



**Submission to the Royal Commission into
Institutional Responses to Child Sexual Abuse:
Redress and Civil Litigation**

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1. Introduction

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. Through its legal practice, PIAC has experience representing victims of crime, assisting them to seek compensation through the NSW Victims Compensation Scheme, incident-specific redress schemes and through civil litigation. All of our clients experience some form of disadvantage and vulnerability, with a number suffering from historic incidents of child sexual abuse. Accordingly, PIAC welcomes the opportunity to comment on the Royal Commission Consultation Paper, *Redress and Civil Litigation*.¹

Overall, PIAC supports a national redress scheme that recognises the abuse suffered by survivors in institutions across the country and provides support and redress, calibrated to the different needs of victims. The depth and scale of this shameful period in Australia's history necessitate an equally comprehensive response. PIAC urges swift and definitive action to bring some resolution to the lives of far too many who have suffered childhood sexual abuse while in the care of a government or non-government institution.

In this submission, PIAC comments on those questions raised in the Consultation Paper where PIAC is able to provide advice based on its relevant casework experience.

1.1 The Public Interest Advocacy Centre

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

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

1.2 PIAC's work relevant to this submission

PIAC has experience representing vulnerable clients seeking damages for personal injury via NSW statutory compensation and redress schemes. For example, PIAC's Homeless Persons' Legal Service (**HPLS**) has provided legal advice to and on-going representation for victims of physical and sexual violence and abuse. A significant portion of the HPLS caseload involves representing victims in the NSW Victims Compensation Scheme.²

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation*, January 2015, available at <http://www.childabuseroyalcommission.gov.au/policy-and-research/redress>.

² See Coroneo, *A Review of NSW's Victims Compensation Scheme*, Public Interest Advocacy Centre, 30 April 2012, available at

PIAC has also previously sought compensatory damages on behalf of a number of Aboriginal and Torres Strait Islander clients who were part of the 'Stolen Generation'. In 1996, PIAC and the then Public Interest Law Clearing House NSW 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*. PIAC subsequently provided legal representation for some members of the Stolen Generations, including one successful claim in the NSW Victims Compensation Tribunal for crimes committed against her while she was a State ward.

In addition, PIAC has extensive experience in relation to the redress scheme established by the NSW Government to pay back wages kept in trust for Aboriginal clients. This involved investigating and substantiating the claims of PIAC's Aboriginal and Torres Strait Islander clients that they had been denied access to wages, allowances and other entitlements that were purportedly held in trust for them by the state.

PIAC conducted extensive research and advocacy, which led to a redress scheme being established: the Aboriginal Trust Funds Reparations Panel, which implemented the Aboriginal Trust Fund Repayment Scheme (**ATFRS** or **Stolen Wages redress scheme**). PIAC worked within Aboriginal and Torres Strait Islander communities to publicise the scheme; provided pro bono legal assistance, representation, support and advice to a number of clients making a claim; and, on the basis of this experience, provided a number of policy submissions to the ATFRS review and the Senate Inquiry into Indigenous Stolen Wages.³

2. A redress scheme

PIAC supports the Royal Commission's proposal for a national redress scheme to address the child sexual abuse suffered by many while in the care of both state and privately-run institutions.⁴ The inquiry currently being conducted by the Commission must ensure systemic change so that the risk of child sexual abuse in the context of institutional care is minimised, as much as possible, for the future.

While there have been ad hoc state and territory redress schemes established in recent years, PIAC believes, given the depth and spread of abuse, that an overarching, adequately resourced, national scheme is required to ensure equal access to justice and guarantee parity among victims. The redress scheme should also be independent of the institutions that were responsible for, or were otherwise associated with, the abuse and sufficiently arms length from government to ensure that there is both the appearance and existence of impartiality, particularly when considering claims where an institution was providing a care function on behalf of the state.⁵

http://www.piac.asn.au/sites/default/files/publications/extras/12.04.30_review_of_nsws_victims_compensation_scheme.pdf.

³ Stolen Wages Referral Scheme, *Settling accounts: the effectiveness of the Aboriginal Trust Fund Repayment Scheme in addressing stolen wages in NSW*, Submission to the Hon John Watkins MP, Minister responsible for ATFRS, Public Interest Advocacy Centre, 11 June 2008.

⁴ Chapter 2 Questions: whether a single, national redress scheme led by the Australian Government or an alternative approach is preferable; and whether the Royal Commission should recommend redress processes and outcomes for future institutional child sexual abuse. Royal Commission Consultation Paper, above note 1, at page 62.

⁵ As discussed in the Consultation Paper, above note 1, at page 169.

