

**Submission
No 70**

INQUIRY INTO OVERCOMING INDIGENOUS DISADVANTAGE

Organisation: Public Interest Advocacy Centre

30 April 2008



The Director
Legislative Council Standing Committee on Social Issues
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Director,

Submission to the Inquiry into Overcoming Indigenous Disadvantage

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues. PIAC's Indigenous Justice Program aims to identify systemic wrongs by the state and its agents affecting Indigenous Australians and advocate for access to remedies and the elimination of those wrongs. The Indigenous Justice Program also aims to improve access to essential services for Indigenous communities and strengthen the capacity of Indigenous Australians to engage in public policy making and advocacy.

Significant Indigenous disadvantage continues to flow from the impact of previous government policies and laws, in particular, those that permitted the removal of children from their families (resulting in the Stolen Generations), and those that diverted wages and other payments due to Indigenous people (particularly young people) into government-managed trust funds (referred to as Stolen Wages).

PIAC has advised and represented members of the Stolen Generations since 1996. Between 1997 and 2002, PIAC developed a model for a Stolen Generations Reparations Tribunal, following an extensive consultation project with Indigenous communities throughout Australia. The final report of that project, *Restoring Identity*, is attached as **Appendix A**. For its submission to the ongoing Federal Senate Inquiry into the Stolen Generations Compensation Bill, PIAC drafted a Bill encapsulating the Reparations Tribunal model, which is attached as **Appendix B**. PIAC proposes a national Reparations Tribunal, established by Commonwealth legislation but with reparations jointly funded by the Commonwealth and the States. In the absence of Commonwealth action, the Reparations Tribunal model could be implemented by the New South Wales Government for the benefit of Indigenous people in this State, and would assist in overcoming some aspects of Indigenous disadvantage.

PIAC has worked on the issue of Indigenous Stolen Wages since 2003. In 2004, PIAC made a submission to the Panel that reported on the establishment of the Aboriginal Trust Fund Repayment Scheme (ATFRS). That submission is attached as **Appendix C**. PIAC has subsequently represented several ATFRS claimants and, with the Public Interest Law Clearing House (PILCH), organised *pro bono* representation many more claimants. While PIAC welcomes the establishment of the ATFRS, the Scheme has shortcomings and is not a comprehensive response to Indigenous Stolen Wages issues in New South Wales. Some of PIAC's concerns are discussed in its submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Indigenous Stolen Wages, which is attached as **Appendix D**. Further issues will be discussed in a submission to the Minister responsible for ATFRS, the Hon John Della Bosca, which

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PIAC and PILCH are preparing to coincide with the three-year review of the Scheme.

Both a Stolen Generations Reparations Tribunal and a more public process to compensate Indigenous people for their Stolen Wages would help to educate the public about how these policies were a major cause of Indigenous disadvantage.

The policies that created the Stolen Generations and Stolen Wages caused intergenerational harm. Members of the Stolen Generations were often deprived of the opportunity to learn parenting skills. Their descendants lost culture and family connections and it has fallen to them to care for traumatised parents who often suffer due to mental illness or substance abuse.

Similarly, government control of Indigenous people's money deprived them of the opportunity to learn financial skills and deprived their descendants of their financial inheritance. Full reparations for the Stolen Generations and Stolen Wages would address the ongoing intergenerational disadvantage suffered by these descendants.

Yours sincerely
Public Interest Advocacy Centre



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Appendix A

Restoring Identity

restoring **identity**

final report

2002



restoring identity

Final report of the
Moving forward consultation project

Amanda Cornwall

Public Interest Advocacy Centre

Cover design

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Acknowledgements

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We thank the members of the reference group for their support and hard work during the project – Elizabeth Evatt, PIAC's chairperson, Audrey Kinnear, co-chairperson of the National Sorry Day Committee, Brain Butler, ATSIC Social Justice Commissioner, Harold Furber, Northern Territory stolen generations groups and Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC.

Andrea Durbach, PIAC Director, provided advice during the project and Alexis Goodstone and Shaz Rind, PIAC solicitors, provided research assistance. Thanks to Sarah Mitchell, administrative officer for the project.

We would also like to thank Darren Dick, Chris Cunneen, Reg Graycar and Jennifer Clarke for comments on the draft of this report.



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Overview

This report documents the outcomes of the *Moving forward* consultation project, which included a consultation process conducted during 2001 and research carried out in late 2001 and 2002. It is divided into three parts.

Part 1 provides information on forcible removal policies and the project. Chapter 1 outlines the methodology used for the consultation project. Chapter 2 provides background information about forcible removal policies and the meaning of reparations. Chapter 3 introduces PIAC's proposal for a reparations tribunal to provide redress for the harm caused by forcible removal policies.

Part 2 discusses Indigenous peoples' views about reparations and how the situation in Australia compares to international approaches. Chapter 4 presents Indigenous views on reparations in the wider context of Indigenous aspirations for self determination and the reconciliation debate. It explains the importance of identity for the stolen generations and how government programs have failed. Chapter 5 reviews government and church programs for rehabilitation and restitution, identifying successes and shortfalls. Chapter 6 reviews reparations schemes in Canada, South Africa and New Zealand, offering insights into the fundamental aspects of reparations in practice.

Part 3 explains the current options for redress for forcible removal policies and presents PIAC's reparations tribunal proposal as amended in light of feedback from the *Moving forward* consultations. Chapter 7 discusses the legal claims by members of the stolen generations in courts and tribunals, and compensation schemes for institutional child abuse and exploitation of Indigenous labour. Chapter 8 details the role and functions of the proposed reparations tribunal, who can apply for reparations and how the proposal might be implemented.

Executive summary

Reparations for the stolen generations

The Public Interest Advocacy Centre (PIAC) developed a proposal for a stolen generations reparations tribunal to provide full reparations for forcible removal of Indigenous children. The proposal was developed to address the failure of governments and churches to provide reparations as recommended by the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families*.

The tribunal proposal gained widespread support during the Senate Inquiry into the Stolen Generations in 2000, which reviewed government and church responses to the *National Inquiry*. In 2001 PIAC sought the views of Indigenous peoples about the proposal through a national consultation project, called *Moving forward: achieving reparations*.

Moving forward project

The *Moving forward* project was carried out with the advice of a reference group with representatives of the Aboriginal and Torres Strait Islander Commission (ATSIC), the National Sorry Day Committee, the Human Rights and Equal Opportunity Commission (HREOC) and stolen generations groups in the Northern Territory. The Myer Foundation, Rio Tinto Aboriginal Foundation and The Reichstein Foundation provided funding for the project.

The project held group and individual interviews with over 150 people at 10 focus group meetings across the country between February and May 2001. It also held meetings with over 20 Indigenous organisations, including stolen generations groups, Indigenous health services and legal services. Submissions were received from over 30 people and organisations during the project.

The discussions were based on an issues paper that canvassed aspects of the proposed tribunal:

- ◆ what reparations means to Indigenous peoples
- ◆ the functions of the tribunal
- ◆ who should be entitled to reparations from the tribunal
- ◆ the issue of compensation and
- ◆ how the tribunal should be structured.

In August 2001 a national conference, *Moving forward: achieving reparations for the stolen generations* was organised by PIAC, ATSIC and HREOC. An *Interim report* detailing the outcomes of the meetings and submissions was prepared for the conference. Recommendations from the conference also informed the consultation project.

The *Interim Report* was forwarded to state, territory and federal governments for comment in August 2001. Some state and territory governments indicated interest in the tribunal proposal and gave examples of how they are progressing aspects of the proposal. The Federal Government has made it clear that it is opposed to PIAC's proposal for a reparations tribunal.

Background

Australia's Indigenous child separation policies are part of a racist past in which the state controlled almost every aspect of Indigenous peoples' lives. It is a history in which Indigenous parents were presumed unfit to care for their children by nature of their race. The policies caused destruction of family, culture and dignity and, in many cases, caused deep emotional and psychological harm.

An estimated 10 per cent of Indigenous children - mainly those with some non-Aboriginal ancestry - were removed from their families and communities under government policies between 1910 and 1970. About 20,000 to 25,000 people are thought to have been removed under the policies during that period.

The HREOC conducted the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families* during 1995 and 1996. It investigated past law and policies that resulted in the removal of Indigenous children by compulsion, duress and undue influence.

The report of the National Inquiry, *Bringing them home*, concluded that the policies were in breach of the international prohibition on racial discrimination and the level of systematic discrimination amounted to a 'gross violation of human rights'. HREOC recommended a package of reparations based on international human rights principles consisting of:

- ◆ **acknowledgment and apology** by federal and state parliaments, and by state and territory police forces and churches
- ◆ **guarantees against repetition** through community education and legislation for national Indigenous Child Placement Principles, and incorporation of the UN Genocide Convention into Australian law
- ◆ **measures of restitution** through language and culture centres, family tracing and reunion services and protection of records
- ◆ **measures of rehabilitation** by way of counselling services and providing opportunities for Indigenous communities to assume responsibility for the welfare of their children
- ◆ **monetary compensation** to people directly affected by forcible removals

The HREOC also reviewed contemporary policies for Indigenous child separation from their families. It found pervading paternalism towards Indigenous peoples in child welfare services and in the juvenile system. HREOC acknowledged that major social and economic disadvantage among Indigenous peoples is a significant contributing factor. It recommended major reforms in these sectors and a comprehensive Indigenous social justice package.

Government and church responses

In the five years since the *Bringing them home* report only limited progress has been made in implementing the recommendations.

All state and territory governments and all of the churches involved in administering forcible removal policies have offered acknowledgment and apologies, which have been widely accepted. The Federal Government claims that the magnitude and effect of the policies has been exaggerated and has offered only a statement of regret for past wrongs against Indigenous peoples generally.

Funding for specialised counselling programs have been administered as part of mainstream mental health programs and have largely failed to reach the stolen generations.

Federal Government funding for community-based family reunion services, called Link Up, took many years to implement. Although there was a national network of Link Up services by 2002, there are few with integrated counselling services.

Government and church undertakings to co-ordinate access to family records through 'one-stop shops' have not eventuated in some states. Few governments have acted on promises to train Indigenous archivists, historians and genealogists.

Little attention has been paid to restoring culture and language, acknowledging personal experience and providing redress. State and federal government funding for museums and libraries to conduct oral history programs do not provide the therapeutic benefits of public hearings and associated healing programs.

Indigenous children continue to be separated from their families at a much higher rate than children in the general population, primarily on grounds of 'neglect'. Indigenous young people continue to be over represented in the juvenile justice system.

Indigenous priorities

During the *Moving forward* meetings strong themes emerged from discussions about the meaning of reparations for Indigenous peoples.

- ◆ Acknowledge the full history of government treatment of Indigenous peoples as a first step towards reconciliation.
- ◆ Acknowledge the distinct identity of the stolen generations within the Indigenous community and consult with them about design and delivery of reparations programs.
- ◆ Affirm identity and experience of removals through 'telling story' in an appropriate forum, with an official acknowledgment and apology.
- ◆ Reduce the number of Indigenous children who are separated from their families through programs that empower Indigenous communities and families and overcome social and economic disadvantage.
- ◆ Establish memorials and community education programs in response to proposals developed by the stolen generations and their families.
- ◆ Allocate funds and premises for stolen generation support groups to provide culture and healing centres, to support removed people in the community in which they now live.
- ◆ Ensure appropriate access to family and personal records and training of Indigenous archivists, historians and genealogists.
- ◆ Provide travel subsidies for removed people to visit family.

International approaches

The right to reparations for gross violations of human rights has been recognised in many countries around the world. The experiences in Canada, New Zealand and South Africa are particularly pertinent. These examples reflect a growing international recognition of the role of reparations in the process of reconciliation. In those countries governments have acknowledged the harm caused and have recognised victims' rights to reparations. Features of the schemes are processes to hear the experiences of survivors, rehabilitation and restitution programs and limited monetary compensation.

About the tribunal

The tribunal offers an alternative to legal claims by the stolen generations and addresses the failure of government and church programs to provide full and just reparations as recommended by *Bringing them home*.

The tribunal would be based on governments and churches acknowledging the nature and magnitude of forcible removal policies and the harm caused. It would acknowledge people's

stories of removal and seek to restore culture and identity. It would also have a role in recommending measures to prevent the high rate of Indigenous child separation that still occurs today.

The functions of the tribunal would be:

- ◆ to provide a forum for Indigenous peoples affected by forcible removal policies to tell their story, have their experience acknowledged and be offered an apology
- ◆ to provide reparations measures in response to applications through reparations packages
- ◆ to make recommendations about government and church practices on Indigenous child separation to heal the past and prevent recurrence.

The reparations packages would be designed to help people heal and move on with their lives. There would be an emphasis on measures to support groups and communities.

Indigenous peoples made it clear during the consultation meetings that they want a flexible tribunal model so that local needs are accommodated. They believe it is important that the tribunal is able to influence state and territory government programs affecting them and their children as well as Federal Government schemes. Similar redress programs in Canada and New Zealand provide for local and regional diversity to reflect local needs and customs.

Why a tribunal?

Government responses to *Bringing them home* have failed to address the modest aspirations of the stolen generations. The reparations tribunal would ensure government and church responses to past racism are in line with international human rights principles.

Members of the stolen generations have made legal claims against state and federal governments in an effort to seek redress, at great personal cost. The cases have not been able to establish that governments owe a duty of care or a fiduciary duty to children removed under the policies. The courts have made it clear that they are reluctant to find governments liable for individual acts which occurred so long ago. Some judges have stated that the issues raised by these cases would be better resolved in the political arena.

The cases illustrate the limitations of litigation. They tend to focus on technical legal issues and fail to acknowledge the racism and broader consequences of the policies. Litigation is not available to many of the stolen generations because of lack of documentary evidence and the statutory bar on bringing legal claims more than three years after the damage occurred. The adversarial nature of litigation means that members of the stolen generations, who have already suffered emotional and psychological harm, are subject to further trauma.

Compensation

Many of the children removed under forcible removal policies were the victims of sexual and physical assault, racial discrimination and labour exploitation. *Bringing them home* recommended that compensation be paid to people who can prove these types of wrongs.

To many of the stolen generations and their families monetary compensation is important as symbolic recognition of harm. Others find it objectionable that life-changing trauma and grief should be quantified in monetary terms. Members of the stolen generations at the national *Moving forward* conference said that compensation is not a priority and should not dominate public debate.

The governments of Canada and Ireland have used the restorative justice approach to resolve claims by children who have been victims of sexual assault in government-run institutions. This approach recognises that redress includes financial and other compensation for survivors and offers them an opportunity to establish a permanent record of personal experiences and an apology.

The proposed reparations tribunal would provide financial compensation for members of the stolen generations who can prove a legal wrong, such as sexual assault, false imprisonment or labour exploitation.

What next?

The tribunal proposal was originally designed to operate on a national basis with leadership from the Federal Government. It was supported by the Australian Labor Party and Australian Democrats members of the Senate Inquiry into the Stolen Generations in 2000. However, the Federal Government has made it clear that it does not support a reparations tribunal.

PIAC envisages that the tribunal could be implemented by state, territory and federal governments in partnership with churches and Indigenous organisations. Different initiatives could be taken in each state to reflect the views and needs of local Indigenous communities.

Government programs in Victoria, Western Australia and Queensland already reflect key recommendations from the *Moving forward* project. State and territory governments and the Australian Council of Churches have indicated interest in the project.

The *Moving forward* project reference group will continue to meet to work for implementation of the tribunal proposal and to restore the identity of the stolen generations.

Recommendations

Implementation of government programs

1.1 The Ministerial Council on Aboriginal and Torres Strait Islander Affairs provide annual public reports on the progress of state and federal government programs that seek to address past Indigenous forcible removal policies and prevent the current high rate of Indigenous child separation.

1.2 All government agencies responsible for programs to provide reparations engage with members of the stolen generations in the design and implementation of the programs.

Family tracing and reunion

2.1 State, territory and federal governments provide additional resources to the national network of Link Up services to provide outreach services and integrated counselling services.

2.2 State and territory governments that have not already done so, work with the churches to provide Indigenous peoples with a 'first stop shop' to provide co-ordinated access to their personal and family histories.

Family records and genealogy

3.1 State, territory and federal governments implement their promises to provide training for Indigenous archivists, genealogists and historians and to promote employment of Indigenous peoples in these positions.

3.2 State, territory and federal governments work with Indigenous community organisations to develop community genealogies to identify the people affected by forcible removals and their descendants.

Contemporary removal

4. Governments address over-representation of Indigenous children and young people in the child welfare and juvenile justice systems through programs that promote Indigenous self governance and social justice.

Tribunal principles

5. State, territory and federal governments, in co-operation with the churches, establish a tribunal to make full and just reparations for forcible removal policies based on the following principles:

- ◆ **acknowledgement** of the racist nature of forcible removal policies and the harm caused
- ◆ **self-determination** of Indigenous peoples, including the stolen generations
- ◆ **access to redress** for Indigenous peoples affected by forcible removal policies
- ◆ **prevention** of the causes of contemporary separation of Indigenous children from their families in the present and future.

Functions of the tribunal

6. The tribunal have the following functions:

- ◆ provide a forum for Indigenous peoples affected by forcible removal policies to tell their story, have their experience acknowledged and be offered an apology
- ◆ provide reparations measures in response to applications through appropriate reparations packages
- ◆ make recommendations about government and church activities that affect contemporary Indigenous child separation and measures that might be taken to heal the past.

Types of reparations

7. The tribunal provide appropriate reparations measures in response to applications to assist Indigenous people to overcome the harm caused by forcible removal policies, with an emphasis on group resolution of claims.

Individual compensation

8. The tribunal provide individual monetary compensation to Indigenous peoples affected by forcible removal policies who can prove that they suffered types of damage recognised under current Australian law, such as sexual and physical assault or labour exploitation.

Who can apply

9. The tribunal provide reparations to Indigenous peoples who were removed from their families under forcible removal policies, family members who suffered as a result of the removals and their descendants who suffered harm.

Procedures

10.1 The tribunal conduct hearings primarily to hear people's stories and document their experiences, with fact-finding for the purpose of verifying claims conducted through a separate, non-adversarial process.

10.2 The tribunal be accessible and accountable, widely publicising its procedures and the reparations measures available.

10.3 The tribunal protect personal information of applicants, unless applicants consent to its publication or other use.

Structure and membership

11. The tribunal be a partnership of governments, churches and Indigenous peoples, including the stolen generations, with the following features:

- ◆ members are appointed by the partners according to set criteria for relevant skills and expertise
- ◆ maximum funding for reparations be made available and the cost of administering the tribunal be minimised as far as possible
- ◆ local level presence in the community
- ◆ structures to influence state and federal government activities.

Implementation

12. State, territory and federal governments and the churches develop and implement a process to establish a reparations tribunal in close consultation with ATSIC and stolen generations groups.

PART 1 - INTRODUCTION

Chapter 1 – About the project

Background

Australia's Indigenous child separation policies are part of a racist past in which the state controlled almost every aspect of Indigenous peoples' lives. It is a history in which parents were presumed unfit by the nature of their race, not their ability to care for their children. The results were destruction of family, culture and dignity, which often caused deep psychological and spiritual harm.¹

The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (the National Inquiry) contributed significantly to Australia's understanding of these policies. The report of the National Inquiry, *Bringing them home*², prompted unprecedented public sympathy and gestures of apology, including official apologies from all state and territory governments. Yet five years since *Bringing them home* was tabled in the Federal Parliament only limited progress has been made in implementing the reparations measures that were recommended.³ The Federal Government has denied the magnitude and effect of the policies, refusing to apologise for events of the past. Members of the stolen generations have made legal claims against the NSW and Federal Governments in an effort to seek redress, so far without success.⁴

To provide an alternative to litigation and to achieve full and just reparations for the stolen generations the Public Interest Advocacy Centre (PIAC) devised a proposal for a reparations tribunal. PIAC sought the views of Indigenous peoples about the tribunal proposal during 2001 through a national consultation project called *Moving forward – achieving reparations* (the *Moving forward* project). The proposal was strongly supported by Indigenous peoples with some refinements.

The aspirations of the stolen generations indicated during the *Moving forward* project are modest. They want a full acknowledgement of history and an apology from the Federal Government, recognition of the distinct identity of the stolen generations and some control over programs that are intended to meet their needs. The challenge for the project partners is to see the proposal implemented by state, territory and federal governments and the churches.

Project management

The project was conducted in partnership with key stolen generations groups and Indigenous and human rights bodies, through a project reference group. Members of the reference group are:

- ◆ Audrey Kinnear, Co-chairperson, National Sorry Day Committee
- ◆ Brian Butler, Social Justice Commissioner, Aboriginal and Torres Strait Islander Commission
- ◆ Elizabeth Evatt, Chairperson, Public Interest Advocacy Centre
- ◆ Harold Furber, Northern Territory stolen generations corporations
- ◆ Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission.

The reference group met on five occasions during 2001 and reviewed the final report during 2002. It has agreed to continue meeting after completion of the *Moving forward* final report to advance the implementation of the recommendations.

PIAC managed the project, with Amanda Cornwall as project manager and Sarah Mitchell as administrative officer.

The Myer Foundation, the Rio Tinto Aboriginal Foundation and The Reichstein Foundation provided funding for the project.

Terminology

The term 'stolen generations' refers to the Indigenous peoples' who were removed from their families as children under policies favouring separation of children of 'mixed' ancestry. The historian, Peter Read, coined the term in his work in the early 1980s on the separation policies in NSW.⁵ It has since gained currency in public debate and is therefore used in this report. However, the term is problematic as it has a tendency to blur the wide variety of circumstances and policies under which the separations occurred.

The difficulties with the term were highlighted in a story about Lowitja O'Donoghue in the *Herald Sun* newspaper on 28 February 2001. Ms O'Donoghue had been separated from her Aboriginal mother at the age of two when she and her four siblings were taken to Colebrook Home, a mission for 'half caste' children. Her father, an Irish station worker, had sent the children to the home. Ms O'Donoghue's mother had no say in the matter and suffered unbearable grief for the rest of her life. The story was presented in the *Herald Sun* as an admission by Ms O'Donoghue that she was not 'stolen' as previously claimed. Many members of the stolen generations felt betrayed by the story and were hurt by the ensuing negative publicity.

The term 'forcible removal policies' is used to refer to the range of past policies, laws and practices that resulted in the separation of Indigenous children from their families by 'compulsion, duress or undue influence'. The Human Rights and Equal Opportunity Commission (HREOC) referred to the policies collectively as 'forcible removal policies' during the National Inquiry.⁶

In defining 'forcible removal policies' HREOC took into account the circumstances at the relevant time (it focussed on 1910 to 1970). It recognised that while many removals were made in accordance with laws and policies, in some cases there had been illegal use of force and use of threats, moral pressure or infliction of hardship. HREOC acknowledged that a common practice was to remove children in the absence of their parents. The uneven power relationships between government officials and Indigenous families at the relevant time were also acknowledged. 'Forcible removals' were contrasted with removals that were truly voluntary on the part of parents who relinquished their children, or where the child was orphaned and there was no Indigenous carer to step in.⁷

The term 'Indigenous peoples' is used to describe Aboriginal and Torres Strait Islander people in Australia, to reflect the distinct cultural groups. It is also used to describe the Indigenous peoples in other countries.

Methodology

The *Moving forward* project sought the views of Indigenous peoples about PIAC's proposal for a reparations tribunal to address the harm of forcible removal policies. The discussions necessarily also canvassed views on reparations and government and church responses to *Bringing them home*.

The project used qualitative and quantitative information. The quantitative material was drawn from parliamentary and government inquiries in Australia and overseas, published research in legal and social policy journals and relevant laws and decisions of courts and tribunals.

The qualitative research was drawn from 10 focus group meetings with Indigenous peoples conducted across Australia, from oral and written submissions and from meetings with key Indigenous organisations. The focus group meetings, called *Moving forward* meetings, took place between March and May 2001 and were attended by over 150 Indigenous people. Nearly 50 submissions from Indigenous organisations helped to inform the project. The views expressed at a national conference held in August 2001 also contributed to the recommendations in this report. All stolen generations groups in Australia were consulted during the project.

An issues paper, entitled *Moving forward – achieving reparations*, set the parameters for the consultation process. It was launched in March 2001 at the second national Stolen Generations conference, *Healing the Pain*. The issues paper provided information about the tribunal proposal and posed questions about its core aspects:

- ◆ key functions of the tribunal
- ◆ who could apply for reparations
- ◆ tribunal processes
- ◆ mechanisms for compensation.

Moving forward meetings

The *Moving forward* meetings heard responses to the tribunal proposal and provided an opportunity for Indigenous peoples to discuss their own priorities for reparations. Most meetings were planned for three to four hours duration, but some meetings continued all day at the request of local organisers. Each meeting was attended by about 15 people, usually with a balance of men and women, and a mixture of older people and younger people. The participants were predominantly people who identified as members of the stolen generations. They usually included some people working for Aboriginal community controlled health services, Link Ups, the Aboriginal and Torres Strait Islander Commission (ATSIC) and relevant state government agencies. A profile of the meetings is set out in Appendix 1.

The meeting locations were selected on the basis that there was an active local stolen generations group in a particular area or an Indigenous member of the National Sorry Day Committee with appropriate skills to conduct the meetings. These people and organisations were engaged as project consultants to organise and facilitate the meetings. Counsellors or support people were provided at each meeting and space was set aside for people who needed a break from discussions or time alone. The location of the meetings and the host organisations are set out in Table 1.

Table 1 - Program of *Moving forward* meetings

Location	Venue and host	Facilitators
Sydney	Host: ATSIC, Sydney Venue: University of Technology Sydney	Lola Edwards, National Sorry Day Committee (NSW) & Barry Duroux Link Up NSW
Nambour	Venue: Nambour Community Centre	Judi Wickes, National Sorry Day Committee
Bathurst	Host and venue: Bathurst Aboriginal Land Council	Lola Edwards and Carol Kendall, National Sorry Day Committee (NSW)
Perth	Venue: Aborigines Advancement Council	Rosalie Fraser, National Sorry Day Committee
Broome	Host: Kimberley Stolen Generations Corporation and ATSIC Regional Council Venue: ATSIC office	Mark Bin Bakar, Kimberley Stolen Generations Corporation
Darwin	Host: Northern Territory Stolen Generations Corporation	Jane Vadiveloo and Toni Ah-Sam
Alice Springs	Host: Central Australian Stolen Generations and their Families Corporation	Jane Vadiveloo
Adelaide	Host: Link Up and ATSIC Venue: Nunkuwarni Yunti	Richard Young, for Link Up (SA)
Melbourne	Host: ATSIC Regional Councils Venue: Victorian Aboriginal Health Service	Marjorie Thorp, PIAC stolen generations group (assisted by Melissa Brickell, National Sorry Day Committee)
Hobart	Venue: Hobart Aboriginal Church	Debra Chandler, National Sorry Day Committee

Before approaching any community representatives about hosting a focus group meeting PIAC notified local ATSIC elected officials and invited them to participate in the meeting if they wished. All elected officers of ATSIC were notified about the project in January 2001.

A highlight of the of the *Moving forward* meeting in Alice Springs was a visit by the United Nations Special Rapporteur on contemporary forms of racism, Professor Maurice Glele-Ahanhanzo. Participants at the meeting had a rare opportunity to tell their personal stories of removal and discuss their disappointment with the Federal Government's response to *Bringing them home* directly to the UN's visiting team.⁸

Notes of the discussions at each meeting were made by the project manager and local volunteers. To protect the privacy of individuals, who were often relating very sensitive personal information, detailed records were not kept of the meetings. A profile of the main themes of the discussions at the meetings is set out in Appendix 2. More specific discussions on particular topics are referred to throughout this report.

Submissions and other meetings

The project received 33 written and oral submissions addressing the tribunal proposal and suggesting ideas for appropriate reparations. Submissions were received from the following organisations:

- ◆ ATSIC, NSW state advisory committee
- ◆ Central Australian Aboriginal Legal Aid Service, Alice Springs
- ◆ Garden Point Association, Darwin
- ◆ Graham Home, Mt Margaret Mission, Kalgoorlie, Western Australia
- ◆ Jarrah – Stolen Generations, NSW
- ◆ Kobeelya Centre, Edith Cowan University, Katanning Annexe, Western Australia
- ◆ Muramali program, Winangali
- ◆ National Aboriginal and Torres Strait Islander Catholic Council
- ◆ National Aboriginal Community Controlled Health Organisations
- ◆ National Council of Churches in Australia
- ◆ Sacred Site Within Healing Centre, South Australia
- ◆ Social Health Program, Wucchopperen Aboriginal Health Service, Queensland
- ◆ Meeting of South Australian stolen generations counsellors

Submissions to the Senate Inquiry into the Stolen Generations from Indigenous organisations were also used as part of the project's research. They included submissions from:

- ◆ Aboriginal Legal Service of Western Australia (WA)
- ◆ Binaal Billa Regional ATSIC Council (NSW)
- ◆ Crocker Island Association (NT)
- ◆ Jarrah – Stolen Generations
- ◆ Karu Aboriginal Child Care Agency (NT)
- ◆ National Sorry Day Committee (ACT)
- ◆ Northern Territory Stolen Generation Aboriginal Corporation and Central Australian Stolen Generations and their Families Corporation (NT)
- ◆ Residents of Cootamundra Girls Home (NSW)
- ◆ Resource Unit for Indigenous Health, Education and Research, Department of Psychiatry, University of Melbourne (Vic)
- ◆ Retta Dixon Home Aboriginal Corporation (NT)
- ◆ Victorian Aboriginal Child Care Agency Co-operative (Vic)
- ◆ Victorian Aboriginal Legal Service (Vic)
- ◆ Yamatjibarna Baba Maaja Aboriginal Corporation (NT)
- ◆ Yilli Rreung Regional Council (NT)
- ◆ Yirra Bandoo Aboriginal Corporation (NT)

The project officer met with people from Indigenous organisations such as Link Ups, Aboriginal health and legal services, and elected officers of ATSIC between March and June 2001:

- ◆ Aboriginal Legal Rights Movement, Adelaide
- ◆ Aboriginal Legal Service Western Australia, Perth
- ◆ ATSIC Commissioner for Brisbane and senior staff, Brisbane
- ◆ ATSIC Commissioner for Hobart and senior staff, Hobart
- ◆ ATSIC policy staff in Canberra, Sydney and Melbourne
- ◆ Binaal Billa Regional ATSIC Council Chairperson
- ◆ Central Australian Aboriginal Legal Service, Alice Springs
- ◆ Health and Well Being program, National Aboriginal Controlled Community Health Organisations and the Aboriginal Health and Medical Research Council, Canberra and Sydney

- ◆ Kimberley Stolen Generations Corporation
- ◆ Link Up at Derbarl Yerrigan Health Service, Perth
- ◆ Link Up at Nunkuwarrin Yunti, Adelaide
- ◆ Link Up, Queensland, Brisbane
- ◆ Link Up, New South Wales
- ◆ Muramali Program, Winangali
- ◆ National Council of Churches in Australia, Sydney
- ◆ Northern Aboriginal Legal Service, Darwin
- ◆ Queensland Aboriginal and Islander Legal Services Secretariat and National Aboriginal and Islander Legal Services Secretariat, Brisbane
- ◆ Victorian Aboriginal Legal Service, Melbourne

The main themes in the submissions are set out in Appendix 2.

Interim report and conference

An *Interim report* summarising responses to the issues paper and proposing draft recommendations was prepared for a national *Moving forward* conference in Sydney in August 2001. The national conference was held at the University of New South Wales in Sydney. It was organised by HREOC, ATSIC and PIAC. Over 250 people attended the conference including members of the stolen generations, government officers, academics, students and general community.

Speakers at the conference included members of the stolen generations; international speakers from Canada, USA, New Zealand and South Africa; representatives from the major political parties; the National Council of Churches; Reconciliation Australia; ATSIC; the National Sorry Day Committee; HREOC and PIAC.⁹ Workshops at the conference allowed for discussion of the tribunal proposal set out in the *Interim report*. The conference recommendations are set out in Appendix 3.

The *Interim report* was also presented at the Stolen Generations Healing Summit coinciding with the Yeperenye Dreaming Festival in Alice Springs in September 2001. The Summit was organised by the Central Australian Stolen Generations and their Families Corporation.

Federal, state and territory governments, the Federal Australian Labor Party and the Australian Democrats were invited to respond to the *Issues paper* and the *Interim report*.

About PIAC

PIAC is a Sydney-based community legal and policy centre. It provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged people. It uses test case litigation and policy reforms to address unjust or unsafe laws and practices. PIAC's work with Indigenous peoples affected by forcible removal policies is part of its commitment to human rights and reconciliation.

In 1996 PIAC and the Public Interest Law Clearing House in New South Wales (PILCH) co-ordinated legal advice and assistance to Indigenous peoples making submissions to the National Inquiry. After the release of the *Bringing them home* report in 1997 PIAC and PILCH assessed over 50 claims by members of the stolen generations. In 1998-99 PIAC provided legal representation for some members of the stolen generations who took legal action against the NSW Government in the NSW Supreme Court (the claims have since been

withdrawn). PIAC has also represented members of the stolen generations making claims in the NSW Victims Compensation Tribunal for crimes against them while state wards.

PIAC was guided in its policy work on stolen generations issues by a reference group established in 1999. Reference group members included people from the National Sorry Day Committee, ATSIC, Link Up NSW, the Council on Aboriginal Reconciliation, Indigenous people who worked on the National Inquiry, academics and a representative of the NSW Legal Aid Commission.

Notes

- 1 Haebich, Anna, 2001, *Between knowing and not knowing*, public knowledge of the Stolen Generations, paper presented to the second National Stolen Generations conference, *Healing the Pain*, March 2001, at p 1.
- 2 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, Commonwealth of Australia.
- 3 Senate Legal and Constitutional References Committee, 2000, *Healing: a legacy of generations*, report of the Inquiry into the Stolen Generations.
- 4 Clarke, Jennifer, 2001, *Cubillo v Commonwealth*, *Case Note*, Melbourne University Law Review, 25/1 (2001) 218 at p 221.
- 5 Read, Peter, 1982, *The Stolen Generations: The Removal of Aboriginal Children in NSW 1883 to 1969*, (NSW Ministry of Aboriginal Affairs, Occasional paper no. 1).
- 6 *Bringing them home*, Terms of Reference, at p 5.
- 7 *Bringing them home*, at p 5.
- 8 The report of the UN mission during 2001 is discussed in chapter 4 below.
- 9 Human Rights and Equal Opportunity Commission, 2001, *Moving forward: achieving reparations for the stolen generations*, conference papers, available at www.humanrights.gov.au/movingforward/speeches.html

Chapter 2 - Defining reparations

Removal practices

Forcible removal policies were part of a package of racist laws and policies that left Indigenous peoples, particularly Indigenous women, with little control over their lives.¹ The laws included prohibitions on mixed race relationships or a requirement for official permission for mixed race marriages. Legal guardianship of Aboriginal children was often placed with the state, rather than with Aboriginal mothers. Unpaid or underpaid Aboriginal labour and official appropriation of wages were sanctioned. Aboriginal people were required to have permits to leave reserves and visit towns and special controls were imposed on the supply and consumption of drugs and alcohol.²

This occurred in the context of violent conflicts over land, food and water. Children were removed from their families for reasons of education and to be exploited for their labour. At different periods of time and in different parts of Australia a variety of policies applied. Segregation and 'protection', which involved moving Indigenous peoples to reserved lands under the management of government or missionaries, were adopted in the 19th century. The exception to this protectionist trend was Tasmania, where most Indigenous families had been removed to Cape Barren Island by the turn of the 19th century. Until the late 1960s Tasmanian Governments insisted that Tasmania did not have an Aboriginal population.³

By the mid 19th century the decline of the Indigenous population had been so great that its very survival was in doubt. 'Merging' and 'absorption' were then favoured – removing children of mixed race from Indigenous families so that over time they would 'merge' with the non-Indigenous population. Following the first Commonwealth-State Native Welfare Conference in 1937, state governments began adopting policies designed to assimilate Indigenous peoples of mixed descent. Assimilation was an active and intense policy of intervention, in contrast to the more passive process of 'merging'.⁴

From the 1940s and 1950s general child welfare laws, rather than race specific laws, were increasingly used to remove Indigenous children. Under welfare laws the children had to be found to be 'neglected, 'destitute' or 'uncontrollable'. *Bringing them home* states that these terms were applied by courts and welfare officers much more readily to Indigenous children. Also, greater scrutiny of Indigenous peoples' lives by government meant that 'any deviation from the acceptable non-Indigenous 'norm' came to the notice of the authorities immediately'.⁵

Indigenous children could be removed under an explicitly racist law or under a law with apparently general application, but they were subject to the same administration – Aboriginal welfare boards.⁶ 'During the 1950s and 1960s greater numbers of Indigenous children were removed from their families to advance the cause of assimilation. As institutions could no longer cope with the numbers of children being removed, welfare practice encouraged placement of those children with non-Indigenous foster families 'where their identity was denied or disparaged'.⁷

The laws and practices were examined by the National Inquiry conducted by HREOC in 1995-96. While this was not the first time these policies had been publicly aired, the racism underlying the policies and the tragic human consequences had never before been provided in such detail.⁸

The Federal Government has argued that the lower number of Indigenous children removed under race specific laws in the 1940s and 1950s in the Northern Territory is evidence that

there were no race-based forcible removal policies at the time. In the *Cubillo* case Justice O'Loughlin concluded from this evidence that there was no 'blanket' policy of removal of 'part-Aboriginal' children in the 1940s and 1950s in the Northern Territory.⁹ This analysis takes no account of the increasing numbers of 'part-Aboriginal' children in the care of the state for 'ordinary welfare reasons'. In 1957 in the Northern Territory 'part-Aboriginal' children made up a majority of children in the care of the state.¹⁰

Churches and religious bodies were heavily involved in the care of separated Indigenous children, and in some early cases missionaries removed children without the consent of parents. They share some responsibility for forcible removals because of their involvement in providing accommodation, education, training and work placements for children.¹¹

Despite changes in policies and practices since 1970, Indigenous children continue to be over-represented in the child welfare and juvenile justice systems. The National Inquiry found that pervading paternalism in the welfare system plays a large part in the high proportion of Aboriginal child separations today. Most are removed on the basis of 'neglect' rather than 'abuse'. HREOC also acknowledged underlying social disadvantage as a major obstacle to changing the fortunes of Indigenous children.¹²

How many?

The number and proportion of Aboriginal children removed from their families under the forcible removal policies is not known. The *Bringing them home* report estimated that 'between one in three and one in ten Indigenous children were forcibly removed from their families or communities' from 1910 to 1970.¹³ Research since the National Inquiry has found that HREOC misread some of the statistics available to it.

