



**Submission to the Queensland Government  
consultation on the new Stolen Wages  
Reparations Scheme**

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**Sophie Farthing, Senior Policy Officer**



# 1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to respond to the consultation regarding the re-opening of the Queensland Stolen Wages reparations scheme. PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

While based in NSW, PIAC has a long history of working closely with Aboriginal and Torres Strait Islander communities across the country. PIAC was involved in advocating for the Aboriginal Trust Fund Reparations Scheme (**ATFRS**) to be established in NSW. Once the ATFRS was set up, PIAC worked with Aboriginal and Torres Strait Islander communities across NSW to inform potential applicants about the scheme, provided legal representation for applicants and co-ordinated the provision of pro bono legal advice. PIAC also made a number of submissions to relevant reviews of the scheme.

Criticism of the original scheme set up to repay money withheld from Aboriginal and Torres Strait Islander communities in Queensland is well known. In its comprehensive review of Stolen Wages, the Senate Legal and Constitutional Affairs Committee recommended

the Queensland Government revise the terms of its reparations offer so that

- (a) Indigenous claimants are fully compensated for monies withheld from them;
- (b) further time is provided for the lodgement of claims;
- (c) claimants are able to rely on oral and other circumstantial evidence where the records held by the state are incomplete or are allegedly affected by fraud or forgery;
- (d) new or further payments do not require claimants to indemnify the Queensland government; and
- (e) the descendants of claimants who died before 9 May 2002 are included within the terms of the offer.<sup>1</sup>

Based on its experience with the Stolen Wages scheme in NSW, these are all measures PIAC supports.

The Underpayment of Award Wages Process (**UAW process**) and the Indigenous Wages and Savings Reparations Offer (**IWSR**) in Queensland were both largely ineffective in repaying underpaid and withheld wages. The widely derided process, in which many Aboriginal and Torres Strait Islander people did not participate, can only be seen as detrimental to the reconciliation process in Queensland. The decision to reopen the scheme, amending its operation based on consultation conducted by the newly appointed Special Taskforce, is accordingly a welcome one.

PIAC understands that the Taskforce will provide advice and recommendations to the Queensland Government regarding the new Stolen Wages Reparations Scheme (**the new Reparations Scheme**), including specifically in relation to

- eligibility criteria for the new Reparations Scheme;
- how payments should be made; and

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<sup>1</sup> Recommendation 6, Senate Legal and Constitutional Affairs Committee, *Unfinished business: Indigenous*

- how applications should be assessed.<sup>2</sup>

In this submission, PIAC draws on its extensive experience with the ATFRS in NSW to make a number of recommendations regarding the operation of new Reparations Scheme. While PIAC recognises it is generally accepted that the ATFRS provides a model for other reparations schemes,<sup>3</sup> it should be noted that there were still significant flaws in the ATFRS process. The lessons learned from the ATFRS are set out in detail in this submission.

## 2. About the Public Interest Advocacy Centre

### 2.1 About PIAC

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) 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 Services Program. PIAC also receives funding from Trade and Investment NSW for its work on energy and water, and from Allens for its Indigenous Justice Project. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The need to address the specific disadvantage experienced by Aboriginal and Torres Strait Islander people arises in all areas of PIAC's policy and legal work. In addition to its general policy work and legal casework, PIAC has two project areas where Aboriginal and Torres Strait Islander clients are specifically in focus. First, PIAC's Indigenous Justice Program (**IJP**), set up in 2001, aims to:

- identify public interest issues that impact on Aboriginal and Torres Strait Islander people;
- conduct public interest advocacy, litigation and policy work on behalf of Aboriginal and Torres Strait Islander clients and communities; and
- strengthen the capacity of Aboriginal and Torres Strait Islander people to engage in public policy making and advocacy.

The IJP has conducted policy and advocacy work in relation to a wide range of issues, such as policing in Aboriginal and Torres Strait Islander communities, the effectiveness of police complaint systems in NSW, the over-representation of young people in detention, improving access to justice and race discrimination. The IJP has also acted for family members of Aboriginal inmates who have died in custody.

