



# Victorian Aboriginal Legal Service Co-operative Ltd.

*Head Office:*  
6 Alexandra Parade,  
P.O. Box 218  
Fitzroy, Victoria 3065  
Phone: (03) 9419 3888 (24 Hrs)  
Fax: (03) 9419 6024  
Toll Free: 1800 064 865

**SUBMISSION TO THE SENATE SELECT COMMITTEE ON THE  
ADMINISTRATION OF INDIGENOUS AFFAIRS (August 2004)**

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## **INTRODUCTION**

The Victorian Aboriginal Legal Service (VALS) welcomes the appointment of the Senate Select Committee on the Administration of Indigenous Affairs.

VALS argues that:

- The proposed abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the proposal to tender out legal services for Indigenous Australians will disadvantage Indigenous Australians.
- Changes to ATSIC should come about through consultation with the Indigenous community. VALS calls for the Government to ensure that Indigenous Australians are involved in the development and implementation of a structure to replace ATSIC. Indigenous Australians should be included in a similar manner in relation to the provision of legal services for Indigenous Australians.
- The trend towards mainstreaming services is inappropriate, as Indigenous Australians prefer to access Indigenous services.
- The trend away from recognising Indigenous Australian's right to self determination is a denial of human rights.
- The trend towards mainstreaming services for Indigenous Australians and trend away from recognizing the right to self determination are steps backwards in terms of the administration of Indigenous Affairs.

### **A) THE PROVISIONS OF THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL 2004**

On 15 April 2004, the Commonwealth Government announced the proposed abolition of ATSIC, the national elected peak Indigenous body. VALS has concerns about the Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (Bill).

### **VALS CONCERNS ABOUT THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL 2004**

#### **The Introduction of the Bill**

VALS is concerned by the fact that the Government introduced the Bill on the 37<sup>th</sup> anniversary of the 1967 Referendum, which recognised Indigenous people in Australia (27 May 2004).<sup>1</sup> Arguably, such an occurrence is representative of the Government's

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<sup>1</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Snowdon MP).

insensitivity towards, ignorance of and lack of respect for Indigenous Australians. This argument is also applicable to the contents of the Bill itself.

### **Contents of the Bill**

#### **The Contents of the Bill are Not the Result of Consultation with the Indigenous Community.**

Indigenous Australians were not consulted on the proposed abolition of ATSIC, nor the contents of the Bill. VALS calls for the Government to consult with Indigenous Australians to reach a model to replace ATSIC that the Indigenous Community will accept. It is in the interests of the Government and Indigenous Australians that a consultation process takes place. The benefits of consultation are as follows:

- Gives due respect to Indigenous perspectives;
- Enables Indigenous Australians to influence their future;
- Consultation with the Indigenous community on a new initiative and the involvement of the Indigenous community on a new initiative is more likely to lead to the success of a new initiative because:
  - Indigenous Australians are included, which makes sense as Indigenous Australians are aware of how to meet problems within their community. The ATSIC Review (In the hands of the regions – a new ATSIC) noted that “funding services through mainstream agencies without a significant involvement of ATSIC seems unsustainable”.<sup>2</sup>
  - Indigenous Australians support the initiative. The ATSIC Review recommended that reforms need to follow from a process of discussion and negotiation rather than being imposed by the Minister.<sup>3</sup>
  - Effective input means effective outcome.

VALS encourages the Government to consult with Indigenous Australians, rather than take the easy way out and ignore the voice of Indigenous Australians. In the long run, consultation is beneficial. VALS calls for greater transparency on the part of the Government.<sup>4</sup>

#### **The Bill is a Result of Inconsistencies in Government Approach**

VALS notes the following inconsistencies in the Government’s approach to Indigenous issues.

- The Government has found the right direction, which is partnership with Indigenous people and a planned approach. The Government is aware of Reports

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<sup>2</sup> ATSIC Media Release, ‘Board Welcomes Review’s Support for a “New ATSIC”, 19/6/2003 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>3</sup> Acting ATSIC Chairman Media Release ‘An Indigenous Vision for our Future’, 21/5/2003 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>4</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Ms Hall MP).

that recommend such an approach and cannot plead ignorance on this matter. The Government's action conflict with the recommendations of the Reports, as the Government will not systematically consult with Indigenous Australians. The Reports note the disadvantages attached to mainstreaming services for Indigenous Australians (to be discussed later). The Government push for mainstreaming is almost tantamount to a guarantee of future failure.