The estimate that one in ten children were removed is now commonly regarded as more sound – still a significant proportion of children from any community.¹⁴ This estimate is partly based on a 1994 survey by the Australian Bureau of Statistics of Indigenous peoples aged 25 years and above.¹⁵ The survey suggests that approximately 17,000 Indigenous children had been removed from their families up to 1994. Of those removals 4,500 occurred after 1970. Commenting on this survey, historian Robert Manne concludes:

It is not easy to estimate how many Aborigines born after 1900 had died by 1994. Extrapolating from this figure on the basis of Aboriginal life expectancy makes it seem probable that between 20,000 to 25,000 Aboriginal children were separated from their families between 1910 and 1970.¹⁶

The Federal Government has claimed that *Bringing them home* misled the Australian public and that the stolen generations have exaggerated their plight.¹⁷ It disputes the use of the term 'stolen generations' claiming that the magnitude of the policies had been exaggerated – so there was no 'generation' – and there was no systematic use of force to justify the term 'stolen'.¹⁸ In February 2001 the Prime Minister, Mr Howard, characterised the Lowitja O'Donoghue story as a 'highly significant' fact, implying that it vindicated the Government's denial of the existence of the stolen generations.¹⁹ The Federal Government has also claimed vindication of its claims following the Federal Court decision in the *Cubillo* case. The Federal Court has been at pains to distance itself from the social and political issues, stating that its findings are not a decision about the existence of a stolen generation.²⁰

Whatever the estimated numbers, no generalisations can be made about the nature of the removals. There were a diversity of policies and reasons for removals at different times and the Aboriginal populations in each region differed widely. The way the children were treated

once removed also differed from one region to another and at different times.²¹ The number of people affected by the policies must also take into account the impact on families when children were forcibly taken from them.

Effects of removals

During the National Inquiry HREOC undertook an extensive program of hearings in every capital city and many regional and smaller towns. It took public evidence from Indigenous people and organisations, government officials, church representatives, non-government agencies and former mission employees. This included evidence from 535 Indigenous people concerning their experiences of removal policies.

The report of the National Inquiry, *Bringing them home*, was tabled in the Federal Parliament in 1997. It presented hundreds of stories of Indigenous people who had given evidence to the Inquiry. Grief and loss are the predominant themes of the report. It emphasises that the 'past is very much with us today, in the continuing devastation of the lives of Indigenous Australians.'²² It describes the effect of removal from family and culture and in some cases, physical, psychological and sexual abuse. In some cases sexual abuse was pervasive and punishments were severe, leading to deep physical, spiritual and psychological harm.

Bringing them home describes trauma, loneliness and dislocation experienced by those removed and by their families. In many instances the children were brought up in conditions of chronic neglect, with poor levels of education and where Aboriginal languages and cultures were actively suppressed.

Bringing them home identified the effects of the removals on the children of people who had been removed. The lack of experience of home life meant that many of those who had been removed lacked basic parenting skills. The children often grew up caring for traumatised parents with unresolved grief and depression. They had a high risk of suffering mental illness themselves.²³

The families who were left behind often suffered devastating emotional trauma. They were left to carry responsibility for cultural practices and learning and have had to find ways to welcome those removed back into the community.²⁴

Racism and genocide

HREOC found that forcible removal policies and practices were both a breach of the international prohibition on racial discrimination and a breach of the prohibition of genocide. The finding on racial discrimination was based on the view that the practices involved racial discrimination of such magnitude and on such a scale that it amounted to a 'gross violation of human rights'.²⁵ The finding that the policies were a breach of the prohibition of genocide in international law was on the basis that the practices were 'acts done with intent to destroy a racial group in whole or in part by the forcible transfer of members of one group to another group'.²⁶

Historians and the courts have since challenged HREOC's finding on genocide, particularly for the period after World War II. With the benefit of further research historians have concluded that there is a distinction between pre-war 'absorption' policies, based on eugenics, and post-war assimilation policies, based on racism and paternalism. While the former may have been genocidal, the latter is regarded as designed for the benefit of Indigenous peoples, not the destruction of the racial group.²⁷

The Australian courts have made a similar distinction. In *Kruger v Commonwealth of Australia* the High Court ruled that the *Northern Territory Aboriginals Ordinance 1918* was a 'beneficial'

law, authorising 'non-punitive' detention, not a law intended to destroy a race - not genocide.²⁸ The decision left open the question of whether practices and policies under the law, as distinct from the law itself, amounted to genocide.²⁹

In *Cubillo v Commonwealth* Justice O'Loughlin also distinguished between pre-war and post-war policies. Although not ruling out eugenicist thinking in pre-war policies, Justice O'Loughlin found that any such tendencies were overtaken by assimilation policies. He found that a 1939 policy that directed the removal of all illegitimate children of white fathers from their Aboriginal mothers was a beneficial law. These children were removed for separate education, mainly to prepare them for domestic or pastoral work.

Justice O'Loughlin concluded that assimilation, as promoted from the early 20th century, was in the child's best interests. He found no evidence of attempts to 'breed out colour' or to ensure a supply of domestic servants and manual labourers after World War II. He found that destruction of family and cultural associations may have been a consequence of post-war policy but that was not its purpose.³⁰ Justice O'Loughlin concluded that there was insufficient evidence to support the claim that the Federal Government's post-war removal policy in the Northern Territory was 'blanket' and eugenicist.³¹

The discussions about whether post-war removal policies amounted to genocide do not in any way challenge HREOC's finding that the policies were racial discrimination of such magnitude as to amount to a gross violation of human rights. The removal of ten per cent of Indigenous children, primarily based on race, was both substantial and discriminatory. The cruelty and injustice so often associated with the removals and subsequent care, and the effect on the families left behind, cannot be denied.

The *Moving forward* meetings and submissions to the project made it clear that Indigenous peoples believe that acknowledgement of the inherent racism in forcible removal policies is fundamental to reparations and reconciliation. Some people expressed the view that the practices, if not the formal policies, had a genocidal intent.

Defining reparations

To address the harm of forcible removals HREOC developed a package of remedial measures called 'reparations'. These are based on human rights principles accepted by the international community to address gross violations of human rights. The principles, generally known as the van Boven principles, recognise the right to redress for victims of gross violations of human rights.³²

HREOC recommended a package of reparations consisting of:

- ◆ **acknowledgment and apology** by state, territory and federal parliaments, and by state and territory police forces and churches
- ◆ **guarantees against repetition** by way of community education, legislation for national Indigenous Child Placement Principles, and incorporation of the UN Genocide Convention into Australian law
- ◆ **measures of restitution** through language and culture centres, family tracing and reunion services, and protection of records
- ◆ **measures of rehabilitation** involving counselling services and steps towards giving Indigenous communities responsibility for the welfare of their children
- ◆ **monetary compensation** to people directly affected by forcible removals.³³

HREOC made over 50 recommendations for action by governments, churches and the community. The first recommendation was for further recording of testimony by Indigenous people who had experienced forcible removals.³⁴

A large number of recommendations dealt with management of family records held by governments and churches and processes to make them accessible to people who were affected by forcible removal policies. HREOC recommended the indexing and archiving of records, joint records taskforces to co-ordinate interstate and church records and minimum access standards. It favoured a 'first stop shop' for all records held by government and church agencies so that Indigenous applicants would not need to apply to each separately held collection. HREOC recommended training and employment of Indigenous peoples as archivists, historians and genealogists.³⁵ It also recommended enhancement of family reunion and tracing services nationally.³⁶

HREOC recommended a one-off lump sum payment of compensation to all those who were removed. It also recommended compensation for people affected by the policies who could prove types of harm recognised under Australian law, such as labour exploitation, physical and sexual abuse, loss of culture and loss of land rights.³⁷

HREOC found that significantly higher rates of Indigenous children continue to be separated from their families today. It reviewed child welfare practices and juvenile justice laws as they affect Indigenous young people. It concluded that this is the result of a number of factors, including pervading paternalism and indirect racism in child welfare services. To address the problem, HREOC recommended a complete overhaul of child welfare services. It acknowledged that the welfare of Indigenous children is inextricably linked to the well-being of the Indigenous community and its ability to control its destiny.³⁸

A social justice package for Indigenous families and children was recommended, to be developed by governments in partnership with ATSIC and other Indigenous groups.³⁹ At the heart of these recommendations was the need for Indigenous peoples to have self-determination in the areas of child welfare and juvenile justice.

Responses to *Bringing them home*

The *Bringing them home* report had a profound effect on the general public, unlike any inquiry in recent Australian history. Its findings were accepted without question, at least in the short-term. Within days of the report being tabled in Federal Parliament in May 1997, the Leader of the Opposition, Mr Kim Beazley, read extracts and wept openly in the House of Representatives.⁴⁰

The general public embraced HREOC's recommendations for apology and acknowledgement. In 1998 over half a million people responded by signing 'Sorry Books' and thousands took part in ceremonies on National Sorry Day, 26 May 1998. A 'Journey of Healing' was commenced in 1999 and hundreds of events have taken place across the country since then.⁴¹ According to former Prime Minister, Malcolm Fraser, the Journey of Healing 'offers practical ways in which everyone can help to shape a better future for us all'. In 2001 the Journey of Healing focused on the families and communities left behind when children were removed, with many healing ceremonies for communities in rural areas. In 2002 the focus is on two themes – making known the effect of removal on rural and remote regions and helping to build understanding of the effect of removal on the children of those removed.⁴²

The Federal Government refused to make an apology. It said ‘... we do not believe that our generation should be asked to accept responsibility of earlier generations, sanctioned by the law of the times...’.⁴³ HREOC and ATSIC believe responsibility for the policies is continuous through the institution of government.⁴⁴ The Prime Minister’s claims that a formal apology would have legal implications⁴⁵ has been challenged by legal commentators and dismissed as irrelevant by the Federal Court.⁴⁶

The Federal Government’s formal response to *Bringing them home* in 1997 was a package of \$63 million for ‘practical assistance’ measures. It included:

- ◆ training of Indigenous counsellors
- ◆ new counsellor positions
- ◆ parenting support programs
- ◆ family reunion services to extend the network of Link Up services nationally
- ◆ language and culture programs (from existing ATSIC funds)
- ◆ copying and preserving files held by the Australian Archives
- ◆ an oral history project by the National Library of Australia.

All state and territory parliaments formally acknowledged and apologised for past forcible removal policies. Apology and acknowledgement ceremonies by state governments and the ACT Government between 1997 and 1999 incorporated speeches by representatives of the stolen generations who were invited to address state parliaments. Their speeches and those of political leaders in reply were heartfelt and moving.⁴⁷

The Prime Minister’s position is in contrast to the approach taken by the Houses of the NSW Parliament in June 1997, at a time when the NSW Government was the subject of legal claims by members of the stolen generations.⁴⁸ The motion passed by both Houses read as follows:

This House on behalf of the people of New South Wales -

- ◆ Apologises unreservedly to the Aboriginal people of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities;
- ◆ Acknowledges and regrets Parliament’s role in enacting laws and endorsing policies of successive governments whereby profound grief and loss have been inflicted upon Aboriginal Australians...⁴⁹

The Northern Territory Parliament conducted a ceremony of acknowledgement and apology on 24 October 2001 at it’s first sitting following the election of the Australian Labor Party to government.

State and territory government responses focus on similar measures, but the level and type of programs vary. The main initiatives are:

- ◆ indexing and archiving of records
- ◆ programs for access to records
- ◆ oral history programs
- ◆ funding for family reunion and family tracing services
- ◆ school education and cultural awareness training for professionals working with Indigenous families
- ◆ adoption of the Indigenous Child Placement Principle in child welfare and adoption policies and guidelines.⁵⁰

The churches were responsible for providing accommodation, education and work placements for children and have continuing responsibility for records of children who were in their care. The role of the churches in the child separation policies has been acknowledged and apologies have been offered. All the major denominational churches in Australia at national, state and local level have offered apologies in diverse ways. Measures taken by the churches include improving access to records and providing land and premises used as former homes. Some churches have offered to contribute to a national compensation fund if it were to be established by the Federal Government.⁵¹

Notes

- 1 Haebich, Anna, 2000, *Broken Circles, fragmenting Indigenous families*, Fremantle Arts Centre Press, documents the destruction of Aboriginal families through the forced removal of children from 1800 to 2000.
- 2 Haebich, as above, ch 5 and 6; Clarke, already cited, at pp 223-224; *Bringing them home*, pp 25 - 150.
- 3 *Bringing them home*, pp 25 - 150, esp at p 29.
- 4 as above, pp 25 - 150, esp at p 27-33.
- 5 as above, pp 25 - 150, esp at p 33 - 35.
- 6 as above, 25 - 150; Clarke, already cited, pp 245 - 246 discusses the administration of the laws in the Northern Territory in more detail.
- 7 *Bringing them home*, pp 25 - 150, esp at p 34.
- 8 Previous inquiries and public debates are referred to in *Bringing them home*, already cited; also see Anna Haebich, 'Between knowing and not knowing, public knowledge of the Stolen Generations', already cited.
- 9 Clarke, already cited pp 253 - 255, citing *Cubillo v Commonwealth* (2000) 174 ALR 97, at 203.
- 10 as above, at pp 221-222, referring to Barbara Cummings, *Take this child ... from Khalin Compound to Retta Dixon Children's Home* (1990) at 113.
- 11 *Bringing them home*, pp 1 - 24.
- 12 as above, pp 423-459, 489 and pp 539 - 540.
- 13 as above, pp 25 - 150.
- 14 Manne, Robert, 2001, *In Denial: the stolen generations and the right*, UNSW Press, pp 24 - 28.
- 15 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings*, ABS catalogue no. 4190.0 at page 7; *Bringing them home*, pp 36 - 37.
- 16 Manne, already cited, p 27.
- 17 Submission of the Federal Government to the Senate Inquiry into the Stolen Generations, submission no. 36, Senator Herron, Minister for Aboriginal and Torres Strait Islander Affairs.
- 18 as above.
- 19 Manne, already cited, p 2 - 3.
- 20 *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97 at 115; *Cubillo v Commonwealth of Australia* and *Gunner v Commonwealth of Australia* (2001) 183 ALR 249 at 254.
- 21 Manne, already cited, p 27 - 28; *Bringing them home*, pp 36 - 37 and ch 10 and 11.
- 22 *Bringing them home*, p 3.
- 23 as above, pp 222 - 232.
- 24 as above, pp 212 - 221; *Healing: a legacy of generations*, pp 83 - 91; discussed at the *Moving forward* meetings and meetings of the *Moving forward* project manager with ATSIC officials in Hobart, Melbourne and Sydney.
- 25 as above, pp 268 - 269.
- 26 as above, pp 266 - 277; on genocide specifically pp 270 - 275; Aboriginal and Torres Strait Islander Social Justice Commissioner - HREOC, April 2000, submission 93A, Senate Inquiry into the Stolen Generations, pp 40 - 53.
- 27 Manne, already cited, pp 366 - 41; Tatz, Colin, 1999, *Genocide in Australia*, Australian Institute of Aboriginal and Torres Strait Islanders Studies Research Section Occasional Paper.
- 28 *Kruger v Commonwealth* (1997) 190 CLR 1, Dawson J at 70, Toohey J at 88, Gaudron J at 107, McHugh at 144 and Gummow at 158; discussed in Jennifer Clarke, as above, at 219 and 222.
- 29 Storey, Matthew, 1997, *Kruger v Commonwealth: Does genocide require malice?*, University of NSW Law Journal, 4/3 1997; *Kruger v Commonwealth* (1997) 190 CLR 1 (also discussed in ch 7 below).
- 30 Clarke, already cited, pp 254 - 255; *Cubillo v Commonwealth* (2000) 174 ALR 97.
- 31 Clarke, as above, pp 226.

- 32 *Bringing them home*, pp 277 - 283 (esp p 280) and Appendix 8, which sets out the draft van Boven principles; the principles have been reviewed since 1997, but the underlying standards have not changed.
- 33 The components of reparations are discussed in *Bringing them home*, pp 282.
- 34 *Bringing them home*, recommendation 1, p 22.
- 35 as above, recommendations 21 - 28 and 38 - 39.
- 36 as above, recommendation 30.
- 37 as above, recommendations 14 - 20, pp 302 - 313.
- 38 as above, pp 458 - 459.
- 39 as above, pp 489 - 541 (conclusions discussed p 540); ch 25 and recommendation 42, p 558.
- 40 Manne, already cited, pp 5 and 28.
- 41 www.journeyofhealing.com
- 42 www.journeyofhealing.com
- 43 Federal Government's response to *Bringing them home*, Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, 1997, cited in Aboriginal and Torres Strait Islander Commissioner, *Social Justice Annual Report 1998*, HREOC, 1999, p 63.
- 44 HREOC submission to Senate Inquiry quoted in *Healing: a legacy of generations*, p 112; ATSIC quoted in transcript of evidence to Senate Inquiry, p 11, cited in *Healing: a legacy of generations*, p 112 - 113.
- 45 Transcripts of various media interviews cited in *Healing: a legacy of generations* at 113.
- 46 *Cubillo v Commonwealth* (2000) 174 ALR 97, 134-6 and 573 respectively; discussed in Clarke, already cited, pp 250 and 282. Justice O'Loughlin said it is inappropriate for the courts to refer to statements made in the Parliament in reaching a decision on liability. On the other hand, the lack of an acknowledgement and apology from the Government was a factor expressly taken into account when assessing damages.
- 47 The apology processes and extracts of statements are set out in *Healing: a legacy of generations*, ch 4; full statements can be found at www.journeyofhealing.com
- 48 *Williams v The Minister, the Aboriginal Land Rights Act 1983* [1999] NSWSC 843 (26 August 1999); on appeal *Williams v The Minister, the Aboriginal Land Rights Act 1983* [2000] NSWCA 255 (12 September 2000).
- 49 *Healing: a legacy of generations*, pp 129-130; the motion was passed on 18 June 1997.
- 50 as above, pp 51, 61, ch 3, 6 and 7.
- 51 as above, pp 4, 138 - 140, and 166. Also see *Continuing the journey*, report of the National Council of Churches Australia National Forum, July 2001.

Chapter 3 – PIAC’s tribunal proposal

The original proposal

PIAC proposed a reparations tribunal in response to its experience of providing legal advice and assistance to the stolen generations during the National Inquiry. It identified that most of the stolen generations would face major obstacles to successful litigation. They lack adequate evidence as documents have been lost or destroyed and witnesses’ memories are unreliable after such a long period of time. Statutory limitation periods would bar most claims – limitations prevent claims after a set period of time had elapsed since the event that caused the harm (usually three years). The adversarial nature of court proceedings would also be potentially harmful because of the psychological and emotional harm applicants have already suffered. Having to relive past experiences under cross-examination would be traumatic and potentially harmful.¹

In developing an initial proposal for NSW, PIAC consulted with people from Link Up (NSW), the State Reconciliation Council, the NSW Attorney General’s Aboriginal Justice Advisory Council, ATSIC, HREOC, Aboriginal legal services and Aboriginal medical services. The proposal met with widespread support and by mid -1999 PIAC had revised its proposal, recommending a national tribunal.

The aim of the proposal was to provide a preferable alternative to litigation and to comprehensively address inadequacies in government and church responses to *Bringing them home*. It would offer a forum for Indigenous peoples to have their stories heard and provide reparations packages to suit people’s needs. The tribunal would also have a role in monitoring and making recommendations about government and church policies and Indigenous child welfare programs.

The tribunal was designed with reference to the reparations measures adopted in Canada, South Africa and New Zealand (discussed in chapter 6) and aspects of the recommendations for reparations in *Bringing them home*.

The proposal envisaged that the tribunal would be a partnership between governments, churches, Indigenous organisations and the stolen generations community, but independent of all of them. Tribunal members would be a mix of Indigenous and non-Indigenous people with appropriate cultural awareness and experience in adjudication. They would be appointed by the project partners on the basis that they had appropriate skills and expertise.

The tribunal proposal was based on the premise that governments should stop defending legal claims by the stolen generations and agree to provide full reparations, including compensation. The Leader of the Federal Australian Labor Party, Mr Kim Beazley, supported this position in 1999. He called on the Federal Government to stop defending the legal claims and to ‘provide justice and restitution to members of the stolen generations’.²

PIAC proposed that the tribunal be created as a national co-operative scheme with funding from state and federal governments and the churches involved in administering forcible removals policies. It favoured a tribunal created by statutes passed by federal and state governments. PIAC argued that a legislative basis for the tribunal would have a number of advantages:

- ◆ it would be an expression of the will of parliaments, as the people’s representatives
- ◆ it would provide a more secure basis for the tribunal’s operations

- ◆ it could provide the tribunal with appropriate powers to carry out its role effectively and
- ◆ it could provide that people who had been awarded compensation by the tribunal were not able to make further claims through the courts.

The proposal did not require any admission of legal liability by governments and churches. An acknowledgement of the nature of forcible removal policies and the harm done would provide the basis for providing reparations. The tribunal would only need to consider whether a person is entitled to reparations, including compensation. This would simply require proof of Indigenous identity and facts about the circumstances of removal and events following the removal.

There are many schemes that provide for people to receive monetary compensation where they have suffered a loss, regardless of whether someone has admitted fault or been found liable. Statutory compensation schemes for victims of crime, motor vehicle accidents and workplace injuries are the better known schemes. There are also smaller scale schemes established under out-of-court settlements where a group of people have made a claim, such as in class actions. Typically the defendant agrees to pay compensation, but does not admit to legal liability and a fund is established to distribute the compensation to the class of people affected by the claim.

PIAC proposed a wide range of functions for the tribunal:

- ◆ collect information about forcible removals and provide a central repository and point of access for family records
- ◆ hear from Indigenous (and possibly non-Indigenous) people with direct experience of forcible removal policies and their effects
- ◆ respond to applications for reparations from people directly affected by forcible removals, providing a range of reparations measures, including compensation in some circumstances
- ◆ devise programs of its own, such as memorials or community development programs
- ◆ make recommendations about current government practices and programs.³

PIAC recommended that the tribunal would require these functions to achieve the range of reparations measures that might be identified by applicants.

Support for the tribunal

The *Moving forward* project found Indigenous peoples, including the stolen generations, strongly support the reparations tribunal proposal, with some refinements. The all-encompassing functions were not favoured. Instead there was support for a tribunal with a focus on hearings, programs to provide restitution of culture and identity, and prevention of recurrence. People emphasised the desire for group needs to be met rather than just providing for individuals. People also wanted the tribunal to have a flexible structure so that their diverse needs are accommodated. The responses are detailed in chapters 4, 5 and 8.

PIAC's proposal for a national reparations tribunal was detailed in a submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations in 2000.⁴ The National Sorry Day Committee presented a similar proposal for a Healing Commission. The Australian Democrats and Australian Labor Party members of the Senate Committee supported the tribunal proposal. They recommended a reparations tribunal to address the need for an effective process of reparation, including the provision of monetary compensation. PIAC's model was endorsed as a 'general template' for such a tribunal.⁵

In May 2001 the Federal Australian Labor Party made a commitment to actively seek an alternative to litigation. It undertook to convene a conference of state and federal governments, the churches and the stolen generations to 'examine alternative methods for dealing with the effects of forcible removal policies.' Federal Labor seeks a model that avoids the costs and pain of the courts without apportioning blame or guilt.⁶ The NSW Labor Government, however, has defended legal claims by members of the stolen generations.

The Australian Democrats have actively advocated for a reparations tribunal to provide full and just reparations, including monetary compensation.⁷ In a minority report to the Senate Committee, Senator Aden Ridgeway presented a detailed proposal and arguments favouring a tribunal and justifying payment of compensation.⁸

The Federal Government rejected the proposed tribunal on a number of grounds. Firstly, it did not support payment of monetary compensation to individuals. Secondly, it believed the tribunal 'with the comprehensive jurisdiction and extensive powers suggested would not guarantee a less stressful consideration of matters or be less expensive than court proceedings'.⁹ In its submission to the Senate Committee the Federal Government dismissed claims for payment of compensation to the stolen generations. It claimed that compensation would cost \$3.9 billion - four times the annual budget for ATSIC. This estimate is based on payment of \$100,000 in compensation to nearly 40,000 people.¹⁰

In August 2001 the Minister for Immigration and Multicultural Affairs, Mr Ruddock, presented a series of obstacles to the tribunal proposal at the *Moving forward* conference. These included the cost of finding documentary evidence, the administrative costs of a tribunal, the estimated \$3.9 billion cost of compensation and difficulties in deciding how much each state government and church would be required to pay. The comments assume that the tribunal would require every applicant for reparations to prove details of their removal and the harm that followed. It ignores the starting point for PIAC's model - an acceptance by government and churches of the nature of forcible removal policies and the harm caused. The Federal Government's response is in contrast to schemes established by the Canadian, South African and New Zealand Governments, discussed in chapter 6.

State government responses to the tribunal proposal have varied. Most indicated interest in the proposal after receiving the *Interim report* in August 2001. State government officials attending the *Moving forward* conference took away the strong message that the success of reparations programs depends on active engagement with the stolen generations. The Governments of Queensland, Victoria and Western Australia offer models for many aspects of successful reparations (discussed in chapters 4 and 5).

The Senate Committee recommended that individual monetary compensation be paid through a reparations tribunal, using PIAC's model as a template.¹¹ However, no Australian government has agreed to pay compensation. The Federal Government has said that individual monetary compensation is not appropriate. On the other hand it claims that compensation has effectively been provided through the 'practical assistance' package. State governments have refused to pay compensation on the basis that it is not appropriate or that it is a matter for the Federal Government.¹² A number of the major denominational churches have indicated a preparedness to contribute to a national compensation fund if the Federal Government were to establish one, as recommended in *Bringing them home*.¹³

The reparations tribunal proposal is supported by ATSIC, Australians for Native Title and Reconciliation, the Australian Council for Social Services, the National Sorry Day Committee

and HREOC.¹⁴ The National Council of Churches in Australia has indicated that reconciliation requires a church response to the proposed tribunal. It supports an effective alternative to litigation.¹⁵ Reconciliation Australia also supports an alternative to litigation that will advance the journey of healing for those people directly affected.¹⁶ Both organisations will consider the final PIAC tribunal proposal in light of feedback from their constituencies.

Notes

- 1 The limitations of litigation are detailed in PIAC's submission to the Senate Inquiry into the Stolen Generations, chapter 4, available at www.piac.asn.au and reproduced in Australian Indigenous Law Reporter (2000) 5(4) at 107.
- 2 Mr Kim Beazley MP, House of Representatives, *Hansard*, 26 August 1999 page 9209; *Healing: a legacy of generations*, p 117.
- 3 PIAC, 2000, Submission to Senate Inquiry into the Stolen Generations; PIAC, March 2001, *Moving forward: achieving reparations*, Issues paper.
- 4 PIAC submission, already cited.
- 5 *Healing: a legacy of generations*, recommendations 7 and 8.
- 6 Labor's policy was released on 26 May 2001; detailed by Mr Bob McMullan, Shadow Minister for Aboriginal Affairs and Torres Strait Islander Affairs, Reconciliation and the Arts, address to *Moving forward* conference, HREOC, 2001, conference papers, already cited.
- 7 Senator Aden Ridgeway, address to the *Moving forward* conference, already cited.
- 8 *Healing: a legacy of generations*, already cited, Minority Report by the Australian Democrats.
- 9 Federal Government Response to the report of the Senate Inquiry into the Stolen Generations, June 2001, *Hansard*, Senate, Senator Ian Campbell, 27 June 2001.
- 10 Senator Herron, Minister for Aboriginal Affairs and Torres Strait Islander Affairs, 2000, Federal Government submission to the Senate Inquiry into the Stolen Generations, submission 36.
- 11 *Healing: a legacy of generations*, recommendation 7.
- 12 *Healing: a legacy of generations*, pp 229 - 237 and Senator Campbell, Federal Government Response to the report of the Senate Inquiry into the Stolen Generation, already cited.
- 13 *Healing: a legacy of generations*, pp 259 - 260; *Bringing them home*, recommendations 14 - 20.
- 14 See for example, ACOSS submission to the Senate Inquiry into the Stolen Generations 2000, submission 55 and 55A; ACOSS, Pre-Budget submission 2002; ATSIC Social Justice Commissioner, Brian Butler and Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC, William Jonas addresses to the *Moving forward* conference, *Moving forward* conference papers, already cited.
- 15 The Rev David Gill, Secretary General, National Council of Churches of Australia, *Moving forward* conference papers, already cited.
- 16 Ms Shelley Reys, co-chair, Reconciliation Australia, *Moving forward* conference papers, already cited.

PART 2 – UNFINISHED BUSINESS

Governments and churches responded to *Bringing them home* with programs that focussed on areas of undisputed priority – access to personal and family records, family tracing and reunion and support for the emotional wellbeing of people affected by forcible removal policies. The following chapters discuss how implementation of some of these programs has been hampered by governments being unprepared to listen to the stolen generations views about how to meet their needs.

The failure of governments to meet the needs of the stolen generations has come to be known as part of the ‘unfinished business’ of reconciliation, a reference to the work of the Council on Aboriginal Reconciliation during the 1990s.¹ Chapter 4 discusses Indigenous self governance and the importance of recognising the discrete identity and needs of the stolen generations. Chapter 5 reviews difficulties encountered with government programs providing counselling services, family reunion services and access to family records where that identity is not acknowledged. It also sets out the areas where governments and churches have failed to address the *Bringing them home* recommendations.

Chapter 6 reviews reparations programs in Canada, South Africa and New Zealand, providing useful lessons and comparisons for Australia.

Chapter 4 – Acknowledging history and people

Acknowledging history

The Federal Government’s refusal to acknowledge the nature and extent of forcible removal policies and to offer an apology remains a major cause of disappointment for Indigenous peoples and supporters of reconciliation.

A Motion of Reconciliation moved by the Prime Minister in the House of Representatives in August 1999 did not mention forcible removal policies. The motion acknowledged in part that the ‘mistreatment of many Indigenous Australians ... represents the most blemished chapter in our international history’. It expressed ‘deep and sincere regret’ that Indigenous Australians suffered injustices under the past generations...²

While most people accept that an apology at this stage is unlikely to be credible, the ongoing denial of the scope and effects of the policies is a significant barrier to reconciliation. Acknowledging history is the starting point for reconciliation of a racist past. Dumisa Ntsebeza, a former Commissioner with the South African Truth and Reconciliation Commission, told the *Moving forward: achieving reparations* conference, that a racist past is ‘like toxic waste’. ‘It cannot simply be buried and forgotten. It will resurface when least expected’, warned Mr Ntsebeza.³

The Australian Government’s approach is in contrast to the approaches of the governments of Canada and New Zealand. The Canadian Government’s Statement of Reconciliation in 1998 included a full and frank acknowledgement of past child removal policies, the harmful effects and the communal and individual pain caused. It expressed ‘profound regret for past actions of the federal government which have contributed

these difficult pages in the history of our relationship together'. It specifically referred to the residential school system targeting Aboriginal people. It said the system 'separated many children from their families and communities and prevented them speaking their own languages and from learning about their heritage and cultures.'⁴ It specifically acknowledged and apologised for child sexual abuse.

The New Zealand Crown offered an apology in 1995 that included an expression of 'unreserved apology' and 'profound regret' for the loss of lives and devastation of property and social life that resulted from hostilities. It sought to atone for the acknowledged injustices and to 'begin the process of healing and to enter into a new age of co-operation.'⁵

The dissatisfaction of Indigenous peoples with the Federal Government's responses to *Bringing them home* was highlighted in the report of the United Nations Special Rapporteur on contemporary forms of racism, Professor Maurice Glele-Ahanhanzo, on his mission to Australia in 2001. He identified the 'outstanding' question of reconciliation with Indigenous peoples as a challenge that remains for Australia, and the stolen generations is highlighted as one of five areas for attention in his report. He notes that 'for many Aboriginals the defensive attitude adopted by the Federal Government on matters that are very painful to them cast doubt about its real desire to achieve meaningful reconciliation...'⁶ and urges the government to seek 'a humane solution to the question of the 'stolen generation'⁷.

In July 2002 the HREOC Social Justice Commissioner Dr William Jonas expressed serious concerns about the nation's progress in achieving the exercise of Indigenous rights. He suggests Indigenous Affairs seems to have become a series of anniversaries 'operating as an annual reminder of the unfulfilled promises and commitments of governments'. He cites the Royal Commission into Aboriginal Deaths in Custody, the *Mabo* decision, and the *Bringing them home* report. The Commissioner concludes:

... we face a deplorable situation in which not only has the Federal Government failed to respond adequately or comprehensively to the Council for Aboriginal Reconciliation's recommendations, they have quite deliberately sought to shut down debate and avoid any engagement about them⁸

Partnership and self governance

Indigenous peoples in Australia have continually asserted their right to be self-determining and to exercise control over their own lives. There is no 'one size fits all' model for achieving self-determination. It takes many forms ranging from control over decision-making processes and the effective participation of Indigenous peoples in decisions that affect them, to involvement in the design and delivery of services, to recognition and support for Indigenous customary approaches, to the development of community capacity to be self-reliant through broader regional governance and autonomy processes.⁹ ATSIC's call for a treaty is a further example that provides a rights-based approach to Indigenous empowerment.¹⁰

A central aspect of self-determination is an acknowledgement by governments of the legitimacy of Indigenous cultural structures and approaches, and a commitment by them to working in partnership with Indigenous peoples and communities.

Historically, governments have not tended to recognise these factors. The harm caused by state interference in the family life of Indigenous peoples, particularly through the welfare system, has been acknowledged in a number of public inquiries over the past 20 years.¹¹ The Royal Commission into Aboriginal Deaths in Custody, for example, found that the history of relations with Indigenous peoples in Australia is one of 'deliberate and systematic disempowerment of Aboriginal people starting with dispossession of their land and proceeding to almost every aspect of their life... (with) every turn in the policy of government and the practice of the non-Indigenous community... postulated on the inferiority of Aboriginal people'.¹² While this was often 'guided by the best of motives... Aboriginal peoples were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control'.¹³

Since the Royal Commission, governments have made commitments to working in partnership with Indigenous peoples, such as through the 1992 National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders by the Council of Australian Governments. The National Commitment acknowledged the importance of improving the effectiveness of service delivery through:

- ◆ empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders
- ◆ economic independence and equity being achieved in a manner consistent with Aboriginal and Torres Strait Islander social and cultural values, and
- ◆ the need to negotiate with and maximise participation by Aboriginal peoples and Torres Strait Islanders in the formulation of policies and programs that affect them.

The 1992 National Commitment was replaced by a Communiqué on reconciliation in November 2000. The 2000 Communiqué has a more limited focus, with the Council of Australian Governments committing itself to 'an approach based on partnerships and shared responsibilities with indigenous communities, program flexibility and coordination between government agencies, with a focus on local communities and outcomes' in addressing Indigenous disadvantage¹⁴.

The 2000 Communiqué is more consistent with the Federal Government's approach to reconciliation. It is framed in terms of 'practical reconciliation' and 'mutual obligation'. It emphasises government programs and services addressing Indigenous disadvantage at the individual level in health, housing, education and employment¹⁵, as well as on notions of individual empowerment and reciprocity. The Federal Government's policy framework for the next three years, announced in March 2002, suggests more of the same.¹⁶

The HREOC Social Justice Commissioner regards practical reconciliation as an 'impoverished' notion that will not in and of itself lead to meaningful reconciliation between Indigenous and non-Indigenous people. In May 2002 he said:

It is also simply not enough to suggest, as in the past year, that the rights agenda is over by splintering the focus on Indigenous affairs and shifting attention from one topical issue to another, whether it be violence or substance abuse or petrol sniffing in Indigenous communities. Such an approach ... often serves only to manage and even perpetuate enduring cycles of disadvantage, at the expense of resourcing more holistic and far-reaching solutions.¹⁷

Most states and territories have been slow to enter into partnerships with Indigenous peoples, despite the 1992 National Commitment. It is only in the past five years that they have begun to enter into partnership agreements with ATSIC on behalf of Indigenous peoples on issues such as housing and infrastructure, health and law and justice.

Justice agreements, for example, have been reached in Victoria, Western Australia and Queensland and form the core of those government's approaches to addressing Indigenous over-representation in custody. New South Wales, despite having adopted the rhetoric of partnership¹⁸, has been slow to implement such commitments in practice. The NSW government has only recently requested the NSW Aboriginal Justice Advisory Committee to prepare a draft justice agreement and entered into a communiqué with ATSIC in April 2002.

The view that Indigenous peoples must have control of their lives was reflected during the *Moving forward* project. The *Moving forward* meetings clearly supported Indigenous communities taking greater responsibility for the care of their children and young people to protect them from substance abuse and family violence. The project was told repeatedly how members of the stolen generations and their families support each other through support networks and shared experience.¹⁹ The project also heard concerns about the lack of involvement of stolen generations groups in decisions concerning program delivery aimed at addressing their needs (see Appendix 1).

Information and co-ordination

Many government reparations programs have failed because of a lack of political will and a failure to engage with the stolen generations, the people who are meant to be the beneficiaries. Throughout the *Moving forward* project people sought information about government and church programs. People had heard of promised funding and programs, but few knew if they had eventuated or where to find them. The prevailing view was that most government programs have failed to reach the stolen generations or to achieve their goals.

The Senate Constitutional References Committee Inquiry into the Stolen Generations came to similar conclusions. The Committee's report, *Healing: a legacy of generations*, found that the Federal Government's 1997 'practical assistance' package had not effectively targeted the stolen generations.²⁰ It concluded that funding allocated for separated people had been misdirected and that an audit of the allocation of funding against the target population would be beneficial. The Committee recommended an independent evaluation of the progress of all government initiatives to implement *Bringing them home*.²¹ The Federal Government's programs and the Committee's comments on them are summarised in Table 2 on page 24.

The 2001-2002 Federal budget allocated a further \$53.9 million over four years to continue support for Link Up, counselling services and counselling support and parenting support programs. The National Library oral history project and the National Archives work were regarded as complete in 2001. The \$9 million originally allocated from ATSIC funds for language and culture programs has not been extended.³⁰

Table 2 - Federal government programs 1997 - 2001

Program	Amount	Comments by Senator
<p>Health, including counselling: Enhance Health and Well Being programs by expanding the network of Indigenous Regional Training Centres (for Indigenous counsellors) and 59 additional specialist Indigenous counsellors.²² Administered by Department of Health and Aged Care, OATSIH</p>	<p>\$33 million (\$17 million training, \$16 million counsellors)</p>	<p>Critical of the process used by the Office of Aboriginal and Torres Strait Islander Health (OATSIH) for selection of the location of counselling services and lack of monitoring of who uses the services. It concluded the manner of allocation was an inappropriate use of the funding.²³</p>
<p>Parenting and family support: Administered by Family and Community Services \$5.9 million</p>	<p>Only \$580,000 spent by late 2000, leaving \$5.3 million unspent.²⁴</p>	<p>The program did not target stolen generations. There was a strong likelihood of the funding being inappropriately allocated to mainstream Indigenous programs.</p>
<p>Family tracing and reunions: Enhance existing Link Up programs and establish a national network of Link Ups.²⁵ Administered by ATSIC</p>	<p>\$11.25 million</p>	<p>Delays in funding for services outside NSW and Queensland, but new services in WA, SA and NT by 2000. Need for additional component to Link Up services to assist people going home, provide in-house counselling services and outreach services.</p>
<p>Culture and language programs: Administered by ATSIC</p>	<p>\$9 million</p>	<p>Focus on language, not culture. Failed to meet the diverse and complex needs of separated people (\$5.5 million allocated by 1999).²⁶</p>
<p>Oral History project: Administered by the National Library</p>	<p>\$1.6 million</p>	<p>Failed to satisfy the intent of Bringing them home recommendation for Indigenous agencies to be funded to record, preserve and administer access to testimonies of Indigenous people affected by forcible removal policies. Testimony collected from all types of witnesses, when the need for Indigenous perspectives of history had been emphasised by HREOC and the unnecessary brevity of the project.²⁷</p>
<p>Indexing and copying material: held by the National Archive</p>	<p>\$2 million²⁸</p>	<p>The National Archives is responsible for a National Records Taskforce, implementing the recommendations for access and for training of Indigenous archivists.²⁹ Not clear what has been completed.</p>

State and territory governments have primary responsibility for programs in key areas such as access to records, funding for family reunions, oral history projects and policies affecting current Indigenous child separation. Detailed information about state and territory responses was not available to the Senate Inquiry.³¹

Poor monitoring and co-ordination of state, territory and federal government responses has been a fundamental problem with implementation of programs. HREOC recommended that the implementation of responses to *Bringing them home* be coordinated through the Council of Australian Governments (COAG). It recommended a process for the auditing of implementation by federal, state and territory governments with annual progress reports.³² Instead, the Federal Government gave the responsibility for monitoring implementation to the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA).

