A fairer system: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into a review of Government compensation payments

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based, public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Review of Government compensation payments

PIAC welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee Inquiry into a review of government compensation payments.

In recent years, there has been an emergence of state government compensation schemes designed to provide financial redress to children who experienced abuse and/or neglect in state care. This is an issue that affects many Indigenous children who were forcibly removed from their families and placed into state care as a consequence of unjust government laws, policies and practices. The *Bringing them home* report of the *National Inquiry into the Separation of Aboriginal Children from their Families* (National Inquiry) estimated that between one in three and one in ten Aboriginal children were forcibly removed between 1910 and

1970.[1] Research conducted since the National Inquiry and now commonly regarded as more sound estimates the number of removals during that period as one in ten, which still represents a significant number of children (about 20,000 – 25,000) that were removed during this period.[2]

In 2006, Tasmania became the first state in Australia to implement a scheme to provide compensation to its members of the Stolen Generations. Many Indigenous people also participated in redress schemes in Queensland and Western Australia for children harmed while in state care.

Queensland and New South Wales have also established schemes to provide ex-gratia payments to Indigenous people who had their wages and other entitlements diverted into government-controlled trust fund accounts and never repaid (commonly referred to as Stolen Wages). Many Aboriginal state wards and workers were affected by stolen wages practices and policies as trust funds were established in their names to divert money they earned from being sent out to work by government 'protection' agencies.[3] In many cases, these monies were never returned.

These schemes are symbolically significant to Indigenous peoples as they mark progress towards reconciliation between Indigenous and non-Indigenous Australia. Furthermore, the practical importance of such schemes as a means of obtaining redress cannot be overstated given the significant challenges that members of the Stolen Generations and those who have been denied access to their wages and entitlements face in attempting to obtain redress through the courts.

In this submission PIAC focuses on ex-gratia payments and statutory schemes that affect Indigenous Australians, with a particular focus on the NSW Aboriginal Trust Fund Repayment (ATFR) Scheme established by the NSW Government in 2004 to provide ex-gratia repayments to Aboriginal people or their descendants whose money was diverted into trust fund accounts by the Aborigines Protection Board (Protection Board) and later the Aborigines Welfare Board (Welfare Board) and never repaid.

By drawing on its experiences representing claimants under the ATFR Scheme and using case examples, PIAC in this submission discusses the legal principles that must guide the operation of such schemes to ensure that they are effective, transparent, afford procedural fairness to participants and, importantly, adequately address Indigenous disadvantage that flows from the impact of previous government policies, practices and laws.

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1 Human Rights and Equal Opportunity Commission, *Bringing them home, Report of the National Inquiry into the Separations of Aboriginal and Torres Strait Islander Children From their Families* (1997) pp 25 - 150

2 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.

3 NSW: Brian Gilligan, Terri Janke and Sam Jeffries, 'Report of the Aboriginal Trust Fund Repayment Scheme Panel', (2004), Aboriginal Trust Fund Repayment Scheme; and in QLD: Queensland Government, *Wages and Savings of Indigenous Queenslanders 1897 – 1970s – History Sheet* http://www.atsip.qld.gov.au/people/claims-entitlements/wages-savings/wages-history (viewed on 11 June 2010)

PIAC's work on Government compensation schemes

Through its Indigenous Justice Program (IJP), PIAC has undertaken a number of projects that are of particular relevance to the current inquiry.

In 1996, PIAC and the Public Interest Law Clearing House (PILCH) NSW, played an instrumental role in co-ordinating legal advice and assistance to Aboriginal and Torres Strait Islander people making submissions to the *National Inquiry*.

