Submission to the Senate Stolen Wages Inquiry

1. Australian Lawyers for Human Rights Inc (ALHR) is a national network of Australian lawyers active in practising, and promoting awareness of, human rights law in Australia. ALHR's membership of over 1,000 has active national, State and Territory committees.

2. ALHR thanks the Committee for the opportunity to make this written submission to this important inquiry. ALHR notes the Committee intends to hold public hearings and would welcome the opportunity to provide oral evidence at those hearings.

3. Other submissions to this inquiry have addressed, in detail, the historical context in which the stolen wages issue arises.[1] ALHR does not seek to add to that valuable body of material.

4. Instead, in this submission, ALHR focuses upon relevant international obligations that require Australia to take action to address the past injustices arising from the so-called 'protection legislation' that operated in various Australian jurisdictions. Other submissions to this inquiry have made general reference to those human rights obligations. In this submission, ALHR seeks to precisely identify what those obligations are and how they apply to the matters before the Committee.

5. ALHR's submission relates to the following terms of reference:

[1] See, by way of example, the submissions of the Queensland Public Interest Law Clearing House Inc dated 10 August 2006 and the submission of the Castan Centre for Human Rights dated 24 July 2006.

- *'the responsibility of governments to repay or compensate those who suffered physically or financially under 'protection' regimes'* (paragraph (g) of the terms of reference);

- *'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'* (paragraph (i) of the terms of reference).

Non-discrimination

6. Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7. The International *Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD) also contains prohibition on discrimination on the ground of race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[2]

8. The United Nations Human Rights Committee (HRC) has made clear that article 26 of the ICCPR is to be interpreted broadly. It applies to:

> …any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[3]

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2 Articles 1 and 2.

3 *General Comment No. 18: Non-discrimination* (paragraph 13).

9. Relevantly for current purposes, the HRC has confirmed that article 26 applies to the terms and conditions of employment[4] and to property rights.[5] The prohibition on discrimination in ICERD similarly applies to those matters.[6]

10. Article 26 of the ICCPR also applies to the private sphere, as was confirmed by the HRC in the following statement:

> In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.[7]

In that regard, ALHR supports the submission made to this inquiry by the Human Rights and Equal Opportunity Commission (HREOC), to the effect that the terms of reference should be interpreted or expanded so as to consider the position of Indigenous people employed by church organisations on 'mission' communities and by non-religious 'benevolent' institutions.

11. In ALHR's view, there can be little doubt that the matters giving rise to this inquiry involved differential treatment on the ground of race for the purposes of the non-discrimination provisions of the ICCPR and ICERD. In particular:

(a) Indigenous people were required to work[8], which was a requirement that was not applied generally to non-Indigenous people.

(b) The wages of those people were not paid directly to them, but were retained in trust funds or other accounts maintained by government.[9] No such restriction was applied to other groups identified by race.

(c) Indigenous people were paid at rates that were less than those paid to other members of the Australian community.[10]

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4 *Bwalya v Zambia* (314/88).

5 *Adam v Czech Republic* (586/94).

6 Art 5(d) and (e).

7 *General Comment 31*, para 8.

8 See R Kidd *Trustees on Trial* (2006) 58-63.

9 Ibid, 72.

12. However, the HRC has observed that not every differentiation of treatment in areas covered by article 26 constitutes discrimination. Rather, there will be no discrimination:

> …if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant[11]

13. It cannot, in ALHR's view, be tenably argued that the differential treatment identified above was reasonable and for a purpose that is legitimate under the ICCPR. It sprang from misguided stereotypes, which posited Indigenous people as 'inferior' and in need of paternalistic protection.[12] The HRC has held that differentiation based upon such stereotypes does not constitute reasonable differentiation that is legitimate under the Covenant.[13]

14. In addition to the non-discrimination obligations in the ICCPR and ICERD, ALHR also draws the Committee's attention to the similar (but more specific) obligation in article 9 of the *International Covenant on Economic Social and Cultural Rights*, which requires Australia to ensure that everyone has the right to:

> Remuneration which provides all workers, as a minimum, with…[f]air wages and equal remuneration for work of equal value without distinction of any kind…

Slavery/forced labour

15. The Castan Centre for Human Rights Law has suggested in its submission to this inquiry that the conditions of <u>some</u> Indigenous people affected by the stolen wages issue amounted to slavery. In international law, slavery is defined as:

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10 Ibid, 72-3. Note also the more recent examples of under-award payment of Indigenous people considered by the Human Rights and Equal Opportunity Commission in *Bligh and Ors v State of Queensland* [1996] HREOCA 28 and the Federal Court in *Baird v State of Queensland* [2005] FCA 495.

11 *General Comment 18*, para 13.

12 See, for example, R Kidd *Trustees on Trial* (2006) 62-3.

13 See, for example, *Broeks v Netherlands* 172/84, which involved stereotypical assumptions about the roles of men as 'breadwinners'.

> …the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[14]

16. Australia has had an obligation in international law to abolish slavery since at least the time it entered into the *International Convention to Suppress the Slave Trade and Slavery* (the Slavery Convention) in 1927. It is arguable that its obligation extended even further back, on the basis that the obligation to abolish slavery was and is part of customary international law.[15]

17. ALHR agrees with the Castan Centre that:

    (a) if relevant at all, the concept of slavery may only be applicable to some of those affected by the protection acts[16]; and

    (b) particular care is required in this area, given the emotive nature of the term 'slavery'.

18. Another (perhaps less controversial) obligation of relevance to at least some of those caught by the protection acts is the obligation to abolish practices involving forced labour. The Slavery Convention dealt with that issue, stating that (to the extent forced labour continued to exist) it must:

> [unless it is required for 'public purposes'] invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence.

    Similar obligations were imposed by ILO Convention (No 29) concerning Forced or Compulsory Labour, which entered into force for Australia in 1933.

19. Those obligations were arguably breached by:

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14 Art 1(1) *International Convention to Suppress the Slave Trade and Slavery*, Australian Treaty Series 1927 No 11.

15 S Joseph *et al*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) 295.

16 Note, however, that it has been reported that the prominent constitutional lawyer (and former Solicitor General) Sir Maurice Byers gave advice to the effect that the Queensland protection regime violated the *Abolition of Slavery Act* 1833 (Imp) and was therefore invalid: R Kidd *Trustees on Trial* (2006) 11.

(a) requiring Indigenous people to work in circumstances that were not 'exceptional' (sometimes backed by legislation imposing criminal sanctions for refusing to do so[17]); and

(b) failing to provide adequate remuneration.

Retroactive effect?

20. It is a generally recognised principle of international law that treaties do not have retroactive effect.[18] That principle would apply to all of the obligations identified above, save for those in the Slavery Convention, which was in force in Australia for the majority of the period in question. The ICCPR entered into force for Australia on 28 January 1993. ICERD entered into force for Australia on 30 October 1975. ICESCR entered into force for Australia on 10 March 1976.

21. However, this does not mean the obligations in those instruments identified above are irrelevant. In particular:

(a) if the act or practice in question has 'continuing effects'; and/or

(b) the State party 'affirms' the earlier violations,

the State party will be in breach of its obligations.

22. For example, in *Adayom v Togo*[19], the Human Rights Committee considered a complaint regarding dismissal from the civil service for reasons of political persecution. The dismissal took place in 1985, prior to the time that the Optional Protocol to the ICCPR entered into force for Togo (1988). The HRC nevertheless determined that it could consider the complaint, stating:

> …the alleged violations had continuing effects after the entry into force of the Optional Protocol for Togo, in that the authors were denied reinstatement in their

17 See, for example, r28(2) *Aboriginal Regulations 1945* (QLD). See generally, R Kidd *Trustees on Trial* (2006) 58-63.

18 See articles 4 and 28 of the *Vienna Convention on the Law of Treaties* and JS Davidson 'Admissibility and the Optional Protocol to the ICCPR' (1991) 4 *Canterbury Law Review* 337 at 342.