Submissions to the Senate Inquiry said that MCATSIA lacked the necessary level of administrative responsibility to co-ordinate activities across governments. Some said the failure to use COAG indicated a refusal to give priority to Indigenous issues. The Committee did not accept that this was the case. It concluded that the problem did not lie with MCATSIA, but arose from the Federal Government's failure to give clear guidance on the task and a lack of interest by state and territory governments in the mechanics of monitoring and co-ordination.³³ The Committee noted that the working groups of MCATSIA did not meet regularly and that there was very little information available in Council reports.³⁴

The *Moving forward* project reference group concluded that MCATSIA should provide direction for co-ordinating programs to address the impacts of Indigenous child removal and prevent it recurring. It supports an audit by MCATSIA of the funds allocated for stolen generations programs against the target population, as proposed by the Senate Committee. It also supports MCATSIA producing an annual report made publicly available detailing relevant benchmarks and programs to address them in each jurisdiction.

A discrete identity

Recognition of the stolen generations as a discrete part of the Indigenous community with its own history, experiences and traditions was emphasised in the *Moving forward* meetings. The distinctiveness of the stolen generations community was also a strong theme in submissions to the Senate Inquiry from stolen generations groups. The Senate Committee report says an emphasis on the effect of forcible removals on all Indigenous people fails to identify the specific needs of the stolen generations.³⁵

The individual circumstances of separation and the different effects on individuals were emphasised repeatedly throughout the *Moving forward* project. Different situations in each state and territory, different policies and practices at different times and different individual experiences result in different needs. People frequently told the project that they want to be heard in their own right and they resent others claiming to speak on their behalf.³⁶

The varying circumstances in which children were separated or removed and the different experiences in institutional care, foster care or with adoptive families are significant. Stolen generations groups make explicit distinctions between people who were removed permanently, assimilated, segregated, institutionalised or fostered and adopted.³⁷ The different impacts on people's lives mean they have different needs in terms of reparations. Some people who were institutionalised lost all connection to family and culture, while others remained in touch with family or had regular visits from family. Those who grew up

in institutions were denied the affection of family life and family connection, received a generally poor standard of education (trained to be domestic servants and stockmen) and suffered harsh physical conditions. Those who were fostered or adopted did not escape physical and sexual abuse and often grew up suffering shame and rejection within the adoptive family.³⁸

Some commentators have said that *Bringing them home* failed to give sufficient recognition to the diversity of experiences of those who were removed. The Senate Inquiry into the Stolen Generations, for example, took the view that it over emphasised the impacts of the removals across the whole Indigenous community. This was regarded as part of the reason that governments have failed to properly target the stolen generations in the delivery of reparations programs and services. The Senate Committee regarded loss of identity, culture and contact with community as the most crucial loss of all.³⁹

Since *Bringing them home* there has been a growing acknowledgement of the impacts on descendants of those who were removed. This was reflected in submissions to the *Moving forward* project and in discussions at *Moving forward* meetings. The impacts described include intergenerational grieving, growing up caring for traumatised parents - some suffering from mental illness or substance abuse - and loss of family connections.⁴⁰

The *Moving forward* project reference group believe ATSIC and state departments of Indigenous affairs need to actively inform members of the stolen generations about programs designed to meet their needs.

Recommendation 1

1.1 The Ministerial Council on Aboriginal and Torres Strait Islander Affairs provide annual public reports on the progress of state and federal government programs that seek to address past Indigenous forcible removal policies and prevent the current high rate of Indigenous child separation.

1.2 All government agencies responsible for programs to provide reparations engage with members of the stolen generations in the design and implementation of the programs.

Telling story

The need for Indigenous peoples to have their experience of the removal process heard and officially acknowledged continues to be an important priority. It was raised at all of the *Moving forward* meetings, in many submissions and at the *Moving forward* conference. Many people have not had the chance to tell their story and that of their family. The submission from the former residents of Graham Home - Mt Margaret Mission in Western Australia said:

For many of our members the [*Moving forward*] issues paper has brought their past to the fore, ... some have revisited their past for the first time ... many felt intimidated to tell their story in the open for fear of their disloyalty to that era. However, on the whole the members felt that it was time to let go of the hurt and sadness.

Bringing them home identified the benefits of the hearings conducted by the National Inquiry and recommended that hearings continue for the purpose of restoring the balance to historical perspective. It recommended funding for 'appropriate Indigenous agencies' to

record, preserve and administer access to testimonies of Indigenous peoples affected by forcible removal policies who wish to record their history.⁴¹ It also recommended that Indigenous culture, language and history centres serve as repositories of personal information that individuals may place in their care. Private collections of records held by churches and other non-government agencies could be transferred to the centres.⁴²

Instead of funding Indigenous agencies, state and federal governments funded libraries and museums to conduct oral history projects on Indigenous family separation.⁴³ The Victorian Government, for example, funded the Koori Oral History Program at the Museum of Victoria. New South Wales and Western Australia have taken a similar approach. At the time of the Senate Inquiry, only Queensland and the Australian Capital Territory had programs that provide funding to Indigenous organisations for these activities.⁴⁴

The Federal Government provided funding for an oral history project, carried out by the National Library. The Senate Committee found that the project did not satisfy the intent of the *Bringing them home* recommendation. It was most concerned that the project collected testimonies of non-Indigenous people. It said the objective of the recommendation was to provide the specific views and histories of Indigenous peoples. The government's claims of desiring a 'well rounded' view were therefore inappropriate. The brevity of the project, over just two years, was also criticised.⁴⁵

The participants in the *Moving forward* project made it clear that oral history projects do not meet their needs. They want to tell their story for the official record to have their experience acknowledged, with an official explanation and apology. Providing an interview to an historian is an entirely different process. The desire for an appropriate process to tell their story was one of the major reasons they support the reparations tribunal proposal.

The Senate Committee recognised the limitations of oral history as a measure for healing through 'telling story'. Interviews are carried out for the purpose of collecting raw data that will later be assessed for relevance and research value. The information is shaped by the interview because the objective is to discuss a particular subject.⁴⁶ In contrast, a person telling their story is able to define the scope and nature of what is said.

Submissions to the Senate Committee criticised the lack of funding for telling of the past other than through oral history interviews. The submissions also commented on the lack of funds for preservation of memories and for the provision of safe-keeping places for memorabilia, photos, testimony and records.⁴⁷ The Central Australian Stolen Generations and their Families Corporation is one of only a few groups that provide a repository for records, testimony and other memorabilia of their members.

Community Forums conducted by the Victorian Koorie Records Taskforce in 2001 and 2002 provide a more appropriate forum for people to tell their stories. The aim of the Forums was to consult with Koorie communities, to inform people about how to access their records, but also to give people a chance to share stories about their experiences in finding their family history. Over 250 participated in the Forums, which were well received by local communities. The Taskforce was established in 2001 by the Victorian Government primarily to facilitate access to family records, but the forums met a much wider need in the community.⁴⁸

Notes

- 1 The CAR identified the issue in a number of its reports including *Australian declaration towards reconciliation*, 11 May 2000, *Roadmap for reconciliation 2000* and its final report *Australia's challenge*, tabled in Federal Parliament on 7 December 2000. Also see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, report no. 3 HREOC, 2002.
- 2 Mr John Howard, House of Representatives, *Hansard*, 26 August 1999.
- 3 Dumisa Ntsebeza, HREOC, 2001, *Moving forward* conference papers, already cited.
- 4 *Healing: a legacy of generations*, chapter 4 (Canada discussed pp 119 – 123); Canadian Government, *Statement of Reconciliation* at www.inac.gc.ca/gs/rec_e.html
- 5 Waikato Raupatu Claims Settlement Act 1995 (New Zealand); *Healing a legacy of generations*, pp 122 - 123.
- 6 *Report to the 58th session of the Commission on Human Rights*, March 2002, available at www.humanrights.gov.au/social_justice/index.html
- 7 as above, recommendation 9.
- 8 Speech delivered by Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner at the Sydney and Adelaide launches of the *Social Justice Report 2001* and the *Native Title Report 2001*, 17 July 2002, available at www.humanrights.gov.au/speeches/social_justice/sydney_launch.html
- 9 For a discussion of processes currently under way see papers from the Indigenous Governance conference hosted by Reconciliation Australia in April 2002: www.reconciliation.org.au; *Social Justice Report 2001*, already cited, ch 3.
- 10 ATSIC, 2001, *Treaty – get it right*, available at www.atsic.gov.au; Geoff Clark, ATSIC Chairperson, *Setting the Agenda*, paper presented to ATSIC national policy conference March 26, 2002. Rights based approach advocated by the Aboriginal and Torres Strait Islander Social Justice Commissioner in *Social Justice Report 2000*, HREOC, report no.2/2001 and *Social Justice Report 2001*, already cited.
- 11 Report of the Royal Commission into Aboriginal Deaths in Custody, 1992; *Bringing them home*; Haebich, *Broken Circles*, already cited.
- 12 Report of the Royal Commission into Aboriginal Deaths in Custody, 1992, pp9 - 10.
- 13 as above, p10.
- 14 http://www.pm.gov.au/news/media_releases/2000/media_release531.htm
- 15 John Howard, 'Practical Reconciliation' in *Essays on Australian reconciliation*, ed. Michelle Grattan, 2000.
- 16 The Hon Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, *Changing direction* address to the ATSIC national policy conference, 26 March 2002, available at www.atsic.gov.au
- 17 Speech delivered by Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner at the launch of the *Social Justice Report 2001*, already cited.
- 18 Bob Carr, Partnership the key to relations between black and white, *Sydney Morning Herald*, 20 February 2001.
- 19 *Moving forward* meetings in Sydney, Perth, Broome, Alice Springs and Darwin. Also emphasised in meetings of the *Moving forward* project manager with the Aboriginal Health and Medical Research Council and Link Ups between March and May 2001 (listed in Appendix 3).
- 20 *Healing: a legacy of generations*, already cited.
- 21 as above, p 74, recommendation 1.
- 22 as above, p 45, from the submission by OATSIH.
- 23 as above, p 48 - 49.
- 24 as above, p 49 - 50.
- 25 as above, p 53 - 56.
- 26 as above, p 86 - 87.
- 27 as above, p 81 - 82.
- 28 Minister for Aboriginal and Torres Strait Islander Affairs, 2000 Submission to the Senate Inquiry into the Stolen Generations, submission 36, p 663 and Appendix 2.
- 29 *Healing: a legacy of generations*, p 91.
- 30 Budget 2001 Fact Sheet, ATSIC May 2001; details provided in a facsimile from the office of the Federal Minister for Aboriginal Affairs, February 2002 to the *Moving forward* project.
- 31 Most state and territory governments either did not make submissions to the Inquiry or the submissions provided no new or useful information. Only the ACT Government provided a submission that included a government response to *Bringing them home* and the most current ACT Implementation report. See *Healing: a legacy of generations*, at 2 - 3.
- 32 *Bringing them home*, recommendation 2, at 23.
- 33 *Healing: a legacy of generations*, pp 146 - 147.
- 34 *Healing: a legacy of generations*, pp 150 - 151.
- 35 *Healing: a legacy of generations*, pp 24 - 25 (quotes Mr Matthew Story for Yirra Bandoo Aboriginal

- Corporation, Transcript of evidence to the Senate Committee).
- 36 *Moving forward* meetings in Sydney, Darwin, Alice Springs, Broome, Perth (see Appendices 1 and 2).
 - 37 *Healing: a legacy of generations*, pp 18 - 22.
 - 38 *Healing: a legacy of generations*, pp 22 - 23; Discussed in the *Moving forward* meetings in Perth, Broome, Darwin, Adelaide and Alice Springs (see Appendices 1 and 2). The stolen generations organisations in the Kimberley and the Northern Territory distinguish people who were adopted and fostered and those who were institutionalised in the categories of membership of the associations.
 - 39 *Healing: a legacy of generations*, p 21.
 - 40 Discussed in *Bringing them home*, pp 222 – 232; written submissions from Central Australian Aboriginal Legal Service, The Sacred Site Within Healing project and *Moving forward* meetings in Bathurst, Darwin, Alice Springs.
 - 41 *Bringing them home*, recommendation 1 and pp 21 - 22.
 - 42 *Bringing them home*, recommendations 29b and 39.
 - 43 as above, pp 77 - 78.
 - 44 as above, pp 81 - 82.
 - 45 as above, pp 81 - 82.
 - 46 *Healing: a legacy of generations*, p 82.
 - 47 as above, p 78.
 - 48 Victorian Koorie Records Taskforce, 2001, Victorian Regional Forums: Bringing them home, *Finding your story community forums summary report*, pp 2 - 5.

Chapter 5 – Rehabilitation and restitution

Government and church responses to *Bringing them home* have focussed on rehabilitation and restitution. The priority given to health and well-being, assistance with tracing family records and family reunion reflect the priorities of the stolen generations. These programs meet people's most fundamental desire - to know about their family and their own identity. Although these programs have been effective in general, specific problems have arisen in some areas. Programs to provide restitution of culture and history and to address contemporary separation of Indigenous children from their families have been far less successful.

Health and well-being

The Federal Government's 'practical assistance package' included \$33 million to expand training for Indigenous counsellors and to fund 59 new specialist Indigenous counsellor positions.¹ According to the Senate Committee, funding for the counselling services had been misdirected to mainstream Indigenous health programs as part of Indigenous mental health services. The agency responsible for the program was the Office of Aboriginal and Torres Strait Islander Health (OATSIH) within the Department of Family and Community Services. The process used to select the geographic location of the new counselling positions was heavily criticised by the Senate Committee. It described the process as 'difficult to follow' and flawed on a number of grounds.

The Committee found that OATSIH had no clear definition or understanding of the target audience or their geographic location. Even worse, OATSIH could not provide data on people who use the services and if they 'deem themselves members of the stolen generation'. The Committee concluded that the process used by OATSIH does not 'seem to be an appropriate use of government funding.'²

While the training program appears to have been well received, the *Moving forward* project heard criticisms of the new counsellor positions. Many people said the counselling services are generally not available at times of greatest need - when seeking records and during family reunions. A frequent comment from the *Moving forward* meetings was that people have to be prepared to identify as having mental illness to be able to access counselling.

The need for culturally appropriate counselling and support services for members of the stolen generations, their families and communities was the issue most frequently raised during the Community Forums conducted by the Victorian Koorie Records Taskforce in 2001.³

The Indigenous counsellor training programs funded under the 'practical assistance package' have been more successful. An example is The Muramali Program, a training program for Aboriginal health practitioners. It provides guidance on how to deal with the specific type of trauma experienced by people who were forcibly removed.⁴ Lorraine Peeters from Muramali describes their program as follows:

Survivors of [forcible] removal policies, now known as 'the stolen generations', have existed in an environment of sustained assault on identity and culture, and enduring grief, loss and disempowerment. As survivors of removal policies struggle to heal from these past wrongs, we offer a pathway to recovery, which unites mind, body and spirit.⁵

Another community-based counselling program is The Sacred Site Within Healing Centre, a counselling and grief management training program for Indigenous peoples.⁶

A commonly held view at the *Moving forward* meetings was that some of the funding for new counselling services would have been better placed with stolen generations groups to complement their activities.⁷

Family reunion

A national network of Link Up services has been in existence since 1997, primarily through funding provided by the 'practical assistance' package. ATSIC is responsible for administering the program, which is delivered by local, community-controlled organisations. They provide information and support, assistance with tracing records and arranging reunions.⁸ Link Ups also play an important role in certification of descent and research.⁹ The first Link Up was established in NSW in 1980, followed by Queensland Link Up ten years later.

One of the shortcomings of Link Up services discussed by the Senate Inquiry is a lack of in-house counselling services.¹⁰ Link Ups and stolen generations groups told the project they believe that at least half of the new Indigenous counsellor positions should be relocated to Link Ups.¹¹ The only counsellor positions co-located with Link Up services are in Perth and Broome, where the Link Up service is located at an Aboriginal community-controlled health service. The Senate Committee supported the need for Link Ups to have integrated counselling services.¹²

Another shortcoming of Link Up services is the very limited number of offices, with only one in most states. The Senate Inquiry supported state and territory governments providing funds to facilitate expansion of the services. Progress has been made to improve the extent and quality of Link Ups since then, with development of best practice guidelines, staff training and accreditation by ATSIC. New Link Up offices opened in Broome, Tennant Creek and Cairns during 2001 and 2002.¹³

The need for financial assistance for people to travel to meet with family was frequently expressed during the project. Children separated from their families were often taken to a place some distance away. Family reunion and regular visits to family are impossibly expensive for most Link Up clients, who are on very low incomes. Link Up is able to provide limited financial subsidies as part of its role in supporting family reunion, but it far from meets the needs of the stolen generations community.¹⁴

Family records

Seeking out personal and family records is of utmost importance to people who have been separated from their family and community. It was raised at all the *Moving forward* meetings and in many submissions to the project.

Access to records

The need for co-ordination of government and church records and for support for people going through the process was frequently raised in the *Moving forward* meetings and meetings with Link Up staff. Many people find that the information recorded in official records helps confirm what happened to them, including brutality and racism. Others expressed the distress they had experienced because records had been lost or destroyed, or only partially maintained. Sometimes the records do not have the answers that people are looking for and sometimes they contain more than people want to know.

Bringing them home made over 20 recommendations about preserving records, co-ordinating access to records and providing support for people during the process. It included a recommendation for a 'first stop shop' for all government and church records in each state and territory, facilitated by Joint Records Taskforces.¹⁵

Implementation of these recommendations has progressed well in some states and territories but not in others. The most advanced program for access to records is in Queensland, where the Community and Personal Histories Section of the Department of Families, Youth and Community Care was established in 1992. The program was established in light of recommendations of the Royal Commission into Aboriginal Deaths in Custody. It provides access to historical state records about Aboriginal and Torres Strait Islander peoples and in doing so assists many people to piece together family histories and genealogy.¹⁶ The usual fees for access to records are waived for people applying for their family records through Link Ups.¹⁷

A centralised service is also provided in Western Australia. The Family Information Records Bureau of the Department of Community Development (WA) provides family history information from records held in its own archives and assists with access to records held by other departments and organisations.¹⁸

In contrast, in New South Wales, where the majority of Indigenous peoples live, applications for government records still need to be made to at least two separate departments – Archives and Aboriginal Affairs. Processes for managing the privacy of individuals named in the records were found wanting in 2001. However, NSW appears to be the only state that has reciprocal arrangements with other states.¹⁹

The Northern Territory has recently introduced Freedom of Information legislation, which will facilitate improved record keeping and provide a right of access to personal records. The Senate Committee described the arrangements in South Australia in 2000 as grossly under-resourced.²⁰

The search for records is often the first step in tracing family and therefore identity. The *Moving forward* meetings discussed the distress that occurs as part of this experience. *Bringing them home* recommended that agencies providing access to personal records should have counsellors available. The Senate Committee found that few agencies responsible for providing personal and family records had counsellors available.²¹ At best, agencies offer information on where to find counselling services but even that information is not always available.²²

Governments and churches in all states and territories, with the support of the Federal Government, need to provide effective personal and family history programs with the following features:

- ◆ adequate resources for joint records taskforces to co-ordinate records
- ◆ a first stop shop for applicants to obtain their records and assistance with compiling family histories
- ◆ an appropriate privacy protocol to protect individual identity, and allow people to trace family
- ◆ records provided free of charge or for minimal cost²³
- ◆ counselling services available at the time of making applications.

Recommendation 2

2.1 State, territory and federal governments provide additional resources to the national network of Link Up services to provide outreach services and integrated counselling services.

2.2 State and territory governments that have not already done so, work with the churches to provide Indigenous peoples with a 'first stop shop' to provide co-ordinated access to their personal and family histories.

Indigenous genealogists

An important aspect of managing family records is to ensure that Indigenous peoples are among the genealogists, historians and archivists looking after and interpreting the records. Many *Moving forward* meetings raised the need for Indigenous genealogists and historians as a priority. Genealogy is becoming increasingly important for all Indigenous peoples because of native title claims. It is also important as governments will not hand over custody of records unless appropriate professionals are available to care for them.

Bringing them home recommended training programs for Indigenous archivists, historians and genealogists. Most state and territory governments have a long way to go to implement this recommendation, even though they claim to support it. Queensland is the most advanced, with more than half the archivists and historical researchers being Indigenous. In 1998 in Victoria there were no Indigenous researchers or archivists, although funds had been pledged to train two Koori archivists.²⁴ In 1997 as part of the Federal Government's funding package the National Archives was given responsibility for progressing training of Indigenous archivists.²⁵ It is not clear what programs resulted.

The *Moving forward* project reference group believes state and territory governments that have not already done so should establish a 'one stop shop' to co-ordinate access to personal and family records and to assist with compiling family histories. Governments should act on promises to train and employ Indigenous peoples as archivists, historians and genealogists.

Indigenous community education

The *Moving forward* meetings identified Indigenous community education as a significant need that has not been met by government and church programs. Of particular importance is the need to inform Indigenous peoples about their family connections and genealogy. The *Moving forward* meetings and the national conference heard of many people who have taken the initiative to construct their own community genealogies.

Bringing them home recognised this need. It recommended Indigenous community education on the history and effects of forcible removal and the development of community genealogies to establish membership of people affected by forcible removal.²⁶

Recommendation 3

3.1 State, territory and federal governments implement their promises to provide training for Indigenous archivists, genealogists and historians and to promote employment of Indigenous peoples in these positions.

3.2 State, territory and federal governments work with Indigenous community organisations to develop community genealogies to identify the people affected by forcible removals and their descendants.

Land, culture and history

An essential element of reparations is to restore people to the position they would have been in but for the harm done to them. For Indigenous peoples who were removed from family and community this includes restoring culture, language, land, history and association with community.

Access to land is a vexed issue for people who were removed. Some have been able to return and take up their place in the community. Many are not able to return, while others who return are not fully accepted into traditional society. These people are not able to claim native title or take on their full role in the cultural knowledge and customs of the clan or tribal group. The Indigenous Land Fund, established to provide for Indigenous peoples who cannot establish native title, has a potential role to benefit the stolen generations. The *Moving forward* project was told about applications by stolen generations groups to the Indigenous Land Fund that have not been successful.²⁷

Churches have considered returning land and buildings used to house forcibly removed children or other mission land to Aborigines. The *Moving forward* meeting in Broome discussed obstacles encountered when such a proposal was offered more than five years ago.²⁸

Access to training programs on Aboriginal language and culture was important for many people in the *Moving forward* meetings and in submissions to the Senate Committee.

ATSIIC conducted a number of language programs as part of the Federal Government's 'practical assistance package'. However, the Senate Committee found that a large proportion of the programs did not meet the complex and varied needs of the stolen generations. One comment was that there was too much emphasis on preserving language rather than on making knowledge of language and culture accessible to the community.²⁹

Bringing them home supported an expansion of funding for language, culture and history centres to ensure national coverage at regional level. Its recommendation was intended to provide for the needs of people who were forcibly removed and to alleviate the pressure on the people left behind (who have responsibility to carry on cultural knowledge).³⁰ The funding for these programs was not renewed in 2001.

People who return home to the community from which they were removed have different needs from those who do not. A language and culture program and title to land may not be as useful to those who cannot return home. For them it is more appropriate to be provided with support in the place to which they were removed and now live.³¹ Submissions to the *Moving forward* project and to the Senate Inquiry advocated providing land or premises to the stolen generations so that they have a place of their own where they can support each other. Support for resource centres and healing centres is strongest in Western Australia, the Northern Territory and New South Wales, where there are organised stolen generations support groups.³²

The *Moving forward* conference supported the efforts by stolen generations groups to have disused former homes converted into memorials.³³ The project heard many stories that highlighted the importance of devising proposals for memorials in close consultation with the stolen generations, and only after a consensus had been reached. The Federal Government's announcement of a national memorial for the stolen generations in 2001 was offensive to many of the stolen generations. The Journey of Healing expressed the views of many who were deeply insulted when their representations about the memorial were ignored.³⁴

Bringing them home recommended proposals for commemorating individuals, families and communities affected by forcible removal at the local and regional levels be developed by ATSIC.³⁵

Community education

Bringing them home recommended school education programs and professional training for people working with Indigenous communities to prevent repetition of forcible removal policies. The Senate Committee found that most state and territory governments have implemented these recommendations in a variety of ways.³⁶ The *Moving forward* meetings supported broad-based community education to enhance community understanding of past wrongs and to prevent repetition. Most people believed government efforts at community education had been inadequate. These views may partly reflect that Indigenous peoples have not been made aware of government initiatives in this area.

Indigenous children today

Rates of separation

Indigenous children continue to be separated from their families at a much higher rate than non-Indigenous children. In 1999-2000 they made up 23 per cent of children in the child protection system.³⁷ Indigenous children are far more likely to be the subject of a substantiated child protection investigation – where a court has found that there are issues of physical abuse, sexual abuse, emotional abuse or neglect.³⁸ Investigations for Indigenous children are more often for reasons of neglect than abuse compared with the general population.³⁹ Indigenous children were six times more likely to be living in out-of-home care (provided for children in need of care or protection) than other children were in June 2000.⁴⁰

The high rate of Indigenous child separation from their families was raised at all the *Moving forward* meetings. It was widely acknowledged that children are bearing the brunt of high rates of family violence and substance abuse in the Indigenous community. At the *Moving forward* meeting in Melbourne the chairperson of the meeting, Marjorie Thorpe, distributed newspaper articles about a Victorian Government inquiry into substance abuse among Aboriginal young people. In the articles the Victorian Aboriginal Child Care Agency had identified ‘chroming’ (paint sniffing) as one of the most serious parenting issues Indigenous people face because of economic and social marginalisation.⁴¹ The group discussed the need for Indigenous communities to acknowledge the problems faced by their communities and to take responsibility for improving the care of their children.

This view is reflected in comments by Indigenous women during public debates about family and sexual violence in Indigenous communities during 2001. For example, Rose Solomon, former manager of Bairnsdale Koori Women’s Shelter and Family Violence Service wrote:

Indigenous people have to be leaders on these issues, not other people. Indigenous women and communities have to be supported to come up with their own solutions. Denying or silencing women victims is re-abusing them and there can be no way forward and no healing if the problems are denied.⁴²

The Social Justice Report 2001 is critical of the federal government’s ‘mutual obligation’ and ‘practical reconciliation’ approaches to welfare reform. It discusses models of Indigenous self governance that are more likely to facilitate community based change.⁴³

Changing attitudes to welfare

Bringing them home acknowledged that the welfare of Indigenous children is inextricably linked to the wellbeing of the Indigenous community and its ability to control its destiny. However, it concluded that the high rate of Indigenous children in the child welfare system is also the result of paternalism in welfare agencies that continues to influence decisions, despite changes in policy. It found that attempts to provide culturally appropriate welfare services to Indigenous communities have failed to overcome the weight of historical experience associated with 'the welfare'.⁴⁴ HREOC proposed a complete overhaul of welfare services to address the problem.

Central to HREOC's recommendations were national standards on the treatment of Indigenous children and young people in care and national legislation to enforce a standard response. Fundamental to the proposed standards is Indigenous self-determination, so that accredited Indigenous organisations are involved in decision-making from the point of notification. The proposal incorporates the Indigenous Child Placement Principle (ICPP), which gives preference to the placement of Indigenous children with other Indigenous peoples when placed outside the family. The standards also require Aboriginal Child Care Agencies to be involved in child placement decisions.⁴⁵

The Senate Committee had 'considerable difficulty' obtaining information on the implementation of recommendations on contemporary Indigenous child welfare practices.⁴⁶ At the time of the Senate Inquiry state and territory governments had adopted the ICPP into policy, but most indicated that they would not incorporate it into legislation. In 2002 the Western Australian Government was proposing to adopt the ICPP into new child welfare legislation.

In 2001 the Australian Institute of Health and Welfare expressed the view that the impact of the Principle is reflected in the high proportion of Indigenous children now placed with Indigenous caregivers or with relatives.⁴⁷ Aboriginal Child Care Agencies are involved in child placement decisions in most jurisdictions.⁴⁸

The extent to which HREOC's other recommendations on Indigenous child welfare have been adopted is not clear, especially those concerning Indigenous self-determination and social justice.⁴⁹ The Social Justice Report 2001 highlights the need for implementation of Indigenous governance and community capacity building as an essential aspect of welfare reform.⁵⁰

Juvenile justice

Bringing them home also reviewed juvenile justice laws and practices as they affect Indigenous young people. It acknowledged previous government inquiries into imprisonment and policing of Indigenous peoples and the failure of programs and policies to address high rates of imprisonment. HREOC concluded these programs had failed because of pervasive tokenism, lack of engagement with Indigenous communities and underlying issues of disadvantage.⁵¹ It recommended law reform measures that would provide self-determination for Indigenous peoples in the juvenile justice area. The recommendations have not been acted on or have been actively rejected.⁵²

The distrust and alienation of Indigenous communities towards the criminal justice system is the result of the history of oppression and racism. The tragic consequences for communities in Cape York in Queensland and Swan Valley in Perth attracted national attention in late 2001. Government agencies in those states are under pressure to find ways to build

relationships with Indigenous peoples so that effective law enforcement can be achieved to protect women and children.⁵³

Aboriginal Justice Agreements developed in Victoria, Queensland and Western Australia provide an avenue for self-determination in the justice arena. The Victorian Aboriginal Justice Agreement was released in 1999 as a joint initiative of the Department of Justice, the Department of Human Services, ATSIC Regional Council and the Victorian Aboriginal Justice Advisory Committee. It addresses over-representation of Aboriginal people in all levels of the justice system, improves Aboriginal access to justice-related initiatives and promotes greater awareness of civil, political and legal rights among Indigenous peoples. The Agreement incorporates measures to provide for Indigenous participation in policy development at state and local level.⁵⁴ An Aboriginal Justice Agreement was also being developed in New South Wales in 2002.

To address the underlying disadvantage that makes Indigenous children more vulnerable to removal, HREOC recommended a social justice package to be developed by governments in partnership with ATSIC and other Indigenous groups.⁵⁵ This recommendation has not been implemented.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has proposed a framework for monitoring and evaluating progress in addressing Indigenous disadvantage. It emphasises the processes and mechanisms necessary to engage in a meaningful process of reconciliation. The Commissioner's strategy focussed on improving accountability of governments, participation of Indigenous peoples in policy and service delivery and protection of human rights.⁵⁶

Recommendation 4

Governments address over-representation of Indigenous children and young people in the child welfare and juvenile justice systems through programs that promote Indigenous self governance and social justice.

Notes

- 1 *Healing: a legacy of generations*, p 45, from the submission by Office of Aboriginal and Torres Strait Islander Health.
- 2 as above, p 46 - 49.
- 3 Victorian Koorie Records Taskforce, *Finding your story community forums summary report*, as above at 7.
- 4 *Indigenous Health Matters* newsletter of OATSIH, vol 4 April 2001. The program is run by Lorraine Peeters and was funded by OATSIH as part of the 'practical assistance' package to provide ten training programs a year.
- 5 Lorraine Peeters, abstract of presentation at a workshop presented at the *Moving forward* conference, 2001 (not included in published conference papers).
- 6 Details about Winangali provided in a submission to the *Moving forward* project.
- 7 *Moving forward* focus group meetings (see Appendix 1); address to the *Moving forward* national conference by John Cox, Kimberley Stolen Generations Corporation (oral presentation only, not included in published papers).
- 8 *Healing: a legacy of generations*, pp 53 - 54; state and territory funding of Link Ups discussed at pp 60 - 61.
- 9 The models for Link Ups vary. In NSW and Queensland they are run by independent organisations with a community based management committee. In other states they are run by Aboriginal Child Care Agencies, stolen generations groups or Aboriginal community controlled health services. The models are discussed in *Healing: a legacy of generations*, pp 54 - 60.
- 10 *Healing: a legacy of generations*, pp 60 - 61.

- 11 Minutes of *Moving forward* reference group meeting, June 2001, Adelaide, available from PIAC.
- 12 The service in Perth is discussed in *Healing: a legacy of generations* p 55; the need for counselling services within Link Ups is discussed pp 62 - 64.
- 13 Personal communication of the author with Link Up offices in NSW and the Northern Territory 2001 and 2002.
- 14 Meetings of the *Moving forward* project manager with Link Up workers in Perth, Lawson (NSW) and Brisbane in March and May 2001; discussed by ATSIC at www.atsic.gov.au/issues/bringing_them_home/bringhome/linkup.html February 2002.
- 15 *Bringing them home*, recommendations 21, 22a, 22b, 23(1) – (5), 24, 25(1) – (8), 26, 27, 28, 29a, 29b, 38a, 38b, 38c, 39 (and 40a and 40b on counselling).
- 16 *Healing a legacy of generations*, pp 89 - 99; *Social Justice Report 1998*, already cited pp 123 - 126; *Report of the Royal Commission into Aboriginal Deaths in Custody 1992*, recommendation 52.
- 17 Memorandum of Understanding between the Queensland Government and Link Up (Queensland) 2001.
- 18 Letter to PIAC from the Minister for Community Development, Women's Interests, Seniors and Youth, Disability Services, Culture and the Arts (WA), 17 October 2001.
- 19 Meeting of PIAC solicitor, Link Up NSW and NSW Archives with the Department of Aboriginal Affairs, March 2001 to resolve a complaint to the Department about a family record inappropriately released.
- 20 *Healing: a legacy of generations*, p 99.
- 21 as above, pp 91 - 99.
- 22 In NSW in 2001 the staff of the Department of Aboriginal Affairs and Archives responsible for Indigenous family records did not know where to refer people to appropriate counselling services; personal communication between PIAC solicitor and Department officials.
- 23 Personal and family records are provided free of charge or at minimal cost - *Social Justice Report 1998*, already cited, pp 123.
- 24 *Healing: a legacy of generations*, p 97.
- 25 as above, p 91, referring to Minister for Aboriginal and Torres Strait Islander Affairs, submission to Senate Inquiry into the Stolen Generations, already cited, p 663.
- 26 *Bringing them home*, recommendation 11.
- 27 *Healing: a legacy of generations*, pp 103 - 106 discusses some of the difficulties with the land councils, laws on native title and the Indigenous Land Fund; the difficulties faced by members of the stolen generations in having their place in traditional society and title to land recognised is discussed in Clarke, already cited, pp 283 - 284.
- 28 Also discussed in *Bringing them home*, pp 418 - 419 and recommendation 41.
- 29 *Healing: a legacy of generations*, pp 83 - 91. ATSIC's programs were funded from a reallocation of funds from within its budget in 1997, imposed by the government.
- 30 *Bringing them home*, recommendation 1 and pp 297 - 301. Also see *Healing: a legacy of generations*, pp 83 - 91.
- 31 *Healing: a legacy of generations*, pp 83 - 91, refers especially to a submission to the Committee from the Kimberley Stolen Generations Committee.
- 32 *Healing: a legacy of generations*, p 88 and pp 104 -105; submissions to *Moving forward* project from Jarra - Stolen Generations and Garden Point Association; Kimberley Stolen Generations Committee, 2000, submission to the Senate Inquiry into the Stolen Generations.
- 33 See *Moving forward* conference recommendation 16, set out in Appendix 4.
- 34 www.journeyofhealing.com.au and discussed in *Healing: a legacy of generations*, pp 140 -142 and recommendation 5.
- 35 *Bringing them home*, recommendation 7B.
- 36 *Bringing them home*, recommendations 8 and 9; *Healing: a legacy of generations*, chapter 7.
- 37 Australian Institute of Health and Welfare, 2001, *Child protection Australia 1999-00*.
- 38 as above, pp 15 and 19. In Western Australia and South Australia Indigenous children required protection at more than seven times the rate of other children and in Victoria it was 9.6 times the rate of other children.
- 39 as above, pp 20 - 21.
- 40 as above, p 43. In NSW the rate of Indigenous children in out-of-home care was over 9 times the rate of other children and in Victoria and the ACT it was over 8 times the rate. The difference was lowest in Tasmania and the Northern Territory. Similar findings are set out in *Healing: a legacy of generations* at page 188 and in *Bringing them home*, chapter 21.
- 41 Julie Anne Davies, Who cares for Matilda?, *The Age*, 9 May 2001; 'How can we reverse this appalling descent into hell?', *The Age*, 12 May 2001; and Children painted into grim corner, *The Age*, May 2001.
- 42 There must be more healing, not more hurt, *Through Our Eyes Bulletin*, 21 June 2001 available at

www.nwjc.org.au/avcwl/lists/public/through-our-eyes/maillist.html.

- 43 *Social Justice Report 2001*, already cited, ch 2 and 3.
- 44 *Bringing them home*, p 458.
- 45 *Bringing them home*, ch 25 and 26 and recommendations 44 - 51.
- 46 *Healing a legacy of generations*, p 202, and pp 176 - 177; implementation of the national standard discussed pp 186 - 192.
- 47 Australian Institute of Health and Welfare, 2001, *Child protection Australia 1999-00*, pp 43 and 44. In NSW 80% of Indigenous children were placed with an Indigenous caregiver or relative, in Queensland 71%, in WA 78%, ACT 69%, NT 64% and Tasmania 42%. No figures were available for Victoria.
- 48 *Healing: a legacy of generations*, already cited, p 196.
- 49 as above, ch 6.
- 50 *Social Justice Report 2001*, already cited, ch 2 and 3.
- 51 *Bringing them home*, pp 489 - 541, esp pp 539 - 540.
- 52 *Social Justice Report 2000*, already cited, p 64 - 72; *Social Justice Report 2001*, chapter 5.
- 53 *Fitzgerald Interim Report on Cape York Justice*, 2001, available at www.thepremier.qld.gov.au; *Record of Investigation into the death of Susan Taylor*, State Coroner, Western Australia, October 2001; *Inquiry into Complaints of Family Violence and Child Abuse in Aboriginal Communities in 2001, Interim Report*, April 2002 available at www.premier.wa.gov.au/feature_stories/GordonInquiry_InterimReport.pdf
- 54 Victorian Aboriginal Justice Agreement, Department of Justice, Victoria, 1999.
- 55 *Bringing them home*, chapter 25.
- 56 *Social Justice Report 2000*, already cited, chapter 4.