- The Government spent over 1 million dollars on the ATSIC Review, which implies that the Government recognises the importance of Indigenous governance. However, the Government has rejected the recommendations of the ATSIC Review not to abolish ATSIC. According to Jackie Huggins, the axing of ATSIC was 'contrary to our view'.<sup>5</sup>
- The Government has announced that money for Indigenous Australians will be quarantined within mainstream Government Departments. This implies a recognition of the separate and distinguishable needs of Indigenous Australians in comparison to the non-Indigenous population. However, the Government is going ahead with mainstreaming services for Indigenous Australians.
- ATSIC is not the only body to contain flaws, yet ATSIC is being abolished because of these flaws, whereas other bodies are not.
- The Government is inconsistent in the accountability standards it imposes on Indigenous organisations. It appears that Indigenous organisations are required to jump through more hoops than equivalent non-Indigenous Organisations. At the same time, the Government lacks accountability and transparency.

VALS calls on the Government to consistent in its approach to Indigenous Affairs and not create double standards for Indigenous Australians that work to the detriment of Indigenous Australians. It appears that the Government is reluctant to commit to affirmative action that improves the lives of Indigenous Australians, such as creating special laws. It was noted in the 2002 Social Justice Report that: "demands for identical or 'sameness' of treatment are tantamount to 'keeping us in our place'".<sup>6</sup> However, the Government is prepared to give Indigenous Australians special treatment that is disadvantageous (ie: higher level of bureaucratic hurdles).

### **The Bill is Racially Discriminatory.**

The motivation behind the introduction of the Bill is apparent in the words of John Howard that: "the experiment in separate representation, elected representation, for

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<sup>5</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> ((Dr Lawrence MP).

<sup>6</sup>The Social Justice Report (Aboriginal and Torres Strait Islander Social Justice Commissioner) 2002

indigenous people has been a failure".<sup>7</sup> This comment reflects an inability to accept difference within the Australian population.

### **Makes No Provision for an Alternative National Representative Body.**

VALS criticisms of the failure to provide a replacement national body are that:

- Indigenous Australians are being disenfranchised and disempowered, rather than empowered. The Government is throwing the baby out with the bathwater.
- The National Indigenous voice is being silenced with the abolition of ATSIC, an advocate for Indigenous Australians.

### **The Bill Contains Questionable Amendments that are Consequential to the Abolition of ATSIC**

VALS is concerned that the Bill:

- Vests increased power in the hands of the Minister for Immigration Multiculturalism and Indigenous Affairs without the assurance a robust process of accountability to Indigenous Australians (ie: ATSIC powers, policy role, direction over regional councils, Indigenous Business Australia etc).<sup>8</sup>
- Indigenous people will only be able to influence Government decisions on an advisory basis through the National Indigenous Council (Council). Criticisms of the Council are as follows:
  - Lacks authority, which means the Government can 'shop' for advice it wants to hear;<sup>9</sup>
  - non-statutory nature of the body raise the issue of permanence;
  - Members of the Council are appointed by the Government and will not necessarily represent Indigenous Australians;<sup>10</sup>
  - Indigenous Australians will not consider the Council worthy of being appointed to, and those that are appointed will be 'crucified by the black nation';<sup>11</sup>

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<sup>7</sup> Howard John, Vanstone Amanda Joint Press Release, 15 April 2004 as at <http://www.pm.gov.au/news/interviews/Interview795.html>.

<sup>8</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr McMullan MP).

<sup>9</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Brendan O'Connor MP).

<sup>10</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Ms George MP).

<sup>11</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Organ MP).