The *Bringing them home* report made recommendations on a wide range of issues to address the trauma and ongoing intergenerational disadvantage caused as a result of forcible removal policies. The recommendations included that governments and churches should provide measures of reparations to all those who suffered because of forcible removal policies.[4]

In response to the failure of governments to act on these recommendations, PIAC led a campaign to lobby for the implementation of a national reparations tribunal for members of the Stolen Generations. PIAC undertook extensive research on various international models of government compensatory and reparations schemes. PIAC, in partnership with the (then) Aboriginal and Torres Strait Islander Commission, the National Sorry Day Committee, the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) and Stolen Generations groups in the Northern Territory, conducted a national consultation to obtain the views of Indigenous peoples about an appropriate framework for a reparations tribunal for members of the Stolen Generations.

In 2001, PIAC released its report, *Restoring Identity*, which proposed a framework for a National Stolen Generations Reparations Tribunal to provide reparations, including monetary compensation, to Aboriginal and Torres Strait Islander people and their families who were affected by forcible removal policies.[5]

Despite early support for PIAC's proposal from the Australian Labor Party and the Australian Democrat members of the Senate Legal and Constitutional Affairs Committee that conducted the inquiry into the implementation of the *Bringing them home* report in 2000, the proposal has not been endorsed and implemented by the Federal Government.[6]

PIAC has also worked extensively on the issue of ex-gratia payments to repay stolen wages in New South Wales and nationally and was a key player in the campaign that led to the establishment of the ATFR Scheme in late 2004. PIAC has been instrumental in ensuring that Aboriginal people have access to legal advice and support in relation to claims made under the ATFR Scheme. PIAC and PILCH established a Stolen Wages Referral project, enabling PILCH members to provide *pro bono* advice and representation to claimants. PIAC and PILCH have assisted hundreds of claimants through the project.

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4 Human Rights and Equal Opportunity Commission, above n1, 25 – 150, esp at 29

5 Public Interest Advocacy Centre, *Restoring Identity: Final Report of the Moving Forward Consultation Project* (2002).

6 Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations* (2000).

In September 2006, PIAC made a submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Indigenous Stolen Wages.[7] PIAC's submission commended the NSW Government for establishing a repayment scheme. However, in that submission PIAC also outlined concerns with the ATFR Scheme's processes and made recommendations for improvements.

Public Accountability

The establishment of government compensatory schemes in matters of public interest must be accompanied by the creation of appropriate public accountability mechanisms to monitor and enhance the effectiveness and efficiency of such schemes. Public accountability is also necessary for gaining and maintaining public confidence in the integrity of government compensatory schemes. This is particularly important where the existence of the scheme is the result of unjust policies implemented by past governments, as is the case with schemes designed to provide redress to members of the Stolen Generations and return wages and entitlements owed to Indigenous peoples. It is essential with such schemes that there is an effective system of accountability in place to ensure the scheme's targets and objectives are being met and that the scheme operates in a manner that is fair, transparent and readily accessible.

Through its work with Aboriginal claimants under the ATFR Scheme, PIAC has observed that many claimants are dissatisfied with the lack of information provided by the ATFR Scheme about the progress being made and the scheme's ongoing achievements and outcomes. Whilst it has a number of concerns about the ATFR Scheme's processes, PIAC acknowledges the hard work and dedication of the ATFR Scheme's staff and note that there have been a number of considerable achievements by the scheme over the years. However, these simply have not been widely communicated to participants. Basic information such as the number of claims that have been assessed, the number that have been successful, the number that have been unsuccessful and the amount paid out by the ATFR Scheme to claimants is not readily available.

In March this year, the NSW Government released information about the number of claims processed and the total amount paid out to claimants after a Greens MP asked questions on notice in parliament specifically to obtain these figures. This information should be readily available without the need to resort to political processes such as this. Further, it should be easily accessible and understandable and regularly updated for the benefit of participants and the wider community. Information about the progress of government compensatory schemes in matters of public interest should be made publicly available periodically. In relation to the ATFR Scheme, the type of information that should be provided includes (but is not limited to):

- the number of successful claims and an outline of the main reasons for granting the claim;
- the number of unsuccessful claims and an outline of the main reasons such claims have been refused;
- the number of appeals against unsuccessful initial assessments of claims;
- the rate at which claims are processed and the number of claims yet to be processed;

[7] S Moran and C Smith, *Stolen Wages: The Unsettled Debt – Submission to the Senate Stolen Wages Inquiry*, Public Interest Advocacy Centre (2006)

- the amounts spent by government in administering the scheme;
- the total amount repaid;
- the number of claimants who have received independent advice and representation; and
- the number of claimants without legal advice and representation.