Chapter 6 - International approaches

The right to reparations for gross violations of human rights has been recognised in many countries around the world. The experiences in Canada, New Zealand and South Africa are particularly pertinent. These examples reflect a growing international recognition of the role of reparations in the process of reconciliation. In those countries governments have acknowledged the harm caused and recognised victims' rights to reparations. Key features of these schemes are processes to hear the experiences of survivors, rehabilitation programs and monetary compensation.¹

Canada

The Canadian Government had similar programs to Australia's forcible removal policies from the late 1870s to the 1970s. The 'residential schooling program', based on assimilationist child welfare policies, removed Indigenous children from their families and placed them in church-operated residential schools. The schools failed to provide adequate levels of education, children were brought up in conditions of chronic neglect, and became victims of overcrowding and disease. Sexual abuse was pervasive, punishments were severe, and Aboriginal languages and cultures actively suppressed.² About 105,000 Indigenous children attended some 80 residential schools across the country before the last ones closed in the 1980s.³

From 1991 to 1996 the Royal Commission on Aboriginal Peoples in Canada investigated the relationship between Indigenous peoples, government and society. It recommended a full public inquiry to document the purposes and effects of the policies and propose remedial action. The Commission also recommended a national repository of videos and records about residential schools.⁴

In 1998 the Government of Canada made a Statement of Reconciliation.⁵ It provided the starting point for community initiatives and redress programs based on partnership with Aboriginal peoples. A central initiative was the Aboriginal Healing Foundation, established in 1998 with Canadian \$350 million to distribute as grants to community-based healing initiatives for the victims of residential schooling. Programs funded by the Foundation address issues such as cycles of physical and sexual abuse, family violence, drug and alcohol abuse and parenting skills.⁶

The Canadian Government has sponsored redress programs in response to legal claims by former residents of the Indian residential schools who suffered sexual or physical abuse. Over 7,200 individuals have made legal claims against the Canadian Government and the churches in Canada and a number of class or representative claims have also been filed. In 1997-98 the Government settled 220 claims, paying more than Canadian \$20 million to former victims of residential schools run by the Federal Government where employees had been convicted of sexual abuse. In 1998-99 about Canadian \$8 million was paid to 70 alleged victims of sexual abuse. Settlements range from Canadian \$20,000 to \$200,000.⁷

The redress programs include exploratory dialogues with survivors, Aboriginal leaders and healers, and church representatives, to inform models for resolving legal claims. Pilot alternative dispute resolution schemes have worked with and resourced groups of survivors of child sexual abuse to 'find credible ways to resolve abuse claims, help to bring about healing, provide closure to participants, and begin to build new relationships between Aboriginal peoples and the Government of Canada.'⁸

Common elements of the dispute resolution schemes are:

- ◆ compensation for validated claims within the framework of the general law and proven in accordance with the same standard of proof as in the courts (balance of probabilities)
- ◆ neutral fact-finders are responsible for assessing the validity of claims, independent of government and claimants
- ◆ former students tell their sensitive stories in a supportive environment.⁹

One of the limitations of the schemes is that the churches that shared responsibility for developing and administering the schools have not participated.¹⁰ The Anglican church in Canada has stated that it supports alternative dispute resolution processes where the plaintiff agrees, where the facts of the case have been 'adequately established' and where entitlement has been validated.¹¹

There is no forum for former students of Indian residential schools to tell their story and have their experience acknowledged other than in the context of the redress programs for legal claims. The Canadian Healing Foundation has found that many survivors call them to tell their story by telephone because there is nowhere else to go.¹²

The Canadian Government also funds a range of activities to preserve and advance Aboriginal languages and culture through community-based initiatives. Most relevant to the former residents of residential schools is annual funding for cultural education centres established by First Nations and Inuit peoples. These centres are intended to help to increase First Nations' and Inuit people's knowledge and use of their traditional languages and cultural skills.¹³

South Africa

In 1995 a Truth and Reconciliation Commission (TRC) was established in South Africa to help 'transcend the divisions and strife of the past' and build a future based on respect for human rights. The Commission was established by statute with the following objectives:

- ◆ create a record of human rights violations committed between 1960 and 1994
- ◆ facilitate the granting of amnesty to people who made full disclosure
- ◆ restore the human and civil dignity of victims by granting an opportunity to relate their accounts and receive appropriate reparation measures
- ◆ make recommendations to prevent future violations of human rights.¹⁴

The Commission's Committee on Human Rights Violations investigated and conducted hearings into human rights violations over several years. It heard from perpetrators of crimes during the apartheid era and from its victims. People who confessed to crimes associated with apartheid could apply for amnesty from criminal prosecution and indemnity for civil claims.¹⁵

Where claims of 'gross violations of human rights' were substantiated in the hearings of the Human Rights Committee, victims were referred to a Committee on Reparations and Rehabilitation. Gross violations of human rights were defined in terms of killing, abduction, torture or severe ill-treatment.¹⁶

The TRC's final report made recommendations on the appropriate policy to provide reparations to the victims of gross violations of human rights. It recommended a reparation policy consisting of:

- ◆ urgent interim reparation – assistance for victims and their families in urgent need, providing them with access to appropriate services and facilities
- ◆ individual reparation grants – individual monetary grants to victims and their families paid according to various criteria. The Commission made findings of gross violation of

human rights for 22,000 victims, recommending that they receive individual financial grants of between US \$2,800 - \$3,500 a year over a 6-year period

- ◆ symbolic reparation through measures to facilitate communal processes of remembering, such as a national day of remembrance and reconciliation, memorials and museums
- ◆ community rehabilitation programs to promote healing and recovery of individuals
- ◆ institutional reform to prevent recurrence.¹⁷

Urgent interim relief payments of about US \$330 were granted to about 20,000 people in 1998, but many people are still waiting to be paid. In January 2000 the Mbeki government stated its intention to offer several hundred US dollars (Rand 2,000) in compensation. Victims support groups have protested that the amount is too little and that the TRC compromised victims' rights to making civil claims (by providing amnesties and indemnities).¹⁸

New Zealand

The Waitangi Tribunal in New Zealand was established in recognition of the large-scale dispossession brought about by colonisation. The function of the tribunal is to investigate claims by Maori that they have been prejudiced by laws, policies or practices of the Crown in breach of the principles of the Treaty of Waitangi 1840. About 1,000 claims were on the tribunal's books in mid-2001. They range from claims about current government policy or proposed initiatives, to historical grievances about confiscation and land transactions. Although it was established in 1975, the tribunal did not become a significant force in New Zealand until the mid 1980s.¹⁹

The approach to reparations packages has been the subject of public debate for some considerable time in New Zealand. The tribunal can recommend measures such as compensation, changes to government departments and audits of proposed legislation.²⁰ The Waitangi Treaty has meant that reparations focus on loss of land and resources and wars waged against tribes. Compensation is therefore at the tribal rather than individual level.²¹

The tribunal has very limited powers to make binding decisions. It reports grievances to government and can generally only make recommendations for government action. The only exceptions are the tribunal's power to direct that State Enterprise lands and Crown Forest lands be returned to Maori (in the latter case with monetary compensation, if deemed appropriate).

The tribunal regards a damages approach to reparations as neither possible nor appropriate. This is partly based on the view that, given the nature of Indigenous grievances, monetary compensation alone would not suffice. The Waitangi Tribunal supports packages that restore a lost economic base bearing in mind the extent and nature of the loss and the current needs of the grieving community. Settlements look to the future and how to help communities out of grievance mode. Another important aspect of settlement is restoring tribal autonomy – *tino rangatiratanga*.

Finally, in the words of Chief Judge Williams:

...settlements are about face...of standing, of self pride, of that indefinable something by which some people walk tall and others do not. Settlement packages always include a full apology. Face could not be restored without it.²²

A unique and essential feature of the tribunal is its hearing processes. The tribunal strives to be bilingual and bicultural. Half of its members are Maori and at least one Maori must sit on

each panel. Hearings are held in traditional villages in traditional meeting-houses in front of communities who carry the grievance.

The importance of providing simple opportunity for tribunal leaders and members to face Crown officials ... and accuse them directly of historical and current wrongs must not be underestimated. I have sat in many Waitangi tribunal inquiries ... and I have in each case had a powerful sense at the end of a week of hearings that the ability to repeat publicly in front of the tribe and others present ... the grievances of the tribe can be enormously empowering.²³

Hearings are held as much as possible in accordance with Maori custom. The judges are not necessarily in control of hearings. Maori custom always prevails in traditional villages and meeting-houses, so that the judges are the leaders of the local community. The general effect is that the tribes feel they own the tribunal because it reflects their own practices and their own lives.²⁴

Notes

- 1 *Healing: a legacy of generations*, pp 260 - 272; Appendix 11 reviews compensation schemes in Germany, Hungary, Austria, Holland and Japan. Schemes in South Africa, Canada and New Zealand discussed in PIAC submission to the Senate Committee, already cited.
- 2 *Report of the Royal Commission on Aboriginal Peoples*, 1996, volume 1, chapter 10 available at www.indigenous.bc.ca/rcap.htm
- 3 *The Government of Canada's Response to the Law Commission of Canada's Report: Restoring dignity*, June 2001.
- 4 *Report of the Royal Commission on Aboriginal Peoples*, volume 1, already cited.
- 5 *Canadian Government Statement of Reconciliation*, 1998.
- 6 *Gathering Strength: Canada's Aboriginal Action Plan*, Government of Canada, 1997, launched in January 1998. Information about the Foundation available at www.ahf.ca
- 7 Ottawa Citizen Online, www.turtleisland.org/news/news-residential.htm (March 2001).
- 8 *Safeguarding the future and healing the past - Government response to Law Commission of Canada Report*, June 2001, available at <http://canada.justice.gc.ca>
- 9 as above, chapter on *Healing the past: Addressing the legacy of physical and sexual abuse in Indian residential schools*.
- 10 *Safeguarding the future and healing the past*, available at <http://canada.justice.gc.ca> as above; Ottawa Citizen Online, already cited.
- 11 October 2000, *Residential schools: legacy and response*, available at www.anglican.ca/ministry/rs/litigation/#cases
- 12 Personal communication of the author with Michael Degagne, Director, Canadian Healing Foundation, August 2001.
- 13 *Safeguarding the future and healing the past*, already cited.
- 14 *Promotion of Unity and National Reconciliation Act 1995* (South Africa).
- 15 *Truth and Reconciliation Commission Final report*, 1998, volume 1 chapter 1, available at <http://www.truth.org.za>
- 16 as above, volume 5 chapter 1.
- 17 as above, volume 5, chapter 5.
- 18 Wilson, Richard, 2001, *The Politics of Truth and Reconciliation*, South Africa.
- 19 *Treaty of Waitangi Act 1975* (New Zealand): Chief Judge JV Williams, Reparations and the Waitangi Tribunal, *Moving forward* conference papers, already cited.
- 20 Durie and Orr, 1990, *The role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence* (1990) 14 *New Zealand Universities Law Review* 62.
- 21 Chief Judge JV Williams, Reparations and the Waitangi Tribunal, *Moving forward* conference papers, already cited.
- 22 as above.
- 23 as above.
- 24 as above.

PART 3 - ACHIEVING REPARATIONS

Members of the stolen generations have sought redress for the harm of forcible removal policies. The courts have proven to be an inappropriate forum to resolve the claims, even though governments insist that they will only pay compensation where ordered by the courts. Crimes compensation schemes have also been used by the stolen generations to seek compensation for crimes of sexual assault, so far without success.

Chapter 7 canvasses these options and some preferable alternatives. It discusses the restorative justice approach, which emphasises the importance of addressing the therapeutic needs of people who have suffered harm as a result of wrongful acts. Schemes for survivors of institutional child sexual abuse in Ireland and Canada lead the way internationally in providing restorative justice programs for survivors of institutional abuse.

PIAC's reparations tribunal model seeks to provide redress for the harm caused by forcible removal policies in culturally appropriate ways. The original tribunal proposal has been modified to reflect the views of Indigenous people expressed during the *Moving forward* consultation project. Chapter 8 details the revised reparations tribunal proposal and recommendations for implementation.

Chapter 7 - Redress options

Justice and the courts

Legal claims by members of the stolen generations have been important symbolically as a means of obtaining redress.¹ The cases have consumed a great deal of time and resources, particularly in the Northern Territory where over 2,000 people have lodged claims.² However, to date the courts have found governments are not liable for the harm suffered by Indigenous children while state wards.

The cases have not aided restitution or advanced reconciliation. Some argue that legally, the cases have undermined claims by the stolen generations, particularly the claim that the policies constituted genocide.³ There has also been a trend to characterise Aboriginal 'protection' and 'welfare' laws as benign in their intent - as 'beneficial' laws - even in the face of discriminatory operation. Jennifer Clarke described the High Court analysis of the Northern Territory laws in *Kruger v Commonwealth* as 'partial and unsatisfactory' - glossing over 80 years of legal history, drawing inappropriate analogies between vastly different regimes operating in the nineteenth and twentieth centuries.⁴ In the *Cubillo* case Justice O'Loughlin found that a policy directed to the removal of all illegitimate children of white fathers from their Aboriginal mothers was in the children's best interests.⁵

Questions about the validity of individual acts of removal and the duty of care owed to children once in state care are enormously complex and variable. The courts are clearly reluctant to make findings against government officials exercising discretionary child welfare functions many years ago. In *Cubillo* Justice O'Loughlin said:

The removal and detention of part Aboriginal children has created racial, social and political problems of great complexity... it must be left to the political leaders of the day to arrive at a social or political solution to these problems.⁶

Compensation and other forms of redress that form part of full and just reparations will not be met through the courts. Even if individual claims are successful in future the benefits will be limited to the individual in each case.

Legal basis of claims

The legal claims by Joy Williams in New South Wales and Lorna Cubillo and Peter Gunner in the Northern Territory have been based mainly on negligence, fiduciary duty (duty of trust) and statutory duty.⁷ Joy Williams, an Aboriginal woman who was separated from her 18 year-old mother at the age of four weeks, claimed she was forcibly removed and inadequately cared for as a ward of the state.⁸ Lorna Cubillo and Peter Gunner claimed unlawful removal from their Aboriginal mothers as young children and unlawful detention and inadequate care in homes run by religious organisations in the Northern Territory.

Neither case was able to establish that the respective governments owed a duty of care to state wards because of acts of removal or the standard of care in the homes.⁹ In *Cubillo* Justice O'Loughlin considered that a duty of care might be imposed on a care relationship arising out of the exercise of a statutory power. He considered that the directors of the homes might therefore owe a duty to provide for the safety and well-being of children in their care, but not the state.¹⁰

The courts did not recognise a guardianship relationship between the state and the children as state wards, a relationship that would give rise to a fiduciary duty or duty of trust. In *Williams* and *Cubillo* the courts distinguished *Bennett v Minister for Community Welfare*, a 1992 case in Western Australia involving a claim by a state ward. In that case the *Child Welfare Act 1947* (WA) included a guardianship provision which was relied on as the basis for a claim for breach of fiduciary duty.¹¹ In *Williams* the court found that the relevant child welfare statute in NSW imposed a duty to control wards of the state, which it said did not equate with guardianship.¹² In *Cubillo* Justice O'Loughlin also rejected the applicant's claims of fiduciary duty on the facts of the case. The Canadian courts, in contrast, have extended fiduciary principles in similar circumstances.¹³

There were significant deficiencies in the evidence presented in both cases.¹⁴ The courts placed great emphasis on the documentary record because of the absence of witnesses and the fallibility of witnesses' memories after such long periods of time.¹⁵ Unfortunately, much of the written record had been lost or destroyed in these cases leaving the courts with some difficulty in making findings of fact.

The credibility of the plaintiffs as witnesses was a significant problem in both cases due to the young age at which they were removed and the emotional distress suffered by them since. This is likely to be the case for many plaintiffs in such cases because of the psychological nature of the harm done.¹⁶

Limitations of litigation

The legal claims by members of the stolen generations deal with narrow legal issues such as whether a mother's consent technically complied with the law or whether the law authorised Aboriginal children to be wards of the state. The claims do not address the issue of greatest significance to Aboriginal people - the racism underlying the policies, the magnitude of the removals and the social, cultural and individual impacts.

Nearly \$12 million has been spent on the *Gunner* and *Cubillo* cases alone, including legal fees and the costs of investigators.¹⁷ In contrast the Federal Government has committed a total of

\$117.6 million between 1997 and 2004 to address the needs of the estimated 20,000 to 25,000 Indigenous people who were removed under the policies.

The statutory bar on bringing legal proceedings after a specific period of time has elapsed since the harm occurred (usually three years) is a significant hurdle in these types of cases.¹⁸ In most Australian courts an extension of time can be granted if the plaintiff can show special circumstances exist and there is no significant disadvantage to the defendant. In the *Cubillo* and *Williams* cases the courts were prepared to defer making a final decision on the question of limitations until after they had considered the substantive issues. However, both courts ultimately concluded that there would be 'overwhelming prejudice' to the defendant if time limits were waived. This was primarily because of the passage of time since the relevant events and the lack of reliable evidence.¹⁹

Non-Indigenous women who made claims against the NSW Government for forced relinquishment of their babies in the 1960s were also unsuccessful in overcoming the limitations restriction.²⁰ In Western Australia, there is no provision for the courts to grant an extension of time for bringing claims for damages.²¹

The personal difficulties experienced by the plaintiffs during the cases are well known. In *Cubillo* for example, Justice O'Loughlin agreed with Peter Gunner's psychiatric expert who told the court that 'he could not remember seeing a man who seemed "so beaten as Peter Gunner"'.²² The plaintiffs in these cases had their lives opened up for scrutiny as part of a major public controversy, only to be disappointed by what the legal system could offer.

The adversarial nature of the litigation is particularly inappropriate for plaintiffs who have, by the nature of their claims, suffered emotional and psychological harm and are required to undergo extensive cross-examination in relation to difficult and sensitive matters. It is also an inappropriate process for resolving important social and political issues.

Compensation for sexual assault

Court claims

Many of the children removed under forcible removal policies experienced physical and sexual assault in the institutions, in foster care and work placements. *Bringing them home* estimated that sexual exploitation and abuse were part of the evidence presented by one in six witnesses to the National Inquiry.²³

The claims in the *Williams* and *Cubillo* cases included claims for damage for physical and sexual assault. As with other aspects of the cases, the plaintiffs had to produce evidence of the claimed beatings and sexual misconduct. In the *Williams* case, the plaintiff withdrew a claim of sexual assault because she could not satisfy the onus of proof. Her claim was undermined by expert evidence that suggested her psychological disorder distorted her vision of reality.²⁴

In the *Cubillo* case Justice O'Loughlin found that there had been sexual misconduct by a staff member at St Mary's home, including against Mr Gunner. His Honour described the acts, admitted by the staff member concerned, as 'perverted behaviour'.²⁵ Justice O'Loughlin found that the type of corporal punishment to which the children in Retta Dixon home were subjected would be regarded by today's standards as very severe and acknowledged that Mrs Cubillo suffered from these beatings. However, he did not find evidence of the children being 'flogged' for bed-wetting and speaking Aboriginal languages, as claimed.²⁶

The court found that the Federal Government was not liable for these acts because it did not owe a duty of care or a fiduciary duty to the plaintiffs (as discussed at page 45).

Crimes compensation tribunals

Members of the stolen generations have sought compensation for crimes committed against them while wards of the state or in foster care under criminal injuries compensation schemes. People seeking compensation under these schemes generally need to prove that the relevant crime occurred and that harm resulted to them as a result of the crime. There is no prerequisite that a person has been prosecuted or convicted of the crime. The claimant does not need to establish liability. Usually the tribunal relies on police reports of the crime and expert evidence as to the psychological impacts.

Mrs Valerie Linow, an Aboriginal woman from NSW, brought a claim under the NSW scheme for alleged sexual assault while she was a domestic worker on a rural property in NSW. The Aborigines Welfare Board had placed her at the property when she was 14 years old and a ward of the state.

The substance of Mrs Linow's claim was for the psychological trauma suffered as a result of the assaults. Her application included some corroborative evidence in the form of police documents that reveal the early stages of a police investigation. It also included reports from a psychiatrist, detailing Mrs Linow's history and the psychiatric injuries she suffers as a result of the sexual assaults and other life events.

The tribunal agreed to consider the claim even though the relevant acts occurred in the 1950s.²⁷ The Tribunal Assessor accepted, on the balance of probabilities, that 'the applicant was subjected to a series of indecent and sexual assaults by the alleged offender'.

However, Mrs Linow's claim was denied because the Assessor was not satisfied 'that the [psychiatric] injury was caused as a result of the sexual assaults'. The Assessor noted that if Mrs Linow had been reared in a loving family, she would not have suffered from the psychiatric disorders.²⁸

The applicant's claim appears to have failed on the basis that the devastating effects of her removal were so extreme that the subsequent events of abuse did not cause harm to the applicant.²⁹ The decision is the subject of an appeal.

PIAC has been told that members of the stolen generations in Victoria have successfully made claims under the criminal injuries compensation scheme in that state. They received about \$4,000 for sexual assaults. The Victorian scheme provides a maximum of \$7,000. In contrast the NSW scheme provides a maximum of \$50,000 under the *Victims Support and Rehabilitation Act 1996* (NSW).

Mrs Rosalie Fraser, an Aboriginal woman from Perth, used the crimes compensation framework in Western Australia as the basis for attempting to negotiate an *ex-gratia* payment from the State Government for assaults against her while in foster care. The negotiations were ultimately unsuccessful, being entirely dependent on Ministerial discretion.³⁰

Church compensation schemes

Non-Indigenous children in Australia have been awarded compensation by the churches for inadequate care, including sexual abuse, in church-run institutions. An example is the claim of 200 child migrants who, as boys, were expatriated from England and Malta and placed in orphanages in outback Western Australia run by the Christian Brothers. Many of the boys were physically and sexually abused. In 1995 the claims were settled for a total of \$5 million dollars, with every claimant receiving a minimum amount, and those most severely harmed receiving up to \$25,000.³¹

Compensation for labour exploitation

An important aspect of the policies applying to Indigenous people during the past century was government control of Indigenous labour. This resulted in low wages being paid to Indigenous people and deductions from wages of Indigenous people to government controlled welfare funds. The Queensland Government has offered up to \$55.6 million to 16,400 Indigenous people in Queensland to help ease the pain of these policies.

The most significant symbol of these policies was the Aboriginal Welfare Fund, into which a portion of Indigenous peoples' wages were paid from 1943 to the 1960s. Indigenous people were not informed of how much money was in their accounts and had to seek permission to spend even small amounts. The Fund was frozen in 1993, and by 2002 it contained \$8.6 million.³²

The offer is a one off payment of up to \$4,000 for non-payment of award wages to Indigenous peoples under the policies. The Government is not acknowledging legal liability as part of the deal. The offer is being made as an alternative to litigation, so people who accept the offer must waive their right to sue.

A number of cases of this type have been settled out of court. The Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS) is said to have 4,000 further claims waiting to sue. The Queensland Premier has acknowledged that the claimants have reason to feel angry and bitter. However, he says the process 'could deliver some overdue justice to ageing people and advance the cause of reconciliation'.³³

The package will include written apologies, a statement in the Queensland Parliament and a protocol for commencement of all government business requiring acknowledgement of traditional owners.

In July 2002 QAILSS commenced consultations with Indigenous people affected by the offer with \$200,000 funding from the Government.³⁴ The Government requires people to decide if they will accept the offer by the end of August 2002. Aboriginal leaders have been critical of the offer and the time frame imposed. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr William Jonas, describes the amounts offered as 'totally insulting' and says the Government should give people proper time to consider the deal.

Restorative justice

The restorative justice approach to conflict resolution is based on the premise that the most effective response to conflict is to redress the harm caused by a wrongful act. It is becoming popular in a number of western legal systems as an effective alternative to the traditional judicial model. Where possible, it brings together all the affected parties - the wrong doer, those who have suffered harm and family or community members - to work through the best response to the harmful act. A common theme of restorative justice is that it shifts the focus to redressing the harm caused and making reparations, rather than on punishment.³⁵

The traditional judicial model requires a decision-maker to discern facts that are relevant to a particular legal claim. It is adversarial, producing winners and losers. In contrast, the benefits of alternative mechanisms that facilitate all the relevant parties coming to a mutually agreed outcome are now well-recognised.³⁶

Restorative justice programs are most developed in the field of criminal justice. In Australia these programs have included diversionary programs for juvenile offenders, utilising family and community conferencing. These programs have often failed young Aboriginal people

because they have not been built around self-determination and community negotiation. As a result, young Aboriginal people have generally not benefited from family conferencing programs.³⁷ Restorative justice has also been applied to a limited extent in the context of child care and protection in Australia. It gives families the main responsibility for decisions about care arrangements.³⁸

Restorative justice also has a place in resolving conflicts in the civil courts. A Canadian study on why survivors of sexual assault choose to take legal action found that the reasons are mostly therapeutic. The primary motivations were not just to seek monetary compensation, but also to obtain appropriate social responses to injustice. The women surveyed expected to be heard, to have their experience acknowledged and validated and sought to prevent recurrence. Deterring the perpetrators was an expected outcome of legal action for a third of those surveyed and nearly as many said they were seeking revenge.³⁹

The restorative justice approach is reflected in the international human rights framework for reparations for human rights abuses. In this context restorative justice is broader than a concern with the individual. It is concerned with the role of the state in a civil society in acknowledging harm and responding to wrong doing.⁴⁰

Redress for institutional child abuse

In Canada and Ireland governments have devised major redress programs for survivors of abuse in institutions run or regulated by government, based on restorative justice. Common features of the schemes are:

- ◆ the needs of survivors are central to the scheme
- ◆ the harm caused is assumed from the outset
- ◆ survivors are offered the opportunity to put their experience on the public record
- ◆ validation or proof of claims is conducted in a non-adversarial way
- ◆ monetary compensation is paid to support the recovery of survivors.

Schemes such as these have been recommended by at least one public inquiry into institutional child abuse in Australia. The Commission of Inquiry into Abuse of Children in Queensland Institutions, known as the Forde Inquiry, made over 40 recommendations to address past child abuse and prevent its recurrence. These included recommendations for reconciliation, apology and support, including compensation for survivors of abuse. The Forde Implementation Committee, established in 1999 to report to the Queensland Parliament on implementation of the report, had significant concerns about implementation in this area. Its final report in August 2001 said significantly more work needs to be done on compensation. It found that the Forde Trust Fund established by the Queensland Government with a contribution of \$2 million was inadequate to meet the high level of demand. The Committee says the Government continues to adopt the position that compensation must be pursued through the courts. It calls for a significant change of approach by the Government and churches.⁴¹

Ireland

The Government of Ireland has established two separate processes for dealing with children who suffered abuse in state-run or state-regulated institutions. The initiatives cover reformatory and industrial schools, orphanages, children's homes and hospitals. In 2000 the Government established a Commission to Inquire Into Child Abuse. The Commission's role is to investigate child abuse in institutions, enable survivors to give evidence, prepare a report and make recommendations for prevention and action to address the continuing effects of child abuse. It has the power to regulate its own procedures by use of standing orders.⁴²

The Commission will report to the Parliament on its findings about abuse that occurred during particular periods, at particular institutions, and about management, administration and regulation of an institution. It is prohibited from identifying survivors or making findings about particular circumstances of alleged abuse.⁴³

In February 2001 the Irish Government announced a statutory-based compensation scheme for survivors of child abuse in state institutions. It will run for three years to ensure that claims are dealt with quickly and effectively. The stated objective of the scheme is to provide fair financial redress to survivors of abuse, through a process that avoids the stress, delay and uncertainty of adversarial hearings. Unlike the Inquiry it is 'concerned only with the measures needed to give people who are injured financial support in their recovery from injury.' The main elements of the scheme include:

- ◆ *ex gratia* payments for survivors
- ◆ validation of claims by the compensation body will be conducted in a non-adversarial way, with inquiries confined to establishing essential facts combined with medical and psychiatric assessment of a claimant
- ◆ compensation will be paid for present and continuing damage and for past damage from which the claimant has now recovered
- ◆ criteria for awards are set out in the legislation, including the amount for different types of abuse.⁴⁴

The Irish Government's program also includes a counselling program provided by all health boards for survivors of child abuse.

Canada

The Law Commission of Canada conducted a review of the processes for dealing with institutional child physical and sexual abuse in government-run and government-funded institutions during the late 1990s.⁴⁵ It specifically included Indian residential schools. The Commission's report, *Restoring Dignity: Responding to child abuse in Canadian institutions*⁴⁶, recommended a process for redress that takes into account the needs of survivors, their families and communities in a manner that was fair, fiscally responsible and acceptable to the public. It framed this ideal through eight criteria that included respect, engagement and choice, accountability, fairness, reconciliation, compensation, the needs of families and communities and prevention.

The Commission applied these criteria to a range of redress processes including the courts, police, ombudsman, public inquiries and community initiatives. It recognised that community initiatives could meet the most compelling needs of survivors by involving them in the design and delivery of helping and healing initiatives. The Commission concluded that governments should not attempt to monopolise approaches to redress and should support grassroots community programs.

The Commission reviewed existing alternative redress programs for meeting the needs of survivors by providing financial and other compensation. Key features of the programs are an opportunity to establish a permanent record of personal experiences and an apology. The Commission concluded that redress programs were the most effective official response to meeting its eight criteria for redress options. However, it did not recommend a single approach because the needs of survivors and their communities are so diverse.⁴⁷ Instead, the Commission devised five principles to be respected in all processes through which redress is sought:

- ◆ former residents should have the information necessary to make informed choices about what course of redress to take

- ◆ former residents should have access to counselling and support throughout the process
- ◆ those who conduct the process should have the training to understand the circumstances of survivors
- ◆ ongoing efforts to improve existing redress options should be made
- ◆ the process should not cause further harm to the survivors, and should acknowledge that confronting a painful past is far from easy.⁴⁸

The Canadian Government believes the redress programs it currently provides for survivors of Indian residential schools reflect these principles.⁴⁹

The Government of Ontario in Canada negotiated a particularly interesting scheme under an agreement with former inmates of Grandview Training School for Girls. The details of the agreement, which provide a useful case study, are set out below.

Case study – Grandview Agreement

The Government of Ontario negotiated a unique compensation agreement to deal with claims of abuse by former inmates of Grandview Training School for Girls.⁵⁰ The Agreement commences with the statements that society ‘has a direct responsibility to provide the support necessary to facilitate the healing process of survivors of sexual and physical abuse’ and ‘individual based solutions offered by the civil justice system are inadequate...’.

The process provided for former Grandview residents to apply for ‘healing packages’ – specific medical and other benefits, funds for educational and vocational training, scar reduction, and access to a crisis line. Awards of up to Canadian \$60,000 were also available. The packages were available to women who could prove their claims through an independent investigation process. Hearings were conducted before adjudicators, all women, who were selected on the basis of appropriate expertise. The hearings were held in private at neutral locations. Legal assistance was provided to prepare claims, but claimants were rarely represented in the adjudication hearings.

The Grandview process has considerable benefits compared to claims in the courts and victims compensation schemes. Most Grandview survivors sought public affirmation of wrong, or closure. They also expected an apology, which had been delayed pending legal proceedings.

Research on claimants’ experience of the adjudication procedure found that 85 per cent of Grandview survivors reported overwhelming approval for their adjudication experience. Civil litigants before the courts and victims compensation tribunals, in contrast, reported great difficulty with their hearings.⁵¹

Lessons for reparations

The experience of litigation and restorative justice models helps to inform an appropriate process to provide redress for forcible removal policies in Australia.

The traditional approach of the courts, which requires a single determination of facts, focuses on legal issues and not on the needs of the parties, is not appropriate. Equally, an adversarial process for validating claims is not appropriate. Essential elements of any scheme for redress must include an apology, appropriate support and compensation.

The opportunity for people to place their experience on the public record in an appropriate environment is also essential. The process must be able to provide guarantees against repetition.

The people who have suffered harm must be central to any process. They need to know what to expect and to some extent, should be able to shape the process to ensure it meets their needs and those of their community.

Families and communities play a crucial role in healing. Grass roots community initiatives are better able to address the most compelling and specific needs of survivors, and should be supported as part of any overall redress package. No single model should be imposed by government.

Notes

- 1 Clarke, already cited pp 220 - 221, esp note 6, and at p 226, note 37 (on the symbolic value of the 'stolen generations' litigation to Aboriginal people).
- 2 A total of 742 writs have been issued on the Commonwealth arising from the claims. Aboriginal legal services in Brisbane, Melbourne, Perth and Adelaide told the project that they collected thousands of statements during 1997-98, but litigation was not commenced except in South Australia. In NSW PIAC assessed and referred over 50 claimants to community legal centres and private lawyers that agreed to represent members of the stolen generations and their families during 1997-98.
- 3 *Kruger v Commonwealth* (1997) 190 CLR 1, Dawson J p 70, Toohey J at 88, Gaudron J p 107, McHugh p 144 and Gummow p 158; Clarke, already cited, p 219; also see chapter 2 of this report.
- 4 Clarke, already cited, pp 222-223, 226 and 254 - 255.
- 5 Clarke, already cited, pp 254-255.
- 6 *Cubillo v Commonwealth* (2000) 174 ALR 97.
- 7 In *Williams v The Minister* the statement of claim included trespass. In *Cubillo v Commonwealth* and *Gunner v Commonwealth* the claims included false imprisonment.
- 8 *Williams v The Minister, Aboriginal Land Rights Act 1983*, [1999] NSWSC 843 (26 August 1999) and on appeal [2000] NSWCA 255 (12 September 2000).
- 9 Clarke, already cited, pp 272-277; Cody, Anna, 2000, *Case note, Williams v The Minister, Aboriginal Land Rights Act 1983*, Australian Journal of Human Rights, volume 7(1) 155 at pp 164 - 168.
- 10 Clarke, already cited, pp 284 - 286; Cody, already cited p 163.
- 11 *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, under section 10 *Child Welfare Act 1947* (WA).
- 12 Anna Cody, as above at pages 163-164; *Williams v The Minister, Aboriginal Land Rights Act 1983*, [1999] NSWSC 843 (26 August 1999) at 301.
- 13 *Cubillo v Commonwealth* (2000) already cited, pp 499, 500, 503 - 505; Clarke, already cited, pp 284-286.
- 14 Clarke, already cited, pp 264 and 294.
- 15 Cody, already cited; Clarke, already cited, pp 264 - 265.
- 16 Cody, already cited, p 168 and Clarke, already cited, pp 258 and 265.
- 17 Over \$11.5 million of Federal Government funds were spent on the *Gunner* and *Cubillo* cases to August 2001, of which \$770, 000 was for private investigators; Bob McMullan, *Moving forward* conference papers, already cited.
- 18 Discussed in PIAC submission to the Senate Inquiry into the Stolen Generations, chapter 4, already cited.
- 19 as above
- 20 *Welfare v State of New South Wales* 1993, heard before Master Greenwood. PIAC represented Ms Welfare in the claim. The decision is discussed in PIAC, 1999, *Submission to the Legislative Council Standing Committee Adoption Inquiry* and see *Releasing the Past, Adoption Practices 1950 - 1998*, Final Report of an Inquiry by the NSW Legislative Council Standing Committee on Social Issues, December 2000.
- 21 *Social Justice Report 2000*, already cited, p 142.
- 22 *Cubillo v Commonwealth* (2000) already cited, p 556.
- 23 *Bringing them home*, p 194.
- 24 Cody, already cited, pp 160 - 161.
- 25 *Cubillo v Commonwealth* (2000), already cited, p 410.

- 26 *Cubillo v Commonwealth* (2000), already cited, pp 490-491; Clarke, already cited, pp 258 - 259.
- 27 Notice of determination, Victims Compensation Tribunal (NSW) April 2001.
- 28 Notice of determination, Victims Compensation Tribunal (NSW) February 2002.
- 29 Christine Forster, Lecturer, University of New South Wales, April 2002, *Valerie Linow's Claim in the NSW Victims Compensation Tribunal: The 'Writing In' of Aboriginality to 'Write Out' Her Right to Compensatory Redress for Sexual Assault*, unpublished at time of going to print.
- 30 Rosalie Fraser, 1998, *Shadow Child: A memoir of the stolen generation*, Hale and Iremonger Pty Ltd.
- 31 Terms of the settlement provided in correspondence with lawyers for the plaintiff, Slater and Gordon, February 2001. The Federal Government also made contributions to the scheme.
- 32 Premier Peter Beattie, 16 May 2002, Media Statement, *State government officers reparations to about 16,400 Indigenous Queenslanders*, available at www.thepremier.qld.gov.au
- 33 as above.
- 34 Minister for Families, Aboriginal and Torres Strait Islander Policy and Disability Services, 3 July 2002, Media Statement, *Beattie Government urges Indigenous Queenslanders to accept reparations offer*, available at <http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?is=7436&db+media>
- 35 Strang, Heather and Braithwaite, John (eds), 2001, *Restorative Justice and Civil Society*, Cambridge University Press, Cambridge, chapter 1.
- 36 Strang, Heather, 2001 *Restorative justice programs in Australia*, Report to the Criminology Research Council.
- 37 *Social Justice Report 2001*, already cited, chapter 5; *Bringing them home*, chapter 24.
- 38 Strang and Braithwaite already cited; *From restorative justice to transformative justice*, Discussion Paper, Law Commission of Canada 2000 at www.cdc.gc.ca
- 39 Feldthusen, Hankivsky and Greaves, 2000, *Therapeutic consequences of civil actions for damages and compensation claims by victims of sexual abuse*, CJWL/RFD vol 12 (2000) 66, pp 72 - 75.
- 40 Cuneen, Chris, *Reparations and restorative justice: responding to the gross violations of human rights*, chapter 6, Strang and Braithwaite, already cited.
- 41 *Report to the Queensland Parliament by the Forde Implementation Monitoring Committee*, August 2001, available at www.qld.gov.au
- 42 *Commission to Inquire Into Child Abuse Act 2000* (Ireland), ss 1-4 and s 7.
- 43 as above, s 5.
- 44 Michael Woods, Minister for Education and Science, , 27 February 2001, *Government approves proposals for child abuse compensation scheme*, press release.
- 45 For a review of the schemes see Goldie and Shea, 1999, *Redress Programs relating to Institutional Child Abuse in Canada*, Background Paper for the Law Commission of Canada, available at www.lcc.gc.ca/en/themes/mr/ica/shea/redress/index.html
- 46 Law Commission of Canada, 2000, *Restoring Dignity: Responding to child abuse in Canadian institutions*.
- 47 as above, pp 8 - 9.
- 48 as above, p 10.
- 49 *Safeguarding the future and healing the past, the Government of Canada's response to the Law Commission of Canada's report*, already cited.
- 50 All of the girls sent to Grandview became wards of the province of Ontario. The Grandview Agreement refers to the *Agreement between the Grandview Survivors Support Group and the Government of Ontario 1994*.
- 51 Feldthusen, Hankivsky and Greaves, already cited, pp 82 - 83.

