Submission to General Purpose Standing Committee No. 3, *Inquiry into reparations for the Stolen Generations in New South Wales*

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1. Introduction

The policy of forcibly removing Aboriginal and Torres Strait Islander children in NSW from their families and communities continues to cast a shadow over survivors, their descendants and entire communities. The official policy of forced removals and assimilation is a stain on the State's history. Its legacy causes on-going pain and cyclical disadvantage, a trend yet to be significantly ameliorated by a comprehensive process of reparation and reconciliation.

For many years, the Public Interest Advocacy Centre (**PIAC**) has worked closely with Aboriginal and Torres Strait Islander people in calling for effective and adequate reparations to be made to members of the Stolen Generations. In the time that has passed since the *Bringing Them Home* report (**BTH report**) was published in 1997,[1] there has been some progress towards reconciliation in NSW and across the country. This has included the repayment scheme established for Stolen Wages in NSW and Queensland, reparations for Stolen Generations in Tasmania, the national apology given by former Prime Minister Kevin Rudd MP and the current debate regarding the need to recognise Aboriginal and Torres Strait Islander people in the Australian Constitution.

Though these developments are not insignificant, the central recommendation of the BTH report (**Recommendation 3**) has only been partially fulfilled. Recommendation 3 was for the establishment of a system of reparations for members of the Stolen Generations consisting of:

- an acknowledgement and apology;
- guarantees against repetition;
- measures of restitution;
- measures of rehabilitation; and
- monetary compensation.[2]

Accordingly, PIAC welcomed the reference to the General Purpose Standing Committee No. 3 (**Standing Committee**) to consider the adequacy of the NSW Government's response to the BTH report's recommendation for reparations to be made and to consider whether potential legislation or policies are required to make reparations to members of the Stolen Generation and their descendants.

The central recommendation in this submission is for the NSW Government to establish, as a matter of urgency, a reparations tribunal to compensate members of the Stolen Generations, their descendants and communities. There is clear desire for the establishment of such a tribunal – as is clear from extensive consultation PIAC has undertaken with Aboriginal and Torres Strait Islander communities across NSW in the wake of the BTH report. Nearly two decades on from this landmark publication, the time has come for action, not further discussion and deliberation.

In addition to a comprehensive reparations tribunal, PIAC recommends in this submission that decisive policy decisions be made to reform current child protection and criminal justice practices in order to avoid the continuing and increasingly disproportionate removal of Aboriginal and

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1 Commonwealth of Australia, *Bringing them home, Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families,* August 1997, available at https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.

2 Recommendation 3, BTH report, above note 1.

Torres Strait Islander children from their families and communities. Addressing the contemporary trend of disproportionate removal is vital to fulfil a key component of Recommendation 3: that the devastating policies creating a Stolen Generation of our first peoples are never repeated.

2. About 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.

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

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

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

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

Secondly, PIAC's Homeless Persons' Legal Service (**HPLS**), established in 2004, assists a number of Aboriginal and Torres Strait Islander clients who are experiencing or are at risk of homelessness. The HPLS operates 11 legal clinics based at agencies that provide other services to homeless people and provides legal information, referral, advice and, in some cases, on-going casework, in a large range of areas of law. One new HPLS clinic, for example, is being established at The Shed in Mt Druitt of NSW, a centre that provides support for predominantly Aboriginal and Torres Strait Islander men across a range of areas including mental health, employment and housing. PIAC's HPLS also conducts policy and advocacy work on issues arising from the provision of legal services and its liaison work.

3. PIAC's work on the Stolen Generations

PIAC has been involved in Stolen Generations work since the early 1990s. This work, detailed below, has been undertaken in consultation with Aboriginal and Torres Strait Islander communities throughout NSW. In making the recommendations in this submission, PIAC builds on this work, its current casework and its evidence-based policy submissions. Key pieces of work are annexed to this submission.

3.1 Representation of members of the Stolen Generations (1996 to 1999)

In 1996, PIAC and the (then) Public Interest Law Clearing House NSW (**PILCH**) co-ordinated legal advice and assistance to Aboriginal and Torres Strait Islander people making submissions to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (**National Inquiry**). Following the release of the National Inquiry's Report, *Bringing Them Home*, in 1997, PIAC and PILCH assessed over 50 claims by members of the Stolen Generations.

In 1998-99, PIAC provided legal representation to members of the Stolen Generations who commenced legal action in the Supreme Court of NSW against the NSW Government – the claims were subsequently withdrawn at the request of the claimants. PIAC has also represented members of the Stolen Generations before the NSW Victims Compensation Tribunal in relation to criminal conduct against them while State wards.

3.2 PIAC's Stolen Generations Reparations Tribunal proposal (1997 to 2008)

PIAC first proposed the establishment of a Stolen Generations Reparations Tribunal in 1997.[3] The PIAC proposal recommended the establishment of a reparations tribunal that would meet the key objectives of:

- ensuring that Aboriginal and Torres Strait Islander people were involved in the design and delivery of reparations processes and outcomes;
- validating the specific experience and identity of the Stolen Generations; and
- acknowledging, both symbolically and substantively, the magnitude of the moral wrong perpetuated against the victims of removal policies and the pain and enduring harm borne by the Stolen Generations.

This proposal was developed in consultation with representatives from Link Up (NSW), the Stolen Generations Working Group (NSW), the State Reconciliation Council (NSW), the NSW Department of Aboriginal Affairs, the NSW Attorney General's Aboriginal Justice Advisory Council, the then Human Rights and Equal Opportunity Commission (**HREOC**) National Inquiry Secretariat, the Aboriginal and Torres Strait Islander Commission (**ATSIC**) and Aboriginal Legal Services, Aboriginal Medical Services and focus groups of Stolen Generation members across the country.

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

In 2008, following extensive consultation with Aboriginal and Torres Strait Islander communities, PIAC published the Stolen Generations Compensation Bill 2008. This Bill is referred to in detail in this submission, and is attached as **Appendix A**.

3.3 *Restoring Identity* report (2002)

As emphasised above, PIAC's work in this area has always been conducted in close consultation with Aboriginal and Torres Strait Islander communities. During 2001, PIAC conducted various focus groups with Aboriginal and Torres Strait Islander individuals and organisations across Australia in relation to the proposed reparations tribunal. This national consultation project, *Moving forward: achieving reparations*, brought together over 150 Aboriginal and Torres Strait Islander people and PIAC received close to 50 submissions from individuals, churches and organisations. PIAC consulted all Stolen Generations groups that existed in Australia at the time. The consultations and submissions were based on an issues paper developed by PIAC, which provided information about the tribunal proposal and sought responses to key questions about the tribunal functions and processes, eligibility and forms of reparations.

The interim report summarising responses to the issues paper and proposing draft recommendations was presented to the *Moving Forward* conference in August 2001, organised by HREOC, ATSIC and PIAC. The conference, held at the University of New South Wales, attracted over 250 people, including members of the Stolen Generations, government representatives, academics and representatives from key Aboriginal and Torres Strait Islander organisations.

Throughout the *Moving Forward* project, PIAC's work was guided by a reference group of academics, legal practitioners and representatives from the National Sorry Day Committee, ATSIC, Link Up NSW, the Council on Aboriginal Reconciliation and the National Inquiry. The final report of the *Moving Forward* consultation project, *Restoring Identity*, was completed in 2002.[4] This work is referred to throughout this report and the *Restoring Identity* report is attached as **Appendix B** to this submission.

3.4 PIAC's work on Stolen Wages

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

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

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4 Cornwall, A *Restoring Identity: Final report of the Moving Forward consultation project*, Public Interest Advocacy Centre, 2009, available at http://www.piac.asn.au/sites/default/files/publications/extras/RI_report_final.pdf.

Following the release of this information, PIAC advocated that such a scheme be established. This work culminated in a formal apology in the NSW Parliament by the (then) Premier, the Hon Bob Carr, on 11 March 2004, which included a commitment to repayment of withheld wages.[5] PIAC welcomed the subsequent establishment of the Aboriginal Trust Fund Reparations Scheme (**ATFRS**) and was a strong supporter of and participant in the ATFRS from its inception. PIAC represented eight claimants to the ATFRS and facilitated the referral of 40 claims to pro bono partner firms. PIAC also provided information to descendant claimants, and provided training for all lawyers who represented ATFRS claimants through the Stolen Wages Referral Scheme.

While the issues of Stolen Generations and Stolen Wages are in some ways distinct, PIAC's experience in relation to the ATFRS is helpful for reasons of both practice and principle. This is because many of the relevant issues and challenges are similar, including:

- the paucity 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 and Torres Strait Islander people; and
- the need to design tests for entitlement that adequately and fairly address the particularities of the injustice they are intended to redress.