Secondly, PIAC's Homeless Persons' Legal Service (**HPLS**), established in 2004, assists a number of Aboriginal and Torres Strait Islander clients who are experiencing or are at risk of homelessness. The HPLS operates a number of legal clinics based at agencies that provide other services to homeless people and provides legal information, referral, advice and, in some cases, on-going casework, in a large range of areas of law. One new HPLS clinic, for example,

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<sup>2</sup> Queensland Government, *Stolen wages reparation scheme: Taskforce actions*, accessed 14 October 2015, available at <https://www.qld.gov.au/atsi/having-your-say/stolen-wages-taskforce-actions/index.html>.

<sup>3</sup> The Senate Legal and Constitutional Affairs Committee, for example, noted that the 'AFTR scheme for the repayment of monies is generally better regarded than the Queensland reparations offer': above, note 1, at [7.2].

has recently been established at The Shed in Mt Druitt of NSW, a centre that provides support for predominantly Aboriginal and Torres Strait Islander men across a range of areas including mental health, employment and housing. PIAC's HPLS also conducts policy and advocacy work on issues arising from the provision of legal services and its liaison work.

## 2.2 Work relevant to the current consultation

PIAC has been involved in work to address historic wrongs against Aboriginal and Torres Strait Islander Australians since the early 1990s. This work has been undertaken in close consultation with Aboriginal and Torres Strait Islander communities.

### 2.2.1 PIAC's work in relation to the Stolen Generations

PIAC has provided legal representation to members of the Stolen Generations making submissions to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families; before the Supreme Court of NSW in relation to compensation claims; and before the NSW Victims Compensation Tribunal in relation to criminal conduct against removed children while State wards.

Following the release of the *Bringing them Home* report in 1997<sup>4</sup> (the **BTH report**), PIAC conducted a national consultation project, *Moving forward: achieving reparations*, to determine a community response to the BTH report. The final report of the *Moving Forward* consultation project, *Restoring Identity*, was completed in 2002.<sup>5</sup> Based on this extensive consultative work, PIAC developed a proposal for a Stolen Generations reparations tribunal<sup>6</sup> and drafted a Bill for its establishment.<sup>7</sup>

### 2.2.2 PIAC's work on Stolen Wages

PIAC's work with Aboriginal and Torres Strait Islander communities led it to investigate the claims of clients being denied access to wages, allowances and other entitlements held on trust for them by the NSW Aborigines Protection Board (**Protection Board**), then the NSW Aborigines Welfare Board (**Welfare Board**) and subsequently the NSW Government.

In 2003, PIAC obtained documents from the (then) NSW Department of Community Services (**DoCS**) under the (then) *Freedom of Information Act 1998* (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 and entitled 'Aboriginal Trust Funds Payback Scheme Proposal'. The Minute sought Cabinet's endorsement for the establishment of a scheme

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<sup>4</sup> Human Rights and Equal Opportunity Commission (1997) *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, available at [https://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf).

<sup>5</sup> Cornwall, A *Restoring Identity: Final report of the Moving Forward consultation project*, Public Interest Advocacy Centre, 2009, available at [http://www.piac.asn.au/sites/default/files/publications/extras/RI\\_report\\_final.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/RI_report_final.pdf).

<sup>6</sup> Public Interest Advocacy Centre, *Providing Reparations: A Brief Options Paper* (1997), Appendix C in Durbach, A and Thomas, L *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generations Compensation Bill*, Public Interest Advocacy Centre and the Australian Human Rights Centre, April 2008, available at <http://www.piac.asn.au/publication/2008/04/080410-piac-stolengens>.

<sup>7</sup> See Appendix A in Farthing, S *Submission to the General Purpose Standing Committee No. 3 Inquiry into reparations for the Stolen Generations in NSW* (7 October 2015), available at [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/318702324c711c40ca257edd0014b7e4/\\$FILE/0016%20Public%20Interest%20Advocacy%20Centre%20-%20Partially%20confidential.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/318702324c711c40ca257edd0014b7e4/$FILE/0016%20Public%20Interest%20Advocacy%20Centre%20-%20Partially%20confidential.pdf).

to reimburse Aboriginal trust funds monies to rightful claimants at fair value in contemporary currency.

