

Stolen Wages: The Unsettled Debt

Submission to the Senate Stolen Wages Inquiry

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1. Introduction

The Public Interest Advocacy Centre ('PIAC') seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

2. Experience relevant to this Inquiry

2.1 PIAC's work on Stolen Generations

In 1996, PIAC and PILCH co-ordinated legal advice and assistance to Aboriginal people making submissions to the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* ('**the National Inquiry**'). Since then, PIAC has provided legal representation for some members of the Stolen Generations, including for Mrs Valerie Linow, who made a successful claim in the NSW Victims Compensation Tribunal for crimes committed against her while she was a state ward.

In 2000, PIAC developed a proposal for a Stolen Generations Reparations Tribunal to provide full reparations for the forcible removal of Aboriginal children. The proposal was developed to address the failure of governments and churches to provide reparations as recommended by the National Inquiry. The tribunal proposal gained support from the Australian Labor Party and Australian Democrat members of the Senate Inquiry into the Stolen Generations in 2000.

In 2001, PIAC sought the views of Aboriginal and Torres Strait Islander people about the proposal through a national consultation project, funded by The Myer Foundation, Rio Tinto

Aboriginal Foundation, and the Reichstein Foundation, culminating in the 2002 report, *Restoring Identity*.

While the nature and purpose of the proposed Stolen Generations Reparations Tribunal is significantly different to that of the Aboriginal Trust Fund Repayment scheme, PIAC's expertise in designing the former has nevertheless been of great value in considering appropriate principles, tests for entitlement and procedures for the latter. This is because many of the issues faced in proposing a design for both administrative schemes are similar. These include:

- the lack of documentary evidence;
- the need to deal with events that occurred a long time ago;
- the effect of raising potentially traumatic memories, including the separation of children and families and the harsh impact of the state's control of Aboriginal people; and
- the need to design tests for entitlement that adequately and fairly address the particularities of the injustice they are designed to redress.

2.2 PIAC's work on Stolen Wages

PIAC's work with Aboriginal communities led it to investigate the claims of clients who were denied access to wages, allowances and other entitlements held on trust by the NSW Aborigines Protection Board (**'the Protection Board'**), then the NSW Aborigines Welfare Board (**'the Welfare Board'**) (together **'the Boards'**), and subsequently the NSW Government.

PIAC's involvement in Stolen Wages commenced in 2003, when it obtained documents from the NSW Department of Community Services (**'DoCS'**) under the *Freedom of Information Act 1989* (NSW) (**'FOI'**). The documents revealed that DoCS had previously considered implementing a scheme to repay Aboriginal people unpaid trust fund monies. The draft DoCS scheme, developed in 1998, appears to have formed the basis of a draft Cabinet Minute dated 12 April 2001 titled *Aboriginal Trust Funds Payback Scheme Proposal*. The Minute sought Cabinet's endorsement for the establishment of a scheme to reimburse Aboriginal trust funds monies to rightful claimants at fair value in contemporary currency.

Following the disclosure to PIAC of documents requested under the FOI application, and examination of the Cabinet Minute, PIAC requested an urgent meeting with the Director-General of DoCS to discuss the reasons that the scheme proposed by DoCS had not been implemented. PIAC also sought to advocate for the urgent implementation of a repayment scheme in light of the position of PIAC's clients and the potential for expensive and protracted litigation if the NSW Government did not properly address the issue. The Director-General proposed a meeting with staff of the Minister for Community Services.

Subsequently, in early March 2004, PIAC met with senior staff of the Minister for Community Services, and advocated for comprehensive consultation with the Aboriginal community leading to the implementation of a scheme similar to that proposed by DoCS in 1998. PIAC emphasised the importance of an expeditious scheme with fair criteria for eligibility and proof of claims, a commitment to compensating heirs and an appeals process. The culmination of this lobbying was a formal apology by (then) Premier Bob Carr on the 11 March 2004 and a commitment to repaying monies.

The first substantive undertaken by the NSW Government in meeting this commitment was to establish a Panel to make recommendations on the establishment of a repayment scheme. PIAC

made extensive submissions to this Panel and the Panel reported to the NSW Government in late 2004.

