and non-Indigenous Australians have highlighted the dire consequences of this failure to act. This has included:

- Loss of confidence by the Indigenous community in government and police in relation to their concern over addressing deaths in custody and the targeting and harassment of Indigenous people by police;
- Increasing numbers of Indigenous people incarcerated and exposed to the criminal justice system (see above at p25 under "Incarceration");
- Continuing deaths in custody;
- Continuing heavy-handed and racially discriminatory actions by police toward Indigenous people;
- An apparent upturn in race-related violence and racial intolerance in the community.

In 2004 the deaths of two Indigenous people, one in police custody and the other while allegedly being pursued by police, sparked riots by the local Indigenous communities.

In Redfern in inner city Sydney an Indigenous teenage boy died while allegedly being pursued by police, sparking a violent confrontation between police and the community resulting in scores of injuries and arrests.

In the Indigenous community of Palm Island in Queensland a riot involving 300 people erupted in November after the community heard of the autopsy report for a man who died in police custody. The man's injuries included a ruptured liver and four broken ribs. The police station and courthouse were burnt down in the riot.[102]

[100] CERD/C/304/Add.101
[101] Australian Non-governmental Organisations' Submission to the Committee on the Elimination of Racial Discrimination, January 2005, pages 32-33.
[102] 'Island police station torched', *Sydney Morning Herald*, 27 November 2004. At: http://www.smh.com.au/news/National/Island-police-station-torched/2004/11/26/1101219735343.html#

It is significant that in both cases the riots ensued because the Indigenous communities were in no doubt that police were responsible for the deaths, indicating a serious lack of confidence in police culture and practices with respect to Indigenous peoples. In the Palm Island incident, the death in custody in part resulted from the failure of police to follow procedure as recommended by the RCIADIC, with the seriously injured man being placed in a cell and not provided immediate medical treatment.

Of further concern is that in both cases the response from police and authorities to the community's reactions has been heavy-handed and discriminatory, further inflaming resentment and a breakdown in relations between police and the community. On Palm Island heavy-handed tactics by police have included the use of semi-automatic weapons and stun guns in raids on homes greatly exacerbating tensions.[103] Reports of what has happened are deeply disturbing.

Brad Foster, chief executive of Carpentaria Land Council and a Palm Island community leader reported that police in riot gear had traumatised the community:

> *"People are afraid to sleep in their houses and the wider public doesn't know about it. A lot of people are just living in fear at the moment.*
> *…*
> *On December 31, my younger brother was sitting at home here. Three carloads of coppers rocked up in full-body riot gear with masks on, with two plainclothes police. They smashed the front and back doors and walked straight into the house. There were six kids asleep in the lounge room who were disturbed by what happened. The police said they were looking for drugs but didn't find anything. That kind of behaviour hasn't stopped yet."* [104]

Another Palm Island resident reported that her 16 year old daughter is still having nightmares after police placed a gun at her head:

> *"My daughter is an innocent Christian girl who was in one house which police raided looking to arrest people and she was placed on the floor and had a weapon held at her head. I am very angry that it could have happened."* [105]

In a further disturbing response, one of the accused Palm Island rioters experienced racial abuse and violence when abuse and bottles were thrown at the house he was staying at in Townsville while on bail. He presently faces bail breaching charges, despite his argument that he relocated to escape the verbal and physical racial abuse which he had informed police about.[106]

Within weeks of the Palm Island riot, a teenage boy caught attempting theft was stripped naked, tied, beaten, threatened with a shotgun and dragged by a rope around his neck for approximately 45 minutes while his teenage accomplice was tied to a tree and forced to watch the attack.[107]

Grossly disproportionate levels of violence against and involving Indigenous Australians, compared with non-Indigenous Australians, have been commonplace since the country's colonisation. The past 10 years of Australian Government neglect of Indigenous people and communities logically feeds Indigenous people's anger. Co-Chair of Reconciliation Australia,

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[103] *The Anger of the Aborigines*, Kathy Marks, http://www.eniar.org/news/toomelah.html. See also Media Release from Carpentaria Land Council, 6 January 2005. At http://lists.riseup.net/www/arc/antar-news/2005-01/msg00002.html
[104] 'Living in fear', *Koori Mail*, 12 January 2005.
[105] 'Trauma on Palm', *Koori Mail*, 12 January 2005.
[106] *Queensland Racial Abuse Claims Resurface*, AAP, 5 January 2005, http://smh.com.au/articles/2005/01/05/1104832141611.html
[107] 'Rope put around neck of black teenager', *Sydney Morning Herald*, 2 December 2004.

Fred Chaney, has commented that he "*believes the anger felt by many Aboriginals is justified".*[108]

The examples listed above recall episodes in America's Deep South in the 1960s. They have fuelled fears that racial violence against Indigenous Australians is presently increasing in both frequency and seriousness.[109] These should be regarded as a warning sign of potential future tragedy and the urgent need for further action by the government to address racial violence.

ANTaR believes that the issues as detailed above raise serious concerns in terms of the Australian Government's responsibilities ICERD Articles 2 (1) (a), (c), 4 (a), (c), 5 (b), (d), 6.