This type of information not only fosters a more transparent process but it gives claimants valuable information that may assist them to establish their claims.

In addition to making information about the scheme's processes publicly available, as suggested above, another measure to ensure public accountability is to adopt an approach used in the ATFR Scheme to conduct an operational review of the scheme after it has been operating for sufficient amount of time to be able to measure outcomes. When the ATFR Scheme was established, it was recommended that there be a 'review and report back to government on [the] operation of ATFRS after three of its five years of operation'.[8]

While PIAC commends the NSW Government for taking this action and supports such measures in principle, there were many aspects of the review that were of great concern and do not provide a best practice model for reviews of government compensatory schemes.

The review, which was conducted in 2008, failed to involve participants of the ATFR Scheme including Aboriginal people who had made claims under the scheme and legal service providers assisting claimants. PIAC was only made aware of the timing of the review because of the co-operation of the ATFR Scheme staff and staff at the Department of Premier and Cabinet. Many claimants were not aware of the review and as far as PIAC is aware, claimants were not invited to have input into the review process. Further, once the review was complete, the results of the review were not made public and have still not been made public.

Any review of a government compensatory scheme cannot be complete or adequate without contributions by participants of the scheme, meaning claimants as well as services involved in assisting those claimants. Further it is not known what information was available to the government during the review and whether it considered any information from claimants about their experiences with the scheme. The review resulted in significant changes to the ATFR Scheme's guidelines, which had a substantial affect on the rights and entitlements of claimants under the scheme. The changes will potentially reduce the amount owing to some claimants and increase the amount owing to others. The changes also limit the groups of descendants eligible to receive repayments. There was no public consultation during the review and no opportunity given to claimants to provide their views about the potential effect of the changes. This action by the NSW Government to make significant changes to the Scheme without consulting with claimants or the broader public, created mistrust among claimants about the Government's commitment to repay the amounts owed.

Although a review is a positive mechanism by which public accountability can be achieved, the way in which it was carried out in NSW exposed the ATFR Scheme and the NSW Government to allegations of secretiveness and bad faith that should more fairly be made against the Protection and Welfare Boards than

[8] Above n3, 1.2 – Executive summary

the scheme designed to redress the injustices committed by past governments. It is particularly important in the case of Aboriginal trust money to involve Aboriginal people in the decision-making process about how the monies should be paid out so as not to perpetuate the cycle of injustice that started with Aboriginal people being denied the right to manage their own money by past governments. There is a public interest in the effective public administration of government compensatory schemes and ensuring such schemes are held to account.

Recommendation

1. *Government compensatory schemes in matters of public interest should include appropriate public accountability mechanisms to monitor and enhance their effectiveness and efficiency.*
2. *Information about the progress and outcomes achieved by Government compensation schemes should be made publicly available and accessible on a regular basis.*
3. *Reviews of government compensation schemes in matters of public interest should include participation by users of the scheme and the results of such reviews should be made publicly available and easily accessible.*

Administrative justice

Administrative schemes for providing ex-gratia payments are commonly structured to allow for procedural informality, flexibility and speed. The redress scheme for members of the Stolen Generations in Tasmania allowed for claims to be assessed in a non-adversarial and informal assessment process without formal hearings or the applicability of formal rules of evidence. Redress schemes in Western Australia and Queensland and stolen wages schemes in Queensland and NSW have similarly informal administrative processes for determining claims. The ability of schemes established under informal arrangements to offer financial and other measures of redress in cases where the courts would be unlikely to and in time frames that would not be achievable through a judicial process, is a considerable advantage for claimants, and more broadly. However, there can also be negative consequences where the process gives primacy to expedience over quality decision-making and fairness. The failure to provide intelligible and thorough reasons for individual decisions, the inability for claimants to effectively exercise their rights or enforce interests through the process, and the lack of information provided to claimants about the claim process are just some of the potential causalities of an informal process.

