



Ms Jackie Morris
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Morris

Re: Inquiry into Stolen Wages

We are pleased to present a submission from the Indigenous Law Centre, University of New South Wales ('ILC') to the Inquiry into Stolen Wages.

The submission consists of this letter, which addresses the terms of reference for the Inquiry, and an ILC research report entitled "*Eventually they get it all*": *Government Management of Aboriginal Trust Money in New South Wales* ('the Research Report').

The Research Report is primarily a technical piece focussing on the statutory law relevant to government control of the money of Aboriginal people *in NSW*. It also contains some discussion of policy and its implementation, as well as reference to other historical material. The ILC trusts that the Research Report will assist the Committee in its investigations into laws and practices in NSW. It may also provide some useful background information on *national* issues, that is, the role of Commonwealth law and agencies in NSW *and* in other States and Territories, particularly in relation to federal social security entitlements from the early 1940s.

The Research Report is based primarily on documents - the 'official' version of how things were done. It does not recount the personal experience of those whose labour and money was managed under government authority. It is a resource designed to complement those accounts, to help in piecing together the larger story of what actually went on. For the evidence shows that, in practice, Board conduct could depart substantially from what the law required. In order to come to terms with this prolonged period of injustice from our recent past, the Committee will need to hear those personal stories. The work of historians and other researchers who have analysed Aboriginal experiences with government administration in NSW will also be essential to a proper understanding of the issues.

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Summary of Research Report

Background

The long campaign to have injustices dealt with in NSW culminating in the establishment of the Aboriginal Trust Fund Repayment Scheme in 2004. The general role of the ILC and the production of the Research Report.

Introduction

The statutory role of the Aborigines Protection Board (later known as the Aborigines Welfare Board). The nature of Aboriginal reserves and Stations in NSW.

Apprentice Wages

The statutory law regulating the forced employment of Aboriginal children and the diversion of most of their wages to government trust accounts. The failure of the Aborigines Protection Board ('APB') to fulfil its statutory duties to protect apprentices and supervise their employment. Other injustices experienced by child apprentices. A discussion of the numbers of children possibly affected.

Social Security Entitlements

A lengthy analysis of the main social security benefits available from either the NSW or Commonwealth Governments up until 1969 (the year the Aborigines Welfare Board or 'AWB' was abolished). A discussion of general features including eligibility criteria, payment rates over time and take-up of the benefit within the Australian population – which may assist in assessing the scale of issues confronting governments today. Discussion of Aboriginal eligibility for each benefit and the potential for diversion of payments to third parties (such as Aboriginal protection authorities), whether specifically by reference to the payee's race or not. Some discussion of policy and administration.

Lump Sum Entitlements

A brief discussion acknowledging the relevance of investigating government control of lump sums through trust accounts held by the APB or AWB (collectively also referred to hereafter as 'the Board').

Adult Wages

A brief discussion of Board powers, apparently little used, to control adult labour and wages in NSW. Acknowledgment that unfair and discriminatory labour practices affected many Aboriginal men and women, with intergenerational consequences.

Working for rations

A discussion of the law, and also unfair and inconsistent Board practices, in relation to distribution of rations to Aboriginal people in NSW.

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Accounting and Accountability Obligations on the Government

A description of the accounting and accountability obligations imposed on the Board and the government by the Aborigines Protection Act 1909 and the Audit Act 1902. These are separate from any legal obligations that might arise at common law or equity. Recognition that a substantial paper trail should exist regarding the operation of government trust accounts holding Aboriginal people's money, but that past failures to comply with obligations mean that financial records are deficient.

Records and Record-Keeping

The statutory law regulating (only since 1960) the preservation of documents by NSW government agencies such as the Board. The ad hoc nature of State administration in this area for much of the 20th Century. The need for continued efforts to locate documents that shed light on government administration of Aboriginal people's money.

Bibliography

The main primary and secondary materials relied on to produce the research report.

Issues addressed relevant to the Terms of Reference

The Research Report covers a lot of material relevant to the Terms of Reference, together with footnotes indicating the sources for the information. This summary highlights some of the content most relevant to the Committee's investigations.

The purely fiscal dimension of what Aboriginal people experienced can be encapsulated in this statement from the then Premier of NSW, Bob Carr, made on 11 March 2004. Mr Carr told Parliament that for decades Aboriginal people were forced by government 'to pay their wages, their pensions, their family endowments, their inheritances and lump sum compensation payments into a trust. Those funds were held in trust, and our predecessors failed that trust'.

a. the approximate number of Indigenous workers in each state and territory whose paid labour was controlled by government; what measures were taken to safeguard them from physical, sexual and employment abuses and in response to reported abuses;

The Aborigines Protection Board in NSW had legal authority to control adult wages, particularly after an amendment in 1936 to the *Aborigines Protection Act 1909* (NSW). It appears, however, that the focus for the authorities in NSW was control over the labour and earnings of children. Many Aboriginal children in NSW were removed from their families and placed in institutions. From there a large number was forced into work as child apprentices (the term used in the Act was 'indenture'), usually as domestic servants or labourers.