- Lacks ability to act as an advocate on Indigenous issues and criticize the Government, as the Council is not independent of Government.<sup>12</sup> This may be detrimental to the quality of advice that the Government receives.<sup>13</sup>
- Transfers ATSIC powers to bodies that do not have the capacity to perform the new role (ie: housing fund to be administered by Indigenous Business Australia, Regional Land Fund to be administered by Indigenous Land Corporation).<sup>14</sup>
- Amends the *Aboriginal and Torres Strait Islander Act 2004* to: abolish Regional Councils in July 2005. VALS notes that the Government has ignored the recommendation of the ATSIC Review to give greater control to Indigenous people at the regional level.<sup>15</sup> At the same time VALS notes the argument of Will Sanders that “[r]egionalism is not a panacea for organizational and geographic scale problems in Indigenous community governance any more than it is in other policy or issue areas of Australian government. But it is a modestly useful resource”.<sup>16</sup> Regionalism is often embraced due to difficulties in the discharge of State and Federal responsibilities. VALS notes that Indigenous Australians favour a holistic approach to service delivery. The distinction between Commonwealth and State responsibility for Indigenous Australians is often complex. The proposed abolition of ATSIC raises the issue of Federation and cohesion in approaches to Aboriginal Affairs.
- Makes consequential amendments to eleven other Acts which removes the involvement of Indigenous Australians in issues affecting them. For instance, the proposed amendment to the Environment Protection and Biodiversity Conservation Act removes the requirement for the Minister for the Environment to inform any Indigenous representative organisation of a proposal.<sup>17</sup>

### **The Bill is a Result of Unfair Expectations on ATSIC**

The ATSIC Review recognises that “time and time again ATSIC has been used as a scapegoat for poor Indigenous affairs outcomes (even when the program responsibility

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<sup>12</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Brendan O’Connor MP).

<sup>13</sup> Ibid.

<sup>14</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr McMullan MP).

<sup>15</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Dr Lawrence MP).

<sup>16</sup> Sanders Will, Prospects for Regionalism in Indigenous Community Governance (Seminar for AIATSIS) 27 April 2004.

<sup>17</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr McMullan MP).

concerned clearly did not belong to ATSIC)".<sup>18</sup> Unfair expectations were placed on ATSIC as mainstream departments were responsible for the majority of service delivery to Indigenous Australians. The latter are responsible for the high levels of disadvantage afflicting Indigenous peoples.<sup>19</sup>

### **ATSIC is Being Stripped Before the Bill is Passed**

VALS is concerned that the Federal Government has stripped ATSIC of its responsibilities before legislation to abolish the organisation is passed. More than one billion dollars of former ATSIC/Aboriginal and Torres Strait Islander Services (ATSIS) programs have been transferred to mainstream Australian Government agencies. On 1 July 2004, some one thousand, three hundred staff commenced work in their new Departments.<sup>20</sup>

### **Steps Forward in the Right Direction**

#### **Whole of Government Approach**

The Bill envisages building upon what has been learned from the whole of government approach adopted in the Council of Australian Government Indigenous trials.<sup>21</sup> The trials involve working closely with local elected and representative leaders of Indigenous organisations to design and deliver services in a coordinated and customised way and in consultation with State and Territory Governments.<sup>22</sup> VALS believes that 'whole of Government' is rarely achievable but a "some of government" approach is an excellent start and should be built on.

#### **Approach to Monitoring**

The increased monitoring role of the Office of Audit and Evaluation in relation to the performance of Commonwealth, State and Territory agencies is also arguably a step in the right direction.<sup>23</sup>

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<sup>18</sup> ATSIC Media Release 'Board welcomes Review's support for a "new ATSIC"', 19/6/2003 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>19</sup> Whitby Terry (ATSIC Acting Deputy Chairman) ATSIC Media Release 'Prime Minister Wrong About ATSIC – Just Ask His Minister February 2004 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>20</sup> Anderson Alison (ATSIC NT Central Zone Commissioner) Media Release, 'ATSIC Cuts Won't Stop Our Fight For Indigenous Rights' 24 June 2004 [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>21</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Hardgrave MP).

<sup>22</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Amanda Vanstone MP).

<sup>23</sup> ATSIC Media Release 'Not Beaten Yet', 23/4/2004 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/Default.asp?id=3222](http://www.atsic.gov.au/News_Room/Media_Releases/Default.asp?id=3222).

## **B) THE PROPOSED ADMINISTRATION OF INDIGENOUS PROGRAMS AND SERVICES BY MAINSTREAM DEPARTMENT AND AGENCIES**

The Bill and the tender proposal reflect a move towards mainstreaming and a move away from self-determination

### **Move Towards Mainstreaming**

The Bill reflects a move towards mainstreaming in the following way

- It will abolish ATSIC and not replace this representative body, but enable Government agencies to absorb services for Indigenous Australians.