3.5 PIAC's current policy and legal work

A number of PIAC's current legal clients are Aboriginal and Torres Strait Islander people and they are predominantly young people. A large part of PIAC's current systemic litigation seeks to challenge unlawful police practices in their interactions with Aboriginal and Torres Strait Islander people and to improve the relationship between communities and the NSW Police Force. For example, PIAC is currently finalising a class action representing young people, a number of whom are Aboriginal, who were unlawfully detained for breach of bail by NSW police officers due to inaccurate or out of date information held on the police computer system.[6]

PIAC has also made a number of submissions to government and parliamentary inquiries at both State and Federal levels, and published stand-alone reports in relation to criminal justice policies that disproportionately impact on Aboriginal and Torres Strait Islander communities. These include, for example, submissions in relation to: bail reform;[7] the high incidence of involvement of Aboriginal juveniles in the criminal justice system;[8] justice reinvestment;[9] appropriate diversions

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

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

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

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

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

from the criminal justice system;[10] and the need for rehabilitation and support after release from prison.[11]

Finally, much of PIAC's legal and policy work seeks to overcome the significant barriers to accessing justice experienced by our clients, all of whom suffer from some form of disadvantage. This work is obviously directly relevant to any consideration of compensation for wrongs done under the forcible removals policy. In this regard, PIAC has made a number of submissions to government and parliamentary inquiries based on PIAC's legal service provision, including: obstacles to justice in civil litigation;[12] judicial and merits review;[13] and the funding of legal assistance services.[14]

4. Time to act: the response of the NSW Government to the Bringing them home report

Since the publication of the BTH report, the NSW Government has taken some steps to fulfil the central recommendation that reparations be made for the injuries caused by the forcible removals policy. Former NSW Premier, the Hon. Bob Carr, made an apology to Aboriginal people on behalf of the Government and the NSW population on 14 November 1996, while the BTH report was being finalised. In so doing, he

> acknowledge[d] with deep regret Parliament's own role in endorsing the policies and actions of successive governments which devastated Aboriginal communities and inflicted, and continue to inflict, grief and suffering upon Aboriginal families and communities. I extend this apology as an essential step in the process of reconciliation.[15]

The establishment of the ATFRS to repay wages, allowances and other entitlements held on trust for Aboriginal and Torres Strait Islander peoples and never repaid was also an important development. In announcing the commitment to establishing the 'Stolen Wages' scheme Mr Carr 'invited the House to turn its attention to another legacy of misguided paternalism' and stated:

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10 See, for example, Hartley, C *NSW Law Reform Commission – Sentencing Question Papers1-4*, Public Interest Advocacy Centre, 4 June 2012, available at http://www.lawreform.justice.nsw.gov.au/Documents/cref130_se005.pdf.

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

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

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

14 See, for example, Moor D, Santow E and Roth J *Equal before the law: Submission in response to the Productivity Commission Issues Paper about Access to Justice Arrangements,* Public Interest Advocacy Centre, 4 November 2013, available at http://www.piac.asn.au/publication/2013/11/equal-law; and Goodstone, A and Santow, E *Investing in the community: submission to the NSW Government review of legal assistance services to the NSW community,* Public Interest Advocacy Centre, 28 October 2011, available at http://www.piac.asn.au/sites/default/files/publications/extras/11.10.28_investing_in_the_community_submission_to_the_nsw_government_review_of_legal_assistance.pdf.

15 The Hon. Bob Carr MP, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 14 November 1996 at 6030.

> I take this opportunity to formally apologise to the Aborigines affected and offer the assurance that any individual who can establish they are owed money will have it returned.[16]

The Commonwealth Government has also taken limited steps towards fulfilling Recommendation 3. Most notably this consists of the apology delivered by former Prime Minister the Hon. Kevin Rudd on 13 February 2008.[17] More recently, the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**), while encompassing all children, has highlighted the sexual abuse suffered by a number of Aboriginal and Torres Strait Islander children who were institutionalised and subsequently abused following their removal.[18] The Royal Commission has recently recommended that a redress scheme be set up to compensate individuals injured after suffering child sexual abuse in institutions or in connection with institutions (discussed further below).[19] The recommendation for a redress scheme will be considered at the November 2015 of the Coalition of Australian Governments (**COAG**).[20] It should be noted, however, that the redress scheme the Royal Commission recommends does not take into account how specific groups, including members of the Stolen Generations, should be compensated for abuse suffered while they were in state care.[21]

Overall, however, it is clear that a majority of the BTH recommendations are yet to be fulfilled. With the exception of the $5 million allocated by the Tasmanian Government under the *Stolen Generations of Aboriginal Children Act 2006* to be paid in compensation to members of the Stolen Generations by the Stolen Generations Assessor,[22] there has been no move to fulfil Recommendation 3 in the BTH Report at either state/territory or federal level. In its recent *Scorecard Report*, which comprehensively measures responses to the BTH recommendations by assessing current and historic policies from all jurisdictions, the National Sorry Day Committee (**NSDC**) noted:

> To some extent there have been measures of restitution and rehabilitation through a range of service and program delivery but there has been no attempt, at a national level, to deal with the question of monetary compensation…[23]

In its formal response to the BTH report, the NSW Government stated it was:

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16 The Hon. Bob Carr MP, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 March 2004 at 7163.

17 The Hon. Kevin Rudd MP, Commonwealth, House of Representatives, *Parliamentary Debates (Hansard),* 13 February 2008 at 167.

18 See, for example, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 17, The response of the Australian Indigenous Ministries, the Australian and Northern Territory police force and prosecuting authorities to allegations of child sexual abuse which occurred at the Retta Dixon Home*, July 2015, available at http://www.childabuseroyalcommission.gov.au/getattachment/d256585f-f32b-457a-a215-22ef61f1e69a/Report-of-Case-Study-No-17.

19 Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report*, 14 September 2015, available at https://www.childabuseroyalcommission.gov.au/policy-and-research/redress.

20 AAP, 'Abuse redress will be on COAG agenda', 20 September 2015, *SBS News Online*, available at http://www.sbs.com.au/news/article/2015/09/29/abuse-redress-will-be-coag-agenda.

21 The Royal Commission states 'we do not accept that our Letters Patent allow us to consider redress for all of those who were in state care…who are members of the Stolen Generations, regardless of whether they suffered any child sexual abuse in an institutional context': above, note 19, at page 6.

22 See Department of Premier and Cabinet, Tasmania, *Report of the Stolen Generations Assessor*, February 2008, available at http://www.dpac.tas.gov.au/__data/assets/pdf_file/0004/53770/Stolen_Generations_Assessor_final_report.pdf.

23 Rule, J and Rice, E, National Sorry Day Committee Inc, *Bringing them home: Scorecard Report 2015*, February 2015, available at http://apo.org.au/files/Resource/scorecard_report_2015_with_appendices_11_copy.pdf.

> committed to making reparations to individuals, families and communities by involving Aboriginal organisations and communities in the development and delivery of programs and services for Aboriginal people. The NSW Government will continue to work in partnership with Aboriginal people, communities and organisations to make reparation for past injustices, and to seek to promote social justice, equality and reconciliation.
>
> In *Bringing them home*, the Human Rights and Equal Opportunity Commission recommended the establishment of a National Compensation Fund to administer monetary compensation for members of the Stolen Generations. Monetary compensation is a matter for the Commonwealth Government.[24]

PIAC urges the Standing Committee to re-assess the NSW Government's previous position, which seeks to allocate responsibility for monetary reparations to the Commonwealth Government. There is no apparent basis in principle for such a rigid approach. Certainly, there is no constitutional reason for any such responsibility being confined to the Commonwealth. Nor is there a sound policy basis for such an approach, given the extensive role that state governments, including NSW, have had in this area.

By way of illustration, Tasmania has taken the lead in ensuring eligible Aboriginal and Torres Strait Islander citizens of that state have been able to participate in a compensation scheme.[25] In addition, the NSW Government's apology recognises that responsibility for implementation of the forcible removals policy lies with state governments. While there may be a preference for a national model of reparations to ensure parity for victims across the country, there is now an urgency to meet the needs of the ageing members of the Stolen Generations and their descendants. As noted by the NSDC *Scorecard* report,

> the unfinished business of the Stolen Generations needs to be front and centre in Indigenous affairs and the original *Bringing them home* recommendations offer a sound foundation towards achieving this. …If we fail to implement these recommendations, we not only fail the Stolen Generations and the current generations of Aboriginal and Torres Strait Islander children, we also undermine efforts to reach a lasting settlement among us, and the achievement of the long cherished national ideal of equality of opportunity for all.[26]

In the absence of prioritised, firm commitments at the national level to establish a reparations tribunal, PIAC urges the Standing Committee to recommend a reparations tribunal be established in NSW. This will, most importantly, accord with the wishes and needs of Aboriginal and Torres Strait Islander communities across NSW, as established during PIAC's *Moving Forward* project. Despite the passage of time since the publication of the BTH report, 'a tribunal with a focus on hearings, programs to provide restitution of culture and identity, and prevention of recurrence'[27] remains patently relevant as a means by which to address the needs of Aboriginal and Torres Strait Islander communities in NSW as well as the individuals who were taken.

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[24] NSW Department of Aboriginal Affairs (undated) *NSW Government Response: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, at page 8. Available at http://www.aboriginalaffairs.nsw.gov.au/wp-content/uploads/2012/11/NSW-Response.pdf.

[25] See above, note 22.

[26] Above, note 23, at page 8.

[27] See *Restoring Identity*, Appendix B, at page 17.

