



4 October 2006

The Committee Secretary  
Senate Legal and Constitutional Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
ACT 2600

Dear Ms Morris,

Please find attached a submission for the Inquiry into Indigenous workers whose paid labour was controlled by government. This submission is made on the behalf of made on behalf of the members of the New South Wales Reconciliation Council (NSWRC), the peak body representing upwards of 60 Local Reconciliation Groups and affiliated organisations throughout NSW.

For further correspondence please contact the NSW Reconciliation Council office on 02 9219 0719.

Thank you,

Greg Davison  
Chairperson  
NSW Reconciliation Council

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**Re: Inquiry into Indigenous workers whose paid labour was controlled by government**

This submission is made on behalf of the members of the New South Wales Reconciliation Council (NSWRC), the peak body representing upwards of 60 Local Reconciliation Groups and affiliated organisations throughout NSW. Some of our members will also be making submissions to this Inquiry. More information about the Council can be found on our website at [www.nswrecon.com](http://www.nswrecon.com). A full list of the NSWRC's recommendations is attached.

It is our view that the issue of unpaid wages and entitlements is an open wound in the history of Indigenous and non-Indigenous relations in this country, and it is a matter of social and economic justice nationally that it be reconciled.

This submission refers to the Queensland and NSW Stolen Wages situations, and occasionally to other States and Territories where identified. This submission discusses NSW government control of Aboriginal wards, their wages, and the numerous entitlements they were eligible to receive over their lifetimes, within the overarching context of control over Aboriginal people's lives that existed during the 1900s.

This submission outlines a range of concerns that would need direct attention to ensure the ***"full repayment"*** of monies held in trust on behalf

of NSW Aboriginal people – with a view to furthering best practice nationally. The eight key areas covered in this submission include:

1. The Inquiry's Terms of Reference
2. Clarification of the Scope of existing State and Territory repayment or reparations Schemes
3. Lessons Learned from the NSW State Experience
4. Research
5. Ageing Claimants
6. Full Repayment at Fair Value
7. A National Forum

### **1. The Inquiry's Terms of Reference**

It is the view of the NSWRC that the terms of reference (ToRs) in this inquiry are limited as they describe the 'control of wages by governments.' In NSW, this would apply to apprentices under the control of the NSW Aborigines Protection Board (APB), and from 1939, the Aborigines Welfare Board (AWB).

The ToRs do not include, for example, instances where employees of all ages were privately employed or otherwise controlled, including where people were underpaid or denied wages or received only rations.

The first time this matter emerged within the NSW Government, the issue was referred to as the 'NSW Aboriginal Trust Funds'. This term we believe is a much broader term and best describes the situation in NSW where lump sums and entitlements as well as the wages of Aboriginal wards under the control of a statutory guardian (eg the AWB) have been and continue to be held in trust by successive NSW governments.

The term "Stolen Wages" refers mainly to wages earned and not payed and predominately relates to an employer/employee scenario. This was primarily the situation in Queensland. Given that the situations between states and territories can vary significantly, it is important to adopt a broad frame of reference and terminology and clearly distinguish between moneys not paid in relation to wages as well as lump sums and entitlements.

Examples of payments that might have been paid into NSW Government-controlled Trust Accounts include child endowment, maternity allowances, and pensions. The Commonwealth mandated these benefits to improve the lives of mothers and children, widows, the elderly etc.

*The NSWRC recommends that this Committee ensure there is a comprehensive investigation of State and Commonwealth government transactions in this inquiry - that is not limited to only earnings, but covers any funds comprising Indigenous entitlement and enterprise, including rations.*

*The NSWRC recommends the Committee heeds Terms of Reference (d) to ensure accommodation of unpaid welfare entitlements.*

*The NSWRC also recommends that within the terms of reference, this inquiry further consider the following issues:*

- To what extent did State or Territory governments profit by their control of Indigenous wages and benefits?*
- What were the responsibilities of the States and Territories through statutory bodies such as the APB and AWB or other third parties, in relation to trust accounts?*
- What evidence is there that the Commonwealth authorities suspected misuse of benefits? and*