Chapter 8 - Revised tribunal model

PIAC has revised its proposal for a reparations tribunal in light of feedback from the *Moving forward* project. It has also considered some practical ways to implement the proposal in light of existing government and church programs and the Federal Government's opposition to the tribunal.

The essential elements of the original proposal have been retained. It offers an alternative to litigation and seeks to fulfil the promise of full and just reparations for a gross violation of human rights. It would not require governments or churches to admit legal liability, but simply to acknowledge the nature of the policies and the harm done.

Principles

The *Moving forward* meetings and submissions supported the tribunal being explicitly based on a number of principles:

- ◆ **acknowledgement** that forcible removal policies were racist and caused emotional, physical and cultural harm
- ◆ **self-determination** for Indigenous peoples, recognising the distinct identity of the stolen generations and their right to shape reparations
- ◆ **information and access** for Indigenous people affected by forcible removal policies to facilitate their access to the tribunal or other redress options
- ◆ **prevention** of contemporary Indigenous child separation from their families.

The *Moving forward* meetings highlighted the need for acknowledgement of the nature of forcible removal policies as a fundamental aspect of the tribunal. The concept of reparations, and therefore the tribunal, is based on the recommendations of the National Inquiry and international human rights principles. The meetings also discussed the importance of acknowledging that the removals involved compulsion, duress and undue influence and the powerlessness of Indigenous women when confronted by the state.

The principle of self-determination means that Indigenous peoples devise and deliver policies and programs to meet their needs. For the stolen generations this means recognising their distinct identity and special needs. It also means respect for Indigenous elders and cultural norms through tribunal processes.

Some people were concerned that the tribunal may undermine their rights and entitlements under the law. A submission to the project from the Retta Dixon Association said tribunals 'usually take away as many rights as they provide'. The *Moving forward* meetings agreed that people should have a choice whether to claim compensation before the courts or the tribunal. People in the Northern Territory supported an exception to allow people who have commenced legal claims before the tribunal is established to have access to the tribunal.

A high priority for the stolen generations is to ensure that Indigenous child separation from their families is minimised. It is therefore important that the tribunal has a role in contributing to prevention strategies.

Recommendation 5

State, territory and federal governments, in co-operation with the churches, establish a tribunal to make full and just reparations for forcible removal policies based on the following principles:

- ◆ **acknowledgement** of the racist nature of forcible removal policies and the harm caused
- ◆ **self-determination** of Indigenous peoples, including the stolen generations
- ◆ **access to redress** for Indigenous peoples affected by forcible removal policies
- ◆ **prevention** of the causes of contemporary separation of Indigenous children from their families in the present and future.

Functions

The *Moving forward* consultations did not support the all-encompassing functions originally proposed for the tribunal.¹ The clear view was that the functions of the tribunal should be:

- ◆ providing a forum in which Indigenous people affected by forcible removal policies could tell their story, have their experience acknowledged and be offered an apology
- ◆ providing reparations measures in response to applications through appropriate reparations packages
- ◆ making recommendations about government and church practices on Indigenous child separation and about measures that might be taken to heal the past and prevent recurrence.

There was strong support for the tribunal to hear stories only from Indigenous peoples, consistent with its purpose of providing reparations. Some people supported government and church officials appearing for the purpose of offering an explanation and apology, but not to give testimony.

Making recommendations about government practices was regarded as an essential role for the tribunal. The tribunal should be able to highlight the causes of the continuing high rate of Indigenous child separation and problems with government practice in areas such as access to family records and genealogy. Recommendations for churches to take action on relevant issues would also be an important part of the tribunal's role.

PIAC's proposal that the tribunal monitor government and church implementation of *Bringing them home* was not generally supported. There was a firm view that governments must be accountable for their policies and effective program delivery. These should be the subject of clear performance criteria and reported on publicly, as proposed in recommendation 1, above. Organisations such as ATSIC and the National Aboriginal Community Controlled Health Organisations are regarded as having a responsibility to advocate for the stolen generations to ensure the effective implementation of government programs.

The suggestion that the tribunal devise programs for community development similar to the Canadian Healing Foundation, was generally not supported. The view was that there are already many government agencies with responsibility for community development within Indigenous communities. More co-ordination is needed in this area, not more organisations. However, there was support for the tribunal to provide funding to stolen generations groups to carry out support and development activities as part of reparations packages.

Recommendation 6

The tribunal have the following functions:

- ◆ provide a forum for Indigenous peoples affected by forcible removal policies to tell their story, have their experience acknowledged and be offered an apology
- ◆ provide reparations measures in response to applications through appropriate reparations packages
- ◆ make recommendations about government and church activities that affect contemporary Indigenous child separation and measures that might be taken to heal the past.

Reparations packages

Types of reparations

The *Moving forward* meetings emphasised that reparations packages provided by the tribunal should support individuals, groups and communities to move on with their lives in a positive way. The reparations measures provided by the tribunal need to reflect the basis of reparations, a gross violation of human rights and the needs expressed by those affected by forcible removal policies.

The *Moving forward* meeting participants were invited to discuss the types of reparations they might seek as an outcome from the tribunal, other than hearings and apologies. The national conference also discussed priorities for reparations measures. The types of measures identified reflect modest expectations:

- ◆ resources for stolen generations groups to provide culture and history centres, or healing centres, including funding and land or premises
- ◆ community education programs about the history of forcible removals
- ◆ community genealogy projects for Indigenous communities to help identify membership of the stolen generations and their descendants
- ◆ monetary payments for individuals to meet current needs such as funding to travel to see family
- ◆ access to appropriate counselling services
- ◆ access to language and culture training
- ◆ memorials that appropriately reflect the consensus views of local stolen generations
- ◆ monetary compensation for people who can prove that they suffered particular types of harm, such as sexual and physical assault.

The tribunal could provide most reparations measures through grants of funding and recommendations for action by governments and churches. For example, the tribunal could provide funding for a culture and history centre for a stolen generations group. It could facilitate the provision of premises for the centre by making a recommendation to a relevant church or to the Indigenous Land Fund.

Participants in the *Moving forward* project recognised that there is a role for the tribunal to comment on government policies. However, they said the wider aspirations for reparations, such as social justice packages to address the underlying disadvantage of Indigenous peoples, could not be addressed through a tribunal.

Issues such as contemporary Indigenous child separation and training of Indigenous archivists, genealogists and historians could arise in the course of hearings and applications for reparations to the tribunal. The tribunal could make recommendations on these policy and program issues, similar to the role of the Waitangi Tribunal in New

Zealand or the Commission of Inquiry into Institutional Child Abuse in Ireland (discussed in chapters 6 and 7).

Facilitating group outcomes

The *Moving forward* meetings and the national conference supported reparations measures based on group or community outcomes. Canadian redress programs and the Waitangi Tribunal were discussed as models. The Canadian redress programs for survivors of residential schools was widely supported during the *Moving forward* meetings. The programs include exploratory dialogues with survivors, Aboriginal leaders and healers and church representatives to inform the models for resolving legal claims of institutional child abuse. The Waitangi Tribunal focuses on reparations for losses experienced by tribal groups rather than individuals. Both programs explicitly aim to bring about healing and begin to build new relationships between Aboriginal peoples and government.²

The *Moving forward* issues paper suggested that the tribunal offer procedures for groups of people to make applications for reparations. The proposal was based on class actions procedures in the courts. The procedures allow individuals who have a claim that raises common issues of fact or law and which arise from similar or related circumstances, to make a claim together, represented by a member of the class.³

The *Moving forward* meetings supported the tribunal making reparations packages for groups of people and stolen generations organisations. The procedures for class actions are not suited to group outcomes as they only provide for individual class members to receive compensation. The tribunal would need procedures to facilitate group or community claims, such as healing centres or resource centres and memorials.

An emphasis on grouped or community solutions for the stolen generations and their descendants is consistent with the principles of the reparations tribunal.

Recommendation 7

The tribunal provide appropriate reparations measures in response to applications to assist Indigenous people to overcome the harm caused by forcible removal policies, with an emphasis on group resolution of claims.

Compensation

Basis for compensation

Bringing them home recommended that Indigenous people who were removed under duress, compulsion or undue influence be entitled to a one-off payment of compensation. It also recommended that compensation be paid for specific types of harm that are recognised within the current Australian legal framework, such as assault, labour exploitation or loss of culture and land rights. All people affected by the policies could apply for the compensation for specific damages.⁴

Compensation has been a symbolic, political aspect of the claims for reparations for forcible removal policies. This was reflected in the discussions at the *Moving forward* meetings. To many of the stolen generations monetary compensation is important as a measure of recognition of harm. Others find it objectionable that life-changing trauma and grief can be quantified in monetary terms.

Many members of the stolen generations who attended the *Moving forward* conference were concerned about the attention compensation has received in the media. A common view was that compensation should not be allowed to distort public debate about the need for other aspects of reparations.

There was no agreement in the *Moving forward* meetings about the amount of compensation that would be appropriate. Most people's expectations about what compensation could achieve were modest - money to travel to see family, enrolling in Aboriginal language and culture courses or funding for stolen generations' support groups.

The *Moving forward* meetings agreed that compensation should be available to the children who were removed under forcible removal policies and to their families where particular types of harm can be established. In this context, family is understood to mean family members who experienced direct loss and grief, such as parents and siblings. There was also support for descendants to be compensated where they can prove certain types of harm.

Proving damage

Bringing them home and PIAC proposed that people seeking monetary compensation would need to prove the types of damage they have suffered in accordance with the same standards required by a court (on the balance of probabilities). This means an applicant would have to convince the tribunal that it is more likely than not that they suffered the damage or loss. The Canadian and Irish redress programs for sexual abuse require the same standard of proof (discussed in chapter 7).

Applicants and the tribunal are likely to encounter difficulties with evidence given the passage of time since the relevant events. PIAC proposes a number of measures to address these problems. First, the tribunal would need an investigative function so that it would not have to rely on an adversarial process between applicants and governments (or churches) for evidence. Second, the tribunal should not be strictly bound by the rules of evidence or by strict legal formalities or forms, like administrative review tribunals in Australia. This would mean that any cogent and relevant information would be allowed to be considered. The processes used by HREOC for the National Inquiry are an example of how these measures might work.

Third, PIAC also suggests the tribunal be allowed to take into account difficulties in ascertaining facts or circumstances, such as the passage of time and absence of official records. This is based on the powers of the Repatriation Commission, which considers entitlements of war veterans to pensions and compensation for medical treatment.⁵

Even with these measures in place few people are likely to be able to establish proof of damage. The experience of many war veterans, for example, is that they are not able to provide sufficient evidence to satisfy the requirements of the Repatriation Commission.

Applicants who are able to provide evidence are likely to find that the amounts of compensation awarded are modest. The appropriate compensation suggested by the Federal Court in the *Cubillo* case was \$125,000 for Mr Gunner and \$110,000 for Mrs Cubillo for claims including sexual assault and cultural losses.⁶ The amounts were presented in theory only as the Federal Government was not found liable to pay compensation. The maximum amount of compensation offered for victims of crime in most states and territories is \$50,000. However, the amount that has actually been paid is closer to \$4,000 (see page 47).

The project reference group agreed that people affected by forcible removal policies who can show that they suffered particular types of harm should be entitled to compensation. This would include harm such as sexual abuse and labour exploitation. It also agreed that the criteria for deciding the amounts of compensation is a matter for negotiation between governments, churches and the Indigenous peoples, particularly the stolen generations.

Recommendation 8

The tribunal provide monetary compensation to Indigenous peoples affected by forcible removal policies who can prove that they suffered particular types of damage recognised under current Australian law, such as sexual and physical assault or labour exploitation.

Who can apply?

The *Moving forward* meetings and submissions discussed who should be entitled to reparations, other than compensation. In *Bringing them home* HREOC suggested that the following classes of people be entitled to reparations:

- ◆ Indigenous people who were forcibly removed from their families as children
- ◆ family members who suffered as a result of the removals
- ◆ communities that suffered cultural and community disintegration as a result of the forcible removal of children
- ◆ descendants of those forcibly removed who have been deprived of community ties, culture, language, and links and entitlements to their traditional land because of the removals (discussed on pages 10-12).

The definition was widely accepted at the *Moving forward* meetings and in the submissions to the project. However, there was discussion about the place of Indigenous children and young people removed under contemporary welfare policies and the descendants of people removed under the forcible removal policies.

There is a practical problem in defining precisely where and when assimilation policies ceased, and therefore who was 'forcibly removed'. A large proportion of Indigenous children continue to be separated from their families under child welfare systems that *Bringing them home* found to be paternalistic and indirectly racist.⁷

Many people in the *Moving forward* meetings held the view that Indigenous children separated from their families after 1970 should be distinguished from those removed under forcible removal policies. Government policies had changed by 1970 and could no longer be described as a breach of human rights. After 1975 people had the right, in theory, to seek redress for racial discrimination under the *Racial Discrimination Act 1975* (Clth) or to complain to government Ombudsmen. In recent years the role of Aboriginal Child Care Agencies and the adoption of the Indigenous Child Placement Principle have played an important role in changing government approaches to Indigenous child welfare.

However, many descendants of the stolen generations told the *Moving forward* project that their losses need to be recognised. Ms Diane Jarret, Aboriginal Cultural Heritage Research officer, told the national *Moving forward* conference she believes 'the children of the stolen generations' should be recognised for the purpose of reparations as well as future generations. Ms Jarret's mother was a member of the stolen generations. Diane and her siblings were removed from their mother as children in the 1970s and placed in a home as her mother was not able to care for them. The home offered no Aboriginal culture and Ms Jarret grew up confused about her identity and Aboriginal family connection.⁸

Bringing them home recognised that descendants had lost culture and family connection and often grew up with parents who lacked adequate parenting skills. Intergenerational grieving, caring for traumatised parents who suffer from mental illness or substance abuse and loss of family connections were among the impacts identified during the *Moving forward* meetings.

The *Moving forward* project reference group agreed that reparations is for the purpose of making amends for the harm of forcible removal policies. Reparations should therefore be available to those people who were harmed by those policies.

Recommendation 9

The tribunal provide reparations to Indigenous peoples who were removed from their families under forcible removal policies, family members who suffered as a result of the removals and their descendants who suffered harm.

Hearings

Therapeutic purpose

The *Moving forward* meetings, the submissions and the national conference made it clear that the highest of priorities for the stolen generations is to have their experience placed on the official record and acknowledged. Some people also seek an apology or explanation from government officials, clergy who ran institutional homes or perpetrators of physical or sexual abuse. The hearing process was seen as a means to affirm identity and to allow people to move on. The same objectives are used for hearings using the restorative justice model discussed in chapter 7. The inappropriateness of government funded oral history programs to achieve this objective is discussed in chapter 5.

Determining facts

The tribunal would need to make determinations of fact for the purpose of establishing people's entitlement to a reparations package and what the package might most appropriately include. A strong preference was expressed during the *Moving forward* project for the hearing process to be separate from the processes used for making findings of fact. The process to decide facts and entitlements would be best dealt with in a distinct process, where legally defined standards of proof are required. The Canadian redress programs for Indian residential schools are an example of this approach, with hearings held separately from the process of fact-finding and 'validation' of claims.

The process used by HREOC during the National Inquiry also separated the investigation process from the hearings. It recognised the value of hearing and documenting Indigenous people's stories, taking a conscious view that it would hear 'stories' from 'story tellers' rather than 'testimony' from 'witnesses'. The process was effective to describe the effects of forcible removal policies and was necessary to provide the healing function of the Inquiry. According to Sir Ronald Wilson, the National Inquiry was 'careful to ensure it was in line with Indigenous aspirations'. However, the approach has been criticised as lacking an adequate basis for discovering 'facts' according to the usual legal standard of proof. It is said to have confused truths and to have used heart-wrenching accounts of events to fudge selective evidence.⁹

Sir Ronald Wilson says that processes such as cross-examination may have exposed factual errors, but *Bringing them home's* recommendations were not based on any individual story. They were based on documented evidence of government policies, programs and laws found during HREOC's investigations. The stories described the effects of the policies and any discrepancies within the stories were peripheral to the wider findings.¹⁰

Protecting personal information

Many people expressed concerns about protecting their personal stories and other information collected by the tribunal. Most participants in the *Moving forward* meetings wanted the information collected by the tribunal to be kept secure and not to be published or used in any way without their consent. The potential for people's stories to be used in litigation caused a great deal of distress in the Northern Territory. People had been reluctant to seek the help of counselling services or contribute to the National Library Oral History project for fear that records of their comments could be subpoenaed.¹¹ Some people also said they resent the stories they had told the National Inquiry being reproduced by other authors in subsequent publications.

Privacy laws in Australia require personal records to be kept secure and prohibit the use of records for purposes other than the purpose for which they were collected without consent. However, these laws cannot prevent the use of personal information authorised under other laws, including the authority of the courts to subpoena documents.¹² There are no laws protecting the privacy of personal information held by state and territory government agencies, except in NSW and Victoria.

There are precedents for protecting the identity of people involved in proceedings involving children and families. For example, parties to cases in the Family Court and in children's courts are not allowed to be identified. Applicants to the proposed reparations tribunal should be informed of their rights to privacy of personal information and any limitations on those rights.

Processes

The importance of the proposed tribunal providing a supportive environment for people to tell their story and have it acknowledged was stated frequently during the *Moving forward* project. A number of measures were suggested to achieve this:

- ◆ build trust in the tribunal through widely publicising its existence, procedures and the outcomes that are available through reparations packages
- ◆ ensure processes are flexible and reflect the diverse needs and wishes of applicants and Indigenous communities
- ◆ provide applicants with information and support throughout their dealings with the tribunal with culturally appropriate counselling and support services.

Close links with organisations such as Link Ups, appropriate counselling services, stolen generations support groups, Aboriginal health services and Aboriginal legal services would be essential to ensure the tribunal could to make appropriate referrals. Link Up information and support services, assistance with tracing records, arranging reunions, research and certification of descent would complement the work of the tribunal.

Participants in the *Moving forward* meetings and submissions to the project expressed a variety of views about the types of hearing processes that the tribunal should adopt. One option was for people to tell their story in a private setting in the local community with the participation of local Indigenous elders. Another was formal public hearings of the tribunal with an official apology provided as part of the process – akin to the Waitangi Tribunal. Some people supported a 'welcome home' ceremony where the community symbolically welcomes back a person who had been removed. Link Ups already provide support for family reunions that can include welcome home ceremonies, but they are not able to meet the demand for this service.

The *Moving forward* meetings agreed that individual applicants to the tribunal should be able to show that they are people of Aboriginal or Torres Strait Islander descent affected by forcible removal policies. A part of the legal requirements for establishing Indigenous identity is recognition of a person as Indigenous by an Indigenous community. The meetings agreed that the tribunal should recognise organisations such as Link Ups and Aboriginal and Islander Child Care Agencies as Indigenous communities for the purpose of certifying descent.¹³

Most people in the *Moving forward* meetings supported the initial application process requiring only a certificate of Indigenous identity and a brief statement about the circumstances and impact of the removal. Applicants who are seeking a reparations package that does not include compensation would not need to provide further information, unless their claim is contested.

Most *Moving forward* meetings and submissions supported PIAC's suggestion that lawyers have a limited role in the tribunal. The *Moving forward* issues paper suggested that legal representation be allowed where the tribunal believes that not to do so would prejudice the applicant.

There was strong support for applicants to be assisted by someone other than a lawyer if they wish, such as a friend, counsellor or advocate.

Recommendation 10

10.1 The tribunal conduct hearings primarily to hear people's stories and document their experiences, with fact-finding for the purpose of verifying claims conducted through a separate, non-adversarial process.

10.2 The tribunal be accessible and accountable, widely publicising its procedures and the reparations measures available.

10.3 The tribunal protect personal information of applicants, unless applicants consent to its publication or other use.

Membership and structure

The membership and structure of the tribunal were the subject of many varied views during the *Moving forward* consultations. However, a number of elements of the tribunal proposal were widely supported:

- ◆ the tribunal be a partnership of governments, churches and Indigenous peoples, including the stolen generations but independent of all of them
- ◆ the members of the tribunal be appointed by the partners according to set criteria for relevant skill and expertise
- ◆ maximum funding for reparations be made available and the cost of administering the tribunal be minimised as far as possible
- ◆ the tribunal have a state and local level presence and influence.

The *Moving forward* meetings strongly supported a tribunal structure that would minimise the cost of administration. A separate infrastructure for the tribunal was not supported. Instead, the meetings supported a tribunal that utilised the resources of appropriate, existing organisations. There was a variety of views on the organisations that would be most appropriate to auspice the tribunal. Some people suggested HREOC or ATSIC as possibilities. Many people favoured the tribunal having links to local communities and a permanent local or regional presence. This could only be accommodated with the use of existing

organisations. Essential requirements would be independence from the stolen generations who would be applying for reparations, but an understanding of their needs.

The need for the tribunal to have a presence at state and territory level was emphasised in a number of *Moving forward* meetings, particularly the meetings in South Australia, Western Australia and Victoria. Many practical aspects of reparations are the responsibility of state and territory governments, such as record keeping and child welfare laws. An understanding of the policies and practices in each state would be essential for tribunal decision-makers.

There were a range of views about the membership of the tribunal at the *Moving forward* meetings and in the submissions to the project. The need for tribunal members to be appropriately skilled was emphasised - cultural awareness and an understanding of the trauma of forcible removals were regarded as important attributes. Members of the tribunal would need to be provided with training about the trauma experienced by members of the stolen generations so that they could respond appropriately.

Most people supported tribunal members being appointed by agreement of all project partners, not just appointed by government. Some people said the tribunal should be made up entirely of the members of the stolen generations, but most supported a balance of Indigenous and non-Indigenous people with appropriate skills. Many people said tribunal members should be under an obligation to act in the best interests of applicants and to avoid conflicts of interest.

Recommendation 11

The tribunal be a partnership of governments, churches and Indigenous peoples, including the stolen generations, with the following features:

- ◆ members are appointed by the partners according to set criteria for relevant skills and expertise
- ◆ maximum funding for reparations be made available and the cost of administering the tribunal be minimised as far as possible
- ◆ local level presence in the community
- ◆ structures to influence state and federal government activities.

Implementation

PIAC proposed a legislative basis for the tribunal, based on a national legislative scheme. The *Moving forward* meetings supported a legislative basis for the tribunal. The meetings identified the need for state governments to play their part in providing reparations. Some submissions to the project were concerned that state governments are relying on the Federal Government to avoid fulfilling their own responsibilities.

PIAC's proposal that state and federal governments fund the tribunal, with voluntary contributions from the churches involved in administering forcible removal policies, was generally supported. There were mixed views on whether the churches should be expected to contribute to funding of the tribunal and its reparations measures. According to the report of the Senate Committee, some churches have indicated that they are willing to contribute to a national compensation fund if such a fund is established by the Federal Government.¹⁴

Jarrah, a stolen generations group in New South Wales, supports funding for the tribunal coming from a levy on all taxpayers so that the whole community takes some responsibility.

The Federal Government's opposition to the tribunal makes it impractical to continue to pursue a national model tribunal at present. State governments could implement the revised model tribunal as part of their policy commitment to reconciliation and partnership with Indigenous communities. The success of the Journey of Healing, as a community initiative with minimal funding, in bringing people together for reconciliation and healing, demonstrates the benefits of local and regional initiatives. State and territory government tribunals could be established in partnership with ATSIC and stolen generations groups.

The fundamental features of the tribunal could be delivered with modest financial support. It primarily requires a process for conducting hearings and acknowledging experiences, provision for memorials, funding for resource and cultural centres, and financial subsidies for family reunions. The cost of conducting hearings and providing appropriate reparation packages need not be prohibitive. HREOC conducted its National Inquiry over 18 months for \$1.8 million, a fraction of the funds spent on litigation so far.

The recommendations from this project require governments and churches to review their reparations programs with the participation of the stolen generations. The programs, like the tribunal, must be developed in close consultation with Indigenous peoples, especially the stolen generations.

Recommendation 12

State, territory and federal governments and the churches develop and implement a process to establish a reparations tribunal in close consultation with ATSIC and stolen generations groups.

Notes

- 1 See chapter 3; Submission to the Senate Inquiry into the Stolen Generations 2000, PIAC, already cited.
- 2 The programs are discussed in chapter 6.
- 3 For example, *Federal Court of Australia Act 1976* (Clth), Part IVA.
- 4 *Bringing them home*, recommendations 14 and 19.
- 5 *Veterans' Entitlement Act 1986* (Clth), especially section 119.
- 6 Clarke, already cited, p 284; *Cubillo v Commonwealth* (2000), already cited, pp 577.
- 7 *Bringing them home*, pp 453 - 460.
- 8 Diane Jarret, *Healing ourselves, Moving forward* conference papers, already cited.
- 9 Patrick Carylton, 2001, 'White lies', *The Bulletin*, 12 June 2001, 26, p 28.
- 10 as above.
- 11 *Healing: a legacy of generations*, p 48.
- 12 *Privacy Act 1988* (Clth).
- 13 *Bringing them home*, recommendation 13.
- 14 *Healing: a legacy of generations*, pp 259 - 260.

GLOSSARY

ATSIC – Aboriginal and Torres Strait Islander Commission

CAR – Council for Aboriginal Reconciliation

Bringing them home – report of the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997

Healing: a legacy of generations – report of the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations, 2000

HREOC – Human Rights and Equal Opportunity Commission

Link Up – Indigenous community based organisations providing family reunion services primarily with funding from the Federal Government

MCATSIA – Ministerial Council of Aboriginal and Torres Strait Islander Affairs

NACCHO – National Aboriginal Community Controlled Health Organisations

National Inquiry - National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families conducted by HREOC during 1995-1996

NSDC – National Sorry Day Committee

OATSIH – Office of Aboriginal and Torres Strait Islander Health, Department of Health and Aged Care (now Department of Health and Ageing)

Senate Committee - Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations, 2000

Social Justice Report – annual report to the Federal Attorney General by the Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC

1. Sydney, 20 March 2001, 10.30am – 3.00pm

Facilitators: Lola Edwards, NSDC (NSW), and Barry Duroux
Link Up NSW, both members of PIAC's Stolen Generations Reference Group

Meeting participants:

There were 14 participants - 7 men and 7 women - predominantly members of the stolen generations from Sydney and Bateman's Bay. Many of the women grew up together in the same institution. Participants included individuals, community activists, workers for Aboriginal health and legal services, people who work for State Government agencies (justice and community welfare), Aboriginal counsellors, and Link Up. Two PIAC lawyers and a policy officer from ATSIC also attended.

Primary issues:

- ◆ there was a strong theme of self-determination for Indigenous people and for members of the stolen generations to make decisions for themselves.
 - ◆ the need for discriminatory and genocidal practices of governments to be acknowledged was raised repeatedly.
 - ◆ there was emphasis on the need for the tribunal to have timely and supportive processes with appropriately trained indigenous therapists, lawyers and other support people drawn from the Indigenous community.
 - ◆ the term 'reparations' was rejected - people need a word that they can identify with.
 - ◆ compensation, and how it might work, was an important topic for the group.
-

2. Sunshine Coast, 3 April 2001, 9.30am – 2.00pm

Facilitator: Judi Wickes, National Sorry Day Committee

Meeting participants:

There were 11 participants - four men and seven women. The participants included individual members of the stolen generations from the local area, some people who were only just beginning the process of finding their Aboriginal family, Indigenous people working for Aboriginal health services, Queensland Health and the Department of Families and Link Up.

The ATSIC Commissioner for Brisbane gave apologies and met with the project worker later that day to discuss the project and hear what the group had said.

Primary issues:

- ◆ There was considerable anger and frustration about the amount of talking and lack of tangible action.
 - ◆ There was a strong theme that the tribunal should be 'by black people, for black people'. There was resentment about other people claiming to speak on behalf of the stolen generations.
 - ◆ The group spent quite some time discussing Aboriginal identity and how the tribunal's processes should be structured to avoid insults and alienation.
 - ◆ There was concern that Aboriginal children face greater challenges than ever.
 - ◆ The tribunal should harness the existing knowledge in the Indigenous community
-

through mechanisms such as training Indigenous fact finders, recognising the role of elders, and processes of community participation.

- ◆ The need for appropriate counselling services, Link Ups and cultural and family education was identified as a priority.
-

3. Bathurst (NSW), 11 April 2001, 10.30am – 1.00pm

Facilitators: Lola Edwards, National Sorry Day Committee and Carol Kendall, National Sorry Day Committee

Host: Bathurst Aboriginal Land Council

Meeting participants:

There were five participants – two women and three men. One participant identified as a member of the stolen generations, another identified as a descendant of the stolen generations. The others were members of the local Aboriginal community.

Primary issues:

- ◆ A major issue was Aboriginal identity – how the community identifies those removed, the insults of government proof of identity processes, the extent of the loss of language and culture in the Bathurst area.
 - ◆ The need to address the problems of the current generation of Aboriginal children. A legacy of removals is reluctance to engage with government services such as schools and health services.
 - ◆ The tribunal needs to be designed to give recognition to people's feelings. Community processes, such as group discussions should be available, not just one on one interviews or public hearings.
 - ◆ The distressing experience of finding and reading personal files dominated much of the discussion. The insulting language, false claims, the type of information recorded, lost files. People need support and counselling through this process.
-

4. Perth, 20 April 2001, 9.30am – 3.00pm

Facilitators: Rosalie Fraser, NSDC

Host: Aborigines Advancement Council

Meeting participants:

There were 19 participants - 10 men and 9 women. Almost all the participants were members of the stolen generations from Perth, Albany and Geraldton. They included a Link Up worker, counsellors from the Aboriginal health service (Derbarl Yerrigan) and people working for the WA Department of Health.

Primary issues:

- ◆ One of the key issues was the need for recognition of the role of people telling their stories in the community, and support from individuals in the community, as part of counselling, not just mental health professionals.
- ◆ There were serious concerns about record keeping by government and churches – the offensive language used, lost and destroyed records, and continuing difficulties in obtaining records.

- ◆ People did not feel confident about the privacy of information collected by the National Library's Oral History project.
- ◆ There was strong support for members of the stolen generations to control decisions about them through a process of election of representatives.
- ◆ Definitions of 'stolen generations' and 'forcible removal' were discussed.
- ◆ A permanent regional and local presence for the tribunal was regarded as fundamental.
- ◆ Compensation and the role of litigation took up a substantial part of the discussion. Many people felt that the restrictions on the right to sue the WA government (strict limitations periods) were racially based.

The group enjoyed a live performance from local stolen generation musician, Fred Penny. Fred had written a song especially for the occasion entitled 'Lowitja, Lowitja'.

5. Broome, 27 April 2001, 9.30am – 1.30pm

Facilitator: Mark Bin Bakar, Kimberly Stolen Generations Corporation

Host: ATSIC - Kullarri ATSIC Regional Council

Meeting participants:

There were 14 participants - seven men and seven women. Most of the participants had been separated from their families and grew up at the Catholic Mission at Beagle Bay. The others identified as their descendants. The participants included the Chairperson of the Kullarri ATSIC Regional Council.

Primary issues:

- ◆ a major theme was the need for the tribunal to have a permanent local community presence but also for their stories to be heard nationally – 'we are sick of telling our stories to each other in the bush'.
- ◆ the deep personal feelings of permanent alienation from family, loss of culture and right to land are strongly felt. The desire to own land as stolen generation people, and the effects of the native title process were significant.
- ◆ the Corporation is seeking a place to provide its Link Up service and to carry out its support and advocacy activities.
- ◆ the definition of who is the stolen generation was discussed. The Corporation has a definition in its membership criteria but this is under review.
- ◆ there were concerns about the effect and ownership of the stories they have told to the National Library, the Human Rights and Equal Opportunity Commission, and lawyers.
- ◆ the group spent some time discussing monetary compensation, the harm that it would be redressing and the practical uses of the money.
- ◆ the group discussed the *Gunner* and *Cubillo* cases and whether the tribunal offers justice. They want expert, independent legal advice so that they know their rights are being protected.

6. Darwin, 30 April 2001, 10.30pm – 3.30pm

Facilitators: Toni Ah-Sam, Northern Territory Stolen Generations Corporation and Jane Vadivelloo

Host: Vikkie Hoult, acting Chairperson, Northern Territory Stolen Generations Corporation

Meeting participants:

There were 26 participants - five men and 21 women. Most participants were separated from their families and grew up in institutions in the Darwin area. Participants were members of local associations that represent the people who grew up in each home. For example, the Garden Point Association. Members of the Retta Dixon Home Aboriginal Corporation chose not to attend the meeting.

Primary issues:

- ◆ a major theme was the right for members of the stolen generations to speak for themselves and make decisions on matters affecting them.
 - ◆ the role of litigation as a legal and political strategy was a dominant issue – reflecting the impact of the *Gummer* and *Cubillo* claim and the *Kruger* case.
 - ◆ there was a strong view that only the courts will deliver justice and the tribunal may not, at least in terms of compensation.
 - ◆ the outcomes sought from the tribunal included place and land, telling your story, a Bill of Rights and monetary compensation. The need for people to be able to tell their story in a private and confidential setting was expressed by many.
 - ◆ there was a discussion of definitions of ‘stolen generations’, based on the definition used by the various local associations and the Northern Territory Stolen Generations Corporation.
 - ◆ there was a long discussion on the most appropriate scheme for monetary compensation, who should be entitled and to how much.
-

7. Alice Springs, 2 May 2001, 9.30am – 4.30pm

Facilitator: Jane Vadiveloo

Host: Zita Wallace, Central Australian Stolen Generations and their Families Corporation

Meeting participants:

There were 14 participants - seven men and seven women. All were members of the Central Australian Stolen Generations and their Families Corporation. Most had grown up in institutions in the Northern Territory, and many had grown up together. Some identified as descendants of the stolen generations.

Primary issues:

- ◆ a key issue was lack of recognition of members of the stolen generations by Aboriginal organisations, even though the community and clan groups recognised and welcome them as part of the community.
- ◆ a significant theme was the need to recognise the suffering of Aboriginal mothers who had their children removed from them.
- ◆ Priorities for reparations include measures to address contemporary removal, more funding for organisations such as Aboriginal Child Care Agencies and community education.
- ◆ the need for appropriate counselling to support people in their journey of healing and particularly when telling their story was identified.
- ◆ there was an emphasis on the need for stolen generations people locally to manage services that are targeted to assist them. The Corporation now runs Link Up in Alice Springs and is a very effective advocacy organisation.
- ◆ the need for the tribunal to have a permanent local presence was discussed. There should be field officers and fact finders as well as appropriate counselling and support for applicants.

- ◆ There was strong interest in monetary compensation, the types of schemes that might be used and the practical uses people would make of the money.

Meeting with UN Special Rapporteur on Racism

The meeting adjourned from 12.00 to 2.00pm to meet with the UN Special Rapporteur on Racism and his assistant who happened to be visiting Darwin on that day. Participants had the opportunity to tell their individual stories and to raise their concerns as a group. The Special Rapporteur said it was one of the most moving presentations he has attended.

The Special Rapporteur undertook to take up three issues in his meetings with Government during his visit to Australia and in his report to the UN. The three issues were contemporary removal of Aboriginal children from their families, the misdirection of the \$63,000,000 intended for the stolen generations and the group's aspiration for a reparations tribunal, recognising that this first requires an apology.

8. Adelaide, 11 May 2001, 9.30am – 2.00pm

Facilitator: Richard Young, for Link Up

Host: Link Up & Nunkuwarrin Yunti

Meeting participants:

There were 19 participants - four men and 15 women. The participants included individuals who are members of the stolen generations – some grew up in mission institutions, some fostered, and some who had only recently discovered their Aboriginal family ties. There were also people who identified as descendants of the stolen generations. They were also Indigenous counsellors, workers from Aboriginal health and legal services, from ATSIC, and Link Up, as well as Indigenous staff of state government agencies (State Records and Aboriginal Affairs) and Catholic Education. Some non-Indigenous members of the National Sorry Day Committee also attended.

Primary issues:

- ◆ the group were very interested in the litigation across Australia, and the difference between how issues are defined by the courts and by the tribunal.
- ◆ a key theme was the need to recognise inter-generational grieving and loss of family functionality, so that the mental health problems and the burden of looking after anguished parents are recognised.
- ◆ the group agreed that there should be some international supervision of the tribunal, possibly through UN membership.
- ◆ distrust of government agencies in keeping information private was a strong theme - people must be able to control who has access to their information.
- ◆ the group emphasised the need to ensure people tell their stories in the appropriate context, allowing for the unspoken knowledge about people's lives and accommodating the potential impact on other individuals.
- ◆ during the discussion of compensation people suggested the option of having individual claims pooled for use in community programs or services – the ultimate in self-determination.

9. Melbourne, 17 May 2001, 10.30am – 2.00pm

Facilitator: Marjorie Thorp, PIAC stolen generations reference group

Hosts: Victorian Aboriginal Health Service, Fitzroy Vic
Ms Daphne Yarram, Binjirru Regional ATSIC Council
Mr Troy Austin, Tumbukka Regional ATSIC Council

Meeting participants:

There were 19 participants - 10 men and 9 women. The group included local members of the indigenous community and clients of the Victorian Aboriginal Health Service. Most were people working for Indigenous organisations - a worker from a regional Aboriginal Cooperative, workers from Aboriginal health and legal services, ATSIC, Link Up workers, and workers from the Victorian Aboriginal Child Care Agency. The chairpersons of the ATSIC Binjirru and Tumbukka Regional Councils also participated. A number of participants were non-Indigenous people who work for Aboriginal organisations.

Primary issues:

- ◆ a strong message was the view that there is a different legal system for Aboriginal people. Political solutions are needed to provide redress.
- ◆ the extent of child abuse in the Indigenous community, and the need for the community to develop responses was raised as a most important issue.
- ◆ the requirements for establishing Aboriginal identity are a barrier for many people. Genealogy is becoming critical with native title.
- ◆ the tribunal should be state based rather than national as Aboriginal people are mostly affected by state laws, programs and institutions.
- ◆ cultural concepts should drive solutions, and community processes and elders should be part of the process.
- ◆ the definition of forcible removal should take into account the wider legal and social circumstances of Aboriginal people of the day, and the impacts of removals on those left behind.
- ◆ tribunal processes and outcomes should provide for family and group claims to reflect how people are affected and the best outcomes for them.
- ◆ people indirectly affected by removals, such as family members, descendants, and non-indigenous parents, should be recognised as 'co-affected' applicants.
- ◆ the tribunal should be linked to discussions about treaty. The legal basis of the tribunal, its capacity to make binding decisions, is fundamental.

10. Hobart, 18 May 2001, 9.30am – 1.00pm

Facilitator: Ms Debra Chandler, National Sorry Day Committee

Meeting participants:

There were 8 participants - 2 men and 6 women. Participants included non-Indigenous members of the National Sorry Day Committee, a priest of the Uniting Aboriginal and Islander Christian Congress, Indigenous members of the National Sorry Day Committee.