Following the release of this information, PIAC advocated that such a scheme be established. This work culminated in a formal apology in the NSW Parliament by the (then) Premier, the Hon Bob Carr, on 11 March 2004, which included a commitment to repayment of withheld wages.<sup>8</sup> PIAC welcomed the subsequent establishment of the ATFRS and was a strong supporter of and participant in the ATFRS from its inception. PIAC represented eight claimants to the ATFRS and facilitated the referral of 40 claims to pro bono partner firms. PIAC also provided information to descendant claimants, and provided training for all lawyers who represented ATFRS claimants through the Stolen Wages Referral Scheme.

### 2.2.3 PIAC's current policy and legal work

A high proportion of PIAC's current legal clients are Aboriginal and Torres Strait Islander people and they are predominantly young people. A large part of PIAC's current systemic litigation seeks to challenge unlawful police practices in their interactions with Aboriginal and Torres Strait Islander people and to improve the relationship between communities and the NSW Police Force. For example, PIAC is currently finalising a class action representing young people, a number of whom are Aboriginal, who were unlawfully detained for breach of bail by NSW police officers due to inaccurate or out of date information held on the police computer system.<sup>9</sup>

PIAC has also made a number of submissions to government and parliamentary inquiries at both State and Federal levels, and published stand-alone reports, in relation to criminal justice policies that disproportionately impact on Aboriginal and Torres Strait Islander communities. These include, for example, submissions in relation to: bail reform;<sup>10</sup> the high incidence of involvement of Aboriginal juveniles in the criminal justice system;<sup>11</sup> justice reinvestment;<sup>12</sup> appropriate diversions from the criminal justice system;<sup>13</sup> and the need for rehabilitation and support after release from prison.<sup>14</sup>

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<sup>8</sup> The Hon, Bob Carr MP, New South Wales, House of Representatives, *Parliamentary Debates (Hansard)*, 11 March 2004, at 7164.

<sup>9</sup> See Bibby, P 'Wrongful detentions: NSW Police to pay \$1.85 million in compensation after settling class action' *Sydney Morning Herald*, 3 August 2015, available at <http://www.smh.com.au/nsw/wrongful-detentions-nsw-police-to-pay-185-million-in-compensation-after-settling-class-action-20150802-gipqqq.html>

<sup>10</sup> See, for example, Bailey, B et al *Review of the law of bail in NSW: submission to the New South Wales Law Reform Commission*, Public Interest Advocacy Centre, 26 July 2011, available at <http://www.piac.asn.au/publication/2011/07/review-law-bail-nsw>.

<sup>11</sup> See, for example, Brown, L and Zulumovski, *A better future for Australia's Indigenous young people: Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*, Public Interest Advocacy Centre, 22 December 2009, available at <http://www.piac.asn.au/sites/default/files/publications/extras/09.12.22-PIAC-IndigenousYouthSub.pdf>.

<sup>12</sup> See, for example, Schetzer, L *Value of a Justice Reinvestment approach to criminal justice in Australia*, *Submission to the Legal and Constitutional Affairs Committee*, Public Interest Advocacy Centre, 18 March 2013, available at <http://www.piac.asn.au/publication/2013/04/value-justice-reinvestment-approach-criminal-justice-australia>.

<sup>13</sup> See, for example, Hartley, C *NSW Law Reform Commission – Sentencing Question Papers 1-4*, Public Interest Advocacy Centre, 4 June 2012, available at [http://www.lawreform.justice.nsw.gov.au/Documents/cref130\\_se005.pdf](http://www.lawreform.justice.nsw.gov.au/Documents/cref130_se005.pdf).

<sup>14</sup> See, for example, Schetzer, L and Streetcare *Beyond the prison gates*, Public Interest Advocacy Centre, 31 July 2013, available at <http://www.piac.asn.au/publication/2013/08/beyond-prison-gates>.