- *What measures were implemented to address such misuse?*

*The NSWRC recommends this Inquiry consider the implications of the failure of State and Commonwealth governments, statutory bodies or third parties to meet their duty of care in cases where Aboriginal and Torres Strait Islander lives were being controlled, particularly where statutory bodies and/or third parties were involved.*

## **2. Clarification of the Scope of existing State and Territory repayment or reparations Schemes**

An important aspect of this Inquiry is understanding the extent to which each existing State or Territory repayment or reparation scheme addresses local issues. Key to understanding each Scheme is knowing their scope. For example, it would be useful to this Inquiry if the scope of the NSW Aboriginal Trust Funds Repayment Scheme was confirmed. For instance, wages for work performed as wards as house servants, jackaroos, and other apprenticeships, as well as other government payments are included in the NSW Scheme. However,

- Does the NSW Scheme, as implemented through its present Guidelines<sup>1</sup>, reflect all available information on the matter?

- What issues are still to be resolved?

- What is not dealt with by the Scheme; eg, 'pocket money'?

- What advice has the NSW ATFRS received from the Commonwealth government pertaining to all issues in this matter?

***The NSWRC recommends that the Committee request the NSW Government via the NSW Premier's Department clarify the range of***

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<sup>1</sup> NSW ATFRS Guidelines can be accessed via <http://www.premiers.nsw.gov.au/AboutUs/OurStructure/AboriginalTrustFundRepaymentScheme/Guidelines/default.htm>

*repayments they will and will not determine under the Aboriginal Trust Funds Repayment Scheme and in so doing, clarify areas of overlapping interest between NSW and the Commonwealth Governments as well as statutory bodies and/or third parties.*

### 3. Lessons Learned from the NSW State Experience

NSW Aboriginal community members have told NSWRC representatives of a number of issues concerning the NSW Scheme, *how it was set up* and *what they know of it*.

With a mandate to establish a scheme to bring closure to the trust funds issue in NSW, in 2004 the first panel of the then Aboriginal Trust Funds *Reparations* Scheme<sup>2</sup> conducted a short series of town meetings and made detailed investigations of existing records. The community consultation aspect of this initial research is widely criticised as being too limited with only a dozen or so towns visited and inadequate ascertainment in the community that the consultations were in process. There were however, good opportunities for researchers and advocates to make representations to this first panel.

The first panel's findings, of which a key recommendation was that the Scheme established be a Repayment Scheme, and not a Reparations Scheme, were supported by NSW Cabinet. Shortly afterwards the NSW ATFRS directorate and second panel (the Panel) was established.

However, since the Scheme's establishment, the operations of the Scheme itself and the Panel have been opaque to the community. When new information becomes available on the website, such as the Scheme's Guidelines including information for descendant claimants, it is

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<sup>2</sup> Emphasis added

not widely advertised. Other features of the Scheme such as their 1800 number are not being regularly advertised.

Even today, after one and a half years of operation, our members relate stories from NSW Aboriginal people who have no idea of the Scheme. There is only occasional publicity by the Scheme itself. Few public comments have been made by Scheme representatives. Advocates such as PIAC and ANTaR have occasionally pressed the Scheme for more information and have served as conduit for communities requesting information and clarification. For example, regarding ongoing confusion between what is a repayment and reparations generally.

The NSWRC acknowledges that the Scheme has had many obstacles to overcome in establishing itself, such as privacy issues that arise from accessing personal records, taxation issues and the impact of a successful claim on existing pension entitlements. However, the anxiety at a community level is that direct living claimants are suffering undue hardship and worry whilst these protracted negotiations have taken place.

It is becoming increasingly obvious that if the NSW Scheme is to fulfil its mandate it will require an extended commitment from the Premier's department (via the ATFRS) until all issues are dealt with and all claims processed.

As a case in point, some families are aware that they have until only 31 December 2008 to make a descendant claim. However, many obstacles exist for families to establish a descendant claim and resolving such a claim may involve legal representation. This begs the question, what services will be available to descendant claimants in relation to legal advice.