19 422/90.

> posts until 27 May and 1 July 1991 respectively, and that no payment of salary arrears or other forms of compensation had been effected. The Committee considered that these continuing effects could be seen as an affirmation of the previous violations allegedly committed by the State party (emphasis added).[20]

23. It is particularly significant for current purposes that the HRC suggested that the failure to provide compensation can constitute an 'affirmation' of an earlier violation.

24. A similar approach has been adopted in relation the *American Convention on Human Rights*, where a number of cases have been brought regarding the historical dispossession of Indigenous people from their lands.[21] Those acts of dispossession were alleged to violate the right to property guaranteed by the Convention, even though the relevant State parties had not at that time acceded to the Convention. In relation to those claims, the Inter-American Court of Human Rights has held that there will be a continuing violation to the displaced people unless the State:

    (a) allows them to return to their land;

    (b) provides them with acceptable alternative lands; or

    (c) adequately compensated them for their loss, which goes beyond simply providing a monetary value for the land and requires the State to take into account 'the meaning the land has for [the Indigenous people concerned]'.[22]

25. A failure to adequately address the issues arising from the protection acts will, as in *Adayom*, constitute an affirmation of the acts of the past. That will, of itself, constitute a violation of the provisions of the ICCPR, ICESCR and ICERD discussed above.

26. Further, those past acts must be regarded as having 'continuing effects', particularly when one has regard to the socio-economic status of Indigenous people in Australia. It is relevant to note in that regard:

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20 Para 6.2.

21 Those authorities are summarised in J Pasqualucci The Evolution of International Indigenous Rights in the Inter-American Human Rights System (2006) 6(2) *Human Rights Law Rev*iew 281-322.

22 *Yakye Axa Indigenous Community v Paraguay* (2005) IACtHR Series C 125 para 149.

(a) in the 2001 Census, the average gross household income for Aboriginal and Torres Strait Islander peoples was $364 per/week, or 62% of the rate for non-Indigenous peoples ($585 per/ week);[23]

(b) income levels decline with increased geographic remoteness. They fall from 70% of the corresponding income for non-Indigenous persons in major cities to 60% in remote areas, and just 40% in very remote areas.[24]

27. It is also notable that the United Nations Committee on the Rights of the Child recently expressed concern at effects of that socio-economic inequality upon Aboriginal and Torres Strait Islander children, stating:

> Despite the numerous measures taken by the State party's authorities, including the Indigenous Child Care Support Programme, the Committee remains concerned about the overall situation of Indigenous Australians, especially as to their health, education, housing, employment and standard of living.[25]

28. In that context, the ongoing denial to Indigenous people of money which was rightfully theirs can be seen to have a particularly significant ongoing effect.

Obligation to provide an effective remedy

29. This then leads to the question: what action is Australia currently required to take in respect of the obligations identified above? Article 2(3) of the ICCPR requires Australia to provide an 'effective remedy' to persons whose Covenant rights have been violated. Similar obligations apply to the other international instruments identified above. The nature of that requirement has recently been the subject of detailed consideration by the HRC, which stated:

> Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately

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23 Australian Bureau of Statistics, *Population characteristics: Aboriginal and Torres Strait Islander Australians 2001*, ABS cat. no. 4713.0, Commonwealth of Australia, Canberra, 2003, 81.

24 Ibid*,* 82.

25 United Nations Committee on the Rights of the Child, *Concluding Observations – Australia*, Unedited version, UN Doc: CRC/C/15/Add.268.

> adapted so as to take account of the special vulnerability of certain categories of person, including in particular children…
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> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged…the Committee considers that the Covenant generally entails appropriate compensation [for violations]. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. [26]

Inadequacy of mechanisms in place for seeking redress

30. None of the judicial or administrative avenues to seek redress currently in place meet the obligation to provide an effective remedy.

31. The submission made to this inquiry by the Castan Centre for Human Rights Law suggests that:

> the most promising argument for 'stolen wages' claimants in the Northern Territory, as elsewhere, is that the government breached a fiduciary duty to those whose wages it controlled.