Finally, much of PIAC's legal and policy work seeks to overcome the significant barriers to accessing justice experienced by our clients, all of whom suffer from some form of disadvantage. This work is directly relevant to any consideration of a repayment scheme for Stolen Wages. In this regard, PIAC has made a number of submissions to government and parliamentary inquiries based on PIAC's legal service provision, including: obstacles to justice in civil litigation;<sup>15</sup> judicial and merits review;<sup>16</sup> and the funding of legal assistance services.<sup>17</sup>

### 3. The broader context

PIAC welcomes the renewed impetus to address past wrongs inflicted upon Australia's Aboriginal and Torres Strait Islander communities. The reopening of the Queensland Stolen Wages scheme and the current parliamentary inquiry into reparations for the Stolen Generations being conducted in NSW<sup>18</sup> both serve as stark reminders that the injustices detailed in the BTH report have yet to comprehensively addressed. In relation to Stolen Wages, PIAC has repeatedly called for a nationwide inquiry or public forum to be established

to publicly air the complexity and the consequences of mandatory controls over Indigenous labour and finances during most of the 20<sup>th</sup> century. As with the removal of children, the withholding of Indigenous people's wages has entailed widespread injustice that has impacted upon the Indigenous population in Australia. The repayment of debts is a small part of resolving these issues.<sup>19</sup>

An evidence-based approach for the new Reparations Scheme can deliver valuable benefits, including collating the documentary and oral record and, if decisions are published, correcting an inaccurate social and historical record. It is clear that those individuals who had their wages stolen also suffered due to the fact of their forcible removal from their family and were often subjected to physical and sexual abuse. The experiences of Aboriginal and Torres Strait Islander Australians during this period cannot be neatly segmented. Valerie Linow, for example, was removed from her family at the age of two, placed in children's homes in Bomaderry and then Cootamundra and was then sent into domestic servitude at the age of 16.<sup>20</sup> She described her experience in parliamentary committee proceedings:

<sup>15</sup> See, for example, Goodstone A et al, *Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice* (20 May 2009), Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2009/05/piac-access-justice-submission>.

<sup>16</sup> See, for example, Goodstone, A et al *Statutory judicial review – keep it, expand it, Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia*, 14 July 2011, available at <http://www.piac.asn.au/publication/2011/07/statutory-judicial-review-keep-it-expand-it>.

<sup>17</sup> See, for example, Moor D, Santow E and Roth J *Equal before the law: Submission in response to the Productivity Commission Issues Paper about Access to Justice Arrangements*, Public Interest Advocacy Centre, 4 November 2013, available at <http://www.piac.asn.au/publication/2013/11/equal-law>; and Goodstone, A and Santow, E *Investing in the community: submission to the NSW Government review of legal assistance services to the NSW community*, Public Interest Advocacy Centre, 28 October 2011, available at [http://www.piac.asn.au/sites/default/files/publications/extras/11.10.28\\_investing\\_in\\_the\\_community\\_submission\\_to\\_the\\_nsw\\_government\\_review\\_of\\_legal\\_assistance.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/11.10.28_investing_in_the_community_submission_to_the_nsw_government_review_of_legal_assistance.pdf).

<sup>18</sup> See Farthing, S, above note 7.

<sup>19</sup> Banks, R (Public Interest Advocacy Centre) 'Stolen Wages: Settling the debt' (2008) 12 (SW) AILR 55, at p 65, available at <http://www.piac.asn.au/publication/2011/06/stolen-wages-settling-debt>.

<sup>20</sup> Jopson, D 'First compensation win for the stolen generation', 18 October 2002, *The Age online*, available at <http://www.theage.com.au/articles/2002/10/17/1034561266360.html>.