Importantly, from the Scheme's perspective, there are still a number of direct claims that Panel is yet to finalise, before descendants' claims can be addressed.

Also from the community, there is confusion over the operation of the three-person Panel itself in its role in arbitrating claims. Is it independent? Does it involve government people? What if I don't want government people there? What is it like to talk to the Panel about an offer letter? What happens if I have my legal representative present?

Of the process generally, some claimants signal that their own repayment is of little significance compared to the importance of repaying the Elders first, of perceived fairness within and across families. It is of great concern to claimants that claims by the very elderly and frail are expedited and that a 'level playing field' is maintained between individuals within families and that family conflict not created by the process. For other claimants, repayment is seen as a step along the way to more important issues of lost opportunity and reparations.

***The NSWRC recommends the Inquiry addresses the following questions pertaining to these issues, including practices surrounding any support claimants and their families might need to participate in a repayment/reparation process; i.e.***

- *access to information – about the process,*
- *how to participate,*
- *what to expect,*
- *what records are available,*
- *who has access to the information,*
- *the risks and safety of people in relation to accessing family information,*



*- access to support persons during these processes, including legal support, and to trauma counselling at any point in these processes?*

*The NSWRC recommends that risks involved in accessing archival material, particularly that archival material potentially contains information that might be painful, are conveyed to all families early in their claim process.*

*The NSWRC recommends that professional counselling must be available to claimants and family members should they require it during any claims or inquiry process and, similarly, supervision be offered to all workers administering such Schemes.*

*The NSWRC recommends that this Inquiry seek information from the NSW Aboriginal Trust Funds Repayment Scheme of evaluation of their scheme to date and of the proposed evaluation to take place after three years, particularly as to the participation in the evaluation by Aboriginal claimants and the community generally.*

It is the view of the NSWRC that for many claimants, the NSW Government records are clearly inadequate in relation to proving or disproving a disputed claim.

**A key concern is where the onus of proof lies**, especially when a person makes a claim and there are limited or no records available to approve or not approve a claim conclusively either way. Recent research, confirmed by the first panel, shows that NSW Government record keeping of the Aboriginal Trust Funds as regards the existence of trust accounts, the amounts of monies withheld, for whom and for what length of time, including for example, evidence that repayment cheques were cashed by beneficiaries, is extremely poor.

It is the view of some in the community that despite the rigorous efforts of the ATFRS to establish a well founded process, the inconsistency of documentation will lead to actual and perceived unfairness and to significant disparities in offers to claimants.

The NSW Scheme also purports that it will undertake to the best of its ability to contact claimants it recognises as eligible for repayments. There are many hurdles to this undertaking, not least of which is **families yet to be reunited**.

Of the Stolen Generations and their families affected by this issue, many families are still putting the pieces back together and there is much work being done by organisations like Link-Up and those responsible for State Archives to make family information available. From this perspective, it seems likely that eligible descendant claimants may be excluded from a successful claim because they have yet to link up with their families.

Accessing private information is an issue the NSW Scheme has been dealing with and some information about this is included in their Guidelines. It is important that the utmost care is taken by all jurisdictions during their investigations, including third parties engaged in any legal processes, to consider the real issue of the accidental disclosure of painful information while files are under scrutiny. Many affected families will not know about everything contained in a relation's files.

The NSWRC commends the NSW Government's efforts in establishing the ATFRS.

***The NSWRC recommends that this Inquiry and any Scheme, including the NSW Scheme, examine issues of the onus of proof, and the validity and reliability of existing records.***

*The NSWRC recommends that any Scheme established undertakes to contact Aboriginal families it regards as potential claimants.*

Also, at this early stage in the NSW Scheme, the role and power of oral evidence is untested.

*The NSWRC recommends that this Inquiry consider the issues around oral evidence and clarify the role and power of oral evidence, including examples from other jurisdictions.*

#### **4. Research**

Much of the research in this area is relatively recent and previously undiscovered archival material is continuously appearing all the time. Only recently, approximately 90 previously undiscovered boxes of records were unearthed in the NSW Government Archives. Commendably, the NSW Government has committed additional resources to the cataloguing of this and all relevant archival material.