It is essential that in establishing administrative mechanisms to provide discretionary payments, volume, speed, the need to meet performance targets and the informality of the decision-making process should not interfere with the fundamental principles of administrative justice, which include, but are not limited to, lawfulness, procedural fairness, natural justice, consistency and procedural accountability. As stated in an article about administrative justice by Robin Creyke and John McMillan:

> …it is the impact which a government administrative decision can have on the rights or interests of a person that is a key determinant of the expectation that administrative justice should be observed.[9]

[9] R Creyke and J McMullin, *Administrative Justice – The Concept Emerges*, (2000) Australian Institute of Administrative Law, 3

In 2009, changes were introduced to the guidelines of the ATFR Scheme. Prior to the changes, where it could be established that a claimant was owed money from a government-controlled trust fund account, the claimant would be entitled to receive a repayment of the full amount owed with interest and taking into account inflation. Repayments under this regime were varied, with some claimants receiving amounts of a few hundred dollars and others receiving amounts in the tens of thousands. The highest repayment under this regime was reportedly $44,000. The changes introduced a one-off lump sum payment of $11,000 for successful claimants. Under this new regime (which is currently in operation in NSW), it is irrelevant how much money is actually owed to the claimant. The fixed amount of $11,000 is provided to all claimants for whom a claim can be proved. Shortly after these changes were introduced, the ATFR Scheme gave claimants an opportunity to make a written application if they wished to remain under the old regime, which provided repayments of amounts actually owed. Those who wished to make such an application were required to do so within 28 days otherwise the new regime would automatically be applied to their claim.

PIAC provided assistance to nearly 200 claimants during this particular process. Given that the old regime could result in a smaller or larger repayment than that provided under the new regime, most claimants wanted to know how much money they would be owed under the old regime to compare it to the amount they would receive under the new regime. Specifically, they wanted to know whether they were owed more or less than $11,000 before making a decision. The ATFR Scheme did not make this information available to claimants nor was there sufficient time to obtain potentially relevant records to make an informed decision about which regime would produce the most beneficial outcome. The process was flawed in that while claimants were being given an opportunity to make an application to remain under the old regime, they did not have, were not provided with and could not, because of the limited time frame, obtain the information necessary to make an informed decision about which of the two regimes would be most beneficial to their circumstances. PIAC along with many other organisations assisting claimants wrote to the Government Departments and Ministry responsible for administering the ATFR Scheme to urge that the process be implemented in a manner that is procedurally fair and would give claimants a reasonable opportunity to obtain the relevant information needed to make an informed decision. The response provided from the relevant Government Department was as follows:

> I have noted the concerns you raise in your letter about the process for seeking your client's submissions very carefully [sic] and I accept that there are limits on your capacity to give legal advice to your client in relation to which set of guidelines might produce a larger repayment. I recognise that it is conceivable that a different repayment will be made under the new Scheme Guidelines as a result of changes made by the Government to the ATFRS earlier this year.
>
> A very important public policy object of ATFRS, however, is to recognise to some extent the past injustices suffered by Aboriginal people who were subject to the oversight of the welfare boards by providing *ex-gratia* [emphasis in original] payments to as many claimants as possible before the Scheme closes. I have determined, therefore, that to postpone processing of your clients claim in order to allow detailed documentary searches to

be undertaken to estimate the amount that might have been held in a trust fund is contrary to the public interest and is also likely to be contrary to the individual interests of many claimants affected by the changes.[10]

This process by the NSW Government demonstrates the procedural challenges that can stand in the way of claimants being able to effectively exercise their rights or enforce their interests under government schemes for providing discretionary payments. The time frame afforded to claimants to make a decision was unreasonable and did not give claimants any ability to make an informed decision and effectively engage in the process. As a result of the Government's desire to close the Scheme by a particular date, claimants were unable to effectively engage in the process.