The ATSIC Commissioner for Hobart was not able to attend the meeting but met with the project officer later that day to discuss the issues. Notes from that discussion are incorporated below.

Primary issues:

- ◆ the dominant issue was the struggle for recognition of identity for the stolen generations. Many people, including some Indigenous leaders in Tasmania, do not accept there is a stolen generation. Definitions of 'forcible removal' and 'stolen generations' are quite contentious.
 - ◆ recognition of Aboriginal identity is difficult and divisive in Tasmania. The community and elders are more accepting than organisations. Link Up has a potentially central role in verifying a person's Aboriginal identity.
 - ◆ the need for a stolen generations support group, independent of services such as Link Up, and health services, was identified as a priority.
 - ◆ the need for people to tell their story as part of their healing is still important. The need for people to have the opportunity to talk to a significant person who was present at the time of removal was discussed.
 - ◆ community education was identified as a priority outcome from the tribunal.
 - ◆ the tribunal needs to have state based structures as that is the level at which problems need to be addressed. Obtaining records is still difficult in Tasmania, and the tribunal could be a catalyst for a formal government policy.
 - ◆ addressing the mental health needs of those removed is essential. The healing focus of the tribunal should be paramount.
-

Main themes in submissions and meetings

Appendix 2

There were some common themes at all *Moving forward* meetings. The individual and collective harm, loss and grief experienced by the stolen generations and their families were expressed at every meeting. There was clearly a great need for information about government decisions and services affecting the stolen generations. Other common themes were:

- ◆ a full apology and acknowledgment from the Federal Government is fundamental to moving forward
- ◆ what happened to the \$63 million dollars committed by the Federal Government in response to *Bringing them home?*
- ◆ modest and practical ideas about how financial compensation would assist – mostly to pay for travel to see family
- ◆ the depth of harm can never be adequately compensated by money - payment of small nominal amounts would be insulting and unacceptable
- ◆ government and church records are significant as proof of what happened to people, the attitudes that formed the basis of decisions about their lives, and for tracing family
- ◆ people are tired of talking and feel the need for action is urgent
- ◆ members of the stolen generations seek a voice of their own, often through organisations, and input into and control of services targeting them
- ◆ a pervasive sense of distrust of government agencies
- ◆ the tribunal's processes must be simple and supportive and recognise the needs of people at different stages of the journey of healing
- ◆ the problems faced by the current generation of Indigenous children and young people need to be addressed urgently.

There were different views on some aspects of the tribunal proposal:

- ◆ whether the functions of the tribunal should be limited to responding to applications, or should also include monitoring government programs and funding community projects;
- ◆ the membership of the tribunal and how members are appointed;
- ◆ definitions of the stolen generations and who should be entitled to reparations, and compensation;
- ◆ the name of the tribunal – many are alienated by the word ‘reparations’ and ‘tribunal’ has bad associations for some;
- ◆ the type of scheme that should be used to provide individual compensation;
- ◆ the ability of the courts (legal claims) to provide justice and whether the tribunal would have a positive or negative affect on rights and redress;
- ◆ the extent to which the tribunal should have a local, state or national presence;
- ◆ the culpability of the churches and the role they should play in the tribunal.

All the written submissions to the project supported the tribunal as an alternative to litigation and as a social justice initiative. There was also support for a reparations tribunal in submissions to the Senate Inquiry from Indigenous organisations, although some were sceptical. The submission of the Retta Dixon Home Aboriginal Corporation to the Senate Inquiry expressed concern that the tribunal would undermine legal rights that are currently being sought through litigation.

The written submissions to the project emphasised the need to ensure that the tribunal has strong links to communities. They also discussed the importance of the tribunal having links to complementary services such as Link Up and appropriate counselling. Winangali emphasised the importance of the tribunal to have processes to keep people safe, while the Wuchopperen Health Service emphasised the need for support through the application process.

The burden for descendants of the stolen generations was the focus of a number of written submissions (Central Australian Aboriginal Legal Aid Service and the Sacred Site Within Healing Centre). Most submissions supported the tribunal having some role in addressing the problems of contemporary removals, but recognised that it would be limited.

Most submissions supported state and federal governments funding the tribunal, but there were some alternative views. Jarrah suggested a levy on all taxpayers so that the whole community takes some responsibility. There was no clear view of the role of the churches in the tribunal.

The need for tribunal members to be appropriately skilled, with substantial representation from the stolen generations was raised in some submissions. The appointment of members should not be only a matter for governments to decide – Indigenous communities should be involved in the decisions.

The submissions from the National Aboriginal and Torres Strait Islander Catholic Council and the National Council of Churches Aboriginal and Islander Commission emphasised that the tribunal must be based on a full acknowledgment of the wrongs of forcible removals. The church submissions regarded the tribunal’s most appropriate role as responding to applications from individuals, groups and communities. Both were critical of the short time frame and limited extent of the consultation process used by the project.

General issues

1. That the federal, state and territory governments and the churches fully implement the recommendations of *Bringing them home*.
2. That governments and churches ensure the effective participation of stolen generations members in all decision making that affects them.
3. That the Federal Government apologise to the stolen generations in accordance with recommendation 5 of *Bringing them home*.
4. That the Federal Government provide annual funding to convene national conferences for the stolen generations.
5. That current funding arrangements be extended to provide adequate funding for National Sorry Day activities.
6. That human rights be constitutionally protected, as a guarantee against repetition.
7. That genocide be specifically prohibited by Commonwealth legislation.
8. That ATSIC, in collaboration with representative stolen generations organisations, disseminate these recommendations.

Identity, tracing and family records

9. That all levels of government and church agencies fully maintain all records relevant to institutions, and implement the recommendations in *Bringing them home* in relation to records management.
10. That state and territory governments waive all fees associated with retrieving and amending birth, marriage and death certificates of members of the stolen generations and their descendants so that they reflect their natural birth parents.
11. That the practice of burying members of the stolen generations with a grave identified by a number, rather than a name, be rectified by the establishment of a fund to pay for the funerals of members of the stolen generations, where appropriate.

Family re-union and counselling

12. That Federal Government funding for reunion and counselling services be the subject of adequate consultation with stolen generations members to ensure that it better meets the specific needs of members of the stolen generations. Participants were concerned that the current funding arrangements do not ensure that resources are being allocated to the appropriate organisations (particularly for counselling services)
13. That the Federal Government ensure, as an urgent priority:
 - ◆ funding for Indigenous counsellor positions is made available;
 - ◆ training and skills development for Indigenous counsellors include reference to the particular needs of the stolen generations (the Muramali Project was seen as a model in this regard); and

- ◆ all course curricula for Indigenous health studies incorporate stolen generations issues and healing principles.

14. That the Federal Government provide recurrent funding to Link Up for counselling services, family reunions and annual reunions of people removed to the same institutions.

15. That current funding arrangements be extended to provide ongoing counselling, relationships and parenting support for stolen generations members.

Memorials

16. That federal, state and territory governments consult with members of the stolen generations and their representative organisations in relation to maintaining former institutions of removal as memorial, monuments or historical sites. For example, that the NSW Government consult with people removed to Cootamundra Girls Home (now Bimbadeen College) about the maintenance of the site as a memorial; that Moore River native settlement/Mogumber Mission be restored to its original state and preserved as a memorial to the stolen generations, following consultation with those formerly removed to the institution.

Community Education

17. That reparations include community education and recognition of the experiences of removal.

Compensation

18. That a reparations package include financial compensation for people who were harmed by forcible removal policies. Compensation should take into account individual experiences and loss.

Reparations tribunal

19. That a reparations tribunal be established, following effective consultation with stolen generations members and their representative organisations.

20. That the tribunal be established as a partnership of government, churches and Indigenous organisations, including the stolen generations.

21. That the tribunal be funded by the federal and state governments and the churches who implemented the removal policies.

22. That the majority of the tribunal's membership be comprised of stolen generations representatives from all states and territories.

23. That the reparations tribunal have the following functions:

- i) to hear peoples' stories;
- ii) to investigate applications and obtain documents from governments and church agencies;
- iii) to grant reparations, including compensation;
- iv) to assist in the design of reparations programs;
- v) to make recommendations about policies and practices regarding past forcible removals, eg access to records, mediation and negotiation processes between

- territory, state and federal governments and stolen generations groups;
- vi) to make recommendations about policies and practices regarding contemporary separation of Aboriginal and Torres Strait Islander children from their families, including through the care and protection and juvenile justice systems;
 - vii) to make recommendations to governments in terms of the *Bringing them home* Report; and
 - viii) to carry out any other functions identified through consultations and negotiations with the members of the stolen generations and their families.

24. That the tribunal receive applications from individuals, families, communities and groups of people removed to the same institution.

25. That descendants of those forcibly removed be entitled to bring applications before the tribunal and receive reparations to deal with the ongoing consequences of removal.

26. The tribunal will:

- i) liaise broadly with existing service providers at all levels of government; with Indigenous organisations such as ATSIC, land councils, and the Indigenous Land Fund; and with the churches;
- ii) negotiate with the applicants to determine the appropriate package of reparations (in accordance with the principle of self-determination) and seek to reach a consensual agreement regarding the provision of such reparations; and
- iii) have expedited procedures to prioritise applications from applicants to the tribunal who are old or sick or those making applications on their behalf.

27. That the tribunal must be represented in and accessible to people living in regional areas.

28. That HREOC, ATSIC and PIAC, in collaboration with representative stolen generations groups, design and implement a process of further consultation about a reparations tribunal.



Appendix B

Draft Stolen Generations Reparations Bill

2008

The Parliament of the
Commonwealth of Australia

THE SENATE

Stolen Generations Reparations Tribunal Bill

2008

No. , 2008

**A Bill for an Act to provide for the establishment of a Tribunal to
decide and make recommendations on claims for Stolen
Generations reparations and other matters**

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A Bill for an Act to provide for the establishment of a Tribunal to decide and make recommendations on claims for Stolen Generations reparations and other matters

The Parliament of Australia enacts:

1. Short title

This Act may be cited as the *Stolen Generations Tribunal Act 2008*.

2. Commencement

This Act commences on the day on which it receives the Royal Assent.

3. Interpretation

In this Act, unless the contrary intention appears:

Aboriginal or Torres Strait Islander person means anybody who identifies as an Aboriginal or Torres Strait Islander descendant as defined in the *Aboriginal and Torres Strait Islander Act 2005*.

Australian government means the government of the Commonwealth of Australia or the government of an Australian State or Territory.

Eligibility Criteria means the criteria which determine whether a claimant for reparations is eligible for reparations as set out in section 11.

ex gratia payment means a payment referred to in section 10.

Indigenous means Aboriginal or Torres Strait Islander.

the Principles means the Principles set out in subsection 4(3).

Stolen Generations means persons eligible for reparations under this Act.

Stolen Generations Fund means the Fund established by section 14.

Tribunal means the Stolen Generations Reparations Tribunal established by this Act.

Van Boven Principles means the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* (UN Doc E/CN.4/Sub.2/1996/17, 24 May 1996) drafted in 1996 by Professor Theo van Boven.

4. Stolen Generations Reparations Tribunal and establishing Principles

- (1) A tribunal, to be known as the Stolen Generations Reparations Tribunal, is established by this Act.
- (2) The Tribunal is established in recognition of the Principles.
- (3) The Principles are:

-
- (a) Acknowledgement that forcible removal policies were racist and caused emotional, physical and cultural harm to the Stolen Generations.
 - (b) Indigenous children should not, as a matter of general policy, be separated from their families.
 - (c) The distinct identity of the Stolen Generations should be recognised and they should have a say in shaping reparations.
 - (d) Indigenous people affected by removal policies should be given information to facilitate their access to the Tribunal and other options for redress.
 - (e) Reparations measures for the effects of forcible removals should be guided by the Van Boven Principles.

5. Composition of the Tribunal

- (1) The Tribunal shall consist of six members, at least half of whom must be Aboriginal or Torres Strait Islander persons.
- (2) The Attorney-General must by writing determine a code of practice within 15 days of the commencement of this Act, for selecting persons to be nominated by the Attorney-General for appointment as members of the Tribunal, that sets out general principles on which the selections are to be made, including but not limited to:
 - (a) merit; and
 - (b) independent scrutiny of appointments; and
 - (c) probity; and
 - (d) openness and transparency.
- (3) After determining a code of practice under subsection (1), the Attorney-General must publish the code in the *Gazette*.
- (4) A code of practice determined under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (5) Schedule 1 has effect in relation to the Tribunal.

6. Functions of the Tribunal

The Tribunal has the following functions:

- (a) to decide whether a claimant is eligible for reparations or an ex gratia payment;
- (b) to decide on appropriate reparations to be granted in response to a claim;
- (c) to decide on the appropriate amount of any ex gratia payment to be made in response to a claim;
- (d) to promote a process of truth and reconciliation;

-
- (e) to consider proposed legislation;
 - (f) to consider prejudicial policies and practices; and
 - (g) such other functions as may be prescribed.

7. Powers of the Tribunal

- (1) The Tribunal has power to do all things necessary or convenient to be done to perform their functions and, in particular, has power:
 - (a) to obtain information from departments and agencies; and
 - (b) to obtain further information from the claimant, if unable to decide from the information obtained under paragraph (a) whether a claimant is eligible for reparations.
- (2) The Tribunal may exercise their powers notwithstanding any other legislation relating to the confidentiality or privacy of information.

8. Entitlement to reparations

- (1) Subject to section 10, Tribunal shall award reparations on a claim under this Act if the claimant satisfies one or more of the Eligibility Criteria.
- (2) Monetary reparations are payable from the Stolen Generations Fund.

9. Reparations

- (1) The Tribunal may award reparations in the form of:
 - (a) resources for stolen generations groups to provide culture and history centres, or healing centres, including funding for land or premises;
 - (b) community education programs about the history of forcible removals;
 - (c) community genealogy projects for Indigenous communities to help identify membership of the Stolen Generations and their dependants;
 - (d) monetary payments for individuals to meet current needs such as funding to travel to see family;
 - (e) access to appropriate counselling services;
 - (f) access to appropriate health services;
 - (g) access to language and culture training;
 - (h) memorials that appropriately reflect the views of members of the Stolen Generations; and
 - (i) monetary compensation.
- (2) The Tribunal may award one or more of the forms of reparations set out in subsection (1) in response to a claim.

-
- (3) The Tribunal may award reparations in the form set out in subsection (1)(i) to people who can prove that they suffered particular types of harm, such as sexual or physical assault.
 - (4) The Tribunal may vary the forms of reparations set out in subsection (1) as it sees fit.
 - (5) The Tribunal shall have regard to the Van Boven Principles in varying the forms of reparations set out in subsection (1).
 - (6) The Tribunal shall where practicable award reparations that maximise group rather than individual outcomes.
 - (7) In awarding reparations, the Tribunal must take into account whether the claimant has received an ex gratia payment under s 10, the nature and extent of any reparations received by the claimant under State or Territory legislation and any damages or compensation received by the claimant at common law or otherwise.
 - (8) If the Tribunal is satisfied that reparations should be awarded on a claim, the Tribunal must:
 - (a) notify the Trustee of the Stolen Generations Fund of the amount to be disbursed to cover the cost of the award; or
 - (b) recommend the reparation measure for action by the relevant government, church or non-government body.
 - (9) For the avoidance of doubt, for the purposes of this Act an ex gratia payment is not a form of monetary compensation.

10. Ex gratia payments

- (1) The Tribunal may award an ex gratia payment in respect of a claim under this Act if the claimant satisfies the eligibility criteria in subsection 11(1), 11(3) or 11(4), and indicates, in the claim, that the applicant seeks an ex gratia payment..
- (2) The amount of an ex gratia payment in respect of a claim referred to in subsection (1), is an amount not exceeding \$20,000 as common experience payment and \$3,000 for each year that a child was removed from their family and community, and is payable from the Stolen Generations Fund.
- (3) A claimant may not receive more than one ex gratia payment.
- (4) In awarding ex gratia payments the Tribunal may take into account any reparations, damages or compensation awarded under State or Territory legislation, at common law or otherwise, may not receive an ex gratia payment.
- (5) If the Tribunal decides to award an ex gratia payment in respect of a claim, the Tribunal must notify the Trustee of the Stolen Generations Fund of the amount to be disbursed to the claimant.
- (6) The Tribunal must decided a claim for an ex gratia payment as soon as is practicable.

-
- (7) If a person claims both an ex gratia payment and reparations, the Tribunal may decide the claim for an ex gratia payment and defer assessment of the claim for reparations.

11. Eligibility criteria for reparations

- (1) To be eligible for an ex gratia payment or reparations under this subsection, a claimant must be:
- (a) a person who was, as a child, removed from their family under legislation that applied specifically to Aboriginal or Torres Strait Islander people; or
 - (b) an Aboriginal or Torres Strait Islander person who was, as a child, removed from their family prior to 31 December 1975, where that removal was carried out, directed or condoned by an Australian government or an agent of an Australian government.
- (2) An applicant will not be eligible for reparations under subsection (1) if the Tribunal is satisfied that the removal was in the in the best interests of the child.
- (3) To be eligible for an ex gratia payment or reparations under this subsection, a claimant must be:
- (a) an Aboriginal or Torres Strait Islander person; and
 - (b) a living descendant of a deceased person who would have satisfied the criteria in subsection (1)
- (4) To be eligible for an ex gratia payment or reparations under this subsection, a claimant must be:
- (a) an Aboriginal or Torres Strait Islander person; and
 - (b) a relative, family member or descendant of a person who satisfies or would have satisfied the criteria in subsection (1)
who the Tribunal is satisfied suffered or was harmed as a consequence, in whole or in part, of the removal of that person.
- (5) To be eligible for reparations under this subsection, a claimant must be a community that suffered detriment as a result of circumstances that gave rise to eligibility of any member of that community for reparations under subsection (1), (3) or (4).
- (6) The Tribunal shall have regard to statements by organisations such as Link Ups and Aboriginal and Islander Child Care Agencies for the purpose of determining eligibility under this section.

12. Claims

- (1) A claim for an ex gratia payment or for reparations must be made to the Tribunal in such manner as it prescribes and shall include a certificate of Indigenous identity and a statement about the circumstances and impact of the removal.

-
- (2) A claim must be made within 10 years after the commencement of this Act.
 - (3) A claimant may, with the consent of the Tribunal, amend a claim.
 - (4) A claim may be made by a group of persons.
 - (5) A claim may be made on behalf of a person under a legal disability by a guardian of that person.
 - (6) For the purposes of determining eligibility, the person under the legal disability is to be regarded as the claimant.

13. Time for completion of assessments

The Tribunal must decide a claim within 12 months after receiving it.

14. Establishment of Stolen Generations Fund

- (1) An account to be known as the Stolen Generations Fund is established:
 - (a) for the establishment and work of the Tribunal; and
 - (b) to disburse funds for reparations awarded to claimants eligible under this Act; and
 - (c) to fund ex gratia payments made under section 10.
- (2) Payments from the Stolen Generations Fund are to be met from funds appropriated by the Parliament, together with any contributions from state or territory governments, church organisations involved in administering forcible removal policies, and any other contributors.
- (3) The Stolen Generations Fund will be administered by a Trustee to be appointed by the Attorney General.
- (4) The fund is a special account for the purposes of the Financial Management and Accountability Act 1997.

15. Tribunal decision is reviewable

All decisions made by the Tribunal are eligible for judicial review. Review may be sought by the relevant claimant or by any government, church or non-government body that is the subject of a recommendation of the kind referred to in section 9(8)(b).

16. Jurisdiction of the Tribunal to consider prejudicial policies and practices

- (1) Where any Aboriginal or Torres Strait Islander person claims that he or she, or any group of Aboriginal or Torres Strait Islander persons of which he or she is a member, is or is likely to be prejudicially affected –

-
- (a) by any ordinance or any Act (whether or not still in force), passed at any time on or after 31 December 1975; or
 - (b) by any regulation, order, proclamation, notice or other statutory instrument made, issued, or given at any time on or after 31 December 1975 under any ordinance or Act referred to in paragraph (a) of this subsection; or
 - (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Commonwealth, a State or Territory Governments, any Government Agency or Church Organisation, or by any policy or practice proposed to be adopted by or on behalf of the Commonwealth, a State or Territory Government, any Government Agency or Church Organisation; or
 - (d) by any act done or omitted at any time on or after 31 December 1975, or proposed to be done or omitted, by or on behalf of the Commonwealth, a State or Territory Government, any Government Agency or Church Organisation,

and that the ordinance or Act, or the regulation, order, proclamation, notice or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the Principles, he or she may submit that claim to the Tribunal under this section.

- (2) The Tribunal must inquire into every claim submitted under subsection (1).
- (3) If the Tribunal finds that any claim submitted to it under subsection(1) is well-founded it may, if it thinks fit, having regard to all the circumstances of the case, recommend to the relevant body that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.
- (4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the relevant body should take.
- (5) The Tribunal shall cause a sealed copy of its findings and recommendations (if any) with regard to any claim to be served on –
 - (a) the claimant;
 - (b) such relevant body as in the opinion of the Tribunal has an interest in the claim; and
 - (c) such other persons as the Tribunal thinks fit.

17. Jurisdiction of the Tribunal to consider proposed legislation

- (1) The Tribunal shall examine any proposed legislation referred to it under subsection (2) and shall report whether, in its opinion, the provisions of the proposed legislation or any of them would be contrary to the Principles.
- (2) Proposed legislation may be referred to the Tribunal, in the case of a Bill before the Parliament, by the relevant Minister or by a resolution of either house.

18. Truth and reconciliation

- (1) The Tribunal shall provide a forum and process for truth and reconciliation under which Indigenous peoples affected by forcible removal policies may tell their story, have their experience acknowledged and be offered an apology by the Tribunal or others.
- (2) The Tribunal shall determine and publish appropriate procedures to facilitate the matters referred to in subsection (1).

19. Protection from liability

The Tribunal does not incur any personal liability for an act done or omitted to be done by the Tribunal in good faith in the performance or exercise, or purported performance or exercise, of any of their functions or powers under this Act.

20. Confidentiality

- (1) The Tribunal must not divulge the information obtained under this Act otherwise than as provided by this section.
- (2) The Tribunal may divulge the information obtained under this Act in so far as it is necessary to do so to carry out their functions under this Act.

21. Annual reports

- (1) The Tribunal is to publish annual reports on the performance of their functions.
- (2) The Tribunal is to cause copies of any reports prepared in accordance with subsection (1) to be made widely available to the public.

22. Death of applicant

- (1) A claim under this Act does not lapse because the claimant dies before the claim is decided.
- (2) If a claimant dies before the claim is decided, any ex gratia payment or monetary compensation, if payable on the claim, is to be paid to the estate of the deceased.

23. Regulations

The Governor-General may make regulations for the purposes of this Act.

Schedule 1

Provisions in relation to the Stolen Generations Reparations Tribunal

[To comprise details concerning remuneration and conditions of appointment; staffing; sittings, etc.

Rules of evidence not to apply.

Tribunal to have investigative powers.

A claimant may be represented by a person who is not legally qualified.]



Appendix C

Submission to NSW Aboriginal Wages Repayment Panel

Submission to the Panel

on the

Aboriginal Trust Fund Reparation

Scheme

September 2004

Robin Banks
Director

Simon Moran
Principal Solicitor

Alexis Goodstone
Senior Solicitor

Shahzad Rind
Solicitor

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I. Introduction

I.1. About PIAC

The Public Interest Advocacy Centre (“**PIAC**”) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision making.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, community legal centres, private law firms, professional associations, academics, experts, industry and unions to achieve our goals. PIAC works on public interest issues at both a NSW and National level.

PIAC was established in 1982 as an initiative of the (then) Law Foundation of New South Wales, with the support of the NSW Legal Aid Commission. 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.

I.2. Indigenous Justice Project

The Indigenous Justice Project was initiated by PIAC in 2001, with the financial support of Public Interest Law Clearing House (“**PILCH**”) member firm, Allens Arthur Robinson.

The aims of the project are to:

- strengthen PIAC’s links with Aboriginal organisations;
- identify public interest issues that impact on Aboriginal people and communities; and
- conduct litigation, policy work and training on behalf of and for Aboriginal clients.

The Indigenous Justice Project seeks to address the needs and concerns of Indigenous Australians through a mix of legal advice, casework, policy interventions and community education. In November 2001 PIAC employed Shahzad Rind (“**Mr Rind**”) as PIAC’s inaugural Indigenous Solicitor.

As a result of the Indigenous Justice Project, PIAC has represented a large number of Indigenous clients, particularly in the areas of race discrimination and civil liberties. Mr Rind has visited many organisations that represent Indigenous communities and people throughout NSW to discuss the needs of their communities and the nature of the services offered by the Indigenous Justice Project, PIAC and PILCH. A range of policy initiatives have also been undertaken, including a pilot policy project that has been developed in collaboration with the Utility Consumers’ Advocacy Program on access to water supply by Indigenous people and communities in rural and remote areas of NSW.

1.3. Stolen Generation Project

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 Democrats members of the Senate Inquiry into the Stolen Generations in 2000.

In 2001, PIAC sought the views of Aboriginal 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*.¹

While the nature and purpose of the proposed Stolen Generations Reparations Tribunal is significantly different to that of the Aboriginal Trust Fund Payment 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.

I.4. Stolen Wages Project

I.4.1. Investigating Legal Claims

PIAC's work with Aboriginal communities has led it to investigate the claims of clients who were denied access to wages, allowances and other entitlements held on trust by the Aborigines Protection Board ("**the Protection Board**"), Aborigines Welfare Board ("**the Welfare Board**"), and subsequently the NSW Government. PIAC is currently investigating claims for outstanding entitlements with a view, if instructed, to commencing legal

¹ Amanda Cornwall, *Restoring Identity: Final report of the Moving Forward Consultation Project* (2002).

proceedings for breach of trust, breach of fiduciary duties and potentially, fraud. PIAC currently has over eighty clients who believe that the NSW Government owes them, or to members of their family, unpaid entitlements.

1.4.2. Liaison with clients, communities and others

In 2004, Mr Rind has visited communities in Maclean and Walgett, where he has heard people's stories and learnt about the ways in which the NSW Government denied people access to monies held on trust. He has had the opportunity to discuss the expectations held by those people of the Government payment scheme. Mr Rind has also received instructions and points of view from many Aboriginal people in relation to compensation payments by telephone.

PIAC has also met regularly with members of Australians for Native Title and Reconciliation ("ANTaR") and the Indigenous Law Centre ("ILC") in the Faculty of Law at the University of NSW to discuss and implement ways of supporting the efforts of Aboriginal communities to secure the NSW Government's commitment to pay back the entitlements to Aboriginal people.

1.4.3. Uncovering previous payback scheme proposals

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

1.4.4. Lobbying

Following the disclosure to PIAC of documents requested under the FOI application, and 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 urgency of the implementation of a repayment scheme in light of the position of our 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. PIAC has also briefed members of the cross-benches of the NSW Parliament and had discussions with Senator Aden Ridgeway in relation to this issue.

1.4.5. Developing a scheme proposal

On 11 March, the 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 also gave in-principle support to the development of a scheme to identify and reimburse those who are owed money from trust funds.

The Premier then 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 Panel”**).

In June 2004, PIAC met with the Panel. At that time, PIAC advocated numerous principles that the scheme would need to adopt in order to properly and adequately compensate Aboriginal people for unpaid entitlements. In addition to the issues mentioned above, PIAC raised the importance of ensuring that applicants to the scheme were not disadvantaged by a lack of documentary evidence, particularly as this lack of evidence is due to failures of the various bodies of the NSW Government that were responsible for establishing, holding and maintaining the trusts for Aboriginal people.

This submission builds on PIAC’s discussions with the Panel, and goes significantly further

in terms of proposing the design of the scheme. PIAC is indebted to Zoe Craven, an ILC intern, who has conducted extensive research on the legislative and regulatory framework governing the wages and other entitlements of Aboriginal people in the period 1900 to 1969 in NSW. This research has formed the basis of an ILC submission to the Panel, and has been relied on in the development of this submission.

It is important that the Government's commitment to pay back the monies held on trust is implemented in a manner that is fair, transparent and readily accessible. It is important to remember that the scheme will implement a legal obligation on the NSW Government to pay people back monies that were held on trust. This is not a reparation scheme or a scheme to benefit Aboriginal people, but rather a matter of settling unpaid debts. If the scheme is not designed and implemented appropriately, the NSW Government could face adversarial, costly and protracted litigation for breach of trust, breach of fiduciary duties and, potentially, fraud.

1.5. Overview of this submission

The purpose of this submission to the Panel is to provide some background on the various issues facing the Scheme, to highlight the difficulties in respect of evidence in relation to entitlements under the Scheme, to set out a series of principles that should be considered central to the model adopted, and to propose a model for the Scheme.

The principles—set out in section 3—are based on the fact that the Board and/or the NSW Government failed to properly record and maintain records in relation to the payments made to the Board of various entitlements of Aboriginal people in NSW. Further, the principles reflect a concern that the Board may have failed, in respect of at least some individuals, to make claims for government entitlements despite a clear right to the entitlement existing. Aboriginal people should not be disadvantaged by the Board's failure of oversight in this respect.

The proposed model—set out in section 4—is based on the premise that the Scheme should not be application driven, but rather should be resourced to undertake extensive research to determine independently the identity of all those Aboriginal people who were under the

control of NSW Government and on whose behalf payments may have been made to the Welfare Board or the Protection Board. The proposed model also provides a mechanism for those Aboriginal people who believe the Board held money on their behalf, or for their heirs, to notify the Scheme of a potential entitlement.

PIAC acknowledges with thanks the extension of time provided by the Panel for this submission. However, the time frame available for development of this submission did not permit extensive review and, as such, the model proposed is not fully developed. In PIAC's submission, the model requires consideration and further development by the Panel, perhaps in consultation with PIAC, ILC and others, to work through various issues and the application of the principles. Once such consideration has been finalised, it is PIAC's view that there must be a further consultation with the Aboriginal community in respect of the operation of particular aspects of the Scheme.

2. Historical Background

The history of colonial authority and control over the lives and lands of the Aboriginal people of Australia is one of dispossession, slavery, assimilation and institutionalism.

In New South Wales, colonial authorities implemented a policy of control and restriction on the movement of Aboriginal Australians. In 1883, the NSW Colonial Secretary created the Protection Board, which initially had a policy—with no legislative basis—of removing Aboriginal children from their communities and families. There were several stated reasons for this removal, including assimilating “part-blood” Aboriginal children and institutionalising “full-blood” children into government reserves and missions, or with church or private institutions.

The passage of the *Aborigines Protection Act 1909* (NSW) (“**the 1909 Act**”), gave legislative power to the Protection Board to control all Aboriginal children and people in NSW. The 1909 Act was amended over the following forty years to incorporate greater control of Aboriginal people in NSW. The main duties of the Protection Board, pursuant to section 7 of the 1909 Act, were to apply:

... any moneys voted by Parliament, and any other funds in its possession or control, for the relief of aborigines . . . To exercise a general supervision and care over all aborigines and over all matters affecting the interests and welfare of aborigines, and to protect them against injustice, imposition, and fraud.

The 1909 Act gave the Protection Board broad powers to control the incomes, welfare payments and other entitlements of Aboriginal people. Wages and welfare payments due to Aboriginal people were collected by the Protection Board and, after 1940, by the renamed Aborigines Welfare Board.² These monies were held in an Aboriginal Trust Fund or funds (“**the Trust Fund**”), which was administered by the Board. Most of the individuals whose

² In this submission, the Aborigines Protection Board and the Aborigines Welfare Board are collectively referred to as “**the Board**”.

money was held on trust received minimal amounts from the Board and, in some cases, no money at all. When the Welfare Board was abolished in 1969, no monies were paid out to those Aboriginal people for whom money was still held. Many Aboriginal people sought access to those monies, but few, if any, were successful.

2.1. Control on Aboriginal movement and labour in NSW

The NSW Government structured its control of Aboriginal people through the Protection Board pursuant to the 1909 Act. The Protection Board's policy was generated by the (then) ethnocentric views held by the Government of Aboriginal people. These policies were justified in terms of "protecting" Aboriginal people from their perceived "weaknesses". Predominately the emphasis of the Protection Board's policies on removal and separation was intended, literally, to "breed out" the Aboriginal population.

In order to appreciate and understand the "control" and authority over the Aboriginal population in NSW from 1880s to 1970s it is necessary to understand the powers of the Board and the various relevant statutes in operation at the time, particularly those impacting on control and the payment of benefits or entitlements.

There was both federal and state legislation that impacted on entitlements, on the level of external control exerted over the lives of Aboriginal people, or on the manner in which such control was exerted.

2.1.1. Federal and NSW legislation

2.1.1.1. NSW Legislation

Set out below is a brief overview of the various NSW statutes that impacted on the control of the lives of Aboriginal people in NSW:

Apprentice Act 1901

Under this Act any child who was a ward of State in could be indentured, once they had reached the age of fourteen years, against their will for up to seven years.

Audit Act 1902

This Act governed the payment, collection, audit and inspection of revenue, trust and other monies held by State government entities—including the Protection Board—and delineated the responsibilities of the public officers charged with statutory authority to deal with such monies.

Neglected Children and Juvenile Offenders Act 1905

This Act empowered magistrates to make an order that a child be placed in employment if the magistrate found that the child had been neglected or deserted by his or her parents.

Aborigines Protection Act 1909

The 1909 Act empowered the Protection Board to *inter alia* “by indenture, bind or cause to be bound the child of any Aborigine, or the neglected child of any person apparently having an admixture of Aboriginal blood”.³ The Board was vested with power over all reserves including power to remove people from them. Entry onto reserves by non-Aborigines was forbidden. Regulations could be made under the Act dealing with care, custody and education of Aborigines and prescribing the conditions on which children could be apprenticed under the Act.

The 1909 Act defines “aborigine” as any “full blooded aboriginal native of Australia, and any person apparently having an admixture of aboriginal blood who applies for or is in receipt of rations or aid from the Board or is living on a reserve”.

Aborigines Protection Amending Act 1915 (“the 1915 Amendment Act”)

In 1915, this Act amended the 1909 Act. These amendments gave the Protection Board further powers over apprentices and the right to assume full custody and control over the child of any Aboriginal person, if “after due inquiry” it was satisfied that such a course was in the interest of “the moral or physical welfare of the child”. In practice the 1915

³ Section 11A, *Aboriginal Protection Act 1909* (NSW).

Amendment Act meant that it “was up to the parents to show that the child had a right to be with them, not the other way round”.⁴

Aborigines Protection Act Regulation 1915

This regulation required everyone resident on a Board-run station to do “a reasonable amount of work as directed by the Manager”. Persistent failure to do so would result in all supplies to the individual and his/her family being withdrawn until work was resumed. In addition, a person persistently failing to do work as required risked removal from the station.

Aboriginal Protection (Amendment) Act 1918 (“the 1918 Amendment Act”)

This Act further amended the 1909 Act to extend the definition of “aborigine” in the 1909 Act to “any full-blooded or half-caste aboriginal who is a native of New South Wales”, and to remove the power in relation to people “apparently having an admixture of aboriginal blood”.

Widows Pension Act 1925

This Act provided for the payment of a pension to any person in NSW who was a widow. It was a condition of payment to Aboriginal widows that they either be in possession of an exemption certificate⁵—commonly referred to as a “dog licence” and intended to demonstrate assimilation—under state law, or be able to demonstrate their “character, standard and intelligence and social development”.

Family Endowment Act 1927

This Act established a Family Endowment Fund to which employers were required to contribute a percentage of employees’ wages. While the Act applied to all families in NSW, the Protection Board controlled those payments due to Aboriginal families under section 35(1) of the Act, which authorised the Commissioner to direct payment to another person. In

⁴ R Chisholm, *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (1985), 12-13.

⁵ See below under *Aborigines Protection Amendment Act 1943* on page 14 in relation to the effect of an exemption certificate.

the case of Aboriginal people the Commissioner directed the payments to the Protection Board. The Act made provision for a payment of 5 shillings per week to the mother for each child in families with incomes of less than the official living wage for a man and wife without children, plus £13 a year in respect of each child.⁶

Aborigines Protection (Amendment) Act 1936

This Act empowered courts to order the removal of an Aboriginal person found to be “living in insanitary or undesirable conditions” to a reserve or other location controlled by the Protection Board, or even to the person’s state of origin.

Defines “aborigine” as “any full-blooded or half-caste aboriginal who is a native Australian and who is temporarily or permanently resident in New South Wales”.

Child Welfare Act 1939 (“the Child Welfare Act”)

This Act allowed the removal of children from their parents if they were “neglected” or “uncontrollable” and referred to “improper” or “incompetent” parenting. The Child Welfare Act applied to Aboriginal and non-Aboriginal children alike. However, the past government policy of assimilation coupled with the poverty of many Aboriginal families proved to be a double bind for those families. Aboriginal people were forced to assimilate into the dominant Australian society despite the prejudice and racism that confronted them. When these pressures resulted in Aboriginal people being unable to assimilate, this “failure” and the social circumstances of many Aboriginal people provided the grounds for the removal of Aboriginal children.

The Child Welfare Act defined a “ward” to include a child or a young person who had been “admitted to State control”, a definition broad enough to include Aboriginal children who had become wards under the 1909 Act. Pursuant to paragraph 23(1)(e) of the Child Welfare Act, the Minister had authority to admit a child to state control, and apprentice any ward.

⁶ For an account of this Act, see *The Quarterly Journal of Economics*, May 1928, page 500 and following.

In relation to apprenticeships, sub-section 142(1) of this Act made provision for a prescribed form for indentured apprenticeships and sub-section 142(2) stated:

All wages earned by a ward, except such part thereof as the employer is required to pay to the ward personally as pocket money, shall be paid by the employer to the Minister on behalf of the ward and shall be applied as prescribed.

Regulations 36 and 37 made under the Child Welfare Act stated:

36 Any moneys held by the Minister on behalf of a ward or an ex-ward may be applied by the Minister for or towards the maintenance, advancement, education or benefit of such ward or ex-ward at any time before he attains the age of twenty-one years. Any balance remaining shall be paid to the ex-ward upon his attaining the age of twenty-one years.

37(1) When the Minister's guardianship of a ward is terminated or has ended, the director shall inform the ward in writing –

- (a) that the Minister has terminated his guardianship, or that such guardianship has ended;
- (b) of any monies held to the credit of or any property belonging to the ward or ex-ward, and of the procedure covering its distribution and or control...

The Minister had a legislative duty to repay the monies held on trust when the rightful owner reached the age of twenty-one years or, secondly, when the guardianship ended. There appears to be a lack of evidence of such payments being made despite this legislative duty.

Aborigines Protection (Amendment) Act 1940 (“1940 Amendment Act”)

The 1940 Amendment Act replaced the Aborigines Protection Board with the Aborigines Welfare Board, which then became a body corporate in 1943. A fundamental aspect of the 1940 Amendment Act was the control vested in the Welfare over monies paid to Aboriginal people through welfare payments and employment. These monies were to be held for the benefit of the individual on whose behalf they were paid. The Welfare Board was also vested with control over the employment conditions and wages of Aboriginal people in NSW.