However, there are many primary and secondary sources of information concerning the lives of Aboriginal people subject to government control, specifically labour control available to this Inquiry. Notably, the Commonwealth's own inquiries during 1930s, research and inquiries into Aboriginal wages and working conditions that took place in the 1960s, the *Royal Commission into Aboriginal Deaths in Custody*, and the *Bringing Them Home* Report. Many of the testimonies collected during these investigations were very painful for survivors to recount and we urge this Inquiry to avoid unnecessarily raking over old ground, when an extensive survey of existing documentary material would provide good evidence of past practices.

In terms of the acts and regulations which controlled Aboriginal lives the NSWRC commends the research by the Indigenous Law Centre (UNSW)

who have produced an extensive report of the regimes in which labour and wages control was legislated and regulated in NSW, the lump sum entitlements that were likely to have been controlled, as well as an initial survey of State and Commonwealth entitlements that are likely to have been diverted before reaching their beneficiary.

The NSWRC has, since 2004, been part of a state-based working group, including a number of Elders who are directly affected by the withholding of their wages and entitlements, the Public Interest Advocacy Centre (PIAC), Australians for Native Title and Reconciliation, the NSW Aboriginal Land Council, the Trade Union Committee on Aboriginal Rights (TUCAR), the Labor Council of NSW, the Indigenous Law Centre, Link-Up (NSW), the NSW Sorry Day Committee, and lately the South Western [Sydney] Stolen Generations Support Group.

In 2004, the NSWRC, in close consultation with this Working Group, made a submission to the first panel convened by Premier Carr. We would be happy to provide this Inquiry with copies of submissions that were made to the first panel that we still have on file.

***The NSWRC recommends that***

- i this Inquiry conducts an extensive literature review of material in Commonwealth and State parliamentary libraries in relation to existing testimonies by and about Aboriginal people during the period under investigation with regard to control of their labour, wages and entitlements; but also focussing on resultant socio-economic circumstances; eg, absolute and relative poverty, including health and wellbeing issues flowing from these circumstances.***

- ii the Committee also consider a literature review of available Aboriginal and Torres Strait Islander biographical and autobiographical material as per above, particularly information held at AIATSIS.*
- iii that testimonies gathered during the course of this Inquiry are incorporated in full within any further national forum that may result from the recommendations of this Inquiry so that survivors of these regimes are not obliged to continually retell their stories.*
- iv the Committee review the 2004 report to the NSW Government by the first panel as well as the 13 or so submissions that contributed to it, as they make particular recommendations about principles and processes which would be just as important in the resolution of this issue nationally, particularly as this Inquiry progresses to the hearings stage or a national forum.*
- v the Committee seek additional information from the NSW Scheme on issues associated with the condition of NSW records, particularly on issues of reliability, missing records, and evidence of financial transactions by the Trustees.*
- vi the Committee consider the option of a national amnesty on the return of missing government records, to encourage any persons who may be holding government records or have information pertaining to records of this period to come forward without fear of retribution.*

## 5. Ageing claimants

The population affected by the Stolen Wages/Aboriginal Trust Funds issue is an aging Aboriginal population. In fact many of those affected by this matter have already passed on while a significant number are concerned they will die waiting for their money. A lot of people who are waiting for

their money say they need their money to ensure they have a decent burial and so their families are not burdened with the cost of the funeral. Others say they would like to have something to hand onto their children and grandchildren when they die.

This however, does not mean that we see the NSW Scheme achieving full resolution of this issue in the near future. There is still a high degree of distrust towards the validity of government processes that involve Aboriginal people and their communities. The time frames that are set for people to engage in any national forum or take a claim to their state government should take into consideration the level of distrust that exists and should be set long enough so that better relations can be established.

***The NSWRC recommends to any jurisdiction undertaking a repayment scheme that***

- i elderly claimants be offered a repayment as soon as is practicable***
- ii the scheme has the support of all members of parliament; ie, is bipartisan***
- iii is of a long term, has adequate targets and benchmarks and is funded to be adequately evaluated; and***
- iv any monies owed to deceased claimants be claimable against their estate by living relatives. The development of a workable heir's policy to support this process will take time and the significant engagement of Aboriginal people.***

## **6. Full repayment at fair value**

With regard to wages and entitlements that have been withheld by governments, the primary objective is that they be repaid at fair value and that all the money that the claimant is owed is repaid.