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.<sup>21</sup>

No amount of monetary payment will ever be able to properly compensate Aboriginal and Torres Strait Islander individuals and communities. The importance of a range of reparations for members of the Stolen Generations was recognised in the BTH report, which recommended a system of reparations be established consisting of:

- an acknowledgement and a policy;
- guarantees against repetition;
- measures of restitution;
- measures of rehabilitation; and
- monetary compensation.<sup>22</sup>

The reopening of the Queensland Stolen Wages scheme presents a unique opportunity to pay workers not only what they are owed, but also to provide a forum for people to tell their story of the wrongs they suffered.

## **4. Eligibility criteria for the new Reparations Scheme**

PIAC recommends that the new Reparations Scheme be made available to every claimant who had wages withheld or who was underpaid; arbitrary cut-off dates, as those adopted under the IWSR, should be avoided. Recognising the advancing age of those who had their wages withheld, as well as the fact that many will have passed away, PIAC recommends that living descendants also be eligible to make a claim or that payments be made to the estates of

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<sup>21</sup> Banks, R, above note 19, at page 60.

<sup>22</sup> Recommendation 3, BTH report, above note 4.



deceased individuals who would otherwise have been eligible to make a claim. Opening up the scheme to living descendants not only ensures Aboriginal and Torres Strait Islander people are properly paid for the work they did, it also recognises the intergenerational financial impact that the Stolen Wages policies had.

Following PIAC's experience of the ATFRS, and the experience of the Stolen Generations Assessor in Tasmania, it is clear that identifying an applicant to be a descendant of a claimant can be a difficult and sensitive issue.<sup>23</sup> Accordingly, identifying relevant family members and descendants who may be eligible to make a claim under the new Reparations Scheme for wages withheld from their relative should be set out in guidelines that are based on close consultation with Aboriginal and Torres Strait Islander communities.

Guidelines should also set out clearly which claims will be prioritised, such as those applicants who are particularly elderly or unwell. Again this information should be made publicly available from the outset. In PIAC's experience of the ATFRS, there was a high degree of confusion regarding how claims were to be prioritised as applicants and potential applicants were not informed of how the ATFRS was approaching claims for priority.

## **5. How payments should be made**

### **5.1 Making a payment calculation**

The IWSR has been widely criticised for the arbitrary approach to payments made under the scheme and the inadequacy of the reparations offer, as well as the way that plans were made to spend the leftover funds following the completion of the process.<sup>24</sup>

There was no cap on the amounts the ATFRS could award; this was a highly positive aspect of the scheme. The process undertaken by the ATFRS Unit to make a payment calculation was as follows:

the ATFRS Unit calculates the amount owed to the claimant by working backwards from the final amount recorded in the claimant's trust account records (if any). The ATFRS Unit then investigates whether any of the payments that were made from the account should not have been made – such as dental bills – and then credits this amount back to the final available balance of the trust account.<sup>25</sup>

What the ATFRS Unit did not do, however, was collect evidence about whether all the wages and entitlements were paid into the trust fund, from either the claimant or other sources. In many cases this was likely to lead to a gross underestimation of wages owed, which was the feedback from a number of PIAC's clients. This approach also meant a wide variation in the amounts awarded by the ATFRS, depending on what documentary evidence was available.

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<sup>23</sup> The Tasmanian Stolen Generations Assessor, for example, observed that the issue of Aboriginality was a 'very difficult and sensitive issue in the assessment process': Department of Premier and Cabinet, Parliament of Tasmania, *Report of the Stolen Generations Assessor* (2008), at page 15.

<sup>24</sup> See the Senate Legal and Constitutional Affairs Committee, above note 1, at [7.21].

<sup>25</sup> Banks, R, above note 19, at p 62.

A preferred approach, which PIAC recommends is adopted in the new Reparations Scheme, would be

to estimate the payments (including pensions and benefits) or wages that a claimant should have received during the period in which they were under the control 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. Wage levels were prescribed and the terms of employment are available from documents or from individual evidence from the claimants. The onus of proof should fall on the entity that had the statutory obligation of administering the process of receiving and distributing payments and maintaining financial records.<sup>26</sup>

This approach is equally applicable in Queensland, given the same paucity of documentation and neglectful record keeping as existed as in NSW.