As a result of the Government's consideration of the Panel's report, the Aboriginal Trust Fund Repayment Scheme ('the Scheme') formally commenced operation in February 2005.

PIAC currently provides advice and representation to over 200 claimants who believe that the NSW Government owes them, or members of their family, unpaid entitlements. PIAC has assisted many of its clients to make applications to the Scheme.

3. The Terms of Reference that PIAC will address in the submission (G, H & I)

In this submission, PIAC addresses the issues that arise most often from its experience on stolen wages through its Indigenous Justice Project. PIAC's submission does not address all the Terms of Reference, but is limited to the following:

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

4. Summary of submissions

PIAC commends the NSW Government for establishing a repayments scheme for stolen wages. The scheme established in NSW is, on PIAC's assessment, significantly better than that established in Queensland for a number of reasons, including the absence of a cap on the amount that can be paid to any individual claimant, and the longer time allowed for the scheme to operate.

However, PIAC remains concerned that the limits on the scope of the Scheme will mean that it will not result in the repayment of all the debts owed to Aboriginal people as a consequence of past practices of withholding wages and benefits in a trust arrangement. Firstly, the (effectively) three-and-a-half-year limit on the scheme's operation is of concern and PIAC hopes that, if there are indications that the scheme requires further time to deal effectively with all the claims, the NSW Government will respond favourably to this.

Beyond the issue of the time limit on the scheme's operation, much of PIAC's concern stems from the requirement that the Scheme rely heavily on written financial records. This has the potential to be seriously detrimental to Aboriginal claimants as the records are incomplete and inadequate. This reliance will result in unfairness to the claimants as the State of NSW was responsible through a number of agencies for keeping these records, and the people for whom the monies were held in trust had no control over either the collection or disbursement of monies or over the maintenance of complete, comprehensive and accurate records. Aboriginal people could therefore be disadvantaged as a consequence of the failure of those entrusted with the responsibility for their welfare and financial affairs.

Other limits on the Scheme include the exclusion of consideration of monies owed to the beneficiary, for example as an employee, that were not paid into trust, and the apparent lack of scope for the Scheme to deal with monies that were supposed to be paid direct to the beneficiary by their employer, such as ‘pocket money’, that were simply not paid. Further, the Scheme does not compensate Aboriginal people for the exploitation of their labour through the much lower wages paid to Aboriginal people than to non-Aboriginal people throughout the relevant period.

5. Summary of Recommendations

Recommendation 1

The repayment of Stolen Wages should include all amounts that were owing to the beneficiary, whether or not they were paid to government.

Recommendation 2

Governments should compensate Indigenous people for the widespread exploitation of their labour in NSW and elsewhere in Australia.

Recommendation 3

The starting point for calculation of amounts owed to claimants should be the claimant’s eligibility for payment of pensions (or similar entitlements) or wage and the level of that payment or wage and the period for which the entitlement existed.

Recommendation 4

Guidelines for repayment schemes should be drafted in consultation with key stakeholder groups and should be released prior to commencement of processing of applications for repayment of debts.

Recommendation 5

Guidelines for repayment schemes should be equally binding on the claimants and the repayment schemes.

Recommendation 6

Prioritisation in the processing of claims should be addressed in Guidelines before any registration and prioritisation commences, and should include discretion to prioritise claims due to health, age or other relevant factors.

Recommendation 7

The timeframe for schemes should be five years for receipt of claims, with additional time for the processing of claims beyond that five years and discretion to extend the operation of the scheme.

Recommendation 8

Claimants should have free access to the complete documents held by government departments about them during their time under the protection of government.

Recommendation 9

Funding should be made for legal assistance to claimants and to agencies to assist claimants.

Recommendation 10

Schemes should have a comprehensive and well-resourced communication strategy.

Recommendation 11

A national forum should be held on the complexity and the consequences of mandatory controls over Indigenous labour and finances during most of the 20th century.

6. Commitments by state and territory governments

6.1 Commitment expressed by the NSW Government

On 11 March 2004, the (then) Premier of NSW, The Honourable Bob Carr, formally apologised to Aboriginal people who had their wages and other entitlements withheld between 1900 and 1969. Speaking in the NSW Parliament, the Premier gave in-principle support to the development of a scheme to identify and reimburse those who are owed money from trust funds.