The tender proposal reflects a move towards mainstreaming in the following way

- The Proposal to tender out legal services for Indigenous Australians is open sundry.
- The Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians (Exposure Draft) maximises the chances of attracting non-Indigenous mainstream legal aid and private law firms to bid for tender VALS notes that Minister Ruddock (Attorney General) released a media release on 28 July 2004 detailing changes to the tender proposal outlined in the Exposure Draft, which will be discussed later. The Exposure Draft maximizes the chances of attracting non-Indigenous organisations by:
  - Narrowing Core services to be provided.
    - ❖ The Exposure Draft narrows the range of services to be provided. Services that private law firms are unlikely to have experience in (ie: education or research/reform services) are removed.
  - Requiring Financial viability
    - ❖ The definition of financial viability (ie: ability to pay in arrears) is a definition that community organisations may find difficult to meet (ie: dependent on Government funding).
  - Introducing Means testing
    - ❖ Introducing means testing may be an encouragement for private practitioners.
  - Framing of Selection Criteria: Capacity to provide an accessible and culturally sensitive service to Indigenous Australians (Weighting 30%);
    - ❖ It appears that non-Indigenous service providers will meet the above requirement by simply incorporating cultural training policies and procedures. There is no requirement for Aboriginal staff, control or management.



## **Criticisms of Mainstreaming**

VALS has the following criticisms of mainstreaming that are applicable to the abolition of ATSI and tendering of legal services for Indigenous Australians, as mainstreaming:

- Will severely disadvantage Aboriginal and Torres Strait Islander people.
- Is a denial of Indigenous difference and the need for specific services to meet special needs.
- Has never worked in the past. The move towards mainstreaming is a step backwards in terms of progress in Aboriginal Affairs. According to the Centre for Aboriginal Economic Policy Research, the result of the Howard a 'Practical Reconciliation' agenda is a backwards trend (ie: reduced advancement of Indigenous Australians in socioeconomic terms in 2001 than in 1996).<sup>24</sup>
- Mainstream service provision is not appropriate as mainstream services do not offer the same cultural sensitivity that Indigenous organisations do.
- The notion of cultural sensitivity is linked with accessibility of services. Indigenous Australians will not access services that are culturally insensitive. Mainstreaming jeopardises service provision to Indigenous Australians.
- Mainstream staff will not be prepared for the influx of Aboriginal and Torres Strait Islander issues and concerns as they do not have a track record in this area.<sup>25</sup> There is the danger that mainstream demands will be prioritized over non-mainstream demands.
- Bureaucrats do not know what is best for Indigenous Australians, whereas Indigenous people have a better idea.<sup>26</sup> Mainstreaming has assimilationist undertones.
- Indigenous Australians generally prefer to access Indigenous services in comparison to mainstream services.
- Indigenous organisations are unique in being able to provide appropriate services. Troy Austin, (Victorian ATSI Commissioner) expressed doubt that a mainstream organization could match or reach similar achievements as ATSI.<sup>27</sup>

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<sup>24</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr McMullan MP).

<sup>25</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Emerson MP).

<sup>26</sup> Williams Robbie (ATSI Commissioner) Media Release, 'Brisbane Rally Rejects Federal Government's Handling of Aboriginal Affairs' 20 May 2004 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>27</sup> Austin Troy (ATSI Commissioner for Victoria) Media Release 'ATSI's Unique Voice and Record of Achievement' 22/4/2004 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

- The mainstreaming of legal services for Indigenous Australians is inappropriate because it overlooks the importance of Indigenous organisations in providing services for Indigenous Australians. Aboriginal and Torres Strait Islander Legal Services (ATSILS) are the primary provider of legal services to Indigenous Australians, as 89% of legal services to Indigenous Australians are delivered by ATSILS (Law and Justice Review Number 13, Australian National Audit Office 2003 ANAO).
- Mainstream service providers have expressed a desire not to replace ATSILS (ANAO Report).
- Mainstreaming flies in the face of findings before the Government about the role of Indigenous organisations and mainstream service providers (Recommendation 1c,d & e of the Royal Commission into Aboriginal Deaths in Custody RCIADC 1991). For instance, Recommendation 1d) states: “[t]hat wherever appropriate, governments make use of the services of Aboriginal organisations in implementing such recommendations.”
- Mainstreaming flies in the face of findings of the Commonwealth Grants Commission (2001) and Productivity Commission’s Report on Government Services 2003.
- The findings of the Commonwealth Grants Commission were repeatedly quoted during the Second Reading of the Bill and are as follows:
  - Mainstream services do not meet the needs of Indigenous people to the same extent as they meet the needs of non-Indigenous people.<sup>28</sup>
  - The effectiveness of programs for Indigenous Australians is significantly enhanced by Indigenous control of, or strong influence over, service delivery.<sup>29</sup>
  - There is no evidence that mainstreaming would improve services.<sup>30</sup>
  - the failure of mainstream programs to address the needs of Indigenous peoples effectively means that Indigenous-specific programs are expected to do more than they were designed to do.<sup>31</sup>

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<sup>28</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr McMullan MP).