**Recommendation: Deaths in custody, police practices and racial violence**
That the Government implement in full the recommendations of the Royal Commission into Aboriginal Deaths in Custody and resume reporting against the recommendations.

[108] *The Anger of the Aborigines*, Kathy Marks, http://www.eniar.org/news/toomelah.html
[109] Robbie Williams, ATSIC Commissioner for south-east Queensland, 'Rope put around neck of black teenager', *Sydney Morning Herald*, 2 December 2004.

## Appendix: Comments by Indigenous Leaders on mutual obligation and shared responsibility agreements

Tom Calma, Social Justice Commissioner and Acting Race Commissioner:

*"As Race Discrimination Commissioner I would be deeply concerned if conditions were introduced which place restrictions on access to services for one sector of the Australian community defined by their race that did not apply more generally to the rest of the Australian community. It would be unacceptable for Indigenous peoples to be denied basic citizenship services that all other Australians take for granted."* 11 Nov 2004.[110]

Patrick Dodson, Founding Chair, Council for Aboriginal Reconciliation; Chair, Lingiari Foundation:

*"This is not reform, you can't possibly call this reform. This is social engineering at its worst."* 11 Nov 2004.[111]

*"It smacks of the old native welfare days, when the white folks were in charge of the lives of Aboriginal people."* 9 Dec 2004[112]

Lowitja O'Donoghue, Founding Chair of ATSIC, professorial fellow, Flinders University:

*"I'm really angry. I don't know how to articulate this new policy of mutual obligation. It is nonsense, absolute nonsense. We're back to the protection era."* 8 Jan 2004[113]

Professor Mick Dodson, Former Social Justice Commissioner, Chair of the Australian Indigenous Leadership Centre:

*"I think this is wrong, I think this is racially discriminatory, the ends don't justify the means in my view. You shouldn't violate peoples' rights, their human rights, their right to be free of discrimination in order to put in place some sort of social experiment."* 11 Nov 2004.[114]

*"If they live up to their obligation, if they be accountable to us and provide the services that every other Australian takes for granted, then we've got somewhere down the track towards mutual obligation. But as long as it's just about blaming us for our kids' health, for our substance abuse, for our violence, for a range of other woes that confront our people - and our disadvantage and our poverty - blaming us for that - it's not going to work. It's not mutual obligation. It's one-directional blaming."* 8 Jan 2005[115]

Noel Pearson, Cape York Partnerships.

*"…if the Government allows bureaucrats to go charging around like that, we're going to trivialise and demonise this very important principle* [of mutual obligation]." [116]

Aden Ridgeway, Federal Senator for NSW:

*"Mutual obligation is a door that's got to swing both ways … it seems to me that if there's seriousness about this, first and foremost we ought to make sure that there's a moral requirement to deal with health in our communities. If they want to talk about national mutual obligation, give us $450 million to deal with preventative health in our communities, keep regional* [ATSIC] *councils on board and make sure the communities are empowered…"* 8 Jan 2005 [117]

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[110] Mr Tom Calma, Social Justice Commissioner and Acting Race Discrimination Commissioner, Statement on proposals for welfare reform for Indigenous Australians, 11 November 2004.
[111] The Australian, 11 November 2004.
[112] ABC Radio, *PM*, 9 December 2004.
[113] SBS TV, Living Black Indigenous Leaders Forum, 8 January 2005.
[114] 'Indigenous welfare reforms a step backwards', ABC News Online, 11 November 2004.
[115] SBS TV, Living Black Indigenous Leaders Forum, 8 January 2005.
[116] *The Age*, 15 December 2004.
[117] Aden Ridgeway, NSW Democrats Senator, 'Living Black' SBS TV, Saturday 8 January 2004

Linda Burney MLA, NSW Member for Canterbury:

*"There's nothing wrong with clean kids that go to school regularly, but tying that to decent housing is immoral."* 20 Nov 2004.[118]

Larissa Behrendt, Professor of Law and Indigenous Studies, University of Technology, Sydney:

*"this notion of mutual is really missing from the Government's arrangements. I think where people have a concern is, firstly, that those sorts of efforts from the grassroots communities to make substantial changes become linked to the provision of basic services that should be provided by governments anyway. That's a huge concern."*[119]

Carol Martin MP, Western Australia Member for the Kimberley:

*"I'm offended that people need to sit up and beg. I train my dog by withdrawing things."* 10 Dec 2004.[120]

Vince Mundraby, Mayor of Yarrabah:

*"For a community like Yarrabah, it takes away self-determination if we're going to have to go back to these menial agreements to get funds for real outcomes on the ground."* 29 Dec 2004[121]

[118] 'Indigenous MP condemns welfare reform proposals', ABC Online, 20 November 2004.
[119] SBS TV, Living Black Indigenous Leaders Forum, 8 January 2005.
[120] 'Hygiene pact stymies race accord', *The Age*, 10 December 2004.
[121] 'Aborigines claim heavier responsibility than whites', *The Australian*, 29 December 2004.