5. Seeking compensation through the courts

Before detailing the specifics of a new reparations tribunal, it is important to consider the failures of existing avenues of compensation for the psychological and physical injuries incurred by Aboriginal and Torres Strait Islander people as a result of the forcible removals policies. Notably, attempts to rely on civil litigation processes to obtain compensation have proven largely unsuccessful and extremely costly:

- In a recent Western Australian case, Donald and Sylvia Collard failed in their attempt to establish that the State had breached a fiduciary duty owed to them or, alternatively, their children.[28] The seven Collard children were committed to the care of the Child Welfare Department from 1958 and spent little, if any, time with their parents until their teens or early adulthood. Pritchard J rejected the claimants' argument, which relied on precedent in other common law jurisdictions, that the State owed fiduciary duties to Aboriginal people in Western Australia by virtue of its assumption of various duties and powers with respect to Aboriginal people since colonisation.[29] Pritchard J also rejected the argument that the State owed fiduciary duties to the children by virtue of its position as guardian, on the basis that under the relevant legislation the State itself was not the guardian of the children.[30]

- In 2000, Lorna Cubillo and Peter Gunner failed to prove their cause of action in the Federal Court of Australia.[31] Lorna was removed at the age of eight and placed in the Retta Dixon Home, under the auspices of the Aboriginal Inland Mission, where she remained until she turned 18. Peter was removed at the age of seven from his home and placed in St Mary's Hostel, where he remained until he was 14 years of age. O'Loughlin J held that the claimants failed to establish the requisite elements of the torts of false imprisonment and negligence,[32] and failed to establish a breach of a statutory or fiduciary duty. [33]

- In 1999, Joy Williams sought compensation for Borderline Personality Disorder and substance abuse disorder developed as a result of being placed under the control of the Aborigines Welfare Board from birth to 18 years of age.[34] Abadee J in the NSW Supreme Court concluded that Joy failed to establish that the Aborigines Welfare Board owed her a duty of care and that even if there was a duty then breach had not been established.[35] Abadee J also found no breach of a fiduciary duty, assuming one existed, could be established. [36] Further, even if a breach could be proven, Abadee J indicated that equitable compensation would have been denied by reason of prejudice or delay.[37]

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28 *State of Western Australia v Collard* [2015] WASCA 86 & *Collard v State of Western Australia [No 4]* [2013] WASC 455.

29 See, eg, *Collard v State of Western Australia [No 4]* [2013] WASC 455 at [1091], [1130].

30 Ibid [1092], [1183], [1188], [1191].

31 *Cubillo v Commonwealth of Australia* [2001] FCA 1213 & *Cubillo v Commonwealth of Australia* [2000] FCA 1084.

32 *See, eg, Cubillo v Commonwealth of Australia* [2000] FCA 1084 at [1167], [1256], [1269].

33 Ibid, at [1192], [1307].

34 *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843.

35 Ibid, at [824], [845].

36 Ibid, at [746].

37 Ibid, at [755].

The 2007 case of *Trevorrow v State of South Australia* is the outstanding exception to this line of authority suggesting that very major impediments exist to pursuing justice through litigation in this area.[38] That case involved the removal of the plaintiff at the age of 13 months following his admission to hospital with a stomach illness. The plaintiff successfully applied for an extension of time under South Australia's limitation statute,[39] and proved that the public officials involved in his removal knew their acts to be unlawful and to involve a foreseeable risk of harm. [40] He was, accordingly, entitled to damages for breach of the tort of misfeasance in public office.[41] Gray J also held that the plaintiff was entitled to damages on the basis of the tort of false imprisonment.[42] Mr Trevorrow was awarded $450 000 in compensation for his loss and injury, including the emotional deprivation and psychological suffering and loss of his Aboriginal identity and culture.[43] He was awarded a further $75 000 in exemplary damages.[44]

Despite Mr Trevorrow's success, overall civil litigation should not be considered preferable to a reparations tribunal as a means of compensating members of the Stolen Generation. Ultimately, civil litigation is rarely a viable option for this client group and has significant limitations to address the entrenched disadvantage caused by the forcible removals policies. Obstacles to access to justice are well established, particularly for marginalised and disadvantaged members of our community.[45] Litigation is invariably an expensive and lengthy process, often ruled out completely by the imposition of limitation periods. There is also the risk of costs. In the *Williams* case (outlined above), the plaintiff was ordered to pay the State's costs.[46] In the *Collard* case (above), at first instance Pritchard J concluded that while the usual order of costs would allow the State to recover its costs from the claimants, the special circumstances and public interest aspect of the case meant that the usual order should not be made.[47] The Court of Appeal, however, set this decision aside on the basis there was an insufficient basis to justify departure from the usual order as to costs.[48] An appeal of this decision has been lodged with the High Court.[49]

6. A Stolen Generations compensation tribunal

Given the shortcomings of seeking compensation through the usual channels, and the need for reparation to encompass far more than monetary damages, PIAC believes it is vital that the NSW Government respond to the BTH recommendations by establishing a reparations tribunal. In making this assertion, PIAC acknowledges that no amount of money will ever be able to fully

38 *Trevorrow v State of South Australia (No 5)* [2007] SASC 285.
39 Ibid, at [943], [947], [963].
40 Ibid, at [978], [979].
41 Ibid, at [981].
42 Ibid, at [993].
43 Ibid, at [1201], [1239].
44 Ibid, at [1239].
45 For a detailed discussion of obstacles faced in access to justice see Roth, J et al *Equal access: submission to the Productivity Commission Draft Report* Access to Justice Arrangements, Public Interest Advocacy Centre, 22 May 2014, available at http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test2/submission-counter/subdr246-access-justice.pdf. See also Cunneen, C and Grix, J (2004) *The limitations of litigation in Stolen Generations cases*, Research Discussion Paper, Number 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, available at http://aiatsis.gov.au/publications/products/limitations-litigation-stolen-generations-cases.
46 *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843, Orders (Abadee J).
47 *Collard v State of Western Australia [No 4]* [2013] WASC 455 (S) [27].
48 *State of Western Australia v Collard* [2015] WASCA 86 [60], [61].
49 See Human Rights Law Centre, 'Stolen Generations family seeks justice on legal costs', 18 June 2015, available at http://hrlc.org.au/stolen-generation-family-seeks-justice-on-legal-costs/.

compensate Aboriginal and Torres Strait Islander people and their communities for the trauma of being a member of the Stolen Generations or for the on-going impact of those forced removals. Submissions to the National Inquiry, however, recognised that the making of reparations, and the consequential recognition of the wrongs done, would assist in the healing process. Link-up (NSW), for example, emphasised in its submission to the National Inquiry that it is the responsibility of governments to provide reparations for gross violations of human rights:

> Insofar as reparation and compensation can assist us to heal from the harms of separation, it is our right to receive full and just reparation and compensation for the systemic violations of our fundamental human rights.[50]

The PIAC proposal for a Stolen Generations Compensation Tribunal (**the Tribunal**), set out in the attached draft bill (**the Compensation Bill: Appendix A**), seeks to achieve a holistic and enduring resolution. This proposal is grounded in the testimony presented to the National Inquiry, and has been designed in accordance with the needs of potential claimants and the principles of participation and self-determination. A central aspect of the proposal is to ensure that those affected by forcible removal have an active role in shaping the nature and content of reparations rather than 'constantly being the subject of other people's decisions about what is best for you, what you deserve, what you are entitled to'.[51] In addition to the potential benefits for members of the Stolen Generations, this model also offers significant implications for governments, including:

- access by those harmed by removal policies to an agreed from of compensation;
- the existence of a scheme for financing a range of reparations measures;
- the possible containment of litigation, creating finality and certainty for governments and those affected by forcible removal policies; and
- an effective mechanism for providing social justice for Aboriginal and Torres Strait Islander people.

Set out below are the key elements of what PIAC believes a reparations tribunal should look like, with brief explanation including lessons learned from PIAC's experience working with the Stolen Wages scheme.

6.1 Guiding principles

Clause 4 of the Compensation Bill sets out the key principles that should guide the operation of the Tribunal. These include:

- acknowledgement that forcible removal policies were racist, and caused emotional, physical and cultural harm to the Stolen Generations;
- recognition that Aboriginal children should not, as a matter of general policy, be separated from their families;
- the distinct identity of the Stolen Generations should be recognised and they should have a say in shaping reparations;
- Aboriginal people affected by removal policies should be given information to facilitate their access to the Tribunal and other options for redress; and
- reparation measures for the effects of forcible removals should be guided by the Van Boven principles (as required by Recommendation 3, discussed further below).

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[50] BTM Report, above note 1, Chapter 14.

[51] Human Rights and Equal Opportunities Commission, *Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Sixth Social Justice Report* (1998) 18.

PIAC's Compensation Bill was developed with the consultation and collaboration of Aboriginal and Torres Strait Islander communities across NSW. Involvement of Aboriginal and Torres Strait Islander people accords with a human rights based approach to policy development. The *United Nations Declaration on the Rights of Indigenous Peoples*[52] (**the Declaration**) protects the right to self-determination[53] and the right of Indigenous people to 'participate in decision-making in matters which would affect their rights'.[54] The Declaration also imposes on signatory states an obligation to 'consult and cooperate in good faith' with Indigenous people in order to obtain their consent 'before adopting and implementing legislative or administrative measures that may affect them'.[55]

6.2 Establishing a Stolen Generations fund

It is axiomatic that the work of the Tribunal will only fulfil the recommendations of the BTH report if it is adequately funded, and if the payments it makes are perceived to be fair. To that end, clause 14 of the Compensation Bill provides that a Stolen Generations Fund be established, to be administered by a Trustee appointed by the Attorney General. Funds are to be appropriated from Parliament, together with any contributions from church organisations or other relevant organisations involved in administering forcible removal policies. This would provide ring-fenced funding, ensuring the longevity of the Tribunal's work and that there are sufficient funds to adequately compensate claimants who are able to prove relevant injuries.