In his speech the Premier announced the establishment of a panel to undertake research and consultations and report to the NSW Government on the establishment of such a scheme. The Aboriginal Trust Funds Reparations Panel (**‘the First Panel’**) was appointed to consult with the Aboriginal community in NSW on the issue of Aboriginal trust fund monies and to develop a scheme to identify potential claimants and reimburse the monies.

6.2 PIAC’s submission to the Panel

PIAC formalised its views in a written submission to the consultation entitled *Submission to the Panel on the Aboriginal Trust Fund Reparation Scheme* (see Appendix A).

PIAC’s submission stressed the following considerations:

- the monies owed to Aboriginal people in NSW are a debt and, as a debt, should be paid back in full;
- the scheme should undertake extensive research and investigation into who is entitled to money and the amount to which they are entitled;
- the scheme must be independent of government; and
- decisions made by the scheme about payments must be reviewable.

6.3 The First Panel’s Report

In October 2004, the First Panel released its report entitled *Report of the Aboriginal Trust Fund Repayment Scheme* (**‘the Report’**) (see Appendix B). The Report set out recommendations for the establishment of a scheme to operate for five years to receive claims, undertake research, and determine amounts owed.

On 15 December 2005, the NSW Minister for Community Services held a media conference to announce the NSW Government's acceptance of the recommendations of the First Panel and the establishment of an Aboriginal Trust Fund Repayment Scheme ('**the Scheme**') to operate for five years to receive claims, undertake research, and determine amounts owed. A commentary and analysis of the Scheme is detailed in section 7 below.

6.4 PIAC commends the establishment of the Scheme

PIAC welcomed the establishment of the Scheme as a concrete demonstration of the commitment of the NSW Government to repay the debts it owed to Aboriginal people as a consequence of past government laws and practices in respect of wages and other financial entitlements. The NSW Government has committed extensive resources and expertise to this commitment and should be commended for supporting its formal public apology with practical steps.

At this stage it is too early to tell whether the outcomes of the Scheme will fully resolve the issues encompassing Stolen Wages. Two potential questions arise from the Scheme's design. Firstly, will all the debts be repaid in full. Secondly, will Aboriginal people be compensated for the exploitation of their labour.

Will all debts be repaid?

PIAC's concern over whether all debts will be repaid arises from the focus of the Scheme solely on the repayment of monies held in trust by the Government and the need to have documentary evidence of the debts. This approach rightly acknowledges the payments as debts. However, the reliance on written documentation will, PIAC suspects, have a detrimental impact on Aboriginal people as a result of the inadequacy of record keeping by Government over the years and particularly at the time that the monies were being paid into trust, and as a result of the failure to properly maintain those records and protect them from damage or destruction.

It is clear from the documents that PIAC has inspected that there are no complete chronological records for any trust beneficiary. In particular, PIAC has not sighted any ledgers recording payments in and out of individual beneficiary's accounts. This is a significant omission. In its stead there are sporadic documents and arbitrary notations that have been collated from a variety of different sources.

As there are no complete chronological records, it is not certain on the face of the records whether the amounts in trust were dealt with appropriately, nor whether all transactions were recorded.

Second, it is not clear that all amounts that should have been paid into trust were paid into trust. This is perhaps the more serious deficiency: the failure of the Boards to ensure that all the amounts that should have been paid to it were in fact paid. For example, employers of wards were required to pay the bulk of that ward's wages, less an amount for pocket money and other sundries, to the Board. It appears from PIAC's calculation of the wage levels and the number of years in employment that not all the wages owing were collected by the Boards. This is supported by documents that indicate that the Board had to regularly chase payments from debtors. Without a full ledger, it is not possible to ascertain whether or not these payments were forthcoming.

In addition, in many cases individuals did not receive the pocket money that was held back from the money paid to the Boards. As the money was not paid, and was not required to be paid, to the Board, claims to the Scheme for such amounts are unlikely to be successful.

An emerging issue, about which PIAC is currently seeking more information, relates to the apparent care and employment of a significant number of Aboriginal people in NSW by churches and non-religious benevolent organisations. This appears to have been almost a parallel system and, as a result, there were no trust funds established by government in respect of all of those people. The Scheme is not currently established to deal with claims in respect of monies managed or held by any of those non-government organisations.