The changing definition over time of who was liable to be apprenticed is not spelt out in the research report and hence the technical detail is provided here for the benefit of the Committee. No offence is intended by the quotation below of statutory categories applied in the past to Aboriginal people, the use of which today would be considered offensive.

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Originally the Board's power to indenture children as apprentices applied to the child of 'any full-blooded aboriginal native of Australia, and any person apparently having an admixture of aboriginal blood who applies for or is in receipt of rations or aid from the board or is residing on a reserve', as well as 'the neglected child of any person apparently having an admixture of aboriginal blood in his veins'.¹ In 1918 the reference to neglected children was omitted and the power was widened in some respects and narrowed in others, so as to apply to the child of 'any full-blooded or half-caste aboriginal who is a native of New South Wales'.² The geographical restriction was later relaxed in 1936 to include Aboriginal people from elsewhere in Australia but resident in NSW.³ Eventually in 1940 the power to indenture children was applied to 'any ward', a term which was defined to mean an aborigine under 18 'who has been admitted to the control of the board or committed to a home constituted and established' under the Act.⁴

The numbers involved are not defined with any certainty in the research report, in part because of the patchy state of government records. The work of historians like Heather Goodall and Victoria Haskins suggests there were many hundreds and perhaps thousands of children put into the apprenticeship system in NSW over the course of the 20th Century.

Some indication of the general Aboriginal population in NSW at various points in time can be gained from Board annual reports, though even official sources like the Public Service Board in NSW in 1938 warned that Board statistics must be treated with caution. The Public Service Board estimated in 1938, for example, there were 5333 people resident on reserves and 3115 people on Aboriginal Stations (reserves actively supervised by the Board, usually through a resident married couple acting as manager-teacher and matron respectively). There were still about 6000 people apparently on Stations and reserves in the mid-1960s. Heather Goodall has pointed out that in NSW, while the situation varied according to economic and other conditions, typically a majority and sometimes the overwhelming majority of Aboriginal people led working lives independent of the Board.

Historians have noted that the Board did little to supervise the employment of children by non-Aboriginal businesses and families. The same point was made by Board employees and even the Board itself. This was despite the Board being party to the apprenticeship contracts with employers. It was also despite explicit legal obligations set out in the *Aborigines Protection Act*, requiring the Board to:

- exercise general supervision and care over all matters affecting the interests and welfare of Aboriginal people
- provide for the custody, maintenance and education of Aboriginal children and
- protect Aboriginal people against injustice, imposition and fraud.

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¹ Sections 3 and 11 of the *Aborigines Protection Act 1909* (NSW).

² Section 2(i)(a) and 2(iv) of the *Aborigines Protection (Amendment) Act 1918* (NSW), amending sections 3 and 11 respectively of the *Aborigines Protection Act 1909* (NSW).

³ Section 2(1)(a)(i) of the *Aborigines Protection (Amendment) Act 1936* (NSW), amending section 3 of the *Aborigines Protection Act 1909* (NSW).

⁴ Sections 3(a)(ii) and (iv) and 3(e) of the *Aborigines Protection (Amendment) Act 1940* (NSW), amending sections 3 and 11A of the *Aborigines Protection Act 1909* (NSW).

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Stories of injustice and abuse directed at Aboriginal child apprentices are recounted in a variety of primary and secondary sources. Haskins says that children who reported abuse could encounter suspicious, even punitive responses. Even the long-term Secretary of the Board himself said in 1937 that 'we throw the responsibility on the employer for the physical and moral well being of apprentices'.

b. all financial arrangements regarding their wages, including amounts withheld under government control, access by workers to their savings and evidence provided to workers of transactions on their accounts; evidence of fraud or negligence on Indigenous monies and measures implemented to secure them; imposition of levies and taxes in addition to federal income tax;

The details of the child apprenticeship scheme spelt out in statute and regulations, as amended over time, are set out in the Research Report. There were several basic features that remained in place throughout the period 1909-1969:

- the Board's power to indenture children as apprentices
- the ability for the Board to collect wages in trust accounts, albeit transformed after 1940 into a legal obligation on the part of the employer to forward wages, less pocket money (typically about 20% of the sum), to the Board
- working conditions set by regulation and
- the Board's power to spend an apprentice's money, and the obligation ultimately to return it to them.