A number of submissions to the National Inquiry advocated for a national compensation fund to be established.[56] The BTH Report recommended that the major church organisations which accommodated removed children 'should be encouraged to contribute to this fund should they so choose'.[57]

Similarly the Royal Commission into Institutional Responses to Child Sexual Abuse has recently recommended that a trust fund be established to fund to receive funding for counselling and psychological care paid under the redress scheme, with contributions made by institutions with the federal government a funder of last resort.[58]

6.3 What can be awarded

Clause 9 of PIAC's Compensation Bill provides that the Tribunal may award one or more identified forms of reparations, including:

- resources for Stolen Generations groups to provide culture and history centres, or healing centres, including funding for land or premises;
- community education programs about the history of forcible removals;
- community genealogy projects for Aboriginal and Torres Strait Islander communities to help identify members of the Stolen Generations and their dependents;

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52 *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly in the 107th plenary meeting, 13 September 2007, available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. Australia became a signatory in 2009.

53 Article 3 of the Declaration.

54 Article 18 of the Declaration.

55 Article 19 of the Declaration.

56 BTH report, above note 1, Chapter 14, Recommendation 14.

57 BTH report, above note 1, Chapter 14, Recommendation 14.

58 Royal Commission, above note 19, at page 26.

- monetary payments for individuals to meet current needs such as funding to travel to see family;
- access to appropriate counselling services;
- access to appropriate health services;
- access to language and culture training;
- memorials that appropriately reflect the views of members of the Stolen Generations; and
- monetary payment.

Clause 9(3) provides that monetary compensation may be awarded to those individuals who can prove they have suffered a particular:
- type of harm, such as sexual or physical assault or labour exploitation; or
- psychological or physical injury directly caused by the fact of their removal.

That reparation should be available in a number of formats is central to the recommendations made by the BTH report, and reflects the principles established by Professor van Boven referred to in Recommendation 3. Professor van Boven's *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*[59] provide for a right to reparation consisting of:
- *Restitution:* re-establishment, to the extent possible, of the situation for the victim that existed prior to the violation of human rights.
- *Compensation:* for any economically assessable damage resulting from violations of human rights such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- *Rehabilitation:* including legal, medical, psychological and other care and services to restore the dignity and reputation of victims.
- *Satisfaction and guarantees of non-repetition:* including cessation and prevention of continuing violations, public disclosure of the truth, apologies, commemoration and bringing those responsible to account.[60]

In addition to the incorporation of the van Boven principles as the basis for determining categories of reparations, PIAC's *Restoring Identity* report (Appendix B) refers to a number of key principles underlying the establishment of a reparations tribunal, articulated by participants at the Moving Forward consultation meetings and in written submissions. These include:

- *acknowledgement* that forcible removal policies were racist and caused emotional, physical and cultural harm;
- *self-determination* for Aboriginal and Torres Strait Islander peoples, recognising the distinct identity of the Stolen Generations and their right to shape reparations;
- *information and access* for Aboriginal and Torres Strait Islander people affected by forcible removal policies to facilitate their access to the tribunal or other redress options; and
- *prevention* of contemporary policies which separate Aboriginal and Torres Strait Islander children from their families.

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[59] Adopted and proclaimed by United Nations General Assembly resolution 60/147 of 16 December 2005.
[60] BTH report, above note 1, at 649-650.

6.4 Eligibility criteria

Clause 10 of the Compensation Bill sets out that to be eligible to make a claim for reparation, a claimant must be:

- a person who was, as a child, removed from their family under legislation that applied specifically to Aboriginal or Torres Strait Islander people; or
- 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.

Eligible claimants should also include a living descendant, relative or family member of a person who would have satisfied the above criteria. Following PIAC's experience of the AFTRS, and the experience of the Stolen Generations Assessor in Tasmania, it is clear that identifying an applicant to be of Aboriginal or Torres Strait Islander can be a difficult and sensitive issue.[61] Accordingly, identifying relevant family members and descendants who may have been affected by the removal and eligible for reparations measures should be set out in any guidelines for the Tribunal on the basis of close consultation with Aboriginal and Torres Strait Islander communities.

Clause 10 also provides that the Tribunal should be satisfied the claimant suffered or was harmed as a consequence, in whole or in part by the removal of that person.

6.5 Procedure & assessment of claims

Clause 11 of the Compensation Bill sets out the procedure to make a claim. The proposed deadline for the making of claims is ten years, with the possibility of extension. In PIAC's experience, one of the greatest limitations of the success of the AFTRS was the short timeframe for the making of claims. The tight timeframe did not allow for communities to become even aware of the opportunity to make a claim, let alone receive sufficient independent legal advice in order to make a submission. PIAC notes that the recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse is that the redress scheme should have no closing date.[62]

Clause 12 of the Compensation Bill provides that a Tribunal must determine a claim within 12 months of receiving it. PIAC believes it is important that decisions are made swiftly, where it is reasonable to do so, and that this is ensured by the imposition of statutory limitations.

Clause 15 provides that Tribunal determinations should be eligible for review on the merits by the NSW Civil and Administrative Tribunal (**NCAT**). PIAC believes it is vital for procedural fairness, as well as community confidence in the Tribunal, that its determinations be both accessible and reviewable. Assessments of the ATFRS and determinations of the Minister were not reviewable in the (then) Administrative Decisions Tribunal. PIAC considers that this inability to access review was a heavy counterweight to the advantages of the ATFRS as an administrative scheme.

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

62 See above, note 19, Recommendation 48, at page 39.

In addition to claims for monetary payments, clause 18 provides that the Tribunal shall provide a forum and process for truth and reconciliation, enabling claimants to tell their story, have their experience acknowledged and be offered an apology by the Tribunal or other relevant body.

PIAC also recommends that any guidelines or regulations setting out what should be accepted as evidence by the Tribunal be less stringent than those applied in the context of civil litigation. In PIAC's experience of the AFTRS, a great limitation of the scheme was the refusal to rely solely on oral and circumstantial evidence, even though it was acknowledged that the lack of documentary evidence was due to negligent record-keeping on behalf of state government bodies.[63] This was in contrast to the approach taken by the Tasmanian Stolen Generations Compensation Assessor, who relied on corroborating evidence from eye witnesses to determine claims where records were lost, destroyed or had never been created.[64] The Australian Law Reform Commission has also established that rules of evidence have generally posed a barrier to Aboriginal and Torres Strait Islanders in the context of civil litigation. This is predominantly due to Aboriginal and Torres Strait Islander people relying principally on oral traditions rather than written documentation as evidence of their claims, which is more easily challenged under the hearsay and opinion rules.[65]

Further, it will be important that emphasis is placed on the Tribunal itself conducting preliminary investigations, rather than imposing the burden on applicants to establish their claim. One of the key difficulties for claimants in the AFTRS was the paucity of documentary evidence due to failures of government record-keepers to maintain appropriate records of wages withheld on trust. The AFTRS Guidelines gave the Panel the authority to investigate and direct the administrative support unit for the scheme to research records and information.[66] The Guidelines also enabled the Minister to direct the AFTRS panel to further investigate and consider claims. In PIAC's experience with the scheme, neither of these provisions was relied upon. PIAC's initial submissions to the scheme argued that without independent preliminary research, many claimants would be found to be ineligible or, if eligible, their claims would not be properly considered resulting in an inadequate repayment process. This proposition was borne out in practice by the experiences of the claimants and lawyers involved in the Stolen Wages Referral Scheme.[67]

The procedures adopted by the Tribunal will also be key to its success. PIAC's experience of the AFTRS is that in addition to a lower evidentiary standard, the informality of the process of the oral hearings was important for clients. There were clients who attended the Stolen Wages redress panel process who found it to be a positive experience. At a hearing of the Senate Committee on Legal and Constitutional Affairs inquiry into Indigenous Stolen Wages, Mrs Valerie Linow said:

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

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

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

66 Para's 8.1(b), (c) and (d) of the AFTRS Guidelines.

67 Banks, R *Stolen Wages: Settling the debt*, Public Interest Advocacy Centre, 31 December 2008, at page 22. Available at http://www.piac.asn.au/publication/2011/06/stolen-wages-settling-debt.

> Going to the panel takes a load off you. If you went to court, it would be more traumatic. I thought the panel were out to knife me, but they were understanding and compassionate people. I did not realise that. I was brought up in an environment where non-Indigenous people turn against Aboriginal people. I did not realise that there are people in this world who have an understanding towards Aboriginal People. I found that the panel was very good. It was very easy for me – because, at my age, I am too old for this.[68]

It is also vital that the Tribunal assessors conduct hearings outside of metropolitan areas to ensure accessibility for applicants and whole communities.

Finally, PIAC would recommend that all decisions of the Tribunal be made public. In PIAC's experience with the AFTRS, the minimal public awareness of the scheme due to its failure to publish and promote its own findings, determinations and outcomes undermined its effectiveness. Ensuring that the decision-making process is as transparent as possible will reassure claimants and the public that the process is just and fair. Privacy considerations will of course impact on how details are made public and to what extent individual circumstances should be disclosed. However, as much as is possible, there should be transparency regarding how a decision is made to award a particular monetary payment and/or other forms of redress. Under the AFTRS, while recommendations were not published, it appeared that a system of precedents was established. It is of course preferable that like claims be treated alike and the procedure by which this occurs should be made clear.[69]

In addition, based on PIAC's experience with the AFTRS scheme, it is vital that any decision made in relation to an individual or group claim be accompanied by clear and specific reasons for each individual decision.