Exploitation of Aboriginal labour

While PIAC agrees that the monies held by the Boards were and must be treated as a debt owed by the NSW Government to individuals as opposed to a ‘hand-out’ or payment of compensation for harms done, it is still important that all governments considers their commitment to compensating claimants for issues associated with the widespread exploitation of Aboriginal labour in NSW and elsewhere in Australia.

These issues include physical and sexual abuse occurring within employment situations and institutions such as Cootamundra Girls’ Training Home and Kinchella Boys Training Home. A number of PIAC’s clients have shared some of their stories about their employment situations to be included in this submission.

Valerie Linow

We were all slave labour. No-one told us about wages or that we were supposed to get paid. The welfare put us out there and all we had to do was be little black slaves. I worked long hours from dawn to dusk. We worked seven days a week. There was a lot of work to do for a child. We didn’t have that much experience really. Like milking the cows and chopping wood, we had no experience in that. We had no choices. We couldn’t complain. We were there to obey. Matron would tell us that: ‘You’re out there to do work and that’s it and do a good job. No complaining.’

We always had to be out working, slave labour. All we know was that we were out to obey and to follow their rules. We were too frightened to say anything. If we didn’t do jobs properly we had to keep doing them again until they were right. We were segregated. The only people I could speak to were the cows in the paddock. We were taken advantage of. Little black kids going to work was cheap labour for them and that’s all we were.

I ran away from one employer where I was raped. I didn’t know who told the police about the abuse. All I remember is the police arriving and they told me to pack up my clothes and go back to the station to meet the matron. When I got back to Cootamundra matron told me ‘Don’t tell anyone what has happened and tomorrow I shall take you down town and buy you a new dress’. They should have been protecting us but they didn’t. Matron’s response was to find me other work. One week later she put me out working with someone else. The only option was to run away, but even this was hard because we were so isolated on the properties and didn’t even know which way to head. After this I found it difficult to stay long with any employer.

Vince Peters

There was a not a day at Kinchella that we didn't work. They didn't care what sort of condition we were in, whether we were sick or had an injury, they didn't take that into consideration. You would miss a lot of meals if you didn't finish your chores on time. This would sometimes go on for days on end. We were starved as punishment. You worked from dark in the morning to dark at night on a seven-day basis. Most of the jobs were adult jobs irrespective of whether you were a kid or not. You were expected to do the chore that was given to you. I can only remember one day in seven years that we didn't work and that was because all the kids were sick. Just about everyone in the home, even the managers, were sick.

The managers would try to inflict as much pain as possible on us. We would get a flogging on a daily basis, even if we were in trouble at school. They would call out number such and such. We weren't known by our names, just the number we had. We'd get called up the steps if teachers had informed management and we'd get a flogging with a cane. Most of the fellas took a pledge that we'd never let them see a tear in our eye and the managers didn't like that. We would get a flogging for any little thing that wasn't up to scratch and we have to repeat the job until it would meet their expectations. They seemed to enjoy inflicting pain on another human being. What happened to us at Kinchella was something that we'll never forget. It was complete and constant suffering on a daily basis. Each manager done it for pure pleasure.

We worked and we worked out butts off. We were way too young to even function to do some of the tasks that were given to us.

Cecil Bowden

When we were in Kinchella they used to send us out to local farms. They would put us in a shed or we had to harvest the crops. And we never got anything out of that. I never remember receiving money. We'd harvest their potato crops, carrots and all the vegetables and their corn too. This involved picking the corn cobs off and placing them in a big bin. This was at Kinchella on the local farms.

In the mornings we had to get up at 5am go and get the cows in and milk them before we had breakfast. Breakfast was at 7am. A lot of the time we had to get up at 4am and the ground would be freezing cold, we had chilblains all over our feet. The tops of our feet were cracked from the cold and seeping with puss. We did all our work barefoot as they wouldn't supply us with shoes. The grass was knee deep and we had to walk through it. In the summer we were frightened of snakes. In the afternoon we'd have to go and milk the cows again.