An administrative review of decisions made under the ATFR Scheme may provide an adequate remedy for claimants in situations such as these. However, presently decisions made under the ATFR Scheme are not reviewable in the Administrative Decisions Tribunal (the ADT) because the Scheme is not established under statute but rather under the exercise of prerogative power. This is another heavy counterweight to the advantages of the ATFR Scheme as an administrative scheme. While the lack of public accountability can be easily cured, the limits on convenient review are not so easily remedied and in PIAC's view require that the *Administrative Decisions Tribunal Act 1997* (NSW) be amended to enable decisions under the Scheme to be reviewed in the ADT.

Recommendation

4. *In establishing administrative mechanisms to provide discretionary payments, principles of administrative justice including that decisions are made lawfully, participants are afforded procedural fairness and natural justice and that there is consistency and procedural accountability should be acknowledged.*
5. *The* Administrative Decisions Tribunal Act 1997 *(NSW) should be amended to give the Administrative Decisions Tribunal jurisdiction to review decisions made under the Aboriginal Trust Fund Repayment Scheme.*

Evidentiary challenges

When the ATFR Scheme was proposed by the NSW government, it promised to identify and reimburse all those who are owed trust money and repay them. However, the NSW Government has developed the ATFR Scheme as a claim-based and evidence-driven process. This means that claimants who believe they or a deceased relative may be owed trust money had to contact the ATFR Scheme and register a claim. In order to prove a claim and receive a repayment, there must be strong and reliable evidence showing that money is owed from a government-controlled trust fund account. Where the evidence is ambiguous or unclear following the Scheme's initial investigations of the claim, the burden rests with claimants to provide additional evidence in support of a claim. This approach places the onus on claimants whose trust monies were illegally withheld to satisfy the ATFR Scheme that a repayment is warranted rather than on the government trustees who illegally withheld the money, were responsible for record keeping and should be responsible for repaying it.

10 See appendix A for a full copy of the letter (redacted to protect clients privileged information)

In PIAC's view, any evidentiary burdens should lie with the NSW Government particularly given it acted as trustee in respect of Aboriginal trust money and failed to make the Aboriginal beneficiaries aware of the amounts that were being withheld and how the monies were being expended. This was also the case in Queensland where the Government controlled the wages and savings of Aboriginal people who worked under 'Protection Acts'. The Queensland Government's account of the history of stolen wages and savings in Queensland provides as follows:

> The Queensland Aboriginals Account was a single bank account used to control the wages and savings of Aboriginal people. Until the 1970s, Aboriginal people 'under the Act' were forced to make compulsory savings into this account.
>
> An individual ledger card record was kept for each person who had money banked into this account. This record showed their name, individual deposits and withdrawals and the balance they had in their savings account.
>
> Many people didn't know what was happening to their wages money. Also, unlike the rest of the community, Indigenous people who were 'under the Act' did not have control over their own money.
>
> Government officials took money out of the account to pay for things like clothing, travel fares, postage, medical and dental expenses and purchase orders for the worker or their family. But the workers themselves were often not told of this.[11]

A number of PIAC's clients have shared some of their stories about the circumstances on their employment in NSW. Valerie Linow provided evidence to the ATFR Scheme that 'We were all slave labour. No-one told us about wages or that we were supposed to get paid.' Cecil Bowden, another claimant under the ATFR Scheme, gave the following evidence:

> 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.