This means that monies owed at a particular time are considered in today's real dollar value and should include interest earned during the time it has taken to achieve this. In their report to the NSW Government in 2004, the first panel sought independent advice about real dollar value.

In 2004, the first panel's advice was that every \$100 owed in 1969 equates with \$3,521 in 2005. Whilst NSW Cabinet accepted the report's recommendations, ultimately, the 2004 advice did not accommodate 'lost opportunity' that was part of the original Cabinet submission drafted by the Department of Community Services and leaked to the *National Indigenous Times* early in 2004.

'Lost opportunity' is about being able to save for a home, or buy things for your children or being buried on country. It is clear to members of the NSW Reconciliation Council that the NSW Government is trying to limit its exposure by not including factors to accommodate lost opportunity. On the other hand, the NSW Scheme expressly leaves the way open for successful claimants to pursue additional legal action on unresolved issues, should they so wish.

With regard to fair value, one way of achieving an equitable resolution that this Inquiry might consider is determining a national benchmark with regard to fair value. In saying this, the NSWRC does not endorse the Queensland model of a limited lump sum repayment, not only because it denies justice to descendants, but also because of the barriers to calculating a fair sum.

A national benchmark may also guide decisions about monies that are not claimed in order to achieve transparent and equitable outcomes.

***The NSWRC recommends that for a full and fair resolution of unpaid wages and entitlements, this Committee consider:***

- *the option of repayments be calculated to a national benchmark; and*
- *other mechanisms for assessing the full real value owed to claimants, including lost opportunity.*

## **7. A National Forum**

With regard to 'lost opportunity' and alleged failure of States in their duty of care, much could be said about the issue of reparations, first brought to the wider public's attention by the *Bringing Them Home* Report.

It is documented elsewhere that it was the complacent acceptance of a slave class that allowed the exploitation of Aboriginal labour to occur, paid or unpaid, across Australia, and that this ideology was in turn enshrined in the protection legislation framed by governments.

After *Bringing Them Home*, a tribunal proposal was developed, guided by PIAC, who sought the views of Aboriginal peoples through a national consultation project called *Moving forward: Achieving reparations*. The final report of this project *Restoring Identity* was published in 2002. It is now available online from the PIAC website.

The control of labour and the non-payment of wages and entitlements is noted in *Restoring Identity*. A national forum as proposed in this Inquiry's Terms of Reference would add significantly to the foundation work needed to establish a reparations tribunal. *Restoring Identity* should be considered by this Inquiry in their deliberations concerning such a national forum.

### ***The NSWRC recommends***

- i. a national forum be established to investigate the issue of 'a just outcome' concerning the control of Aboriginal labour, wages and entitlements, and*



- ii. such a national forum should be established on terms agreed to with Aboriginal Elders and through bi-partisan commitment by all Australian parliaments to bring closure to the issue of wages and entitlements withheld or held in trust by Australian governments including – if found appropriate – carrying forward the development of a related reparations process, such as the tribunal model proposed in Restoring Identity.*

For further information, please contact:

**Greg Davison**

**Chairperson**

**New South Wales Reconciliation Council**

Email: [nswrc@daa.nsw.gov.au](mailto:nswrc@daa.nsw.gov.au)

Phone: 02 9219 0719

## Recommendations

*The NSWRC recommends that this Committee ensure there is a comprehensive investigation of State and Commonwealth government transactions in this inquiry - that is not limited to only earnings, but covers any funds comprising Indigenous entitlement and enterprise, including rations.*

*The NSWRC recommends the Committee heeds Terms of Reference (d) to ensure accommodation of unpaid welfare entitlements.*

*The NSWRC also recommends that within the terms of reference, this inquiry further consider the following issues:*