If you made a mistake you were punished and most of the time you were flogged. They'd strip you off and line you up in front of all the boys and each kid had to belt you. If the kid didn't belt you then he would have to get

belted. If the other kids didn't hit you hard enough to satisfy the managers they were sent down the line to get a flogging too. By the time you got to the end you were black and blue and bleeding all over. There was one incident I was involved in with cementing the laundry and someone put their footprint in the concrete. When the manager saw this he went crazy and lined all the boys up to ask who put their footprint there. He made us all place our foot over the print. Half a dozen boys would have fitted it but he blamed me so I was sent down the line and belted. He stripped me off and started belting me with a cane; all over my body. All I could do was cover my face up and my genitals. Later on it was discovered that it was the manager's son that had made the footprint in the wet cement.

These were the sorts of people put in charge of us. They would make us kneel on the 'coke' which is burnt coal near the wood heap and it was very sharp. We had to put a log of wood over our shoulders and hold onto it so there was weight on us causing the coal to cut into our knees. We would be punished for being late, not getting up in time or making mistakes.

In addition to morning and afternoon work on school days, we would work on the weekends mainly on a Saturday and we had to dig the garden up or plough the fields. They had a couple of big draught horses and we had to walk behind them with no shoes on. I worked on the kinchella property from the age of 11 till I was 18. When I got out I came down here to Sydney and started a plumbing apprenticeship. This was no good really. The boss used me as cheap labour. He didn't hire any other workers and made me do all the work, but there was no one we could talk to.

PIAC previously articulated a proposal for a stolen generations reparations tribunal to provide full reparations for forcible removal of Aboriginal children. It is PIAC's view that once the debt has been properly identified and repaid, a further NSW Government commitment is needed to provide for reparations for the harms done both through the forcible removal of children and the exploitation of Aboriginal people in work through the inequitable wages paid. A copy of PIAC's report *Restoring Identity* is provided at Appendix C.

Recommendation 1

The repayment of Stolen Wages should include all amounts that were owing to the beneficiary, whether or not they were paid to government.

Recommendation 2

Governments should compensate Indigenous people for the widespread exploitation of their labour in NSW and elsewhere in Australia.

7. Mechanisms to redress injustices suffered by Aboriginal state wards

7.1 The Scheme

The Scheme officially commenced operation in February 2005 and in May 2005 a new Panel was appointed comprising Aden Ridgeway (Chair), Robynne Quiggan and Sam Jeffries. PIAC commends the NSW government for appointing three Aboriginal people to the Panel.

7.2 The structure of the Scheme

The Scheme comprises both the Aboriginal Trust Fund Repayment Scheme Unit (**‘the Unit’**) and the Aboriginal Trust Fund Repayment Scheme Panel (**‘the Panel’**).

The Unit is essentially the administrative arm of the Scheme and is responsible for:

- receiving and processing applications made pursuant to the Scheme;
- investigating the applications and compiling all relevant information; and
- preparing an interim assessment in relation to each application.

The role and responsibilities of the Panel are to:

- provide advice on the operation of an evidence-based repayment scheme;
- endorse or reject the Unit’s interim assessments for payment of claims where there is certainty, strong evidence or strong circumstantial evidence of money paid into Trust fund accounts and no evidence, or unreliable evidence that money was paid out;
- have discretion to review the facts in each case using all available evidence, including oral evidence;
- review decisions of the Unit at the request of claimants; and
- contribute to a review of the operations of the Scheme after three years including reporting to the NSW Government the extent to which unclaimed Trust Fund monies have been identified where there is no living claimant and recommend a means of addressing the issue, if it arises.

7.3 How the claims process works

The Scheme has a seven-stage process. Set out below is the process as it applies to direct claimants, being Aboriginal people who believe that money was held in trust by the NSW government on their behalf.