Aborigines Protection (Amendment) Act 1943

This Act empowered the Board to issue (and cancel) exemption certificates whereby an Aboriginal person “shall be deemed not to be an aborigine or a person apparently having an admixture of aboriginal blood”. The Board was also empowered to board-out Aboriginal children in its control and required any Aboriginal child on reaching minimum school leaving age to be apprenticed or placed in employment.

Aborigines Protection (Amendment) Act 1963

This Act repealed the provisions that:

- empowered courts to send “mixed blood” Aboriginal people to Board-controlled facilities;
- made it an offence to take an adult Aboriginal person away from NSW; and
- made it an offence for non-Aboriginal and Aboriginal people to live together.

Aborigines Act 1969 (“the 1969 Act”)

The 1969 Act repealed—with effect from 20 March 1969—the 1940 Amendment Act. Under the 1969 Act, the Welfare Board was dissolved. All property and monies of the Welfare Board were vested in the Minister. This meant that claims for which the Welfare Board was previously liable now became the liability of the Minister.

While section 20 of the 1969 Act established a fund known as the Aborigines Assistance Fund, we have received counsel’s opinion that indicates that this provision does not deal expressly with those monies held by the Board on behalf of Aboriginal people. It appears that there is no specific provision that deals with those monies and, again on the basis of the opinion received, it appears that these monies must be dealt with under the general provision that vested all of the Welfare Board’s property and monies in the Minister.

When the Welfare Board was abolished by the 1969 Act, its functions in relation to wardships of Aboriginal children were transferred to the Minister responsible for the Child Welfare Act. It is PIAC’s understanding that this, in effect, meant that responsibility vested with the (then) Department of Youth and Community Services (“**DYCS**”), now Department of Community Services (“**DoCS**”).

2.1.1.2. Commonwealth Legislation

Set out below is a brief overview of the various Commonwealth statutes that impacted on the control of the lives of Aboriginal people in NSW:

Invalid and Old Age Pension Act 1908

This Act allowed for the payment of invalid and old age pensions. The Act specifically provided that Aboriginal people were eligible for the payments if they were living “under civilised conditions”.

Maternity Allowance Act 1912

This Act allowed for a cash grant of £5 to the parents of a newborn child. While the Act excluded Aboriginal people from entitlement to the grant, it retained an entitlement to the grant for those with “50% or less aboriginal blood”. The Board collected these payments.

Child Endowment Act 1941

This Act introduced a national child-endowment scheme whereby a flat-rate cash payment, free of means testing, was provided to parents (usually the mother) for children after their first child.

Widows Pension Act 1942

This Act—like its NSW equivalent from 1925—provided for the payment of a pension to widows. As with the NSW Act, a condition of payment to Aboriginal people was that they must either possess an exemption certificate—a “dog licence”—under state law or must be able to demonstrate their “character, standard and intelligence and social development”.

Social Services Consolidation Act 1947

This Act enabled the appointment of Directors of Social Services to offices in each of the states to oversee the administration of a range of benefits, including child endowment. The Board retained the authority to receive child endowment payments on behalf of Aboriginal people until 1969, when the Board was abolished.

Unemployment and Sickness Benefits Act 1944

This Act amalgamated the old age, invalid and widow's pension, unemployment, sickness and maternity benefits into a single legislative scheme. In 1959, restrictions to the entitlement of Aboriginal people to various payments were repealed, except those in relation to child endowment.

2.1.2. Government bodies and controlling authorities

The NSW Government from 1890 to 1970 used the Board as its means to “control” and “protect” Aboriginal people in this state. Every aspect of the lives of Aboriginal people was controlled.

The Board had the power to remove Aboriginal children at will and had the additional powers of controlling Aboriginal labour, welfare payments, government benefits and income. The report of the Human Rights and Equal Opportunity Commission, *Bring Them Home*⁷, provides a comprehensive report on these issues nationally, while the NSW Law Reform Commission research report, *The Aboriginal Child Placement Principle*⁸, provides a concise report on the issues of child removal and assimilation policies of the past governments in NSW. Both reports also highlight the impact of such policies on the Aboriginal population of today. The cycle of dispossession and poverty, compounded by the socio-economic position of Aboriginal people in Australia, remains an issue to be resolved.

2.1.2.1. Who they were, what they did and when they existed

The Aborigines Protection Board - 1909 to 1940

Alexander Stuart, the (then) NSW Colonial Secretary and Premier, in a Minute of 26 February 1883 created a Board for the Protection of Aborigines. In 1909, the Board was reconstituted and became a statutory body under the 1909 Act. The functions of the Board

⁷ Human Rights and Equal Opportunity Commission, *Bring Them Home* (1997).

⁸ NSW Law Reform Commission, *The Aboriginal Child Placement Principle – Aboriginal and Torres Strait Island Children and the Welfare System in NSW*, Research Report Number 7 (1997).

were to deal with any money voted by Parliament on behalf of Aboriginals, to deal with issues of custody, maintenance, and the education of Aboriginal children, to manage and regulate Aboriginal reserves, and to have a general overseeing power in relation to the interests and welfare of Aboriginal people in NSW.

It was not until the 1909 Act that the Board was granted official power. Previously the Board had relied on informal powers—without legislative basis—and the exercise of coercion and inducement to remove children. The 1909 Act meant that children could be removed without their parents’ consent if they were found by a magistrate to be “neglected”.

From 1915, the Protection Board had the right to assume full custody and control over the child of any Aboriginal person, if “after due inquiry” it was satisfied that such a course was in the “interest of the moral or physical welfare” of the child.⁹

Throughout this period, the Protection Board removed Aboriginal children from their families and placed them in training at specially established institutions such as the Kinchela Boys’ Home and the Cootamundra Aboriginal Girls’ Home. The aim of this training was to enable the children to be placed in the service of non-Aboriginal families. At these homes Aboriginal girls were trained as domestic servants, and Aboriginal boys were trained to be labourers and rural workers. There have been reports of physical and sexual abuse of Aboriginal children both in the homes and at the hands of their white bosses.¹⁰

As a result of the 1918 Amendment Act, with its expanded definition of “aborigine”¹¹, a much greater number of Aboriginal children could be “apprenticed to any master” or removed to a training home or institution by the Protection Board. The reason given for Aboriginal children being removed was often simply “for being Aboriginal”.

⁹ See above at 2.1.1.1 for the summary of the *Aborigines Protection Amending Act 1915* (NSW).

¹⁰ Inara Walden, “‘To Send Her to Service’: Aboriginal Domestic Servants” (1995); Human Rights and Equal Opportunity Commission, *op cit*.

¹¹ See above at 2.1.1.1 for the summary of the *Aborigines Protection Amending Act 1918* (NSW).

In 1937, the Legislative Assembly of the Parliament of New South Wales set up a Select Committee to inquire into the workings of the Protection Board and the following year the Public Service Board also held an inquiry into the Protection Board. Both inquiries resulted in a number of significant findings and recommendations.

The Public Service Inquiry into the Protection Board resulted in the *Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales* (“**the 1940 Report**”). The 1940 Report reflected the ideological approach of the Board, stating:

Shortly, the problem to be faced today is the method to be adopted in dealing not with what the man in the street probably considers to be the problem, viz., those persons with a preponderance of aboriginal blood, but with a constantly increasing number of persons who are half-castes, or who have a lesser proportion of aboriginal blood.

In any case, it appears to be the consensus of opinion of those best qualified to speak, that the only satisfactory solution of the problem is to mould the administration as to ensure, as early as possible, the assimilation of these people into the social and economic life of the general community...¹²

The 1940 Report set out the core function of the Protection Board, observing that the Board, under its legislation:

... shall ... be the authority for the protection and care of aborigines under the Act, and shall exercise general supervision and care over all the aborigines, and over all matters affecting the interests and welfare of aborigines and protect them against injustice, imposition and fraud.¹³

¹² Public Service Board of NSW, *Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales* (1940), 12.

¹³ *Ibid*, 9.

The Aborigines Welfare Board 1940 to 1969

In 1940, the 1940 Amendment Act reconstituted the Aborigines Protection Board as the Aboriginal Welfare Board.¹⁴

The 1940 amendments to the 1909 Act incorporated many of the provisions of the Child Welfare Act. These amendments meant that the Welfare Board could no longer remove Aboriginal children on its own initiative, but instead required Aboriginal children to be brought before the Children's Court in accordance with the procedures in the Child Welfare Act. The powers of the Court were broad and the 1940 Amendment Act did not curb the removal of Aboriginal children.

The Welfare Board's membership structure was changed in 1943 by the *Aborigines Protection (Amendment) Act 1943*, which provided for the appointment of two Aboriginal people to the Welfare Board. This Act also provided for the incorporation of the Board and for limited exemptions from those parts of the 1909 Act that prohibited Aborigines from being supplied with alcohol.

New Departments – 1960-Current

During this decade, the Parliament of New South Wales set up a Joint Select Committee on Aborigines welfare. As a result of this Committee's Report, the Welfare Board was abolished in 1969.¹⁵

In place of the Welfare Board, the 1969 Act created two new bodies, the Directorate of Aboriginal Welfare, which was an administrative body, and the Aborigines Advisory Council, which held an advisory role. The Directorate of Aboriginal Welfare was placed under the administration of the Department of Child Welfare and Social Welfare (now DoCS). The assimilationist approach continued to dominate the NSW child welfare system beyond the abolition of the Welfare Board in 1969. The ongoing application of the Child

¹⁴ See above at 2.1.1.1 for the summary of the *Aboriginal Protection (Amendment) Act 1940*.

¹⁵ *Aborigines Act 1969* (NSW).

Welfare Act meant that Aboriginal children continued to be removed from their families and made State wards or placed in foster homes. Non-Aboriginal social workers and departmental officers still had the power to define what constituted “neglect” and “moral danger” for Aboriginal children. The legacy of assimilation policies is seen as underlying the continuing removal of Aboriginal children from their families and communities.¹⁶

Applications for monies

Aboriginal people have, in the past, applied for their monies. However, as identified in the April 2001 Cabinet Minute, these applications were not successful. The April 2001 Cabinet Minute found that:

This resistance was due in part to the lack of adequate records held by DoCS and Treasury. This lack of records made it extremely difficult for claimants to prove they had not previously been paid all entitlements...¹⁷

In respect of the records, the same document indicates that:

DoCS hold lists of people and amounts placed in Trust in July 1938, 1940, 1958 and 1969. There is also a list of monies with names paid into Unclaimed Monies at Treasury in 1970 (refer 4.1.8).¹⁸

It is apparent, on the NSW Government’s own admission, that Aboriginal people seeking money from the Trust Funds were faced with red tape and evasion:

DoCS has received anecdotal information to the effect that prospective claimants were advised from 1967 that the Funds were being frozen during the abolition of the Board

¹⁶ NSW Law Reform Commission, *op cit*, ¶ 2.20

¹⁷ At 4.2.1.

¹⁸ At 6.8.1.

and for them to make further inquiries later. When they inquired later they were advised that the funds were no longer available.¹⁹

The absence of proper record keeping and archiving must not create a barrier to payments being made to entitled persons or their heirs.

2.1.2.2. Record keeping

A review of the records obtained by PIAC indicates that monies that were paid into the Trust Fund were regularly paid out by the Board to various institutions. In some cases, these payments were made to store owners on production by the store owner of documents bearing a thumbprint. There is no evidence in relation to this latter form of payment that the thumb print was checked to confirm that it was the thumb print of an Aboriginal person for whom monies were held on trust by the Board.

The 1940 Report at several points refers to the inadequate records available and kept by the Protection Board and its authorising officers (mainly NSW police officers).²⁰ In relation to apprentices it states:

The records of the Department in respect of apprentices are not complete as they should be...

The Public Service Board is of the opinion that close supervision in both respects is essential, and that complete records must be kept together with a more adequate system of follow up of the cases once the apprenticeship has been completed.²¹

In more general terms, the 1940 Report notes:

¹⁹ At 4.1.8.

²⁰ Public Service Board, *op cit*, 12 and 19.

²¹ *Ibid*, 19.

It is rather disappointing to find that, after this lapse of time, records of the persons affected are so meagre, not only with regard to older people, but also with regard to children...²²

Further, the 1940 Report states that:

The absence of detailed records of the aborigines under the direct and indirect supervisions of the [Protection] Board and its staff, does not permit of any more specific details being given as to the success of the present policy. It is considered that these details should be kept as being essential to the ultimate solution of this problem.²³

The Public Service Board in the 1940 Report noted that monthly reports furnished by Protection Board managers were of “little use”, and that there were no adequate records of adults under the Board’s control or of Aboriginal children admitted to institutions. The 1940 Report observed, “it is impossible to say how much, if any, employment the individual resident on a station is receiving”.²⁴

The 1940 Report clearly indicates that significant improvements were required to the practices and procedures of the Board to ensure it fulfilled its statutory and related obligations.²⁵ There is little, if any, evidence that such improvements occurred.

2.1.3. Private institutions

Many Aboriginal children, under the care and control of the Board, were placed in private institutions that were operated under the Board’s control, such as Kinchela Boys’ Home and the Cootamundra Aboriginal Girls’ Home.

²² *Ibid*, 12.

²³ *Ibid*, 19.

²⁴ *Ibid*, 29.

²⁵ See Appendix 2 for extracts from the seven pages of recommendations of the Public Service Board’s report.

In the report of the National Inquiry, *Bring Them Home*, the Human Rights and Equal Opportunity Commission states:

In institutions and in foster care and adoptive families, the forcibly removed children's Aboriginality was typically either hidden and denied or denigrated. Their labour was often exploited. They were exposed to substandard living conditions and a poor and truncated education. They were vulnerable to brutality and abuse. Many experienced repeated sexual abuse.²⁶

Further, some Church-run organisations were subsidised and funded by the NSW Government and in many cases children under the control of the Board were sent to church-administered homes.²⁷

The Pastoral industry and farming industry in NSW also had long-term involvement in the lives of many Aboriginal people, with the placement by the Board of Aboriginal people onto stations and into domestic homes, particularly on farming properties. In those situations, Aboriginal workers were in most cases not paid directly and in a majority of cases paid well below the award wages of the time.

2.2. Sources of payments made into the trust funds

The Board was in “control” of payments owed to Aboriginal people either as welfare payments or wages. The Board had the legislative authority to collect the monies owed to Aboriginal people and deposit those monies into Aboriginal Trust Accounts, to be used for the “benefit” of the individual.

Paragraph 4.1.3 of the April 2001 NSW Cabinet Minute provides an overview of the range of monies paid into trust:

²⁶ Human Rights and Equal Opportunity Commission, *op cit*, 193

²⁷ For a detailed overview of the specific institutions and their periods of operation, see the report of DoCS, *Connecting Kin: Guide to Records - A guide to help people separated from their families search for their records* (1998).

The money [diverted into the Aboriginal Trust Funds] was deducted from wages, pensions, child endowments or lump sum compensation payments, such as payments to infants for parents killed in work-based accidents.

So, in terms of classes of payment or entitlement, there appear to be at least the following classes:

- Apprentice wages.
- Domestic wages.
- Other wages paid to either Aboriginal adults or children.
- Child endowment.
- Old age pension.
- Invalid pension.
- Other social security payments.
- Lump sum compensation.

In respect of many of these classes of payment or entitlement, there would be clear criteria—which may have changed from time to time during the relevant period—for determining entitlement. There would also be documents that indicate the usual amount of many if not all of the classes of payment or entitlement. The one class of payment or entitlement that is unlikely to be able to be determined in this way is lump sum compensation payments. There may, in respect of these payments, be court or other records setting out the amount of the compensation payment that was to be made.

3. Summary of key principles to guide the scheme

3.1. Independent of Government

3.1.1. Statement of Principle

In order for the Scheme to be effective it must be independent of Government. Aboriginal people, as well as the non-Aboriginal community, must have faith in the scheme's capacity to be neutral and fair. This cannot be achieved if the scheme is not independent of Government.

3.1.2. Application of Principle

It is disappointing to PIAC to note that the NSW Government has already advertised for a Scheme Director and Administrative Assistant to be employed by DoCS. It has been clearly communicated to PIAC by Aboriginal people that housing the scheme within DoCS will anger many Aboriginal people and potentially result in many of those entitled to monies feeling unable to engage with the process. This is particularly the case considering the past relationship of Aboriginal people with that agency, and the fact that DoCS has delayed dealing this issue for so long.

The Scheme must be established as an entity separate from Government with a governance structure that reflects the importance of Aboriginal involvement in resolving the impact of the actions of former governments on Aboriginal people and the community.

3.2. Established by legislation

3.2.1. Statement of Principle

The Scheme must be established under an Act of the NSW Parliament that provides for the independence of the administration of the Scheme from the Executive of the NSW Government.

3.3.2. Application of Principle

Once the model of the Scheme is determined, legislation should be drafted to provide for the Scheme to be established immediately and for it to have appropriate powers to determine amounts owing, independent of the NSW Government, and to make the necessary payments. The legislation should provide for the governance of the Scheme, its procedures and the process for review of and appeal against decisions made by the Scheme.

3.3. Scheme is proactive in finding creditors

3.3.1. Statement of Principle

The Scheme should be empowered to undertake extensive research and investigation to determine who may be owed money by the NSW Government. The Scheme should not be based on making payments arising from applications only, but rather should determine all eligible people and, thereby, ensure that all those for whom money was held on trust are paid those monies in total.

3.3.2. Application of Principle

Because of the failure by the Board to ensure appropriate records were kept, and because of the lack of self-determination afforded to Aboriginal people during the relevant period, the Scheme cannot be considered comprehensive if it relies on individuals making application. There are likely to be many Aboriginal people who are completely unaware of the entitlement of a deceased family member to monies held on trust. Indeed, there may also be Aboriginal people who themselves had money held on trust, who are unaware of this because of the nature of the relationship and authority of the Board.

The Scheme, as described below, is designed to operate on a research and investigation model, while allowing for those who have an awareness of their own or a family member's entitlement to advise the Scheme of that potential entitlement and to have it investigated.²⁸

²⁸ See more generally, section 4 below.

3.4. Presumptions and the Onus of Proof

3.4.1. Statement of Principle

As NSW Government failed, through the Board, to ensure accurate record keeping and maintenance, the onus of proof in respect of the Scheme should operate such that there is a presumption in favour of a debt being owed, with the onus on the NSW Government to provide evidence to discharge that onus.

3.4.2. Application of Principle

The Scheme should operate on the basis of a set of presumptions in favour of finding a debt owed. Where the Scheme has undertaken its research and investigations and has not uncovered evidence relevant to any entitlement for an individual, and the individual or his or her heirs provide evidence—oral or documentary—that supports the claim that the person was a member of a class to whom some form of payment would have been due, that evidence, without more, should be accepted as evidence of an entitlement for that class of payment. The onus would then be on the government to produce documentary evidence that, on the balance of probabilities, disproved the existence of such an entitlement.

So, for example, the Scheme would operate with the presumptions:

- If an Aboriginal woman provides evidence—oral or documentary—that she was resident in NSW in the relevant period and that she was employed in domestic service, the Scheme should operate to presume that wages were paid on behalf of that woman to the Board and held by the Board in a trust fund.
- If an Aboriginal woman lived in NSW in the relevant period and provides evidence—oral or documentary—that has a child or children in that time, the Scheme should operate to presume that the relevant amount of child endowment was paid on behalf of that woman to the Board and held by the Board in a trust fund.
- That the monies held on trust were not paid out.

More generally, where a person provides evidence—oral or documentary—that he or she met the relevant criteria for a government pension or benefits at any relevant time during the

period, there should be a presumption that money was paid on that person's behalf to the Board and held in trust by the Board. In order to overturn this presumption, there must be documentary evidence that indicated that the person did not meet the eligibility criteria at the relevant time or that the payments of the pension were made directly to the person.

Similarly, where a person provides evidence—whether documentary or oral—that she or he (or his or her ancestor) was in any form of work in the relevant period, there should be a presumption that money was paid in wages on that person's behalf to the Board and held in trust by the Board. Further, there should be a presumption as to the amount paid based on the amounts of wages for types of work done established through further research to be undertaken by the Scheme. In order to overturn this presumption, there must be documentary evidence of payment of the wages directly to the person entitled.

Further consideration needs to be given to the extent of presumptions, ensuring that the presumptions operate to require the NSW Government to produce evidence before a decision adverse to an Aboriginal person's claim can be made.

3.5. Monies to be treated as a debt owed rather than reparation²⁹

3.5.1. Statement of Principle

The monies held by the Board were and continue to be a debt owed to the individuals on whose behalf they were paid to the Board. Discharge of this debt by the NSW Government cannot be seen as other than repayment of a debt. It must not be seen as a form of “hand out” or payment in compensation for harms done to Aboriginal peoples in NSW through, for example, the removal of children, the dispossession of land, etc.

3.5.2. Application of Principle

The Scheme must operate to determine the likely or actual amount of the monies held on trust and the current value of those monies.

3.6. Fair value and opportunity cost

3.6.1. Statement of Principle

The current value of the debt must be calculated to take account of inflation and interest accrued over the relevant period. The Scheme should also ensure that the calculation includes a factor that equitably reflects the loss of opportunity experienced by those people whose money was held in trust through the lack of access to those funds. This opportunity

²⁹ The term “reparation” means, according to *The Macquarie Concise Dictionary*, 3rd edition (2001):

1. the making of amends for wrong or injury done ...
2. ... compensation in money, material, labour, etc., paid by a defeated nation ... for damage to civilian population and property during war.
3. restoration to good condition.

The *Butterworths Concise Australian Legal Dictionary*, 2nd edition (1998), defines “reparation” as:

Making amends for injury or wrong done, often by the payment of compensation...

cost should not be determined on a case-by-case basis, but rather the Scheme should establish a single mechanism for including a factor for opportunity cost.

3.6.2. Application of Principle

The work done by Ernst & Young in 2001³⁰, provides for a range of mechanisms for determining fair value and, indeed, also provides for a mechanism for factoring in opportunity cost. The Scheme should engage Ernst & Young to update this work to provide for current value relevant for the likely payout dates for the Scheme.

3.7. Obligation on governments to assist in investigation process

3.7.1. Statement of Principle

The NSW Government should clearly state its commitment to provide all necessary assistance to ensure the Scheme has access to all relevant documents. The NSW Government should undertake negotiations with the Federal Government to ensure equivalent access at a Federal level to all relevant documents. Any cost of access to documents should not affect the amount of the debt owed.

3.7.2. Application of Principle

The legislation establishing the Scheme must provide for the Scheme to have appropriate access to all NSW Government records, both current and archival, and for all Government Departments and Agencies to provide assistance to the Scheme in its operations. Consideration may need to be given to the impact on records access of the *Privacy and Personal Information Protection Act 1998* (NSW) and, if that Act is likely to result in restrictions on access, the NSW Government should, in consultation with the Scheme and the

³⁰ Warrick Gard and Corinna Lueg, "Fair Value Project" (2001) Unpublished letter addressed to Elayne Jay, Strategic Policy and Planning Directorate, DoCS.

Privacy Commissioner, promulgate such regulations as are necessary to remove those restrictions.

The NSW Government should negotiate with the Federal Government to ensure access to all relevant records is provided. This may require consideration being given to the impact of the *Privacy Act 1988* (Cth) on accessing records and appropriate regulations promulgated to ensure that access is not restricted because of the operation of that Act.

3.8. Funds available and the Cost of administering the Scheme

3.8.1. Statement of Principles

The NSW Government should not place a cap on the funds available to the Scheme, but rather the Scheme should determine the amount owed and that amount should be distributed to those entitled.³¹

The cost of administering the scheme, and any costs arising through records searches, etc, should be borne by the Scheme and should not impact on the funds available for distribution to people found to have an entitlement, either directly or as heirs.

3.8.2. Application of the Principles

The NSW Government needs to allocate sufficient funds to enable the Scheme to operate effectively, taking account of the investigation and research that is fundamental to achieving a fair and equitable outcome. In addition, the NSW Government needs to commit to providing the funds for distribution once the Scheme has determined the total amount owing.

The cost of accessing records, whether it be administrative or copying costs, or an administration fee charged for access, must not impact on the amount owed. Even where

³¹ See below at Principle 3.14 in relation to monies that cannot be paid out because the Scheme is unable to locate the entitled person or their heirs.

there is a cost of accessing a record that can be directly attributed to an individual who is directly entitled, that cost must be borne by the Scheme. This reflects the principle that the amounts held are debts and should not be affected by the delay in repayment that can only be attributed to the inaction of the NSW Government over many years.

3.9. Provision for inheritance

3.9.1. Statement of Principle

Because the money is a debt owed, where the person entitled to the money has passed away, that money becomes a debt to the person's estate and should be paid to that estate and, through the estate, to the person's lawful heirs. The cost of administration of these monies through an estate should not result in any reduction in the amount of money actually disbursed to heirs.

3.9.2. Application of Principle

Part of the role of the Scheme will be to undertake investigations in relation to those people entitled to payment who have passed away and the existence of any will or testamentary disposition made by that person. Where there is a will, the payment should be made in accordance with the directions in that will. Where there is no will, the payment should be made in accordance with the usual rules of intestacy (or as modified through further consultation with Aboriginal communities).

3.10. Appeals process

3.10.1. Statement of Principle

Where the Scheme determines that there is no debt in respect of any individual claimant, that decision shall be capable of review under the *Administrative Decisions Tribunal Act 1997* (NSW).

3.10.2. Application of Principle

3.10.2.1. Internal review

An internal level of merits review should be provided. If an application is rejected on the basis that the applicant is not entitled to apply or cannot establish a trust fund existed, or if the amount granted is disputed, an internal review to a more senior decision-maker within the scheme, or to an appeals panel appointed by the Scheme, should be available.

3.10.2.2. External review limited to questions of law

It is well-established law that decisions of governments and tribunals are reviewable by the courts on questions of law, including whether the requirements of procedural fairness were met. PIAC submits that this principle be reinforced by providing—in the legislation establishing the Scheme—for appeals on questions of law to the Administrative Decisions Tribunal of NSW. This would avoid those seeking payments from the Scheme having to appeal directly to the Supreme Court on questions of law.

Consistent with Principle 3.8 above, there should be a general waiver of any application fee for external review applications in respect of the Scheme.

3.11. Priority

3.11.1. Statement of Principle

Those directly entitled who, by reason of health or age, may not survive to receive a payment calculated under the Scheme, should be paid an up-front payment that reflects the likely minimum debt owed. Such payments will impact on the final amount owed, but should not be repayable in the event that the final amount owed is less than the up-front payment.

Priority should be given to those directly entitled.

3.11.2. Application of Principle

The Scheme should adopt a system for determining in what order applications are processed, whereby priority is given to elderly and ill applicants who are directly entitled. The

Queensland scheme provides some assistance in this regard. People directly entitled should also be given priority over people applying as beneficiaries. Balancing these considerations, it is proposed that the following priority system be adopted:

Priority 1: People directly entitled

- (a) Applicants who are terminally ill or have a severe and chronic health condition (regardless of date of birth)
- (b) Applicants born on or before 31 December 1932
- (c) Applicants born between 1 January 1933 and 31 December 1942
- (d) Applicants born between 1 January 1943 and 31 December 1951
- (e) Applicants born between 1 January 1952 and 31 December 1956

Priority 2: People entitled as heirs

- (a) Applicants who are terminally ill or have a severe and chronic health condition (regardless of date of birth)
- (b) Applicants born on or before 31 December 1932
- (c) Applicants born between 1 January 1933 and 31 December 1942
- (d) Applicants born between 1 January 1943 and 31 December 1951
- (e) Applicants born between 1 January 1952 and 31 December 1956

Applicants who are critically ill may have their priority status upgraded if they are able to provide a recent statement from a doctor explaining why they need an urgent or priority assessment on medical grounds.

Consideration should be given to making the up-front payment to those in Priority 1(a) and Priority 2(a). The amount paid could be based on a fixed amount that reflects the nature of the claim and the date on which the money would have been paid to the person. So, for

example, if the person claims to have been entitled to child endowment payments for the period 1935 to 1945 in respect of one child, the amount paid as an up-front payment could be determined to be the sum of the minimum of the child endowment payment for each of those years multiplied by the relevant accumulated value factor for each of those years. Where a person claims entitlement under multiple payment types, the up-front amount could be based on one of those payment types only.

PIAC submits that this principle requires significant consideration and consultation with the Aboriginal community to ensure that it supports a priority system operating within the Scheme.

3.12. Representation, advice and counselling

3.12.1. Statement of Principle

The emotional impact of the operation of the Scheme on Aboriginal people must be managed and minimised. Aboriginal people should be clearly advised of their rights under the Scheme and have access to free and independent assistance to understand the Scheme and their rights under it. The process for obtaining payments under the Scheme must be clear and free and independent assistance provided to enable any Aboriginal person who believes they—or someone they know—has an entitlement to payment to notify the Scheme of that potential claim and evidence in support of it.

3.12.2. Representation and advice

Independent legal advice and legal representation should be provided to applicants on the process for notifying a claim, the effect of a payment on any debt and, if the Scheme requires payees to execute a Deed of Release, on the effect of that Deed, including the legal implications of agreeing to forfeit their rights to further legal action in exchange for receiving a payment from the scheme.

If an existing organisation is provided with the resources to provide such advice and assistance, it should be one with experience in providing services to Aboriginal people and

one which is able to demonstrate an ability to operate effectively across communities and in urban centres in NSW.

3.12.3. Counselling and support

Adequate and appropriate counselling and support should be provided to people who have interactions with the Scheme. The Scheme's operations may raise traumatic memories, such as of forcible removal from family and/or land, financial hardship, racism and government control over Aboriginal families and resources.

The process of determining beneficiaries, with its inherent tracing of family relationships, may also be painful and traumatic for some individuals and families.

Link-Up should be consulted, prior to the Scheme being established, in relation to the most appropriate mechanisms for ensuring counselling support. Link-Up reports that the Panel's consultation process and resulting community discussions to date have already resulted in an increase in the counselling needs of members of the Aboriginal community. Thus, the issue of support is an urgent one for which a strategy needs to be developed as a priority.

3.13. Impact on income tax, and on existing government entitlements

3.13.1. Statement of Principles

The Scheme must ensure that the monies paid out are not subject to income or other tax and do not impact on the income or other tax liability of the persons to whom monies are paid. The Scheme must ensure that the monies paid out do not impact on any existing government entitlements, be they pensions, benefits or allowances.

3.13.2. Application of these Principles

The Scheme must obtain advice from the Australian Taxation Office, possibly in the form of a determination that deals with any tax liability accruing on payments. If the advice or determination indicates that taxation would be payable, the NSW Government should undertake negotiations with the Federal Government to amend the relevant tax legislation to

remove this effect and ensure that it has no operative effect on any payment made by the Scheme.

The Scheme must also obtain advice from the Federal Government as to any possible impact of payments from the Scheme on existing government entitlements. Where the advice indicates that any government entitlement will be detrimentally affected by a payment, the NSW Government should undertake negotiations with the Federal Government to amend any relevant legislation to remove this impact and ensure that it has no such effect.

Further consideration should be given to any other such impacts and action taken in the establishment of the Scheme to ensure that the payments do not have any effect other than the discharge of the debt owing.

While such an approach could arguably create a “windfall” gain for those who receive payments, it is PIAC’s view that this should be considered as part of the mechanism for compensating for the cost of lost opportunities experienced by those who were directly entitled and the flow-on effect of those lost opportunities.

3.14. Residual/unclaimed monies

3.14.1. Statement of Principle

The NSW Government ought not benefit financially from its failure to properly administer the Trust Funds held by the Board. Any entitlements for which the person entitled or their heirs cannot be located should be used for the benefit of the Aboriginal community in NSW.

3.14.2. Application of Principle

As discussed in section 4.4 below, the Scheme should proactively identify potential applicants, rather than relying on all potentially entitled people to apply. This process is likely to result in amounts of money being identified that should be paid to individuals who cannot be located. Where a person entitled is identified, and neither they nor any of their beneficiaries can be located, the Scheme will therefore have un-repaid entitlements. PIAC submits that such entitlements should, at the end of the operation of the Scheme, be utilised for the benefit of Aboriginal people in NSW and not retained by the NSW Government.

Senator Aden Ridgeway has suggested, for example, that there is a need to establish a scholarship fund for Aboriginal people. This is one manner in which the funds could be used. This is a matter that should be the subject of further consultation with Aboriginal people in respect of the design and operation of the Scheme.

3.15. Opportunity for community to comment on proposed scheme

3.15.1. Statement of Principle

The Aboriginal community must have an opportunity to provide meaningful comment on the Scheme as it is intended to operate.

3.15.2. Application of Principle

The Panel's consultations have gone some way towards beginning the process of community discussion about how the Government's commitment to pay back wages and other entitlements should be implemented. However, as the Panel has not developed a scheme proposal, the consultations have not given the Aboriginal community an opportunity to consider and provide feedback in relation to an actual model to be considered by Government.

The Panel must therefore, with support and resources from the NSW Government, engage in a second stage of community consultation, whereby the Aboriginal community is informed of the proposed scheme model, and of particular issues that need to be resolved in relation to the model. This would include, for example, how the heirs of deceased people who were directly entitled will be treated under the scheme.

This further consultative process will enable the community to provide constructive feedback. Without an opportunity to comment on an actual model, it is difficult to see how the Panel's discussions with the community can be described as true consultation.

There are competing considerations of, on the one hand, implementing the scheme without further delay, and on the other, getting it right. Both must be considered, and the

Government's long-overdue decision to pay people their unpaid trust monies should be implemented in a considered rather than a rushed and potentially divisive and inappropriate manner. This requires engaging with the Aboriginal community about the design of the scheme, and utilising their knowledge of what happened in the past, and of culturally appropriate and acceptable ways of dealing with some of the difficult and sensitive issues inherent in a scheme of this nature. Thus, once the Panel has determined a proposed model, it should be the subject of further consultation with the Aboriginal communities of NSW.

4. Model of scheme

PIAC proposes a scheme that is based in an investigative rather than an application model. The scheme would operate through seven stages to enable both investigation and research to take place, individuals to make claims and those individual claims to be investigated. In summary, the seven-stage model proposed is:

- Stage 1: Research on entitlements by class of payments
- Stage 2A: Research to identify potential members within each class of payments
- Stage 2B: Call for notification of claims
- Stage 3: Review of claimants and class members and further investigation
- Stage 4: Calculation of entitlement amount by year
- Stage 5: Consideration of evidence of payments made
- Stage 6: Calculation of current value
- Stage 7: Identification of beneficiaries and payment.

The scope of each stage is detailed below. The sections following the description of the model deal with issues that are likely to arise in relation to particular stages of the Scheme as modelled.

4.1. Stage 1: Research on entitlements

This Stage involves comprehensive research into the various types of payment that came under the control of the Board during the period of its existence. Some of these payments will be legislatively based and others will be wages or compensation payments. The work done already by the ILC will assist in this task. However, it is the view of PIAC that the Scheme must commit resources to ensuring that the research results are comprehensive.

The outcome of Stage 1 will be a document detailing:

- all of the types of payments that may be relevant to the Scheme;
- the criteria for payment in respect of each type, for example, in relation to payment of child endowment, what criteria had to be met by a person before she or he was eligible for the payment;
- the criteria for determining the amount of payment, for example, in relation to child endowment, the payment amount may have varied depending on the number of children;
- the period during which such payments were available, that is, if it is a payment under a legislative scheme, when the scheme was operative; and
- the weekly, monthly, annual or lump sum amount of the full payment at all relevant times.

Work on this aspect of the Scheme could commence immediately.

4.2. Stage 2A: Research to identify potential members within each class of payments

As with Stage 1, this is a research undertaking to identify who, in NSW, at all relevant times was eligible for payments under each class of payment, whether or not such payments were made.

In order to undertake this stage, it will be necessary to review all available government records relevant to the particular types of payment as well as other records that may indicate that a particular person has a characteristic, such as bearing a child, during the relevant period.

This Stage will result in a list of names of people eligible under each class of payment. For each name, there should also be details of the period during which that person was eligible for a payment within that class. In addition, where the information is available and established by clear documentary records, details of the amount of the payment made in favour of that person should be included. Where there is no clear documentary records

establishing an actual amount, all information relevant to the determining the amount of payment should be included, such as type of work undertaken, age of the person at the relevant times, number of children, etc.

There are likely to be a number of people whose names appear in more than one payment class. For example, a person may have been eligible for child endowment, widows pension and have worked during the relevant period. As such, that person's name should appear in all three classes of payment.

This list should be divided up by payment type. Where the research indicates eligibility for more than one type of payment for an individual, that individual's name should appear under each payment type for which he or she was eligible.

For the purposes of reference later in this proposal, the list that results from Stage 2A is referred to as "**List A**".

4.3. Stage 2B: Call for notification of claims

At the same time as the research is being undertaken in Stage 2A, the Scheme would call for notification of potential claims by both those people who believe they are directly entitled to payments and those who believe they are the heirs of those directly entitled. In order to get as comprehensive a response as possible, the Scheme should publish information about all of the classes of payments and the eligibility criteria for each class (based on the research undertaken in Stage 1).

The call for notification would ask the person making the notification to indicate:

- whether they are a person directly entitled or an heir/family member;
- what type of payment or payments the person believes may have been made to the Board on behalf of the person directly entitled;
- whether or not the person has any documentary evidence of either the actual payment entitlement or how the person directly entitled met the criteria for entitlement; and

- what oral evidence the person has of either an entitlement or that the person directly entitled was eligible for a payment.

This Stage 2B will result in a second list of names; that list is referred to in this document as “**List B**”. Again this list should be divided into payment types and where a person notifies a claim for eligibility of a claimant under more than one type of payment, that claimant’s name should appear under each payment type.

4.4. Stage 3: Review of claimants and class members and further investigation

This stage involves review of List A—the list generated by the Scheme’s own research—and List B—the list resulting from the call for notifications—to determine commonality and differences, and further research to obtain any further evidence to clarify entitlements. This review will be done by payment type. The review will result in three new lists of names:

- List C, being those names on List A that do not appear on List B either at all or do not appear under the same class of payment;
- List D, being those names on List B that do not appear on List A either at all or do not appear under the same class of payment; and
- List E, being those names that appear on both lists under the same payment classes, that is for example, where a person’s name appears on List A under Veteran’s Pension and appears on List B as claiming entitlement for a Veteran’s Pension.

In relation to each of these lists, further research then would be undertaken by the Scheme.

4.4.1. List C research

Names on List C are those people who may be eligible for a payment who are unaware of that eligibility or whose heirs are unaware of such eligibility. It will, therefore, be necessary to undertake some further research to locate the eligible person and/or his or her heirs. This would involve, for example, searches on the register of Birth, Deaths and Marriages for the relevant period (across Australia) and searches on the records of the Public Trustee for records of wills. It would also be useful, at this stage, to consider what assistance could be

provided by Link-Up in relation to records that may indicate the location of heirs who are members of the Stolen Generations and, as a result, less likely to be aware of their family history and any history of a family member having an entitlement. It may also involve undertaking some social research and making inquiries of people who may have known the entitled person.