6.6 Monetary payments

PIAC supports the recommendation of the Royal Commission into Institutional Responses to Childhood Sexual Abuse that a sliding scale of fair monetary payments be established to assess claims.[70] The Royal Commission has recommended a sliding scale of compensation with a maximum of $200 000 and an average payment of $65 000 for successful claimants. The matrix for assessing monetary payments under the scheme will take into account the severity of the abuse, its impact on the survivor and whether there are aggravating additional elements. Aggravating elements may include whether the applicant was in state care, the presence of another form of abuse, whether the applicant was in a 'closed' institution or without the support of family at the time of the abuse and whether the applicant was particularly vulnerable to abuse due to disability.[71]

In the approach taken to claimants eligible for payment, PIAC suggests that the payment be clearly characterised as a monetary payment in recognition of the abuse suffered. It should be clear to applicants that the payments awarded by the Tribunal differ from the compensatory

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68 Senate Committee on Legal and Constitutional Affairs, *Transcript of Proceedings*, 27 October 2006, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:committees%2Fcommsen%2F9819%2F0003.

69 *Settling accounts,* above note 64, at page 14.

70 Royal Commission into Institutional Responses to Childhood Sexual Abuse, above note 19, at page 244.

71 Royal Commission, above note 19, at page 21-22.

damages recoverable in successful litigation (which are generally likely to be a greater sum, but more difficult to obtain).

PIAC appreciates that any reparation scheme established to compensate members of the Stolen Generations and their members must be affordable and that the payment scheme will reflect that. However, in the interests of achieving justice, there must be a perception of fairness in the monetary amounts awarded. Further, any concern of financing a tribunal must be weighed with the huge on-going costs to society associated with the legacy of intergenerational harm caused by the forcible removals policy.

6.7 Interaction with other redress and compensation processes

The establishment of a Tribunal to compensate individuals for the fact of their removal will have to take into account the single-issue redress schemes that have been, or may in future be, established. Monetary payments under the Stolen Wages scheme, for example, should be relevant to an assessment of a claim under any reparations tribunal set up to compensate members of the Stolen Generations. Simultaneously, it will have to be acknowledged that for many Aboriginal and Torres Strait Islander people there is no distinction between the original fact of removal and experiences suffered once removed. This is clear from statements made by the AFTRS claimants. PIAC's client, Valerie Linow, for example, stated:

> 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 crows 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.[72]

Accordingly, cl 9(7) of PIAC's Compensation Bill provides that the Tribunal may take into account the nature and extent of any reparations received by the claimant from another compensation fund, other State or Territory legislation and any damages received by the claimant at common

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72 Included in PIAC's submission to the Senate Inquiry – find reference. Settling the Debt, page 27.

law or otherwise. PIAC believes it is appropriate that a sum received from another redress scheme, notably the AFTRS, or from civil litigation, be taken into account by the Tribunal in determining any monetary award or other relevant order, such as funding provided for counselling.

PIAC also believes it should be made clear that participation in any tribunal scheme will not preclude resorting to civil litigation if the survivor so desires. While PIAC believes that the majority of claimants will prefer the tribunal process over and above protracted litigation, there are situations where litigation is appropriate. This may be the case, for example, where a claimant believes that the payment available under the redress scheme is inadequate to compensate them for the damage that they have suffered. Claimants should be made aware of the different options available to them and the implications of those options. For example,

- while a lower standard of proof may be adopted in the Tribunal, which may increase the chances of a successful application, the monetary compensation payable is far less than common law damages;
- a claim in the Tribunal may lead to other forms of reparation, such as an apology or access to counselling, as opposed to as successful common law claim, which does not necessarily include anything other than monetary damages; and
- the difference in meaning and significance behind *ex gratia* payments granted by an administrative or statutory body, and court-ordered damages.

6.8 Informing potential claimants of the scheme

As was the case with the AFTRS, the success of any reparations tribunal will depend in part on how comprehensively its function and role are publicised and promoted. In PIAC's experience working on the AFTRS claims, eligible Aboriginal and Torres Strait Islander people will only make a claim if they are aware of the process and then only if they think it will be worthwhile to do so. This is evidenced by the Queensland experience, where many potential claimants chose not to make claims to the Indigenous Wages and Savings Reparations Scheme because of their dissatisfaction with the process and the terms of the settlement offered.[73]

During the AFTRS process, PIAC made its own efforts to raise awareness about the scheme by staging community forums and meetings throughout NSW, as a result of which more than 150 claims were registered. During these meetings, PIAC was frequently told by potential claimants that they had never heard of the scheme. PIAC also funded the production of posters and flyers promoting the scheme and warning of the deadline to register claims.[74]

If a Tribunal is established, it is vital that a specific communications strategy is developed and adequately funded. While community sector organisations will be vital to promote the scheme and promote its operation in relevant communities, for the success and credibility of any reparations scheme there should be appropriate funding in place for them to do so.

[73] Due to dissatisfaction with the initial process, the Queensland Government has recently committed to re-opening the redress scheme. See Queensland Government, *About the stolen wages reparations scheme*, 10 September 2015, available at http://www.qld.gov.au/atsi/having-your-say/stolen-wages-about/index.html.

[74] See *Settling Accounts,* above note 64, at page 15.

6.9 Legal support and assistance for claimants

Independent legal advice and information should be provided at all stages for potential complainants.

The experience of the AFTRS shows that whether or not an applicant was legally represented, or received legal assistance, made a difference to the outcome of the process. Data provided by the scheme administrators showed that legal representation made a difference to an applicant determining whether to challenge an interim assessment of the amount the scheme calculated to be owed to them. Every time an interim assessment was reviewed, the average final payment increased significantly.[75] PIAC also found that in addition to legal advice, the pro bono lawyers that PIAC facilitated access to provided practical and emotional support to claimants. Without the support of their lawyers, PIAC believes that some claimants would not have pursued their claims.[76]

Almost certainly the most cost-effective, and possibly also the most appropriate, option for providing legal assistance in relation to a reparation scheme would be to fund a model that catalyses and supports the provision of pro bono legal assistance to individuals seeking to access the scheme. This would involve government providing funding to a body – such as PIAC, a public interest law clearing house or another community legal centre – to be the overarching co-ordinator of legal assistance and representation to survivor applicants. PIAC has experience in doing just this via the ATFRS.

Under this model, legal assistance would be provided by commercial lawyers acting pro bono. The coordinating centre would manage, train, supervise and support commercial lawyers to provide pro bono legal assistance in navigating the proposed scheme. The coordinating centre could also provide direct and more comprehensive legal assistance for less straightforward claims. Under this model, there would be some assurance of the quality and depth of service that will be required is accessible to every survivor applicant.

6.10 Review of the Tribunal's operation

Clause 21 of the Compensation Bill requires the publication of annual reports, and for the Tribunal's operations to be reviewed three years from the date it commences operation.

PIAC believes it is important that reparation and compensation schemes are publically accountable, particularly where the existence of the scheme is the result of unjust policies implemented by past governments. PIAC's observations during the period of the operation of the ATFRS was that many claimants were dissatisfied with the lack of information regarding the progress being made and the scheme's on-going achievements and outcomes. Basic information, such as the number of claims that had been assessed, the number that were successful, the number of unsuccessful claims and the amount paid to claimants, was not readily available during the course of the scheme's operation.[77] Accordingly, PIAC submits that

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75 See *Settling accounts*, above note 64, at page 17.

76 See *Settling accounts*, above note 64, at page 17.

77 Some information was consequently made available following a question on notice in parliament. See Mawuli, V *A fairer system*: *submission to the Senate Legal and Constitutional Affairs Committee Inquiry into a review of Government compensation payments,* 9 June 2010, at page 4. Available at http://www.piac.asn.au/sites/default/files/publications/extras/10.06.09-PIAC-Government_Compensation_Payments_sub.pdf.

information should be made periodically available throughout the course of the operation of the Tribunal as well as in the context of a comprehensive review that will be able to inform the future operation of the scheme.

Further, the review must closely consult claimants and potential claimants. The 2008 review of the AFTRS failed to involve scheme participants, whether Aboriginal people who had made claims under the scheme or legal service providers assisting claimants. This was a subsequent source of frustration, and meant that those most directly affected by changes to the scheme following the review were not consulted regarding consequent changes to its operation. This went against the fundamental principle of self-determination, by denying Aboriginal people a role in the decision-making process about how monies should be paid out, and perpetuated the cycle of injustice that started with Aboriginal people being denied the right to manage their own money by past governments.

7. Avoiding repetition: contemporary policies and practices

In assessing the NSW Government response to the BTH recommendation for reparations, it is crucial that contemporary policies relating to the separation of Aboriginal children from their families and communities are also examined. Assessing current laws and policies regarding the placement and care of Aboriginal children formed the fourth term of reference for the National Inquiry.[78] Finding that levels of removal of Aboriginal and Torres Strait Islander children from their families and communities remained unacceptably high, the BTH report recommended that 'guarantees against repetition' be included as an element of reparations.[79] The report stated:

> Appropriate measures must be implemented to ensure that Indigenous families and communities in Australia never again suffer the forcible removal of their children simply because of their race.[80]

The *Moving Forward* consultations undertaken by PIAC also highlighted this significant feature of reparations: that *effective* redress of historical injustice must address not only the actual harm of the past but also the contemporary effects of past wrongs. Many respondents argued that whole communities experience the continuing manifestations of past harm – socially, culturally and economically – and that reparations provide the opportunity for those affected to design and implement community or collective measures that address their distinct on-going needs and a desire to heal.

In recent years, on-going issues have become apparent in relation to the disproportionate removal of Aboriginal and Torres Strait Islander children under the auspices of child protection and the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system. While perhaps not 'stolen' in the sense that members of the Stolen Generations were deliberately removed under a national policy of forcible removals and assimilation, these issues demonstrate the continued phenomenon of Aboriginal and Torres Strait Islander children

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78 See Terms of Reference for the National Inquiry, available at https://www.humanrights.gov.au/publications/bringing-them-home-preliminary.