These accounts by Valerie Linow and Cecil Bowden and the information from the Queensland Government about the history of stolen wages and savings summarise the fundamental challenges that claimants face in seeking to recover their stolen wages through an evidence-based process where the burden rests with the claimant to prove the existence of a trust fund account.

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[11] Queensland Government, *Wages and Savings of Indigenous Queenslanders 1897 – 1970s – History Sheet* http://www.atsip.qld.gov.au/people/claims-entitlements/wages-savings/wages-history (viewed on 11 June 2010)

The ATFR Scheme relies heavily on the existence of historical government records to substantiate a claim and indeed in the absence of any other evidence about a trust fund account, many claimants are forced to rely on historical government records to discover the truth about what happened to their wages and entitlements. Many claims have been rejected by the ATFR Scheme because of the lack of historical records confirming the existence of a trust account. Rejecting claims on the basis that there are no historical records proving the existence of the trust account fails to acknowledge the fact that many of these records have been found to be incomplete, damaged or destroyed. This was in fact recognised by the former NSW Premier The Hon. Bob Carr in 2004 when he acknowledged the evidentiary challenges that claimants would face in substantiating a claim 'given the miserable nature of the records that have been left to us' and committed the Government to doing 'all it can to help find evidence that will support claimants' cases'.[12] Further, he stated that 'in those cases where the evidence is sketchy, the Government, in consultation with the Aboriginal community, will develop rules for payment.'[13] Despite these commitments, the approach to evidence to date has been generally unfavourable to claimants where the records are inadequate.

PIAC and other advocacy groups have campaigned since the inception of the ATFR Scheme that a different approach should be taken to evidence such that critical evidentiary issues do not hinge on whether the Boards maintained adequate records of the trust fund accounts, given their history of mismanagement of the records. Instead, the claims should focus on whether there is reliable circumstantial oral and/or documentary evidence to support findings that a claimant worked or was owed entitlements, and that a trust should have or was likely to have been created and that wages and other entitlements should have been paid but were not. This would require claimants to do no more than give evidence outlining their work history and provide evidence about whether they received any pay for their work.

The ATFR Scheme and the Minister are currently considering a claim in which they have been asked to take this approach to the evidentiary issues. If the approach is adopted, it will go a long way to reducing the evidentiary burdens placed on claimants during this process and provide for a fairer mechanism for the granting of ex-gratia payments to Aboriginal people affected by stolen wages policies and practices.

Recommendation

6. *Evidentiary burdens should lie with the government in evidence-based schemes designed to provide redress as a result of injustices suffered as a result of government laws, policies and practices.*
7. *Tests for entitlements should be designed to adequately and fairly address the particularities of the injustice they are designed to redress.*

Trust fund accounts outside the jurisdiction of the ATFR Scheme

The ATFR Scheme was established to repay monies withheld from Aboriginal people by the Protection Board and the Welfare Board between 1900 and 1969. When the Welfare Board was abolished in 1969, jurisdiction over some children then under the jurisdiction of the Board was transferred to the Child Welfare

12 Parliament of New South Wales, Full Day Hansard Transcript, 11 March 2004, available at http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA20040311 (viewed on 11 Jun 2010)

13 Ibid

Department (CWD), the predecessor to the Community Services NSW. In the course of investigating some claims, the ATFR Scheme have discovered records that indicate that some claimants had unpaid trust fund accounts that were administered by CWD after 1969. These claims fall outside the jurisdiction of ATFR Scheme because they do not concern monies withheld by the Protection and Welfare Boards.

There is currently no formal process in place for the consideration of claims by Aboriginal people whose monies were withheld by CWD in trust fund accounts despite the fact that they had similar experiences in institutional care and employment to those under the Protection and Welfare Board. They were subject to the same restrictions and requirements, including no control over their finances, employment, medical treatment or associations with family and friends.