- To what extent did State or Territory governments profit by their control of Indigenous wages and benefits?*
- What were the responsibilities of the States and Territories through statutory bodies such as the APB and AWB or other third parties, in relation to trust accounts?*
- What evidence is there that the Commonwealth authorities suspected misuse of benefits? and*
- What measures were implemented to address such misuse?*

*The NSWRC recommends this Inquiry consider the implications of the failure of State and Commonwealth governments, statutory bodies or third parties to meet their duty of care in cases where Aboriginal and Torres Strait Islander lives were being controlled, particularly where statutory bodies and/or third parties were involved.*

*The NSWRC recommends that the Committee request the NSW Government via the NSW Premier's Department clarify the range of repayments they will and will not determine under the Aboriginal Trust Funds Repayment Scheme and in so doing, clarify areas of overlapping interest between NSW and the Commonwealth Governments as well as statutory bodies and/or third parties.*

*The NSWRC recommends the Inquiry addresses the following questions pertaining to these issues, including practices surrounding any support claimants and their families might need to participate in a repayment/reparation process; i.e.*

- access to information – about the process,*
- how to participate,*
- what to expect,*
- what records are available,*
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- access to support persons during these processes, including legal support, and to trauma counselling at any point in these processes?*

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*The NSWRC recommends that this Inquiry seek information from the NSW Aboriginal Trust Funds Repayment Scheme of evaluation of their scheme to date and of the proposed evaluation to take place after three years, particularly as to the participation in the evaluation by Aboriginal claimants and the community generally.*

*The NSWRC recommends that this Inquiry and any Scheme, including the NSW Scheme, examine issues of the onus of proof, and the validity and reliability of existing records.*

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*The NSWRC recommends that*

- i this Inquiry conducts an extensive literature review of material in Commonwealth and State parliamentary libraries in relation to existing testimonies by and about Aboriginal people during the period under investigation with regard to control of their labour, wages and entitlements; but also focussing on resultant socio-economic circumstances; eg, absolute and relative poverty, including health and wellbeing issues flowing from these circumstances.*
- ii the Committee also consider a literature review of available Aboriginal and Torres Strait Islander biographical and autobiographical material as per above, particularly information held at AIATSIS.*
- iii that testimonies gathered during the course of this Inquiry are incorporated in full within any further national forum that may result from the recommendations of this Inquiry so that survivors of these regimes are not obliged to continually retell their stories.*
- iv. the Committee review the 2004 report to the NSW Government by the first panel as well as the 13 or so submissions that contributed to it, as they make particular recommendations about principles and processes which would be just as important in the resolution of this issue nationally, particularly as this Inquiry progresses to the hearings stage or a national forum.*
- v the Committee seek additional information from the NSW Scheme on issues associated with the condition of NSW records, particularly on issues of*

*reliability, missing records, and evidence of financial transactions by the Trustees.*

- vi the Committee consider the option of a national amnesty on the return of missing government records, to encourage any persons who may be holding government records or have information pertaining to records of this period to come forward without fear of retribution.*

*The NSWRC recommends to any jurisdiction undertaking a repayment scheme that*

- i elderly claimants be offered a repayment as soon as is practicable*
- ii the scheme has the support of all members of parliament; ie, is bipartisan*
- iii is of a long term, has adequate targets and benchmarks and is funded to be adequately evaluated; and*
- iv any monies owed to deceased claimants be claimable against their estate by living relatives. The development of a workable heir's policy to support this process will take time and the significant engagement of Aboriginal people.*

*The NSWRC recommends that for a full and fair resolution of unpaid wages and entitlements, this Committee consider:*

- the option of repayments be calculated to a national benchmark; and*
- other mechanisms for assessing the full real value owed to claimants, including lost opportunity.*

*The NSWRC recommends*

- i a national forum be established to investigate the issue of a just outcome concerning the control of Aboriginal labour, wages and entitlements, and*
- ii such a national forum should be established on terms agreed to with Aboriginal Elders and through bi-partisan commitment by all Australian parliaments to bring closure to the issue of wages and entitlements withheld or held in trust by Australian governments including – if found appropriate – carrying forward the development of a related reparations process, such as the tribunal model proposed in Restoring Identity.*