79 Recommendation 3, BTH report, Chapter 14.

80 BTH report, above note 1, Chapter 14.

losing their connection to family and communities. As noted by the BTH report, ‘The facts of contemporary separation establish a need for fundamental change in Australian law and practice’.[81] This is particularly the case in NSW in the context of child protection policy and in criminal justice.

7.1 Child protection

Past policies of forcible removal have had a direct impact on subsequent generations of Aboriginal and Torres Strait Islander children. The BTH report recognised that descendants of members of the Stolen Generations had lost cultural and familial connections, and often grew up with parents lacking adequate parenting skills. Similarly, intergenerational grieving, caring for traumatised parents suffering from mental illness or substance abuse and loss of family connections were among the impacts of the forcible removal policy identified during PIAC’s *Moving Forward* meetings.

The intergenerational trauma and entrenched disadvantage caused by the forcible removals policies provide a unique context in which current child protection policy must operate. Undoubtedly, there is a need to prioritise the best interests of the child principle, but there is an acute need need to reconcile this principle with the principle of self-determination. There is a disturbing trend of continued disproportionality of the removal of Aboriginal and Torres Strait Islander children compared with that of non-Aboriginal children. Since the BTH report was published, the rate of Aboriginal and Torres Strait Islander children in foster, kinship and residential care has approached one in ten, 11 times higher than non-Aboriginal children. This figure has steadily increased over the past decade, during which time the rates of non-Aboriginal children being placed in out-of-home care has stabilised.[82] In the past decade, the over-representation of Aboriginal and Torres Strait Islander children across NSW increased by 140%, compared with 50% of non-Aboriginal children.[83]

The Aboriginal and Torres Strait Islander Child Placement Principle

The Aboriginal and Torres Strait Islander Child Placement Principle (**the Placement Principle**) was developed in recognition of the need to approach child protection with the aim of securing and protecting the connection of Aboriginal and Torres Strait Islander children with their land, communities and culture.[84] In NSW, the Placement Principle is set out in s 13 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Section 13 provides that where an Aboriginal or Torres Strait Islander child needs to be placed in statutory out-of-home care, the preference is for them to be placed with a member of their family, or extended kinship group. If a child is placed with a family which is not Aboriginal or Torres Strait Islander, ‘arrangements must be made’ to ensure the ‘opportunity for continuing contact’ with the child’s ‘family, community and culture’. The Placement Principle, however, is subject to the general principle governing the Act that ‘in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount’.[85]

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81 BTH report, above note 1, at Chapter 20.

82 Australian Institute of Health and Welfare (2014) *Child Protection Australia 2012-13 Child Welfare Series*, cited in Arney, F et al (2014) *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (Australian Institute of Family Studies: Commonwealth of Australia), available at https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child.

83 See Arney, F et al, above note 63, at page 8.

84 See Arney, F et al, above note 63.

85 Section 9 *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Recent research and analysis have identified significant issues with how the Placement Principle is being complied with, implemented and monitored in practice.[86] Arney et al have identified that the gap between the intent and application of the Placement Principle, across all Australian jurisdictions, is due to a number of barriers, such as the 'inconsistent involvement of, and support for, Indigenous people and organisations in child protection decision-making' and shortage of Indigenous kinship and carers.[87] There is also a narrow understanding of how the Placement Principle should be applied in practice. Arney et al noted:

> While its inclusion in legislation is an essential step toward improving the outcomes for Aboriginal and Torres Strait Islander children, the Principle, in and of itself, particularly when interpreted narrowly as a hierarchy of placement options for Aboriginal children, will be of limited value unless the appropriate monitoring and strategies are in place to support its implementation and assess the outcomes for children.[88]

The Placement Principle, for example, has been characterised as having far greater implications beyond the decision of where to place an Aboriginal child, such as requiring steps to prevent removal and ensuring the participation of Aboriginal and Torres Strait Islander children, parents and family members regarding decisions made in relation to intervention, placement and care.[89] Recommendations for strengthening the application of the Placement Principle include better funding for its operation, training in its use, understanding its place in cultural recognition, and inclusion and strengthening its focus in legislation and policy.[90]

Approaches in comparative jurisdictions

The BTH report identified that the fundamental difference between Australian approaches to child protection and removal and the approaches of comparative jurisdictions with a similar history of colonisation was the level of self-determination afforded to Indigenous peoples when establishing systems of child protection and care.[91] In other jurisdictions, control over decisions in relation to Indigenous communities and, specifically, the welfare of their children, lies solely within Indigenous structures or in partnership with government authorities. The *Indian Child Welfare Act 1978* in the United States, for example, 'gives exclusive jurisdiction to tribal courts in child welfare proceedings about Indian children', allowing for the participation of Indian elders in certain decision-making processes.[92]

There are also differences in comparative jurisdictions in relation to the assessment of the best interests of an Indigenous child. The application of the Placement Principle in NSW legislation, as identified above, is subsidiary to other principles in the Act. This has the effect that consideration of the need to preserve culture is subordinate to the best interests of the child principle. This is to be contrasted with the approach in other jurisdictions, where the need to preserve cultural

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86 See Arney F et al, above note 63, at page 5.

87 See Arney F et al, above note 63, at page 7.

88 Citing Valentine, B and Gray, M (2006) 'International perspectives on foster care: Keeping them home, Aboriginal out-of-home care in Australia', above, note 82, at page 18.

89 Tilbury, C et al (2013) *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements.* Melbourne: Secretariat of National Aboriginal and Islander Child Care (SNAICC), cited in Arney, et al, above note 63 at page 5.

90 See Arney et al, above note 63, at page 18.

91 BTH report, above note 1, Chapter 26.

92 BTH report, above note 1, Chapter 26.

connections for Indigenous children is a mandatory consideration in determining the best interests of the child.

In a number of Canadian provinces, for example, child welfare legislation mandates consideration of the preservation of Aboriginal cultural identity in determining what is in the best interests of a child. Section 2 of the *Child, Youth and Family Enhancement Act 2000* (Alberta), for example, states where intervention is required or being considered, a court or authority making decisions must consider the following matter where the child is an Aboriginal child:

> the uniqueness of aboriginal culture, heritage, spirituality and traditions [which] should be respected and consideration should be given to the importance of preserving the child's cultural identity.

Similarly in British Columbia, if the child is an Aboriginal child, 'the importance of preserving the child's cultural identity must be considered in determining the child's best interests'.[93]

In New Zealand, a huge number of changes were made following the release of the 'Green Paper for Vulnerable Children' in 2011, which culminated in the *Vulnerable Children Act 2014* (NZ) (**VCA**). The purpose of the VCA is to support the Government's setting of priorities for improving the well-being of vulnerable children and to ensure children's agencies work together to that end.[94] Under s 7(1) of the VCA, the Prime Minister may set down priorities for improving the well-being of vulnerable children, following consultation with the Police, and ministries of health, education, justice and social development. This plan seeks to promote the best interests of vulnerable children 'having regard to the whole of their lives' and by taking measures across a range of areas including:

- improving their cultural and emotional well-being and participation in cultural activities;
- strengthening their connection to their families, iwi, hapū and whānau or other culturally recognised family group; and
- increasing their participation in decision making about them, and their contribution to society.[95]

While detailed comparison of different jurisdictions is beyond the scope of this submission, PIAC recommends that these jurisdictions be reviewed when considering contemporary issues. This is particularly so given the different outcomes for Aboriginal people in different countries. For example, while Indigenous residents in Canada and New Zealand also have high rates of contact with the criminal justice system, theses rates 'are nowhere near as high as Australia'.[96]

The need for review and change

PIAC recognises that a significant finding of the Special Commission of Inquiry into Child Protection Services in NSW was that Aboriginal and Torres Strait Islander children are unacceptably over-represented in NSW's child protection system. A number of recommendations were made to address this issue in the Final Report, published in 2008.[97] PIAC also recognises

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93 Section 4, *Child, Family and Community Service Act 1996* (British Columbia).
94 Sections 4(a) and 4(b) VCA.
95 Section 6 VCA.
96 Weatherburn, D (2014) *Arresting Incarceration, Pathways out of Indigenous Imprisonment*, at page 2.
97 The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales*, November 2008. See Chapter 18, Volume 2, available at

that the NSW Government has responded to the publication of the 2008 report with the *Keeping Them Safe* strategy, which specifically considers the need to support Aboriginal families in the context of child protection and act to reduce over-representation of Aboriginal and Torres Strait Islander families in the child protection system.[98]

It should be noted, however, that the specific problem of over-representation of Aboriginal people in NSW's child protection system forms just one chapter of the report and was not a specific consideration in the terms of reference. What PIAC does not believe has been considered is how the best interests of the child principle can be implemented in conjunction with the principle of self-determination. This specific need is established as a formative principle of the UN Declaration on the Rights of Indigenous Peoples, which recognises in its preamble

> the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.

The BTH report recommended radical shifts in the approach to child protection and child removals, incorporating both the principle of self-determination and the best interest of the child principle defined in international human rights law.[99] If the goal of Recommendation 3 to 'guarantee against repetition' is to be met, there must be action to address over-representation of Aboriginal and Torres Strait Islander children in care, a trend that is increasing rather than reversing. The importance of doing so is significant given the poor outcomes for Aboriginal children placed in care, particularly with regard to the high rate of movement of these children directly into the criminal justice system. PIAC accordingly recommends that the approach to the protection of Aboriginal and Torres Strait Islander children in NSW be specifically reviewed.