1. A claimant completes an application form and lodges it with the Scheme.
2. The Unit registers the application and allocates the claimant a file number.
3. The Unit forwards the claimant’s details to the NSW Department of Aboriginal Affairs (**‘DAA’**) and State Records NSW (**‘State Records’**) to enable both agencies to undertake a search of all archived documents in relation to the claimant. The Agencies provide a list of all documents and copies of those documents they consider relevant to the claim.
4. The Unit reviews the documents it receives from DAA and State Records. In particular the Scheme concentrates on documents that detail payments into and out of the claimant’s trust fund account and makes an interim assessment of the amount owed to the claimant (**‘Interim Assessment’**).
5. The Unit sends its Interim Assessment to the claimant asking the claimant whether or not they agree with the amount. The Interim Assessment is accompanied by a copy of the list of all documents and a copy of all of those documents that were reviewed by the Unit in making its Interim Assessment.
6. The claimant must respond to the Interim Assessment within six weeks. The Unit then sends the claimant’s response and the Unit’s recommendation to the Panel.

7. The Panel reviews the claimant's response and the Unit's recommendation. It has the discretion to review the facts in each case using all available evidence, including oral evidence. The Panel can endorse or reject the Scheme's Interim Assessment for payment of a claim where there is 'certainty, strong evidence or strong circumstantial evidence of money paid into Trust fund accounts and no evidence, or unreliable evidence that money was paid out'. The Panel then makes a recommendation, which is forwarded to the Special Minister of State ('**the Minister**').
8. The Minister then determines whether to make an *ex gratia* payment or not.

The Scheme released its operational guidelines, entitled *Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme* ('**the Guidelines**') in February 2006, twelve months after it had officially commenced operation. A copy of the Guidelines are provided at Appendix D.

8. Recommendations arising from the operation of the Scheme

8.1 Valuable lessons from the Scheme

The Scheme is a comprehensive mechanism. As a consequence, its operations provide significant lessons for the processing of Stolen Wages claims. We set out below a number of recommendations that we believe could inform the establishment of future schemes.

8.2 The appropriate starting point for calculations

In PIAC's submission the starting point for calculations of amounts owed to individual claimants should be the amount they earned during their employment. The wage levels were prescribed and the terms of employment are available from documents or from individual evidence from the claimants. In PIAC's experience, the Unit calculates the amount owed to the claimant by working backwards in time. It starts its calculations from the final recorded figure in the claimant's trust account. The Unit then investigates whether there were any invalid payments made from the account such as dental bills and then credits this amount back to the final available balance of the trust account.

The Unit adopts this approach as it is limited by the boundaries of the Scheme as set out in the Guidelines referred to at 6.5. Accordingly, the Unit does not question whether the final amount in the claimant's trust fund account is an accurate assessment of the amount owed, that is, the amount that should have been in trust based on the person's work or other entitlements history. The Unit does not investigate whether all the wages were paid into the trust fund or invite the claimant to give evidence of the dates between which they were employed, their level of wages or whether they received payments from their trust accounts. In PIAC's view this approach is likely, in some cases, to lead to a gross underestimation of the amount owed to a claimant.

This is not a criticism of the Scheme or the manner of its operation. Rather it is a concern related to the scope it has been given by the NSW Government.

Many of PIAC's clients have indicated that the amounts calculated by the Unit are grossly deficient. In some cases our clients claim that they did not receive any payments from their employers and yet worked or should have received payments for many years. Yet the paucity of records means that this cannot be established or denied by documentary proof.

Consequently the amounts in the assessments have varied dramatically depending on the state

of the claimant's records. As the claimant has not ever had any control of the documentation it has come down to 'pot-luck'. One claimant may be lucky to have had their records survive and so be assessed as having an entitlement, whereas another claimant in a similar position may receive a 'nil' assessment because they are unlucky in having no surviving documentation.

A preferred starting point is the payments or wages that a claimant should have received during the period in which they were under the protection of the Boards. This can be quantified by reference to the time a claimant was eligible for a payment or wage and the level of that payment or wage. The onus of proof should we submit fall upon those entrusted with the obligation of administering the process of receiving and distributing payments and maintaining financial records

This will potentially expose the governments to greater liability. However unless this methodology is adopted, future schemes will only ever be viewed as capable of making partial repayments.

Recommendation 3

The starting point for calculation of amounts owed to claimants should be the claimant's eligibility for payment of pensions (or similar entitlements) or wage and the level of that payment or wage and the period for which the entitlement existed.