<sup>29</sup> Ibid.

<sup>30</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Brendan O’Connor MP).

<sup>31</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Ms Grierson MP).

- There are important principles and key areas for action that should guide efforts:
  - i) the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery and;
  - vii) recognising the importance of capacity building within Indigenous communities. Pg xvii-xix (CGC 2002)
- Similar findings of the ATSIC Review are as follows:
  - Mainstreaming is not the solution as there was no persuasive evidence that the programs would be delivered more effectively by any other agency.<sup>32</sup>

### **Move Away From Self-Determination**

Mainstreaming goes hand in hand with the overlooking of Indigenous Australian's right to self-determination. Plans to place ATSIC and legal services for Indigenous Australians in the hands of mainstream providers, means that ATSIC and legal services will be taken from the hands of Indigenous Australians. VALS is critical of the lack of respect of Indigenous people right to self determination.

The Bill reflects a move away from self determination in the following way:

- The replacement agency of ATSIC will not be a national representative body. The abolition of ATSIC means the removal of the preamble to the *Aboriginal and Torres Strait Islander Act 1989* (the ATSIC Act) which refers to the aims of self-management and self-sufficiency".<sup>33</sup>

The tender proposal reflects a move away from self determination in the following way:

- The tender policy ignores the right to self-determination by opening up the possibility of legal services no longer being supplied by Indigenous organisations with Indigenous staff, but mainstream providers.

VALS notes that the right to self determination has received broad recognition and calls for the Government also to recognize this right. The right to self determination is recognized in:

- The RCIADIC (Recommendations 188 to 204). The importance of Indigenous control of services was emphasised by Commissioner Elliot Johnson (paragraph 1.7.6 RCIADIC): "The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands".
- The Social Justice Report (Aboriginal and Torres Strait Islander Social Justice Commissioner) 2004. It is noted in the Report that: "Building community capacity and promoting good governance in indigenous communities is

<sup>32</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Ms George MP).

<sup>33</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Organ MP).

increasingly being seen as necessary to developing a more effective service delivery framework that can contribute to sustainable development in Indigenous communities".<sup>34</sup> The vital link between governance and sustainable and development was recognised in longitudinal studies such as:

- Harvard Project on American Indian Economic Development (Harvard Project).
- Mick Dodson and Diane Smith Inquiry into Capacity Building in Indigenous communities (2002).

The Social Justice Report (2002) is critical of the Government for not responding to the Commonwealth Grants Commission's Report that: proposed a "wide range of processes for developing Indigenous community capacity and creating a role for Indigenous communities in controlling service delivery processes".<sup>35</sup>

Noted a finding of the Harvard Project that "[w]e have yet to find a case of sustained, positive... economic performance where someone other than the Indian nation is making the major decisions about governmental design, resource allocations, development strategy and related matters".<sup>36</sup>

### **Criticisms of Move Away From Recognising Indigenous Australian's Right to Self - Determination**

The arguments against the move away from self determination are that it will:

- Severely disadvantage Aboriginal and Torres Strait Islander people, as it will result in the further marginalization of Indigenous Australians.
- Deny Indigenous Australians a fundamental human right. Unfortunately, the rights of Indigenous Australians are used as political footballs.<sup>37</sup>
- Constitute a paternalistic move backwards from what has been achieved in the past in terms of self-determination.
- Remove power from Indigenous Australians to shape their own futures.
- Undermine Government accountability to Indigenous Australians.
- Result in the Government not consulting with Indigenous Australians
- Result in the failure to respect the Indigenous perspective.<sup>38</sup>

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<sup>34</sup>The Social Justice Report (Aboriginal and Torres Strait Islander Social Justice Commissioner) 2004, p 71

<sup>35</sup> The Social Justice Report (Aboriginal and Torres Strait Islander Social Justice Commissioner) 2002

<sup>36</sup> The Social Justice Report (Aboriginal and Torres Strait Islander Social Justice Commissioner) 2002

<sup>37</sup> Whitby Terry (Acting Deputy Chairman ) Media Release 'Prime Minister Wrong About ATSIC – Just Ask His Minister' February 2004 as at [http://www.atsic.gov.au/News\\_Room/Media\\_Releases/](http://www.atsic.gov.au/News_Room/Media_Releases/).