7.2 Over-representation in the criminal justice system

The BTH report concluded that

> issues affecting Indigenous young people in the juvenile justice system have been identified and demonstrated time and time again. It is not surprising that Indigenous organisations and commentators draw attention to the historical continuity in the removal of Indigenous children and young people when the key issues in relation to juvenile justice have already been identified for some time yet the problem of over-representation appears to be deepening.[100]

The BTH report set out clear statistics that showed that Aboriginal and Torres Strait Islander young people are far more likely to be in contact with police, placed in police custody and imprisoned when compared to non-Aboriginal Australians. In the intervening period these rates have not shifted, indeed they are getting worse. In his 2014 annual report, the Aboriginal and Torres Strait Islander Social Justice Commissioner stated the overrepresentation of Aboriginal

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http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0011/33797/Volume_2_-_Special_Commission_of_Inquiry_into_Child_Protection_Services_in_New_South_Wales.pdf.

98 See NSW Government, *Keeping Them Safe, A Shared Approach to Child Welfare*, available at http://www.keepthemsafe.nsw.gov.au/v1/supporting_aboriginal_children_and_families.

99 BTH report, above note 1, Chapter 26.

100 BTH report, above note 1, see Chapter 24.

and Torres Strait Islander Australians in the criminal justice system is 'one of the most urgent human rights issues facing Australia'.[101]

There is no simple answer to reducing the highly disproportionate rates of Aboriginal imprisonment. On the basis of PIAC's legal casework experience in NSW, however, there are a number of areas where PIAC believes reform would assist in beginning to address this national crisis.

Bail in NSW

PIAC's legal casework has in recent years focused on the impact and role of bail laws in the unlawful and unnecessary detention of young people and, in particular, Aboriginal and Torres Strait Islander juveniles. The operation of bail laws and the manner in which bail conditions are policed have created a situation where being held in police detention or on remand in a Corrective Services facility is a common outcome and few steps are taken to avoid it. This damaging trend is problematic for a number of reasons, not least of which is the criminogenic effect of imprisonment and negative interactions with police officers.

The operation of bail laws is particularly significant as it is likely to be one of the first interactions a young person has with the criminal justice system. In addition, the evidence shows that once a young person has come into contact with the criminal justice system, the chances of exiting that system are few.[102] At these preliminary stages, there is already a bias emerging: Aboriginal young people are far more likely to be held in custodial remand than their non-Aboriginal counterparts – in 2011, this was to a factor of 20.[103]

It is essential that bail laws do not have any unnecessarily negative impact on Aboriginal young people, and are not punitive or used as a substitute for effective housing, child protection arrangements or to address other social problems. In PIAC's experience, which is reflected in in depth research across all Australian jurisdictions, the operation of bail laws and policing of bail conditions has had a detrimental impact on our young Aboriginal clients and, in particular, has provided a direct path into the criminal justice system.

Difficulty complying with bail conditions

In PIAC's experience, bail conditions imposed by a court or police officer are often extremely difficult for alleged offenders to satisfy. This is a particular problem for young Aboriginal people. Typical bail conditions often require compliance in areas where Aboriginal people are already struggling, such as requiring stable accommodation or attendance at education or employment. In a study of bail conditions imposed on young people across all Australian jurisdictions, the Australian Institute of Criminology found that bail conditions were unduly onerous, difficult for young people to adhere to and often appear 'arbitrary and unrelated to the young person's offending'.[104]

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[101] Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice and Native Title Report 2014,* Australian Human Rights Commission, 20 October 2014, available at https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-0.

[102] Australian Institute of Criminology, *Bail and remand for young people in Australia: A national research project*, November 2013, at page 63. Available at http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125.html.

[103] Australian Institute of Criminology, above note 102, at page 17.

[104] Australian Institute of Criminology, above note 102, at page 76.

Stringent bail conditions and overzealous policing of those conditions (discussed further below) has arguably led to an increase in the number of Aboriginal people being incarcerated. The Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment concluded that more stringent bail conditions have been a driver of increased incarceration rates.[105] Similarly the NSW Law Reform Commission found that strict bail orders with numerous conditions that are difficult to comply with may contribute to higher numbers of youth breaches of bail and therefore more youths in custodial remand.[106] At the same time, research has shown that there is a very low risk that a child or young person will not turn up to their court date. In 2006-07, less than 2% of children and young people failed to appear at court or had an arrest warrant issued.[107]

Policing of bail conditions

PIAC believes that changes in policing practices in recent years have contributed to the increasing contact Aboriginal and Torres Strait Islander people are having with the criminal justice system.

In 2006, the former Labor Government released a *NSW State Plan* that aimed to reduce re-offending by 10 per cent by 2016 through 'proactive policing of compliance with bail conditions' and 'extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring'.[108] In its submission to the NSW Law Reform Commission's Bail Inquiry, the NSW Police Force submitted that it had increased bail compliance checks by approximately 400% between January 2007 and September 2010.[109] The Australian Institute of Criminology, conducting an in depth review of bail, young people and remand,[110] concluded that one reason for this increase is the existence of Key Performance Indicators for the NSW Police Force.[111] While the language of proactive policing has been removed from the current NSW State Plan, *NSW 2021*, enquiries to PIAC in relation to the policing of bail conditions have continued unabated.

Many of PIAC's clients have sought legal advice after being detained for 'technical breaches' of bail, a term which refers to the circumstances where a person is arrested for breach of a bail condition, which in itself is not a new offence, and does not harm the young person, another person or the community. Examples of technical breaches include being five minutes late for curfew and being with a different family member other than the person specified in the bail condition. PIAC's clients are frequently reporting a level of policing of their bail conditions out of step with the severity of the alleged offence, such as incessant checking of curfews throughout the night several nights per week. Excessive monitoring of bail conditions was also reported to

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105 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, 20 June 2013, at para 2.29 available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

106 NSW Law Reform Commission *Bail, Report 133,* 8 April 2012, available at http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r133.pdf.

107 Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister for Juvenile Justice,* April 2010, at page 64, available at http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Review%20Report%20FINAL.pdf.

108 NSW Premier's Department, *State Plan: A New Direction for NSW* (Sydney: Crown Copyright, 2006).

109 Australian Institute of Criminology, above note102, at page 80.

110 Australian Institute of Criminology, above note 102 at page 16.

111 Australian Institute of Criminology, above note 102 at page 81.

the Australian Institute of Criminology's (**AIC**) national research on young people and bail. As a result of this research the AIC found an Australia-wide practice of 'overzealous policing of young people's bail compliance and in some cases, a 'zero tolerance' approach to bail breaches'.[112]

Unlawful arrests and detention due to administrative errors

Through its Children in Detention Advocacy Project (CIDnAP), PIAC has identified a large number of young people being arrested not even for 'technical breaches' of bail, but for breach of bail conditions that are out of date or have been removed. This was supported by research undertaken by the Youth Justice Coalition, which found that a number of young people were being arrested for breach of bail conditions in circumstances where there were no cases pending or bail conditions; that is, children were being arrested and detained where their matter had been finalised or the conditions changed.[113] In 2011, PIAC launched a legal class action representing a number of young people who were allegedly unlawfully detained on the basis of incorrect or out of date bail conditions remaining on the NSW Police Force's 'COPS' database.[114]

The case of Jenny,[115] a young Aboriginal girl arrested for breach of a bail condition that no longer existed, illustrates the negative consequences that can flow from a seemingly innocuous mistake. Jenny had been on bail on conditions that included being with her mother at all times. Jenny was then sentenced to a youth justice conference that finalised her matter and removed all bail conditions. One afternoon, approximately two weeks later, Jenny was in the city with her friends when she was arrested for not being with her mother. She informed them that her bail conditions were no longer in force, but the police officers did not believe her – their computer system showed that her conditions still applied. Her mother rang the police station, offering to fax over the order that showed the bail conditions were no longer applicable, but was told that if she had been wrongly arrested it was the court's fault for not updating the system. Her mother tried calling the juvenile detention centre where Jenny had been taken, and was told that she would have to wait until morning to sort it out. When the young girl appeared before the magistrate early the next morning, after spending the night in a juvenile detention centre, the prosecutor told the magistrate that the computer system had not been updated, and that the girl was not subject to any bail conditions. Jenny was therefore released without further penalty.

This case study highlights that deficiencies in systems such as computer records, compounded by an inflexible approach to breaches of bail by police, can unnecessarily increase the contact of juveniles with the criminal justice system. If Jenny had been given a warning or a caution, or been brought to court by a summons or a court attendance notice, the mistaken situation could have been resolved without her spending an unnecessary and possibly unlawful night in custody. PIAC has been seeking the eradication of these errors and this approach to bail through its class action.

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112 Australian Institute of Criminology, above note 103 at page 81.

113 Wong K, Bailey B and Kenny D *Bail Me Out: NSW Young Offenders and Bail*, Youth Justice Coalition, 15 September 2009, available at http://www.piac.asn.au/publication/2012/02/bail-me-out-research-report.

114 For information on the class action see PIAC's website, at http://www.piac.asn.au/project/cidnap-unlawful-detention-young-people.

115 Names have been changed to protect the privacy of the individuals.

Consideration of the particular needs of Aboriginal and Torres Strait Islander young people

As with adults, a primary purpose of bail is to ensure a young person's attendance at court. However, particularly when considering Aboriginal and Torres Strait Islander young people, bail laws should also promote rehabilitation and reintegration into society.