## 5.2 Characterisation of the payment

As noted above, Aboriginal and Torres Strait Islander people who had their wages withheld were often subject to a range of abuses, including physical and sexual assault. The characterisation of the payments made under the new Reparations Scheme is therefore important. It is vital that applicants are made aware that what they are receiving is repayment of funds withheld from them to which they have right of access. It should not be characterised in any way as a payment to compensate them for physical and psychological injury suffered as a result of the forcible removals policy and subsequent enforced servitude. During the ATFRS process, reference was made to 'compensation' at a late stage of the process, when successful claimants were asked to sign a statement acknowledging the sum being paid included a 'compensatory element for the hurt caused by the deprivation' of their wages. This caused a great deal of confusion and was generally considered inappropriate and unfair by successful claimants.<sup>27</sup>

## 6. How applications should be assessed

### 6.1 Evidence relied upon

A key difficulty for applicants under the IWRS and the ATFRS in NSW was the onus placed on claimants to establish claims and the reliance on written evidentiary material. If the new Reparations Scheme is to be successful when it reopens then oral and circumstantial evidence must be relied upon. This was the approach taken by the Tasmanian Stolen Generations Assessor, who relied on corroborating evidence from eye witnesses to determine claims where records were lost, destroyed or had never been created.<sup>28</sup> The importance of being able to rely on oral evidence from Aboriginal and Torres Strait Islander claimants in civil litigation has also been acknowledged by the Australian Law Reform Commission.<sup>29</sup>

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<sup>26</sup> Banks, R, above note 19 at p 62.

<sup>27</sup> Stolen Wages Referral Scheme, *Settling Accounts: the effectiveness of the Aboriginal Trust Fund Repayment Scheme in addressing stolen wages in NSW*, Submission to the Hon John Watkins MP, Minister responsible for ATFRS, Public Interest Advocacy Centre, 11 June 2008, at page 16.

<sup>28</sup> Answer to the question put by Natasha Case to the Tasmanian Stolen Generations Compensation Assessor, the Hon Ray Groom, at the National Sorry Day Committee Annual General Meeting and Conference in Canberra on 7 October 2007.

<sup>29</sup> See Chapter 19, 'Aboriginal and Torres Strait Islander Traditional Laws and Customs' in Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102), 8 February 2006, available at <http://www.alrc.gov.au/publications/report-102>.

In PIAC's experience of the ATFRS, the refusal to rely solely on oral and circumstantial evidence was a great limitation of the scheme, even though the guidelines clearly contemplated reliance on oral evidence and it was acknowledged that the lack of documentary evidence was due to negligent record-keeping on behalf of state government bodies.<sup>30</sup> It is clear from the documents that PIAC inspected during the ATFRS operation that there were no complete chronological records for any trust beneficiary. In particular, through its work supporting applicants to the ATFRS, PIAC did not sight any complete ledgers recording payments in and out of a beneficiary's account. Instead, the interim assessments were conducted on the basis of sporadic documents and arbitrary annotations collated from a variety of different sources.

It is also important that all available documents on which the claim is based are made available to the claimant in the course of making a determination regarding their claim. In interim assessments from the ATFRS Unit, for example, a table was included containing a brief description of each document held by the NSW Government relevant to the claimant. Only some of those documents were provided to both the claimant and the decision maker. PIAC's review of some of these tables indicated that excluded items often included such things as employment contracts and memoranda regarding employment progress. PIAC believes access to those documents would have been of significant benefit to the ATFRS process:

A review of all the documents would assist the ATFRS Unit in its assessment and the claimants by helping claimants to recollect important details of employment; by acting as a cross-referencing tool that may lead to further avenues for investigation; and by providing valuable background material for any submissions to the ATFRS Panel.