<sup>38</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Organ MP).

VALS supports the following proposals:

- Indigenous people must have the authority (and be properly resourced) to represent themselves and determine their futures, rather than have them determined for them.<sup>39</sup>
- Some form of representative structure is therefore essential. Indigenous people must be a part of determining the structures and processes by which such representation is to occur (ie: consultation and involvement at the development and implementation stage).<sup>40</sup>
- Self-determination is both a right and a necessity. Programs and policies imposed on Aboriginal and Torres Strait Islander peoples rather than negotiated with them do not have a high success rate.<sup>41</sup>

### **C) RELATED MATTERS**

#### **VALS CONCERNS WITH THE PROPOSAL TO TENDER OUT LEGAL SERVICES FOR INDIGENOUS AUSTRALIANS**

ATSIS released the Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians (Exposure Draft) in March 2004 requesting submissions in response. VALS submitted a joint submission with Arnold Bloch Leibler (Lawyers and Advisers) which is available on the VALS website.

In a media release dated 28 July 2004, Minister Ruddock (Attorney General) announced a revised tender process that will start in Victoria and Western Australia, followed by Queensland. The successful tenderers in Victoria and Western Australia will commence operations from 1 July 2005 and the tendering process in other States and the Northern Territory will start after 1 July 2005. VALS has concerns with the revised tendering process, but acknowledges that the Commonwealth Government appears to have gone some way to recognizing the primarily nature of services ATSILS provide.

#### **VALS Comments on the Revised Tender Process:**

##### **Government Motivation behind Commencing the Tender Process in States Where there is One Service Provider of Legal Services for Indigenous Australians**

VALS questions the Government's motivation behind commencing the tender process in States where there is one service provider of legal services for Indigenous Australians.

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<sup>39</sup> ANTaR Victoria 'Petition Requesting That Indigenous Voice To Be Represented In Australia'.

<sup>40</sup> *ibid.*

<sup>41</sup> Aboriginal And Torres Strait Islander Commission Amendment Bill 2004: Second Reading, 27 May 2004 as at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=47> (Mr Melham MP).

VALS notes that ATSiS admits that there was no cost benefit analysis of the merits of tendering. The Government has claimed that the economic benefits of tendering are cost savings from amalgamating existing services in States with *more* than one service provider. However, the Government is starting tendering in States where there will be no such savings, as there is *one* service provider. The reports to Government indicate ATSiS provide good value for money. VALS calls on the Government to work cooperatively with ATSiS.

### **Introduction of Means Testing**

Means testing will be introduced which overlooks research [Improved Targeting of ATSiS 1999 (“The Keys Young Report”)] that indicates that means testing clients of ATSiS is not cost effective (ie: 98% of Indigenous Australians fall within the means test parameters, waste of resources). The Keys Young Report recommended that means testing is only applied to more expensive cases in the interests of efficiency.

### **Lack of Government Transparency**

The elements of the revised tender process are unclear. VALS calls for the Government to be more transparent about the revised policy on the tender proposal. VALS is concerned that the Government is using the need to maintain the probity of the tender process as an opportunity to alter policy without explanation or consultation, as the Government policy and tender proposal are not separated. Policy changes should not be hidden from scrutiny, yet arguably the Government is using the tender process to cloak policy changes. VALS does not know why ATSiS are subjected to high levels of bureaucracy and uncertainty while other areas of legal aid provision are not. Uncertainty does not promote good governance, and instead adversely affects service effectiveness.

### **Core Services to be Provided**

Minister Ruddock announced in the media release on 28 July 2004 that “service priorities that address Indigenous incarceration will be maintained”. This is an acknowledgement of the important role that ATSiS currently provide in offering a service to people charged with a criminal offence.