32. Certainly, Courts in other jurisdictions (particularly the United States and Canada) have relied upon the existence of such duties in holding government liable for abuses of the power exercised over Indigenous people placed in a position of vulnerability.[27] Further, given that they seek to invoke equitable relief, claims based on fiduciary duty do not

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26 *General Comment 31*, paras 15 and 16.

27 See, for example, *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 and *United States v Mitchell II* (1983)463 US 206. See also the discussion in R Kidd *Trustees on Trial* (2006) 36-46.

encounter the obstacles arising in connection with limitation periods for common law claims in tort.[28]

33. However, Indigenous people in Australia have had very little success in bringing claims based upon fiduciary duty, largely by reason of the fact that Australian courts have been reluctant to find that a relevant fiduciary relationship existed.[29] It cannot, in those circumstances, be said that this avenue constitutes an 'accessible and effective remedy' for those seeking redress in relation to stolen wages.

34. HREOC, in its submission to this inquiry, has discussed claims brought under the *Racial Discrimination Act 1975* (Cth) in relation to underpayment of award wages.[30] As HREOC notes, those applicants have met with mixed success and face considerable difficulties in terms of evidence and the complexity of the litigation. It should also be noted that the RDA does not apply to acts or practices carried out prior to 1975. It therefore does not assist the majority of those affected by the protection acts or the descendants of those affected by that legislation.

35. New South Wales and Queensland have put in place compensation funds to address those affected by the protection legislation. In relation to Queensland:

    (a) the assistance is very limited: being either $2000 or $4000, depending upon what legislative regime the claimant worked under;

    (b) the offer was available only for a limited time and is now closed;

    (c) families of deceased workers could not apply; and

    (d) to be eligible for the payment, the claimant was required to release the state from any potential claim they might otherwise have in relation to the protection legislation.

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28 Although, see *Cubillo v Commonwealth* (2001) 112 FCR 455, at [456]-[459], where the Full Federal Court agreed with the trial judge's conclusion that, even if there had been breach of fiduciary duty, the Commonwealth could rely upon a defence of laches.

29 See, for example, *Cubillo v Commonwealth* (2001) 112 FCR 455. See also the discussion by R Kidd *Trustees on Trial* (2006) 46-51.

30 See *Bligh and Ors v State of Queensland* [1996] HREOCA 28 and *Baird v State of Queensland* [2005] FCA 495.

36. The New South Wales scheme, as currently understood, seems less problematic. The NSW Government has undertaken to pay monies owed, calculated at current value. There is no requirement to release the NSW Government from liability and descendants are eligible to apply (although, living claimants are being dealt with first). However, the scheme does not address the fact that Indigenous workers were paid at lower rates than their non-Indigenous counterparts. It is also difficult to comment upon the practical operation of the scheme, given that there have been delays in implementation and that the procedures to be followed are relatively untested. The scheme's effectiveness in handling descendant claimants cannot be assessed at this stage as no such claims have yet been dealt with.

The way forward

37. ALHR considers there is an urgent need for national leadership on this issue. Under article 50 of the ICCPR, the rights and freedoms guaranteed by the ICCPR 'shall extend to all parts of federal states without any limitations or exceptions'. The obligation to provide effective remedies for the violations identified above is therefore best met through a national scheme, ensuring adequate compensation for all Indigenous Australians affected by the protection acts and their descendents.

38. A very useful model for such a scheme may be found in the submission prepared by the Public Interest Advocacy Centre to the panel established by the NSW government on the Aboriginal Trust Fund Reparation Scheme.[31] ALHR endorses the model discussed in that paper as one that (if applied at a National level) would meet the obligations discussed in this submission.

39. ALHR also endorses the national forum suggested in the terms of reference. Provided such a forum is not regarded as an alternative to the payment of compensation, it would be a useful means of drawing attention to an historical injustice with ongoing consequences. As noted above, the HRC has indicated that such matters can be an important part of discharging the obligation to provide an effective remedy.

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[31] Published on PIAC's website at http://www.piac.asn.au