8.3 The Guidelines

The Guidelines are the policy and procedure document for the Scheme. This is an important document that enables both claimants and the Scheme to be clear about the procedures that are to be followed. Two issues have arisen in NSW that can inform the ongoing operation of the Scheme and future schemes.

Firstly, the release of the Guidelines was delayed beyond the commencement of the Scheme accepting claims. The delayed release of the Guidelines led to confusion about the operation of the Scheme amongst claimants and also the Scheme. PIAC's review of a number of Interim Assessments indicates that there were different methods of arriving at Interim Assessments and processing applications in the initial stages of the Scheme's operations. Some claimants received Interim Assessments without ever being required to complete a claim form.

Secondly, and perhaps more significantly, the Guidelines indicate that they are not binding on the Panel and the relevant Minister. NSW is in the early stages of claims determination, so it is too early to say whether departures from the Guidelines will be benign. However, in PIAC's view clear and binding guidelines are the most effective.

Recommendation 4

Guidelines for repayment schemes should be drafted in consultation with key stakeholder groups and should be released prior to commencement of processing of applications for repayment of debts.

Recommendation 5

Guidelines for repayment schemes should be equally binding on the claimants and the repayment schemes.

8.4 Prioritisation of claimants

It was unclear for some time how claims would be prioritised and ultimately the Scheme determined that this would be on the basis of the order in which claimants had contacted the Scheme (including contacting the First Panel before the Scheme was formally established in February 2006). While the Guidelines do give priority to direct claimants and have some capacity to take into consideration other relevant factors such as age or illness, the lack of public information at the time that the First Panel started registering names means that many claimants have a lower priority simply because they were not aware that contacting the First Panel to indicate a possible claim would be taken as registration for priority purposes.

Recommendation 6

Prioritisation in the processing of claims should be addressed in Guidelines before any registration and prioritisation commences, and should include discretion to prioritise claims due to health, age or other relevant factors.

8.5 Deadlines for acceptance of claims

PIAC believes that the deadline for the operation of schemes should be at least five years. In NSW, the Minister for Community Services advised on 15 December 2004 that the Scheme would operate for five years. However the Guidelines indicate, at paragraph 4.6, that claims shall be lodged no later than 31 December 2008. This is of particular concern given the limited information available to Aboriginal claimants about the existence of the Scheme and the claims process. The reason for this decision to change the claims deadline was not communicated to PIAC or the Aboriginal community, a significant majority of whom will be affected by the Scheme.

As the Scheme formally started accepting claims forms in September 2005 the Scheme will only operate for three and a half years. PIAC does not have current information on how many claims have been determined to date, but we are concerned that the majority of claims that will be made have not yet been filed. That is after almost half of the period allocated for the operation of the Scheme.

Recommendation 7

The timeframe for schemes should be five years for receipt of claims, with additional time for the processing of claims beyond that five years and discretion to extend the operation of the scheme.

8.6 Access to records

In PIAC's view, claimants need to have access to the complete documents held by government departments about them during their time under the protection of government for them to properly engage in the repayment process.

In NSW, when the Unit provides an Interim Assessment to a claimant, it encloses a table that contains a brief description of each document that is held by DAA and State Records. The designated researcher marks a cross next to those items that the researcher deems are relevant to the claim and the Unit's decision-making process. Further, only those marked items are copied and provided to the Unit and the claimant. All non-marked items in the table are excluded from consideration by the Unit in making its Interim Assessment.

PIAC has noted that a number of non-marked items in the summary table include employment contracts, memoranda regarding employment progress and even documents containing specific

reference to trust fund account amounts. In PIAC's view a complete copy of the documentation would assist the Unit in its assessment and the claimants in the following manner:

- assist in the recollection of important details of employment;
- act as a cross-referencing tool that may lead to further avenues for investigation; and
- provide valuable background material for any submissions to the Panel.

PIAC believes that the provision of a complete copy of the documentation would not place an additional resource burden on DAA and State Records because of the following considerations:

- The designated researcher reads each document and writes out a description of each document irrespective of whether a copy is provided. The additional step of making a copy would seem relatively effortless in the circumstances.
- The majority of items in the summary table are already marked and copied.
- The additional amount of photocopying is unlikely to be onerous, as there appears to be a general lack of documentation in existence.
- The NSW Government has given a commitment to provide access to and copies of documents to Aboriginal people as a result of the recommendations in the *Bringing the Home Report*.