Clearly the latter aspect of this research could be highly sensitive. PIAC recommends that the form and manner of this research be the subject of further consultation with the Aboriginal community to determine the most appropriate ways to undertake this aspect of Stage 3. It will also be necessary to ensure that sufficient resources are available to key Aboriginal counselling services, such as Link Up, to assist those who are affected by having to recall the past, with all of the potential to cause upset that such a process entails.

This part of Stage 3 will result in details of the location of eligible people and/or their heirs, along with details of their class or classes of entitlements (from Stage 1 and 2), the basis for those entitlements, and the period for which the entitlement exists. All of these details should then be moved to List E.

4.4.2. List D research

List D will be a list of those people who believe they have an entitlement that has not been revealed through the research undertaken in Stage 2 by the Scheme.

The lack of corroborative evidence of the entitlement from Stage 2 should not be fatal to the claim. Rather, the Scheme should undertake further research into the claim to determine whether or not there is any evidence to substantiate the claim. Such evidence would include both direct and indirect documentary evidence, direct oral evidence (being evidence from the claimant themselves), and indirect oral evidence (being evidence of others who have some knowledge of the claimant's history, such as those who grew up with the claimant, other family members, people from the same area or community, etc).

This part of Stage 3 will result in a confirmation of those people listed on List D for whom some evidence is available to establish a basis for payment. These names and details should then be moved to List E.

4.4.3. List E research

This list, unlike List A and List B, should be sorted by name. For each name, the list should include the type of payment or payments claimed, the period for which the person is eligible for each payment type and, where the eligible person has passed away, details of that person's heirs.

The research in relation to List E will also involve confirming the details of the person, the basis of claim and amount of payment at all relevant times, as well as the period over which the person listed was eligible for the particular payment type. Further research to be undertaken in relation to List E is to identify all of the heirs where the directly entitled person is deceased. As with some of the earlier research, there will clearly be sensitivities in relation to this research and the Scheme will need to be particularly careful to ensure that all efforts are made to identify heirs who are members of the Stolen Generations.

4.5. Stage 4: Calculation of entitlement amount by year

Once the List E details are complete, the Scheme will develop for each person on that list a document that deals with each year in which the person was eligible for a payment. Then, the document will record the total amount of entitlement accrued in each of those years, from all the payment types for which the person was eligible. An illustration of this is set out at Appendix 4. The entitlement will arise at the time the payment was (or should have been) made into trust. Some of the payments would have been one-off payments, as is the case with lump sum compensation; others will have been made weekly, fortnightly, monthly, annually, etc.

The document generated in this process is referred to below as “**Document F**”.

4.6. Stage 5: Consideration of evidence of payments made

This Stage requires consideration of any evidence provided by Government or claimants of payments made by the Board out of monies held, to determine:

- the amount of such payments;
- in what year the payment was made;
- which eligible person the payment relates to; and
- whether or not the payment should be considered a valid payment.

This Stage will result in a list of valid payments made by the Board with the name of the entitled person and the date of the payment.

Where a payment made by the Board is considered valid and can be attributed to the monies owed to an entitled person, that information will be recorded for that person on Document F against the relevant year(s). This will give a resulting net amount for each year for each eligible person.

4.7. Stage 6: Calculation of current value

This Stage involves converting the net amounts in Document D for each entitled person into fair value in today's currency, including interest and opportunity costs.

In order to determine current value it is necessary to establish when the entitlement arose and how much it was at that time. This information is generated in the earlier stages of the Scheme and recorded in Document F. It is then necessary to determine the appropriate present value factor to calculate current value. The present value factor depends on in which year the entitlement arose. That is, the present value factor for an entitlement that arose in the financial year ending 30 June 1930 will be different from the present value factor for an entitlement that arose in the financial year ending 30 June 1931.

Once the details of when entitlements arose have been determined, it will then be possible for the Scheme to apply the appropriate present value factor. PIAC has reviewed the work previously undertaken by Ernst & Young and is of the view that it forms an appropriate basis for this process. However, the current value calculations set out in that report at paragraph 13.9 only provides for value up to 2000 and, as indicated in that report, are examples only.

PIAC recommends that the Scheme re-engage Ernst & Young to update the work undertaken to determine current value.

4.8. Stage 7: Identification of beneficiaries and payment

This Stage will involve the finalisation of the current amount owed to each person for whom a Document F has been created and the payment to those persons entitled who are alive.

The other task in this Stage is to finalise a list of the heirs of those entitled persons who have passed away and to determine how the payment is to be distributed to those heirs.

Once this work has been finalised, the Scheme would notify either the directly entitled person or the person's heirs of its decision as to entitlement and amount of payment.

There are likely to be sensitivities in relation to entitlement and amount where the Scheme is notifying beneficiaries because the directly entitled person has passed away. It is PIAC's submission that the form of this notification process be the subject of further consultation with the Aboriginal community, after the Panel has had an opportunity to discuss the issues with those organizations that have particular experience in dealing with Aboriginal communities.

The notification should include information about review and appeal rights and also include information about where the person receiving the notification can get free legal advice or assistance in relation to the notification and any review.

5. Issues arising in the operation of the Scheme

5.1. Stage 2 issues

5.1.1. Legislative impact dependant on “aborigine”

The research to be undertaken by the Scheme in Stage 2 should identify all of those people who were, at any relevant time, considered to be covered by Board who met any of the criteria for payment under any of the different payment types.

An understanding of the definition of “aborigine” used in the relevant statutes is important to understand the broad implications of those various legislative instruments and, in particular, the scope of the Board’s control.³² The important issue of who is Aboriginal and who should be entitled is concisely outlined in Appendix 1.1 of the National Inquiry report, *Bring Them Home*.

5.1.2. Sources of Evidence of Entitlement - Personal records

PIAC has undertaken searches of some records on behalf of individuals who believe they are owed money from the Trust Funds. These searches indicate that the records are extremely patchy and that it is not always possible to rely on the official records to determine (a) whether a person was under the Board’s control; and (b) what, if any, monies were held on that person’s behalf; and (c) what, if any, money was validly paid out by the Board to the person.

In order to identify all sources of such records, the scheme will need to develop an understanding of the range of records available, including, but not limited to those that relate

³² In addition to the summaries provided above at 2.1.1.1, Appendix 1.1 of *Bring Them Home* provides a useful overview of the legislation operating in relation to children in particular.

to Aboriginal people which are held in NSW. From PIAC's initial work, it is clear that the records are not held in one specific place or by any single institution. Therefore, to determine the type and extent of the records held a search is required of all potential institutions and holding authorities. We list below relevant agencies.

5.1.3. NSW State Records

5.1.3.1. Department of Aboriginal Affairs' records

Through its research on behalf of individual clients, PIAC has identified a number of records that are held by the Department of Aboriginal Affairs that are highly relevant to the operation of the Scheme.³³

5.1.3.2. NSW State Records

The NSW State Records is the New South Wales government agency created by the *Archives Act 1960*. It holds a significant range of NSW Government records, many of which will be relevant to the research and investigation that needs to be undertaken by the Scheme.³⁴ Most records held by State Records are available to the public after 30 years. However, records of the Board are available to Aboriginal people through the Department of Aboriginal Affairs' access process.

5.1.3.3. State Library

The Mitchell and Dixon Libraries, which form part of the State Library of New South Wales, hold non-government records created by individuals, companies and other organisations. These include records that relate to Aboriginal people in NSW.

³³ See Appendix 7 for a limited description of the types of documents obtained by PIAC from the Department of Aboriginal Affairs.

³⁴ See Appendix 4 for an overview of the range of archival records held by the NSW Archives Authority.

5.1.4. Commonwealth Government Records

5.1.4.1. National Archives of Australia (“NAA”)

The NAA holds Commonwealth Government archival records.³⁵ These are available for access by the public.

5.1.5. Other sources of records

5.1.5.1. University of Sydney Archives: Personal archives of Professor A P Elkin

These archives include material that could be highly relevant to the research and investigations that need to be undertaken by the Scheme.³⁶

5.1.5.2. Australian Institute of Aboriginal and Torres Strait Islander Studies

This collection contains, for examples, publications of the Association for the Protection of Native Races.

5.1.5.3. Aboriginal Research and Resource Centre, University of NSW

The Centre has materials that may provide further secondary evidence. For example, it holds a copy of a PhD thesis on the experiences of children under the apprenticeship scheme.

³⁵ See Appendix 6 for an overview of the extent of records held by the National Archives of Australia.

³⁶ See Appendix 8 for an overview of some of the materials held in these archives.

5.2. Stage 3 issues

5.2.1. Identifying people directly entitled

Once a person directly entitled is identified, and if that person has not already notified the Scheme, the Scheme should firstly check to ascertain whether the person is still alive. This could be achieved by checking the electoral roll and/or death records.

Other research may be necessary to ascertain the whereabouts of those people directly entitled where there is no record of the person having passed away.

5.3. Stage 4 issues

5.3.1. Determining how much money was held on trust

As a result of research undertaken in Stage 1, it should be possible for the Scheme to establish what amounts of money Aboriginal people would have been entitled to through, for example, child endowment payments, old age pensions, maternity allowances, widows pensions and veterans pension, as well as records of the average weekly wages for different industries over various periods of time for Aboriginal men, women and apprentices throughout NSW.

It is proposed that the Scheme adopt presumptions based on this research, to assist it in determining how much money was held on trust for each person directly entitled.

For example, if the scheme establishes that the old age pension was worth a certain amount during the period 1920-1930, and all persons were entitled to that pension from a certain age, then when person notifying a claim stipulates that his or her mother or father had a certain date of birth, and death, the Scheme will be in a position to determine how much was most likely held on trust for that person.

Another example is if the Scheme establishes that a farm labourer during the period 1950-1960 was most likely to earn a certain amount per week, then when research by the Scheme or a claim notification to the Scheme indicates that a particular person worked as a farm

labourer for 50 weeks a year for six years in that period, the Scheme will be in a position to determine how much was most likely held on trust for that person.

5.3.2. Probative value of oral evidence

The Scheme will be in a position to collect the oral evidence of many individuals, and from this to create corroborated accounts of the practices of the NSW Government and third parties at various periods of time, in various places and in relation to various entitlements throughout NSW. For example, numerous people indicating that they (or a family member) are entitled to wages may give similar oral evidence that a particular employer, during a particular period, routinely paid only a certain amount of money to workers, with the rest held on trust by the Welfare Board but never paid out. The more people who give evidence of the same practice, the more credible is the evidence. The Scheme will therefore be in a position to map out what has most likely occurred in relation to the Trust Funds of certain groups of peoples.

Sometimes the oral evidence may conflict with written records. For example, the Government may hold records that appear to demonstrate that trust monies were paid out to certain Aboriginal people, while the oral evidence may suggest otherwise. Where the oral evidence contradicts a written record, the Scheme should take account of the very real possibility that what really happened may not be as recorded.³⁷

While those who are directly entitled may be able to give direct oral evidence relating to their trust monies, those who notify the Scheme in relation to a deceased family member will be in a different position. They may not have direct evidence relating to the deceased person's entitlement. However, they may have indirect evidence, for example, they may have been told what happened by the deceased person before they died. Such second hand, or hearsay evidence, should not be precluded by the Scheme. Rather it should form part of the overall body of evidence to be considered in respect of each potentially entitled person.

³⁷ This reflects the comment made in the April 2001 Cabinet Minute at paragraph 6.9 in relation to fraud on the Trust Funds.

5.4. Stage 6 issues

5.4.1. Interest

The Cabinet Minute reveals that DoCS contracted Ernst & Young to review the options and make recommendations in relation to calculating fair value in today's currency of the amounts owed. Ernst and Young recommended an interest rate of 4.8% per annum for the period from 1900 to 1969. For the period from 1969 to 1986, they recommended varying interest rates each year, based on the rates earned/reported by the Office of the Protective Commissioner. These were based on consideration of a range of factors, including the Consumer Price Index ("CPI"), the Average Weekly earnings ("AWE") Index, the rates earned by the Office of the Protective Commissioner and the Commonwealth Ten-Year Bond yield.

5.4.2. Opportunity costs

Ernst & Young took into account the fact that recipients were not paid their money in a timely manner and that there was an inherent "opportunity cost" in not receiving their trust funds when they were entitled to it. Ernst & Young made an allowance for opportunity costs by adjusting the interest rates to be slightly higher than they would otherwise be, by using the gross (as opposed to net) rate, and by not making any adjustment for fees.

The Ernst & Young report appears to provide a sound basis for determining fair value of trust fund amounts in today's currency, taking into account interest rates and opportunity costs.

5.5. Stage 7

5.5.1. Notifying people directly entitled

Where the directly entitled person is alive, the Scheme should attempt to notify them in writing. This will be a simple matter if the person has notified the Scheme of a claim. Otherwise, addresses may be found on the electoral roll or in telephone directories. In addition, lists of names of people entitled could be published in a national newspaper such as *The Australian*, and Aboriginal newspapers such as the *Koori Mail* or *Aboriginal Times*.

This latter option may give rise to privacy concerns and other sensitivities³⁸, and should be a matter of further consultation with Aboriginal communities in NSW.

5.5.2. Defining heirs who can benefit from an entitlement

PIAC proposes that the law relating to the administration of estates in NSW, as contained in the *Wills, Probate and Administration Act 1898* (“**the Wills Act**”), be adopted by the scheme—with some tailoring—in determining the definition of a deceased person’s heirs for the purposes of determining who is entitled to inherit a share the payment entitlement, and what share. The extent to which tailoring is required should be determined by the scheme, in consultation with Aboriginal people.

Under the Wills Act, if a person leaves a valid will, the beneficiaries will (generally) be those individuals or entities named in that will, and the division of the deceased person’s estate will be as specified in the will. Historically, there were certain formalities that were required for a will to be valid. However, amendments to the Wills Act in 1989 mean that a document is now recognised as being a valid will if the relevant court is satisfied that it is a testamentary disposition that records what the deceased person intended.

Assets not specifically mentioned in a person’s will—which entitlements under the scheme would be—are sometimes covered by residuary clauses. Where there is a residuary clause, unspecified assets will be distributed pursuant to the terms of the clause. Where there is no residuary clause, the unspecified assets will be distributed according to the rules of intestacy. Thus, in relation to the scheme, where there is a valid will containing a residuary clause, the beneficiaries in relation to the scheme should be determined according to that clause. Where there is no residuary clause, the beneficiaries should be determined according to the rules of intestacy.

³⁸ For example, if the records do not indicate that an entitled person has passed away, but these records turn out to be inaccurate, the publication of the name of a deceased person is likely to cause significant distress to Aboriginal people who knew the deceased.

Where there is no valid will, a person's estate is distributed according to Division 2A of Part 2 of the Wills Act, known as the rules of intestacy. Section 61B sets out the order of distribution. There are nine classes of beneficiaries that are set out in order of priority. If no one falls within the first class, the whole estate will either be divided equally between members of the second class, or go to the next class of which there is a member or members. Once there is a person qualifying in a particular class, the whole estate passes to that class, and no class lower in the order of priority receives any of the estate. There are special provisions for adopted children, ex-nuptial children and step-children. Thus, in relation to the Scheme, where there is no valid will, the beneficiaries should be determined according to the rules of intestacy.

The Scheme may need to simplify the rules contained in the Wills Act in relation to beneficiaries—both where there is a valid will and where there is not—in order to ensure a timely and cost-effective scheme with straightforward and easy-to-administer criteria. In part, this reflects the difficulties likely to arise in relation to the identification of members of beneficiary classes, particularly given the history of child removal that has impacted on the families of so many Aboriginal people.

In light of the risk of failing to consider all potential issues in defining beneficiaries, the scheme should maintain a discretionary power, so that each case can be considered on the merits.

It is suggested that a committee of Aboriginal people, including a member or members of the Stolen Generations, and an expert in wills and estates, be established to assist in consulting Aboriginal people and developing and refining the rules of the scheme with regards to beneficiaries, based on the Wills Act.

5.5.3. Identifying and notifying beneficiaries

The Scheme will need to identify beneficiaries where a person directly entitled is deceased. This process may be initiated when a person notifies the Scheme of a potential claim and identifies themselves as entitled by reason of being a beneficiary to someone who would have been directly entitled and is deceased. Alternatively, it may be initiated by the Scheme when it proactively identifies a person who would have been directly entitled, but is deceased. In

either case, the Scheme will need to satisfy itself that it is aware of all of the heirs of the person who was directly entitled.

The Scheme will need to investigate birth, death and marriage records, and examine records of the Protection Board, Welfare Board, and State and Commonwealth Government Departments that may shed light on family relationships or the existence of wills. Interviewing those people who do notify the Scheme about their family histories will also assist the Scheme in identifying who the heirs are in any particular case.

Once the identities of the heirs are established, and if they have not already notified the Scheme, the Scheme should notify them in writing. The methods set out in 5.5.1 above could also be used (subject to appropriate consultation with the Aboriginal community). If the identities of all heirs of a deceased, directly-entitled person cannot be established, or the Scheme is unsure whether all heirs have come forward, there may be a need to publish names in a newspaper. As in some cases only the deceased person's name will be known, and as publishing deceased persons' names may breach of Aboriginal cultural protocol, another notification method will need to be developed and implemented for such situations. This should be done through consultation with the Aboriginal community.

5.5.4. Proof of identity and relationship

In determining who is entitled to a payment, both in relation to people directly entitled and their heirs, certain proof of identity and relationship may be required. For example, if a person claiming to be directly entitled notifies the scheme, and they have married and changed their name since money was held on trust for them by the NSW Government, relevant records will be in a different name to their current one. In this case, proof of a person's marriage and change of name would be required.

Another example is if a person claiming to be entitled as an heir notifies the Scheme, he or she will need to prove that they had a certain relationship with the deceased person. In this case, proof of marriage or birth will be required, depending on whether the person is an heir because they were the husband, wife or child of the deceased person.

Another way the Scheme could establish the identity and relationships of a person notifying a claim with a directly entitled person could be to require them to make a statutory declaration. Consideration should be given to the Scheme ensuring that all associated costs in relation to this process (or the process of obtaining marriage or other certificates) should be waived. In addition, the Scheme should assist people to apply for these documents from the relevant government agencies. The Scheme should establish memoranda of understanding and protocols between relevant departments for this purpose.

6. Procedure and related matters

6.1. Term of Scheme

The Scheme should have a limited life span to ensure that the process is not unnecessarily protracted and that finality can be achieved. The April 2001 Cabinet Minute indicates a five-year period of operation. PIAC considers that, so long as the Scheme is established and appropriately resourced in respect of research and investigation needs, this time span should be sufficient.

6.2. Maintenance of co-existing rights

Those claiming an entitlement under the Scheme should be able to choose between receiving payment of that entitlement from the Scheme and seeking redress through the courts. Thus the establishment of the Scheme should not displace common law rights. However, a claimant successful in one forum should not be entitled to proceed in the other.

6.3. Membership and staffing

The Board of the Scheme should be constituted by a majority of Aboriginal people, with the Chairperson being an Aboriginal person.

Decision makers for the Scheme should include both Aboriginal and non-Aboriginal people and should be required to have relevant expertise in assessing the evidence to determine entitlement, and in conducting processes in accordance with the principles of natural justice.

6.4. Communication

In order to achieve its goals, the Scheme must be advertised widely. A communications policy should be developed that ensures broad coverage and conveys in clear terms the Scheme's role and processes, including that notifications can be made by people directly entitled to Trust Fund monies, as well as by the heirs of deceased persons who would have

been directly entitled. It should also be made clear that the Scheme will deal with not only unpaid wages, but also entitlements such as maternity allowance and old age pensions.

The Scheme should be advertised in major metropolitan and regional newspapers as well as in the Aboriginal media. Information about the Scheme should also be provided to Land Councils, Aboriginal Legal Services and other Aboriginal organisations that come into daily contact with Aboriginal people throughout NSW.

6.5. Informed Consultation Process

The Panel's consultations have gone some way towards beginning the process of community discussion about how the Government's commitment to pay back stolen wages and other entitlements should be implemented. However, as the Panel has not developed a scheme proposal, the consultations have not given the Aboriginal community an opportunity to consider and provide feedback in relation to an actual model under consideration.

The consultation process must therefore adopt a second stage, whereby the Aboriginal community is informed of a proposed scheme model, and of particular issues in relation to the model (eg how heirs of deceased people who were directly entitled will be treated), so that it can provide constructive feedback. Without an opportunity to comment on an actual model, it is difficult to see how the Panel's discussions with the community can be described as true consultation.

There are competing considerations of on the one hand, implementing the scheme without further delay, and on the other, getting it right. Both must be considered, and the Government's long overdue decision to pay people their unpaid trust monies should be implemented in a considered rather than a rushed and potentially divisive and inappropriate manner. This requires engaging with the Aboriginal community about the design of the scheme, and utilising their knowledge of what happened in the past, and of culturally appropriate and acceptable ways of dealing with some of the difficult and sensitive issues inherent in a scheme of this nature. Thus once a proposed model has been determined by Government, it should be the subject of further consultation with the Aboriginal communities of NSW.

Appendix I Bibliography

R Chisholm, *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (1985) Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, Sydney.

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Department of Community Services, *Connecting Kin: Guide to Records - A guide to help people separated from their families search for their records* (1998), NSW Department of Community Services, Sydney.

Human Rights and Equal Opportunity Commission, *Bring Them Home* (1997), Human Rights and Equal Opportunity Commission, Sydney.

NSW Law Reform Commission, *The Aboriginal Child Placement Principle – Aboriginal and Torres Strait Island Children and the Welfare System in NSW*, Research Report Number 7 (1997), NSW Law Reform Commission, Sydney.

Public Service Board of NSW, *Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales* (1940), Parliament of New South Wales, Sydney.

Inara Walden, “‘To Send Her to Service’: Aboriginal Domestic Servants” [1995] *Aboriginal Law Bulletin* 5.

Appendix 2 The 1940 Review

Extracts of the observations and recommendations of the report of the Public Service Board of NSW, *Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales* (1940).

(2) The Stations

...

(n) A record should be made of all aborigines on stations, and of the work performed by them, both on the stations and in outside employment.

(o) A record of the produce of the station and of its allocation to the residents, etc, should be kept.

...

(q) The practice on stations of issuing double rations in lieu of cash for station work should be discontinued, and replaced by cash payments.

...

(8) Assistance to Aborigines

(a) Food

(i) ... all aborigines who to-day are issued with orders on local traders, *i.e.*, those living off stations under the control of a manager, might be supplied with food relief on the same conditions as the general community. This is already the case in a number of instances, and there seems to be no real grounds for differentiation.

Aborigines living on stations should continue to receive issues from the bulk store of the station, but the present practice of eliminating children in receipt of family endowment should be discontinued.

...

(c) Family Endowment Payments

The Public Service Board agrees with the present policy of issuing orders for specific goods. At the same time, the Public Service Board considers that there should be more regular review of the cases, in order that every person when deemed to be deserving, may receive payments in cash as in the case of the general community. This policy should prove to be a valuable incentive to the aborigines.

An immediate review of the accumulated funds should be made with a view to determining whether or not they can be usefully employed in the interests of the endowee.

(d) Old Age and Invalid Pensions and Maternity Allowance

The present position with regard to the non-payment of old age and invalid pensions to persons resident on stations, and the non-payment of old age and invalid pensions and maternity allowance to aborigines in whom aboriginal blood predominates, should be reviewed and representations made in that regard to the Commonwealth Government.

(9) Education and Training

...

(b) Adult Education and Training

(ii) ... Inducements to fit themselves are available. For example, family endowment payments, instead of being given by way of orders, could be made in cash ...

...

(10) Social Welfare

...

Cases have come under the Public Service Board's notice where girls with illegitimate children have not pursued their rights; there was also one case of an incapacitated returned soldier who had lost his pension but who, the medical officer reported, should still be in receipt of a pension. Such cases as these should be brought under the notice of the administration and proper action taken.

(11) General

(a) The following action should be taken as early as possible—

(i) Complete records should be established on the stations, etc., and at head office of the aborigines within the state, with particular reference to children.

Appendix 3 Sources of entitlements

The ILC intern Ms Zoe Craven has completed significant research into the sources of payments and entitlements.

As discussed above, the main areas of entitlements were endowment payments, maternity allowance, pensions and apprentice wages.

Below is an outline prepared by Ms Craven of the government departments or agencies responsible for the administration of programs relating to Aboriginal people and/or payments and entitlements:

Administration of Aboriginal Affairs generally:

- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)
- Public Service Board (1895-1988), Department of Administrative Services (1988-present), Office of Public Management (1988-present)

Administration of Trust Money:

- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)
- Department of Treasury (1824-present)
- Colonial Secretary (1821-1900)
- Chief Secretary (1901-1975)
- Department of Services (1975-Jan 1976; May 1976-1982)
- Chief Secretary's Department (Jan 1976-May 1976; 1988-1995)
- Auditor General, Inspector General of Police and Police Magistrates overseen by Office of Colonial Secretary and successors.

Administration of the Apprentice Scheme:

- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)
- State Children's Relief Board/Colonial Secretary (1881-1923)
- Minister for Public Instruction/Minister for Education (1906-1939)
- Director of Child Welfare Department (1939-1956)
- Department of Child Welfare and Social Welfare (1956-1974)
- Department of Youth and Community Services/Department of Youth, Ethnic and Community Affairs (1974-1988)
- Department of Family and Community Services (1988-1990)
- Department of Community Services (1990-present)

Widows Pension:

- NSW Registrar of Widows Pensions (1925-1942)
- Commonwealth Department of Social Services (1942-1972)
- Commonwealth Department of Social Security (1972-?)
- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)

Family and Children Endowment:

- NSW Commissioner for Family Endowment (1927-1941)
- Commonwealth Department of Social Services (1941-1972)
- Department of Social Security (1972-?)
- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)

Invalid/Old Age Pensions and Maternity Allowance:

- Pensions and Maternity Allowances Office within Commonwealth Department of Treasury (1909-1941)
- Pensions and Maternity Allowances within the Commonwealth Department of Social Services (1941-1972)
- State Directors of Social Services (1947-?)
- Department of Social Security (1972-?)
- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)

Veterans Benefits:

- Pensions and Maternity Allowances Office within Commonwealth Department of Treasury (1909-1920); Repatriation Commission (1920-present)
- Department of Treasury/Department of Finance (1976-present)
- Department of Defence (1942-present)

Responsible for Overseeing Industry Awards and/or Administering Wages

- Commonwealth Department of Commerce and Agriculture (1942-1956)
- Commonwealth Department of Primary Industries (1956-?)
- Aborigines Protection Board (1909-1940) and Aborigines Welfare Board (1940-1969)

Appendix 4 List E with payment totals

Example: Person X

It has been determined that person X was eligible for the following payment types in each of the following years:

- wages in the years 1945 to 1956 and again from 1962 to 1966;
- child endowment in the years 1951 to 1969, being for one child in 1951-1952 and again in 1968-69, and for two children from 1953 to 1967;
- unemployment benefit for the years 1956 to 1962; and
- widow's pension for the years 1967 to 1969.

The document generated in Stage 4 would record this information as follows:

Name of Person: X		Alive: Yes/No If no, details of heirs:	
Year	Payment type	Amount	Total for year
1945	Wages	£2 ³⁹	£2
1946	Wages	£2 10s	£2 10s
1947	Wages	£3	£3
1947	Wages	£3 10s	£3 10s
1948	Wages	£4	£4
1949	Wages	£4 10s	£4 10s
1950	Wages	£5	£5
1951	Wages Child Endowment	£5 10s £5	£10 10s
1952	Wages Child Endowment	£6 £5 10s	£11 10s
1953	Wages Child Endowment	£6 10s £12	£18 10s
1954	Wages Child Endowment	£7 £14	£21
1955	Wages Child Endowment	£7 10s £14	£21 10s

³⁹ There is no basis for the amounts used in this table, they are chosen for ease of calculation only.

1956	Wages Child Endowment Unemployment	£3 10s £16 £1 10s	£21
1957	Child Endowment Unemployment	£16 £2	£18
1958	Child Endowment Unemployment	£18 £5	£23
1959	Child Endowment Unemployment	£18 £5 10s	£23 10s
1960	Child Endowment Unemployment	£20 £6	£26
1961	Child Endowment Unemployment	£20 £6 10s	£26 10s
1962	Unemployment Wages Child Endowment	\$20 \$30 \$50	\$100
1963	Wages Child Endowment	\$55 \$50	\$105
1964	Wages Child Endowment	\$65 \$60	\$125
1965	Wages Child Endowment	\$70 \$60	\$130
1966	Wages Child Endowment	\$80 \$70	\$150
1967	Child Endowment Widow's Pension	\$70 \$70	\$140
1968	Child Endowment Widow's Pension	\$40 \$80	\$120
1969	Child Endowment Widow's Pension	\$40 \$90	\$130

Appendix 5 NSW Government Archives

Archives of Aborigines Protection Board and Aborigines Welfare Board:

- Minute Books of the Protection Board and the Welfare Board (1890-1901; 1905-1906; 1911-1969).
- Trust Account Ledgers and Salary Registers of the Board (1897-1934).
- Special Bundles, eg, pocket money books (1920-1957).
- Circulars issued by the Board (1855-1960).
- Correspondence files of the Welfare Board (1949-1969).
- Applications for certificate of exemption (1948-1959).
- Certificates of exemption (1949-1954).
- Record cards of Aboriginal children (1953-1966).
- Ward registers (1916-1928).
- Histories of girls and boys unattached for whom forms not prepared (1930-1938).
- Kinchela case papers (1944-1967).
- Station reports and returns (1942-1948).
- Copies of letters sent (1914-1927).
- Register of letters received (1910-1913).

Archives of the State Children's Relief Board:

- Inspectors Diaries (1916-1922).
- Dependent Children Registers (1883-1923)
- Register of Committals (1907-1921).

Archives of Auditor General:

- Auditor General Reports of Inspectors of Public Accounts (1907-1930). Includes reports on the Protection Board for the years 1912, 1913, 1915, 1918-21, and 1923-28; reports on accounts for Warangesda Aboriginal Station, Wallaga Lake Aboriginal Station, Roseby Park Aboriginal Station, Terry Hie Hie Aboriginal Station and Carowra Tank Aboriginal Station.
- Auditor General's Inventory of Documents and Accounts relevant to the Male Orphan School, the Female Orphan School, the Public Schools and the Aboriginal Native Institution (1926-27). Includes lists of orphans indentured.

Archives of the Colonial Secretary:

- Governor and Colonial Secretary's Minutes and Memoranda (1826-1927).
- Correspondence files.

Archives of Department of Community Services:

- Aboriginal Services Branch Correspondence files (1969-1981).
- Miscellaneous Correspondence files (1964-1979).
- Register of Aboriginal reserves (1912-1925).
- Property Register – Aboriginal reserves (1947-1970).

Archives of Department of Public Instruction/Education:

- Admissions registers,
- examinations registers,
- observation books,
- programme/lesson registers,
- punishment books, and
- visitors registers

for Aboriginal schools in NSW, including Cootamundra, Kinchela and other training homes (1876-1979).

Archives of Police Department:

- Copies of Reports for New Angledool Station (1924-1946). Includes particulars of station and patrols.
- Record of clothing and rations issued to Aborigines on Walgett Station (1900-1940).

Archives of the Premier's Department:

- Special Bundles including official papers forwarded to Sir Joseph Carruthers (1895-1907).
- Letters received (1927-1962). Includes a number of files relating to campaigns for reform to legislation governing Aborigines from Aborigines Progressive Association, C Kelly and AP Elkin.

Appendix 6 National Archives

Archives of Department of Treasury:

- Correspondence files (1901-1976).

Archives of Department of Social Services:

- Correspondence files – Administration (1909-1974).
- Correspondence files – Child endowment (1909-1974).
- Correspondence files – Pensions (1909-1974).
- Correspondence files – Maternity allowance (1909-1974).
- Correspondence files – Unemployment and sickness benefits (1909-1974).
- Personal benefits case files (1947-1967).

Archives of the Department of Commerce and Agriculture:

- Correspondence files (1925-1956).

Archives of the Repatriation Commission:

- Correspondence files (1918-1929).
- Index books “War pensions – General matters” (1915-1921).

Archives of the Pensions and Maternity Allowances Office:

- Registers of correspondence, invalid and old age pensions, maternity allowance and war pensions (1914-1947) .
- Index books for invalid, old age pensions, maternity allowance – general matters (1915-1944).
- Register of Commissioner of Pensions general files (1934-1945).

Appendix 7 Department of Aboriginal Affairs' Records

Below is a limited description of the types of documents obtained by PIAC in respect of particular identified clients of PIAC:

- Aborigines Welfare Board records, list dated 1940 for the period 1927 to 1938.
- Welfare Board Balance of Trust Accounts list as at 1 June 1958.
- Local Police Station Records.
- Aboriginal Reserve records.
- Aboriginal station records.
- Aborigines Welfare Board tenancy records.
- Aborigines Protection Board records.
- Aborigines Welfare Board Scholarship grant records (Bursary for Aboriginal students in 1967).
- Department of Education NSW records.
- Aborigines Welfare Board pass book records (showing amount in balance held by Welfare Board on behalf of client).
- Department of Child Welfare and Social Welfare: record for 1965 being a receipt for goods and amounts paid.
- Welfare Board and Court record "Order of Children's Court" pursuant to the *Child Welfare Act 1939*.
- Commonwealth School Savings book, indicating outstanding balance not paid by Aborigines Welfare Board to individual clients in Cootamundra.
- NSW Chief Secretary's Department: "List of Residents entitled to vote", for Burnt Bridge, 24 July 1961.

Appendix 8 The A P Elkin Archives

Records from Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities held in April 1937. These include records of:

- government policy on identification of “Aboriginal” and “blood” status;
- Commonwealth financial assistance to, and States’ support of Aboriginal people; and
- employment and training of Aboriginal people for domestic and farm work.

Native Welfare: Meeting of Commonwealth and State Ministers, held at Canberra September 1951. Includes notes on:

- education and employment;
- placing “native” girls in institutions for employment and apprenticeships;
- role of the States in supervising wages, etc,
- the level of control to be exercised by the States in relation to conditions of employment;
- mission management records;
- discussions among delegates of the earnings of aboriginal peoples being placed in trust accounts.

Submission by NSW to the Aboriginal Employment Officers Standing Committee Conference 1968. Includes records of the NSW Government submission on wards of state and funds to wards.

Printed “Manual of Instructions to Managers and Matrons of Aboriginal Stations and Other Field Officers of the NSW Aboriginal Welfare Board” (1941). This includes materials that relate to:

- the duties of Managers to, for example, keep accounts of Aboriginal employees and their wages, manage ration system;
- the obligation to provide training;
- Station and Reserve benefits, child endowment payments, maternity allowance, widows pension, military pension, old age and invalid pension;
- eligibility for rations on stations;
- the application of the *Accounts Audit Act 1902* and Treasury Regulations;
- crediting earnings of Aboriginal wards to the Board’s trust accounts;
- maintenance of correspondence and files.

Dawn, the journal of the NSW Aboriginal Welfare Board (1967-68). Includes, in January 1967, an appeal for trust fund claimants.

Minutes of meetings of the Welfare Board: Includes some records of expenditure from Trust Accounts.

NSW Aborigines Protection Board Annual Report for 1915.

NSW Aborigines Welfare Board Annual Reports for 1940 & 1955-68

Select Committee on the Administration of the Aborigines Protection Board for 1938. Includes Evidence and proceedings.

Joint Committee of the NSW Legislative Council and Legislative Assembly on Aboriginal Welfare 1967. Includes Report and Minutes,

Aborigines Welfare Board. Papers including agendas and minutes, meeting papers, correspondence, and some material from district officers of the Board covering the period 1941-69.

Australian Board of Missions. Includes correspondence, meeting minutes, various research papers and some copies of the review of the Australian Board of Missions. Documents cover the period 1928-57.

NSW Aboriginal – Australia fellowship. Includes correspondence and papers concerning the period 1957-58.

Aborigines Progressive Association (NSW) (1938-42).

Anti-slavery and Aborigines Protection Society. Includes correspondence and papers for the period 1936-44.

Association for the Protection of Native Races. Includes correspondence, press clippings, published papers, research papers and notes/notebooks for the period 1912-40.

Foundation for Aboriginal Affairs. Includes newsletters and papers for the period 1964-73.

Correspondence, newspaper cuttings and other papers on Aboriginal problems in NSW (1936-1940).

Papers concerning a conference on missions in 1947.

Papers dealing with surveys of Aborigines and statistical material. This includes reports, printed papers and correspondence covering the period 1936-73.

Papers dealing with Aborigines and the law. This includes reports, copies of legislation, press cuttings, court transcripts, printed papers and correspondence for the period 1928-61.

Correspondence and papers dealing with a Conference on NSW Aborigines held in Armidale in 1959.

Correspondence with the Department of Aboriginal Affairs (1974)

Correspondence and transcripts of interviews with Aboriginal people of the NSW coast (1931-56).

Theses and reports concerning Aboriginal station management (1946-60).

Appendix 9 Other Sources of Corroborative Evidence

J Barker, *The Two Worlds of Jimmy Barker: The Life of an Australian Aboriginal 1900-1972* (1988)

Belonging to Me: An Aboriginal Oral History – Interviews with Twenty Aborigines living in NSW

Coral Edwards and Peter Read (eds), *The lost children; thirteen Australians taken from the Aboriginal families tell of the struggle to find their natural parents* (1989)
Sydney

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Appendix I I Glossary

ANTaR	Australians for Native Title and Reconciliation
The Board	Collectively, the Aborigines Protection Board and the Aborigines Welfare Board
The Child Welfare Act	<i>Child Welfare Act 1939</i> (NSW)
DoCS	NSW Department of Community Services
DYCS	NSW Department of Youth and Community Services
FOI	<i>Freedom of Information Act 1989</i> (NSW)
ILC	Indigenous Law Centre, University of New South Wales
The National Inquiry	The Human Rights and Equal Opportunity Commission's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families
PIAC	Public Interest Advocacy Centre
PILCH	Public Interest Law Clearing House
The Protection Board	The Aborigines Protection Board
The Welfare Board	The Aborigines Welfare Board
The 1909 Act	<i>Aborigines Protection Act 1909</i> (NSW)
The 1915 Amendment Act	<i>Aborigines Protection Amending Act 1915</i> (NSW)
The 1918 Amendment Act	<i>Aborigines Protection (Amendment) Act 1918</i> (NSW)
The 1940 Amendment Act	<i>Aborigines Protection (Amendment) Act 1940</i> (NSW)
The 1940 Report	Public Service Board of NSW, <i>Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales</i> (1940)
The 1969 Act	<i>Aborigines Act 1969</i> (NSW)



Appendix D

Submission to Senate Stolen Wages Inquiry

Stolen Wages: The Unsettled Debt

Submission to the Senate Stolen Wages Inquiry

29 September 2006

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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.