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The provision of all documents by governments under any scheme established would at the very least be seen as a gesture of good faith. However, it would also demonstrate on the relevant government's part an acknowledgement of their responsibilities and a commitment to ensuring that schemes are rigorous and transparent.<sup>31</sup>

## 6.2 Time for making applications and decisions

In PIAC's experience, a significant limitation of the ATFRS was the short timeframe for the making of the claims. There was some disjuncture and confusion regarding the timeframe for the ATFRS, with the Guidelines allowing for three and a half years for claims to lodge a claim.<sup>32</sup> This was particularly problematic given the limited information made available to Aboriginal claimants about the existence of the ATFRS and the claims process. The tight timeframe did not allow sufficient time for communities to become even aware of the opportunity to make a claim, let alone receive sufficient independent legal advice in order to make a submission. PIAC notes the recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse is

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<sup>30</sup> Stolen Wages Referral Scheme, *Settling Accounts: the effectiveness of the Aboriginal Trust Fund Repayment Scheme in addressing stolen wages in NSW*, Submission to the Hon John Watkins MP, Minister responsible for ATFRS, Public Interest Advocacy Centre, 11 June 2008.

<sup>31</sup> Banks, R, above note 19, at page 63-64.

<sup>32</sup> The ATFRS was given a five-year timeframe in which to complete its operations, as announced on 15 December 2004. The ATFRS commenced operation in February 2005, with the panel appointed in May 2005 and the Guidelines published in February 2006, the latter indicating that applications had to be lodged no longer than 31 December 2008.

that the redress scheme should have no closing date.<sup>33</sup> While that redress scheme, if implemented, can be distinguished on the basis that it would be nationwide with an expected 60 000 applicants, it is useful to note that the Royal Commission has recommended an open-ended scheme as it recognised the obstacles claimants face in making reparations claims.

PIAC also believes it is important that a deadline be imposed for the time taken to make a decision regarding an application for wages withheld. A deadline for decision making of 12 months, for example, would give some certainty to applicants and recognise the particular characteristics of this group of claimants.

### **6.3 Indemnities**

PIAC notes that recipients under the IWRS on receipt of funds were required to indemnify the Queensland Government against all future claims.

Given the inadequacy of the IWRS, PIAC believes that this requirement was grossly inappropriate and should be disregarded. The new Reparations Scheme must be open to those who have already received such inadequate sums in recognition of the wages withheld from them.

Any such requirement for a successful claimant to indemnify against future legal actions should also not be repeated if and when the scheme is reopened. In order to ensure access to justice, the new Reparations Scheme should not preclude the possibility of resorting to civil litigation if an individual wants this. Seeking repayment through a monetary scheme and compensation through the litigious process should be seen as alternate routes by which those who had their wages stolen can seek justice. Although PIAC believes the majority of potential applicants would prefer to access a fairly executed monetary repayment scheme, there are situations where litigation is more suited to the matter at hand. This may be where conditions of employment were particularly egregious or where the individual believes the payments available are inadequate to properly compensate for the injuries that occurred in addition to the theft of their wages.

## **7. Other relevant matters**

### **7.1 Informing potential claimants about the scheme**

It is vital that the new Reparations Scheme be supported by a comprehensive and well-resourced communications strategy. PIAC understands that the consultation process currently being undertaken by the Special Taskforce may well be fulfilling this initial need to inform communities and potential applicants about the reopening of the Stolen Wages scheme. It is important, however, that the strategy to inform potential applicants is ongoing once the new Reparations Scheme is re-established.

PIAC's experience is that referrals and word-of-mouth recommendations are some of the best ways of promoting services throughout its client base. Effective communication would also involve educating relevant service providers on how the new Reparations Scheme will work, so that they can refer or assist survivors depending on the services they offer. Survivors who have

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<sup>33</sup> Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report*, 14 September 2015, at p 39.

had positive experiences with the repayment scheme are likely to be very powerful at promoting the scheme.

Once the ATFRS was established and commenced its operation, PIAC made its own efforts to raise awareness about the scheme by staging community forums and meetings around NSW, as a result of which it is understood more than 150 claims were registered. PIAC was also concerned that many Aboriginal people would miss out on claiming their entitlement; accordingly, without funding, it produced posters and flyers promoting the scheme and warning of the deadline to register claims.<sup>34</sup> It is important, in the context of any new Reparations Scheme, that funds be dedicated to the scheme's promotion at the very initial stages of its commencement.