PIAC believes that bail legislation across the country should be amended to recognise the disadvantages facing Aboriginal and Torres Strait Islander young people in bail determinations. PIAC recommends that, before refusing bail to an Aboriginal or Torres Strait Islander young person, the court should consider the social disadvantages that impact on Aboriginal and Torres Strait Islander people generally and on the individual in question specifically. These might include issues such as dislocation from family and culture, educational and employment disadvantages and substance abuse.

A good model for this approach is the Gladue (Aboriginal Persons) Court in Toronto, Canada, which was established in response to the overrepresentation of Canadian Aboriginal people in the criminal justice system.[116] The Gladue principles require a court to take into account at bail hearings and sentencing proceedings specific considerations in relation to Aboriginal offenders. These considerations include, among others, discrimination, institutional or personal abuse, dislocation from culture or family and substance abuse. The court is also able to request a bail report addressing those factors if the information is not readily available at the bail hearing in order to consider alternative options to remand.

The *Bail Act 2013* (NSW) requires a court to consider a range of matters when making an assessment for bail. One of these matters is

> any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment.[117]

Beyond this reference, however, there is no guidance given to the court. PIAC believes a list of relevant factors should be included in bail legislation or regulations that would direct a court's attention to the specific needs of Aboriginal people who are the subject of bail proceedings. This would accord with recognition in other areas of the criminal law of the relevance of Aboriginal disadvantage; specifically, this includes the recent guidance provided by the High Court in relation to taking into account the historic experiences of an Aboriginal offender when being sentenced for a criminal offence.[118]

Policing practices

In the BTH report, the conclusion was clear:

116 Judge of the Ontario Court of Justice, Knazan, B *Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court,* National Judicial Institute Aboriginal Law Seminar, Calgary, January 2003.

117 Section 18(1)(k) *Bail Act 2013* (NSW).

118 *Bugmy v The Queen* [2013] HCA 37.

> the data demonstrate that over-representation of Indigenous young people in police custody is a significant problem and that there are differential patterns of policing Indigenous children and young people compared to non-Indigenous children and young people.[119]

PIAC believes that if the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system is to be addressed, there should be a focus on the initial interaction between Aboriginal and Torres Strait Islander people and the police. Based on PIAC's casework, current policing practices in NSW elevate the chances of arrest and detention of Aboriginal and Torres Strait Islander people, and perpetuate negative relationships with police officers.

The experience PIAC has gained through its casework is backed up by a number of external studies that have deduced an adverse exercise of police discretion on the basis of a perception of race, particularly in relation to Aboriginal and Torres Strait Islander people. A 2006 study of the successful use of stop and search powers, for example, in areas of high Aboriginal and Torres Strait Islander populations, showed that there is a wide disparity in the application of these powers. Given the highest rate of unsuccessful searches took place in geographical areas with large Aboriginal and Torres Strait Islander populations, the authors concluded the use of these powers in the geographical areas of the study were based on racial profiling.[120] Similarly, a 1999 review by the NSW Ombudsman noted a vast disparity in the exercise of move-on powers when comparing the exercise of those powers against Aboriginal and non-Aboriginal people.[121]

As noted above in relation to checking bail conditions, PIAC's concern is that the move over the past decade to 'proactive policing' by the NSW Police Force has disproportionately impacted on PIAC's vulnerable clients, including Aboriginal and Torres Strait Islander people and particularly young Aboriginal and Torres Strait Islander people. The formalisation of 'proactive policing' in the former Labor Government's 2006 *NSW State Plan*,[122] has been followed by legislative reform which incorporates the principle, not only in bail law but also by legislation rushed through in 2013 by the NSW Parliament that provided for the power of arrest without warrant.[123] While disrupting criminal activity is a laudable aim and important for community safety, the concern was always:

> Formalising the goals of 'proactive policing' in arrest law may exacerbate the overpolicing and incarceration of Indigenous people and marginalised groups'.[124]

In late 2014, the head of the NSW Bureau of Crime Statistics and Research concluded that the significant rise in the NSW prison population, despite overall crime going down, could be attributed to 'Much more aggressive policing activity'.[125]

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119 BTH report, above note 1, see Chapter 24.

120 Cunneen, C (Professor of Justice and Social Inclusion, The Cairns Institute, James Cook University) (2012) *Opinion on Racial Profiling on Federal Court of Australia Proceeding No VID 969 of 2010* (11 October 2012), filed in the Federal Court of Australia on 15 October 2012 in the case of *Daniel Haile-Michael & Ors v Nick Konstantinidis & Ors*, at para 20. available at http://www.policeaccountability.org.au/issues-and-cases/racial-profiling/race-discrimination-case-documents/.

121 Cited in Cunneen, C, above note 121 at para 24.

122 NSW Premier's Department, *State Plan: A New Direction for NSW* (Sydney: Crown Copyright, 2006).

123 Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* was amended by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest Without Warrant) Act 2013.*

124 Sentas, V and McMahon, R (2014) 'Changes to Police Powers of Arrest in New South Wales' *Current Issues in Criminal Justice*, Volume 25, Number 3, March 2014, at page 786.

In PIAC's experience, this shift to a proactive policing model has had a largely detrimental impact on Aboriginal and Torres Strait Islander people, unnecessarily drawing them into the criminal justice system and leading to largely irreversible and adverse consequences for the individual, his or her family and indeed whole communities. It has also continued to cement the precarious relationship between Aboriginal young people and adults with the police officers in their communities. Aboriginal Australians report a high level of discrimination across a range of settings, with one of the highest occurrences being when interacting with police, security people, lawyers or in a court of law.[126] The very perception of discrimination has an impact on Aboriginal and Torres Strait Islander people's well being; research has shown that just a perception can lead to changes in job seeking behaviour or dropping out of the work force. Discrimination can also be linked to negative health outcomes.[127]

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125 Hall, L (2014) "'Aggressive policing' creating court delays, crime statistics boss says' *Sydney Morning Herald Online,* 11 June, 2014, available at http://www.smh.com.au/nsw/aggressive-policing-creating-court-delays-crime-statistics-boss-says-20140611-zs3vs.html.

126 Biddle, N "Entrenched Disadvantage in Indigenous Communities" in Centre for Economic Development of Australia *Addressing entrenched disadvantage in Australia*, April 2015, at page 73. available at http://adminpanel.ceda.com.au/FOLDERS/Service/Files/Documents/26005~CEDAAddressingentrencheddisadvantageinAustraliaApril2015.pdf.

127 Biddle, N, above note 127 at page 73.

Appendix A: PIAC's Stolen Generations Compensation Bill

Draft Stolen Generations Reparations Tribunal Bill

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

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 means anybody who identifies as an Aboriginal or Torres Strait Islander descendant as defined in the *Aboriginal and Torres Strait Islander Act 2005*.
Eligibility Criteria means the criteria that determine whether a claimant for reparations is eligible for reparations as set out in section 10.
Indigenous means Aboriginal or Torres Strait Islander.
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 Islanders.

(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 *NSW Government Gazette*.

(4) A code of practice determined under subsection (1) is a legislative instrument for the purposes of the *Subordinate Legislation Act 1989* (NSW).

(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;

(b) to decide on appropriate reparations to be granted in response to a claim;

(c) to promote a process of truth and reconciliation;

(d) to consider proposed legislation;

(e) to consider prejudicial policies and practices; and

(f) 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) The 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

(a) that they suffered particular types of harm, such as sexual or physical assault or labour exploitation; or

(b) that they suffered or continue to suffer from physical or psychological injury caused by the fact of their removal.

(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 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.

10. Eligibility criteria for reparations

(1) To be eligible for 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.

(3) To be eligible for 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 reparations under this subsection, a claimant must be:

(c) an Aboriginal or Torres Strait Islander person;

(d) 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 recognise statements by organisations such as Link Ups and Aboriginal and Islander Child Care Agencies for the purpose of determining eligibility under this section.

11. Claims for reparations

(1) A claim 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) The Minister may, for any proper reason, extend the time for making an application under s 11(2), taking into account:

(a) the reason for the delay;

(b) the merits of the application;

(c) fairness as between the person and other persons in a like position; and

(d) any other factor the Minister considers to be relevant.

(4) A claimant for reparations may, with the consent of the Tribunal, amend a claim.

(5) A claim for reparations may be made by a group of persons.

(6) A claim for reparations may be made on behalf of a person under a legal disability by a guardian of that person.

(7) For the purposes of determining eligibility, the person under the legal disability is to be regarded as the claimant.

12. Time for completion of assessments

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

13. Tribunal to decide claims

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.

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.

(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.

15. Tribunal decision is reviewable

All decisions made by the Tribunal are eligible for merits review by the NSW Civil and Administrative Tribunal. 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 13(b).

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

(1) Where any Aboriginal or Torres Strait Islander claims that he or she, or any group of Aboriginal or Torres Strait Islanders 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, [the State Governments], any Government Agency or [Church Organisation], or by any policy or practice proposed to be adopted by or on behalf of the Commonwealth, [the State Governments], 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, [the State Governments], 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 & operational review

(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.

(3) A review of the Tribunal's operation is to commence three years from the commencement date of this Act.

(4) The purpose of the review is to assess the Tribunal's operation against the principles defined in section 4.

(5) The review must:

(a) involve consultation with claimants, potential claimants, recipients of monetary compensation and whole communities;

(b) be published in full no later than 12 months from the date the review commenced.

22. Death of applicant

(1) A claim for reparations does not lapse because the claimant dies before the claim is decided.

(2) If a claimant for reparations dies before the claim is decided, 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.

Appendix B: *Restoring Identity* report (2002)