While regulations made under the Aborigines Protection Act indicated rates of pay and pocket money for child apprentices, between 1910 and 1941 it was possible for employers to contract out of these obligations and set different rates. There was no formal system set out in the regulations for acknowledging actual payment of pocket money to apprentices until 1941. The Board made it difficult for children to access their accumulated balances at any given time during their apprenticeship.

c. what trust funds were established from Indigenous earnings, entitlements and enterprise; government transactions on these funds and how were they secured from fraud, negligence or misappropriation;

The *Aborigines Protection Act 1909* (NSW) put government collection and control of apprentice wages on a statutory footing. But according to historians like Haskins and Walden, sums were already accumulating in government trust accounts held for child apprentices well before the Act came into operation.

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The Research Report identifies various statements which appear relevant to the question of where the money of Aboriginal people was actually kept by government officials. In discussing child apprentice wages, historian Victoria Haskins reports that the money was 'held on behalf of the individual workers within one large interest-bearing "Trust Account" (opened in 1897) that was transferred from the Savings Bank department to the Rural Bank department of the Government Savings Bank in 1923'.

In the context of child endowment payments diverted from Aboriginal mothers to the AWB, the AWB informed the Commonwealth Department of Social Services in 1941 that the payments were 'simply credited to Trust Accounts which already exist, and which are kept on ordinary ledger cards'.

At the same time the *Audit Act* 1902 (NSW) required that the State Treasurer maintain something called 'the Trust Account' into which all moneys of which the Treasurer was 'by statutory obligation a trustee and custodian' must be paid. Arguably the Treasurer himself was not made the trustee of apprentice wages collected by the Board. On the other hand the regulations made under the Aborigines Protection Act required apprentice wages to be paid into 'the Trust Account', statutory language that suggests a cross-reference to this entity under the Audit Act. Internal Board documents confirmed that at the very least the Audit Act applied to the Board. During the ILC research project we did not have the opportunity to clarify this issue further. It may be that other submissions to the Committee will shed further light on the matter.

Regardless of the precise location and nature of the trust account or accounts themselves, it seems clear that the Audit Act on its terms applied to the Board and its officials. This meant obligations to ensure that proper procedures for the deposit and withdrawal of money were followed – and that a 'paper trail' for individual transactions was created at the time. Unfortunately poor record-keeping and an ad hoc approach to archive management for much of the 20th Century makes retrieving details for individual cases today an unpredictable and usually very difficult exercise. In recognition of these problems, which are well described in Professor Anne McGrath's submission to the Committee, a major feature of the Aboriginal Trust Fund Repayment Scheme in NSW is document retrieval and review.

d. all controls, disbursement and security of federal benefits including maternity allowances, child endowment and pensions, and entitlements such as workers compensation and inheritances;

The diversion of Aboriginal people's social security entitlements into Board trust accounts commenced well before the general assumption of responsibility for social security by the Commonwealth in the early 1940s. Some of the first benefits to which this system applied in NSW were those available under State legislation, such as family endowment (introduced by the Lang Government in 1927). Notably, though, Haskins writes that the Board gained control of the federal maternity allowance (or 'baby bonus') for some Aboriginal mothers as early as 1914, despite there being no provision for indirect payments to third parties under the relevant legislation.

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The Research Report contains most detail regarding the Board's control over family endowment and its later federal analogue, child endowment. Many Aboriginal families were affected by the Board's sub-standard administration of its responsibilities in this area. Its controls over family endowment were apparently comprehensive and not confined only to those resident on Stations or reserves. The Public Service Board reported that in 1938 there were 646 Aboriginal endowees according to Board statistics (noting again the need for caution regarding these figures).

The Board's standard procedure was to issue an order for goods to Aboriginal mothers for use at a local store. Over time, direct cash payments were approved in some cases.

Quite apart from the question of principle involved in denying Aboriginal women direct payment of their money, the Board's practices in relation to the family endowment payment made under NSW legislation were suspect and attracted both official and community criticism at the time. Large sums were allowed to accumulate in the Board's accounts while Aboriginal families went without. Some money was diverted to general Board expenditure and there were other dubious and inconsistent practices regarding the use of endowment as an offset against rations and blankets. Historian Heather Goodall says that contrary to the publicly stated rationale for Board control – that Aboriginal mothers were neglecting their family responsibilities – the APB wanted funds from child endowment to meet a budgetary shortfall during the Great Depression.

In the early 1940s NSW authorities were concerned by the shift to federal jurisdiction over social security and its implications for their control over endowment money. Premier McKell wrote asking Prime Minister Menzies to continue the diversion of endowment payments away from Aboriginal parents, in favour of the Board (on the basis that a voucher or order for goods would be issued to Aboriginal people for use at local stores). The Commonwealth not only agreed but also wrote urging other States to adopt the same method of diverting Aboriginal endowment money.