## 7.2 Legal support and assistance for claimants

During the operation of the ATFRS, PIAC witnessed a significant demand for practical assistance and legal advice, particularly when a claimant was dissatisfied with an interim assessment of their claim. To attempt to fulfil that need, PIAC established, with the then Public Interest Law Clearing House, a referral scheme to obtain pro bono assistance for claims from private legal practitioners. Despite PIAC's best efforts, the majority of claimants did not have legal representation. As noted in PIAC's review of the scheme

A summary of finalised claims...provided to PIAC by the ATFRS indicates that the vast majority of claimants – 84 per cent – were not represented and that all of those who were obtained that representation through PIAC or the referral scheme.<sup>35</sup>

The experience of the ATFRS shows that whether or not an application was legally represented made a difference to the outcome of the process. The data provided to PIAC by the ATFRS Unit showed that legal representation made a difference to an applicant determining whether to challenge an interim assessment of the amount calculated to be owed to them. Every time an interim assessment was reviewed, the average final payment increased significantly.<sup>36</sup> PIAC also found that in addition to legal advice, the pro bono lawyers that PIAC facilitated access to provided practical and emotional support to claimants. Without the support of their lawyers, PIAC believes that some claimants would not have pursued their claims.<sup>37</sup>

It is, accordingly, vital that funding for independent legal advice and practical assistance be provided to potential claimants. Almost certainly the most cost-effective, and possibly also the most appropriate, option for providing legal assistance in relation to a repayment scheme would be to fund a model that catalyses and supports the provision of pro bono legal assistance to individuals seeking to access the scheme. This would involve government providing funding to a body – such as a public interest law clearing house or another community legal centre – to be the overarching co-ordinator of legal assistance and representation to survivor applicants.

Under this model, legal assistance would be provided by commercial lawyers acting pro bono. The coordinating centre would manage, train, supervise and support commercial lawyers to provide pro bono legal assistance in navigating the proposed scheme. The coordinating centre

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<sup>34</sup> See *Settling accounts*, above note 30, page 15.

<sup>35</sup> Banks, R, above note 19, at page 64.

<sup>36</sup> See *Settling accounts*, above note 30, at page 17.

<sup>37</sup> See *Settling accounts*, above note 30, at page 17.

could also directly provide more comprehensive legal assistance for less straightforward claims. Under this model, there would be some assurance of the quality and depth of service that will be required is accessible to every survivor applicant.

### **7.3 Transparency of decision making**

Bearing in mind the importance of privacy for claimants, PIAC recommends, as much as possible, there be transparency regarding how determinations are made in relation to payments made to successful applicants. In PIAC's experience with the ATFRS, there was minimal public awareness of the scheme due to its failure to publish and promote its own findings, determinations and outcomes. Ultimately this undermined the scheme's effectiveness and eroded community confidence that it was being operated fairly. Ensuring the decision making process is as transparent as possible will reassure claimants and the public and the process is just and fair.

It is also important that precedents be established as early as possible and that like claims are treated alike. A key problem with the ATFRS, for example, was the delay in publishing the guidelines governing its operations. This delay led to confusion in relation to how the ATFRS was to operate for both the scheme's administrators and among claimants. PIAC noted in its review of a number of interim assessments that 'there were different methods of arriving at interim assessments and processing applications in the initial stages of the ATFRS's operations'.<sup>38</sup> Any guidelines governing the New Reparations Scheme should, accordingly, be clear and publicly available from the outset. It is also important that any guidelines specify that they are binding on the operation of the scheme so that consistency is assured and the measures cannot be departed from.<sup>39</sup>

For similar reasons, PIAC also recommends that successful claimants be given clear and specific reasons for each individual determination about what they are owed and what repayment will be made.

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<sup>38</sup> Banks, R, above note 19, at page 62.

<sup>39</sup> Banks, R, above note 19, at page 62.