As the situation currently stands in NSW, claimants have to make a separate application to the DAA for the entire records, which results in them incurring additional costs and creates further significant delays. The decision to waive the fee is a discretionary one and is made on a case-by-case basis.

The provision of documents by government would at the very least be seen as a gesture of good faith. However, it would, in PIAC's view, be viewed as much as a commitment to ensuring that schemes are rigorous and transparent, and as an acknowledgement of their responsibilities.

Recommendation 8

Claimants should have free access to the documents held by government departments about them during their time under the protection of government.

8.7 Funding of practical assistance

There is significant demand for assistance from potential claimants to the Scheme, in particular, from claimants who are dissatisfied with the Interim Assessments by the Scheme. There is limited expertise and capacity within the community to assist. As far as we are aware, PIAC is the only provider of assistance to a significant number of claimants. However the demand is already well beyond PIAC's capacity and likely to increase over the life of the Scheme.

PIAC was advised that the Scheme was allocated the amount of \$100,000 for 'practical assistance' funding. PIAC understands that 50% of this amount has been allocated to Link-Up to provide counseling assistance to claimants and community education. It is anticipated that the balance will be used for mediation once descendant claims are being processed due to potential family disputes. PIAC supports the way in which the money has been allocated but is concerned with the extremely limited amount of funding available.

There is no legal aid available for such claims and very limited civil and administrative law assistance available in NSW to Aboriginal claimants. While the Scheme asserts that legal assistance is not required, most claimants want to obtain advice so that they can fully

understand what is being offered, how it has been calculated and the implications of accepting an Interim Assessment. This is not an unreasonable expectation for claimants.

In NSW, solicitors are paid \$825.00 for assisting clients with victim's compensation applications. Such a model could be followed for payments to solicitors or advocates assisting clients with applications for review to schemes, particularly where there is a review of an initial determination.

Recommendation 9

Funding should be made for legal assistance to claimants and to agencies to assist claimants.

8.8 Information available to the public about the Scheme

Schemes should be supported by a comprehensive and well-resourced communications strategy so that potential claimants are made aware of the scheme.

At this stage there appears to have been very little community information or education about the operation of the Scheme and the claims process in NSW. PIAC has encouraged the Scheme to participate in Aboriginal community events and outreach programs, but to date is not aware of the Scheme doing so.

This is no doubt a result of the limited resources allocated to the Scheme and its focus on claims. However, as a consequence of the public demand for information and the level of misinformation in communities about the Scheme (not attributable to the Scheme), PIAC has been forced to use significant resources of its own to promote the Scheme. This included trips to rural areas such as Dubbo, Bourke and Walgett, appearances at public seminars and workshops and the production of publications.

Recommendation 10

Schemes should have a comprehensive and well-resourced communication strategy.

8.9 Transparency and Accountability

It is important that governments' commitment to pay back the monies held on trust is implemented in a manner that is fair, transparent and readily accessible. Clear information about the schemes should be available.

PIAC has sought the following information from the Scheme:

- 1) the number of claim forms that have been lodged with the ATFRS;
- 2) the number of claims that have been processed, ie, Interim Assessments made;
- 3) the amounts that have been awarded in Interim Assessments;
- 4) the number of Interim Assessments for which there is no record of a trust account;
- 5) the number of Interim Assessments that were accepted by the claimant;
- 6) the number of Interim Assessments that were not accepted by the claimant;
- 7) the number of Interim Assessments for which the Scheme did not received a response;
- 8) the number of matters that the Panel has made recommendations with respect to; and
- 9) the number of *ex gratia* payments that have been made.

While the Scheme has been forthcoming the information that it does have available, it has stated that it cannot provide information in relation to items 4-7 as this information is not currently collected.

9. Setting the record straight

9.1 Need for a public hearing

In PIAC's view there is an important need for 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. This was widespread injustice that impacted upon the Indigenous population in Australia and the repayment of debts is a small part of resolving these issues.

Recommendation 11

A national forum should be held on the complexity and the consequences of mandatory controls over Indigenous labour and finances during most of the 20th century.