Some of these details emerge from documents held in the National Archives of Australia. The direct participation of the Commonwealth in this respect creates the possibility that additional records relating to overall administration and individual cases may be located in federally-controlled institutions. The Committee could consider, amongst its recommendations, measures to ensure the Commonwealth does all *it* can to assist Aboriginal people (including descendants) in recovering money to which they are entitled.

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e. previous investigations by states and territories into official management of Indigenous monies;

Aboriginal people have long campaigned about the operations of the Board in NSW, including the unjust operation of controls over wages and entitlements like family endowment. The 1930s were a period of particularly vigorous political protest. With critical attention being turned on the Board at that time both the NSW Parliament and the Public Service Board conducted investigations. The Research Report refers on a number of occasions to the *Minutes of Evidence Taken Before the Select Committee on the Administration of Aborigines Protection Board* established by the NSW Legislative Assembly in 1937 (an inquiry which lapsed in 1938 before the committee reported) and *Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales*, a report written in 1938 and published in 1940.

These inquiries had their own shortcomings. For example, Jim Fletcher in his book *Clean, Clad and Courteous: A History of Aboriginal Education in New South Wales* (1989) praised some of the investigatory work by the Public Service Board, but noted that the 'only group of people it neglected to consult were Aborigines' (p.163). Nevertheless, the two investigations are a valuable source of information about the Board's operation in the 1930s.

Between 1969 and the establishment of the Aboriginal Trust Fund Repayment Scheme ('ATFRS') in 2004, the NSW Government adopted a defensive posture and blocked repayment of moneys from trust accounts that had been kept by the Board. The *National Indigenous Times* reported in February 2004, just prior to Premier Carr's announcement that Cabinet had approved the development of a repayment scheme, that an earlier attempt within the NSW bureaucracy to construct a repayment scheme had been stymied in 2001. It quoted a draft Cabinet minute from the Department of Community Services ('DoCS') which said that '[f]rom 1970 until now the unwritten policy of DoCS and Treasury appears to have been to resist reimbursement of these funds'.

The ILC considers it vital to the Committee's investigations that it obtain detailed evidence from the NSW Government regarding its past research into this issue, the operation of the ATFRS and the nature of any earlier proposals for repayment of moneys owed.

f. current measures to disclose evidence of historical financial controls to affected Indigenous families; the extent of current databases and resources applied to make this information publicly available; whether all financial records should be controlled by a qualified neutral body to ensure security of the data and equity of access;

The ILC is hopeful that the NSW Government will take the opportunity of this Inquiry to place on the public record a full and up-to-date account of the operation of the ATFRS, and that the Committee will take steps to encourage this. The Bibliography to the Research Report indicates the sources of information the ILC relied on during the course of its research.

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g. commitments by state and territory governments to quantify wages, savings and entitlements missing or misappropriated under official management; the responsibility of governments to repay or compensate those who suffered physically or financially under 'protection' regimes;

Again, the best information in relation to official commitments can be provided to the Committee by the NSW Government. A welcome feature of the Government's approach to the issue in 2004 was the unqualified acceptance at the highest political level of the State's past wrongdoing and responsibility to repay those who suffered financial loss (or their descendants, where those owed money are now deceased).

The broader psychological and social costs of these laws, policies and practices remain unaddressed by governments, as do the intergenerational costs of the poverty which resulted. The repayment of sums not returned from trust accounts is a first step but a broader reparation strategy is required.

h. what mechanisms have been implemented in other jurisdictions with similar histories of Indigenous protection strategies to redress injustices suffered by wards; and

We commend to the attention of the Committee the work done on reparations by the Public Interest Advocacy Centre, based in part on overseas research and done in consultation with Aboriginal people and organisations.

i. whether there is a need to 'set the record straight' through a national forum to publicly air the complexity and the consequences of mandatory controls over Indigenous labour and finances during most of the 20th century.

One striking feature of this issue is the degree to which non-Aboriginal Australia has remained unaware for so long of the injustices surrounding government management of Aboriginal labour and money. A second feature is the need which some Aboriginal people have expressed to have their stories, from this paternalistic era in which so much wrong was done, heard in a safe environment. Both Commonwealth and State Governments were implicated in the unjust operation of these laws and policies. They have a responsibility now, to work with the affected Aboriginal people on addressing these injustices – including the opportunity for these stories to be told in an appropriate setting, if that is what those affected people seek. That is really just an aspect, however, of the overall responsibility of governments to work with affected people on repairing the damage done, in meaningful and substantial ways.

If you have any questions about this submission please contact Sean Brennan in the UNSW Law School on 02 9385 2334 or s.brennan@unsw.edu.au.

Yours sincerely
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