Despite the fact that these claims fall outside of the ATFR Scheme's scope, the Scheme has, from time to time, used its procedures to assess these claims and then make a referral to Community Services NSW along with a recommendation that a repayment should be made or considered. In PIAC's experience assisting claimants whose claims have been referred to Community Services NSW, there has been generally a positive response by Community Services NSW to the ATFR Scheme's recommendation about repayments. PIAC commends the ATFR Scheme for its efforts to try and assist claimants who fall outside of its jurisdiction. However, this informal arrangement is not consistent or structured and does not give claimants any certainty about the process involved in seeking to recover unpaid trust monies from Community Services NSW. PIAC's view is that there should be a formal process in place by which Aboriginal people whose monies were withheld in trust accounts by the CWD should be able to recover monies owed to them through a formal and structured process.

Although the scope of this inquiry is to examine existing payment schemes relating to children in care, it is submitted that this is a matter where there is no rational reason why there is not currently a formal scheme for children who were under the care of the CWD who had the same experiences as those under the care of the Protection and Welfare Board for whom a scheme does exist. PIAC urges the Legal and Constitutional Affairs Committee to recommend that the NSW Government takes immediate steps to address this inequity and implement a formal process for Aboriginal people whose monies were withheld by the CWD to recover these monies.

If a scheme were to be established in relation to CWD trust fund accounts, PIAC recommends that:

- the scheme should undertake extensive research and investigation into who is entitled to money and the amount to which they are entitled;
- a fair system of repayments should be implemented to ensure that claimants are not disadvantaged by the failure of past government to properly maintain records;
- the scheme must be independent of government; and
- decisions made by the scheme about payments must be reviewable.

Recommendation

8. A scheme should be established formally to address the issue of unpaid trust fund accounts that were administered by the Department of Child Welfare (predecessor to Community Services NSW) after 1969.

9. *Tests for entitlements in any scheme should be designed to adequately and fairly address the particularities of the injustice they are designed to redress.*

Legal representation and support

Trustees owe fiduciary duties to trust beneficiaries, including a duty to ensure that the beneficiary receives independent legal advice where the trustee may have a conflict of interest. In our view, the NSW Government owes fiduciary duties to Aboriginal people whose money it has held in trust and failed to repay, including a duty to ensure that those people receive independent legal advice regarding their rights.[14] For this reason, the ATFRS should advise all claimants to seek legal advice and assist claimants to find legal representation.

The NSW Government should pay a reasonable set fee to any lawyer representing a claimant under the ATFR Scheme. This would operate similarly to the set fee payable in NSW for legal practitioners assisting with Victim's Compensation matters. This is not merely the Government's duty as trustee, it is also a matter of best practice, which will ensure the transparency and accountability of the ATFR Scheme. PIAC notes that the Queensland Government's Indigenous Wages and Savings Reparations Scheme, the Redress Scheme for Former Residents of Queensland Children's Institutions[15] and Redress WA[16], all required that claimants have legal advice. The Queensland Redress Scheme and Redress WA pay a flat rate to solicitors who provide advice to claimants.

Given that some government compensatory schemes require claimants to sign a waiver of their rights in order to receive a discretionary payment, it is vital that in establishing such schemes provision is made for access to legal advice as a matter of best practice.

RECOMMENDATION

10. *That claimants be advised by the ATFR Scheme to seek independent legal advice, and provided with appropriate referrals to legal practitioners with expertise in the scheme willing to provide advice at no cost.*
11. *That funding be made available for legal assistance to claimants and to agencies to assist claimants in the Aboriginal Trust Fund Repayment Scheme and other schemes.*

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14 Compare *Trevorrow v State of South Australia (No 5)* (2007) SASC 285 at [907] where the relevant fiduciary relationship was one of guardianship.

15 Queensland Government, 'Redress Scheme for former residents of Queensland children's institutions' http://www.communities.qld.gov.au/community/redress-scheme/ (viewed 11 June 2010);

16 Government of Western Australia, 'Redress WA', http://www.communities.wa.gov.au/Services/Redress/Pages/default.aspx (viewed 11 June 2010).