However exactly what services the successful tenderer will offer to people requiring criminal, family and civil law assistance remains unclear. The Government has not promised to address appalling funding levels or to provide additional resources to better cater for demand for civil and family law assistance. VALS does not know whether it will be funded to do prevention, education, research, law reform or test cases, and if this is the case, core services provided by ATSiS will be narrowed to unacceptable levels.

### **Placement of ATSiS**

Minister Ruddock announced that it will no longer be policy to only have ATSiS where there is no Legal Aid Office, which is an acknowledgment of the fact that Indigenous

Australians prefer to access Indigenous specific services.

### **Cultural Sensitivity of ATSILS**

In the media release on 28 July 2004, Minister Ruddock referred to successful tenderers as having the capacity to provide Indigenous leadership and culturally sensitive legal services. This appears to be a change in the tender policy, as it appears from the original Exposure Draft that Indigenous involvement is not a requirement to meet the criteria of cultural sensitivity (refer to criticism of the Exposure Draft in relation to cultural sensitivity on page 7) may imply that the enthusiasm for mainstreaming service may have diminished. However, VALS will need to see the detail on this before we can decide. The distinction between the Government policy on cultural sensitivity and the tender process lacks transparency. VALS calls on the Government to separate these two issues so the Government can receive advice from interested parties on cultural sensitivity policy without fear of undermining the probity of the tender process.

### **Creation of a Level Playing Field**

In the media release on 28 July 2004, Ruddock announced that independent assistance will be provided to Indigenous organisations who may wish to tender. This is recognition of the absence of a level playing field between Indigenous and non-Indigenous organisations. However, VALS does not know what the promised independent assistance to Indigenous organisations will be (ie: extent and quality of assistance and when it will be provided). VALS does not know whether existing ATSILS will be able to access such assistance. VALS does not know if the Government is still proposing to pay the successful tenderer in arrears.

### **Lack of Consultation**

The Government has failed to consult with Indigenous Australians on how to deliver the best legal services to Indigenous Australians. VALS calls on the Government to consult with Indigenous Australians.

### **ROLE OF SELECT COMMITTEE IN CONSULTING WITH INDIGENOUS AUSTRALIANS**

VALS takes this opportunity to address a related concern about the consultation process of the Senate Select Committee on the Administration of Indigenous Affairs. VALS is concerned that as the Committee does not have plans to hold a public inquiry in Melbourne to consult with Indigenous Victorians and Indigenous organisations within Victoria. VALS requests the opportunity to give evidence before the Committee.

As Indigenous Australians experience extreme disadvantage, it is unlikely that many Indigenous Australians traveled interstate to attend a public hearing, if any at all. It is important that consultation with Aborigines in Victoria takes place as it cannot be assumed that issues are the same in all States/Territories. Even though Victoria has a

small population of Indigenous Australians, it does not mean Indigenous Australians do not experience difficulties in Victoria, such as:

- The life expectancy of Indigenous Victorians is around twenty years lower than that for Non-Indigenous Victorians.<sup>42</sup>
- In Victoria Indigenous people are twelve times more likely to be imposed than non-Indigenous people.<sup>43</sup>

The absence of a fully fledged consultation process undermines the value of the inquiry and perpetrates an injustice against Victorian Aborigines. The value of the Committee's inquiry into alleged injustices against Indigenous Australians is questionable if the inquiry commits an injustice. The value of the inquiry is also questionable if the Committee does not learn from the mistakes of the Government that led to the need for this inquiry (ie: lack of consultation). It is natural to be suspicious that a Committee that does not consult effectively has a Report in the bottom of the draw, as the outcome of the inquiry is pre-determined.

## CONCLUSION

The proposal to abolish ATSIC and the proposal to tender out legal services for Indigenous Australians is a blatant example of mainstreaming legal services and ignoring Indigenous Australian's right to self-determination. The Government has developed the above proposals without consultation with Indigenous Australians. As a result, there are many flaws within the above proposals. Consultation with Indigenous Australians is the key to the future of Aboriginal Affairs.

VALS calls on the Government to consult with Indigenous Australians to reach a model to replace ATSIC and a model for the provision of legal services. It is essential that Indigenous Australians:

- a) Are involved in the devising of such models;
- b) Are involved in the implementation of such models;
- c) Support such models.

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<sup>42</sup> ATSIC Binjirru Regional Plan 2004- 2006, page 11

<sup>43</sup> ATSIC Binjirru Regional Plan 2004- 2006, page 27



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