PIAC supports the principles that the Royal Commission has adopted to guide the establishment of the scheme: that it be survivor focused, with particular regard given to vulnerable survivors; culturally appropriate and able to meet cultural needs; and with sufficient legal and other support to assist survivors understand and access the redress scheme and understand their options.⁶ As PIAC's legal casework experience shows, particularly with its HPLS clients, survivors of sexual abuse often face a myriad of social, health, legal and financial problems that can be linked directly or indirectly to historic incidents of sexual abuse. All elements of the redress scheme must be focused on meeting the complex needs of survivors, and the balance must be tipped in their favour where there are competing institutional or government interests. Barriers to entry must also be low to enable as many survivors as possible to access the redress scheme with as little re-traumatisation as can be managed.

PIAC also agrees with the Royal Commission's conclusion that a redress scheme should be 'intended to make redress available to many survivors who would not be able to bring common law claims'.⁷ Equally, the availability of a redress scheme should not act as a bar to civil litigation.

Recommendation 1

PIAC recommends:

1. *a national redress scheme be established, which is victim-focused, has low barriers to entry and which provides all applicants sufficient legal and social supports to access the scheme; and*
2. *participation in such a redress scheme should not act as a bar to civil litigation.*

Particular features of the redress scheme are discussed in further detail below; comments do not address every feature of the scheme, rather only those in relation to which PIAC has relevant experience. In principle, however, PIAC supports the other features of the scheme proposed in the Consultation Paper, such as the need for the scheme to offer access to counselling and the provision of a direct apology from the institution where the victim believes this will meet their needs and expectations.

2.1 Features of a redress scheme

2.1.1 Monetary payments

PIAC supports the Royal Commission's proposal to have a sliding scale of fair monetary payments as a fundamental part of any redress scheme. The payment should not be characterised as compensation, but rather it is recognition of the abuse suffered; this ensures that applicants are clear that the payment differs from compensatory damages resulting from successful civil litigation that is generally likely to be a greater sum but requiring a higher threshold.

PIAC considers that institutions that have been shown, or that have acknowledged, to have engaged in abuse of children in their care or that have been aware of employees perpetrating such abuse, should be mandated to contribute to funding the scheme.⁸ Ultimately, however, government must ensure the scheme is adequately resourced so that all applicants, who meet the eligibility requirements, receive a payment that reflects the severity of the abuse suffered.

⁶ Consultation Paper, above note 1, at page 53.

⁷ Consultation Paper, above note 1, at page 152.

⁸ As discussed in the Consultation Paper, above note 1, at page 169.

PIAC appreciates that the scheme must be affordable and that the payment scale will reflect that, but, as noted in the Consultation Paper, 'justice will not be achieved unless survivors are satisfied that the monetary payment amounts are reasonably fair'.⁹ When considering the cost of financing the proposed Redress Scheme, this should be weighed with the huge on-going costs to society associated with child sexual abuse, which the redress scheme would play an important part in addressing.¹⁰

In addition, PIAC recommends that the approach to providing the monetary payment is flexible to meet the needs of survivors.¹¹ According to PIAC's experience with the NSW Victims Compensation Scheme, while some clients apply for interim payments, most seek to access the scheme for lump sum payments for injuries.¹² While HPLS does not collect information about how recipients of lump sum payments spend the money received, there is little doubt that these funds are hugely significant and can assist victims in coping with the on-going effects of their experience. Ultimately, in a victim-focused national redress scheme, it should be the choice of the survivor to nominate how the monetary payment award is received.

Case study 1

An HPLS client obtained 10 hours of free counselling and received an award of approximately \$17,000, for psychological injury sustained from a deprivation of liberty (kidnapping) and assault by her ex-partner, from the NSW Victims Compensation Scheme. She had been unable to work for a long period following the assault as a result of her on-going psychological injury.

She stated that she was grateful to receive the award and to receive an acknowledgement of the trauma she had experienced. At the time of receiving the award, she said that she felt that she could now move on with her life and that the money she had received would assist her to do so.

Further, if a survivor has already received a monetary payment through a State or Territory redress scheme, or compensatory damages through civil litigation, it is appropriate that these sums be taken into account in the calculation of any future monetary payment.¹³ It should be borne in mind that even if a sum has been received which is equal to or more than would be awarded through the proposed national redress scheme, a survivor may still wish to access other elements of the scheme, such as a direct response from the institution or perpetrator, which might not have been provided in the initial process.

Recommendation 2

PIAC recommends:

1. *a sliding scale of fair monetary payments be established through a national redress scheme, to which relevant non-government institutions are mandated to contribute;*

⁹ Consultation Paper, above note 1, at page 150.

¹⁰ The long-term financial cost of child sexual abuse to society is well established. See, for example, Access Economics Pty Limited, Taylor P, Moore P, Pezzullo L, Tucci J, Goddard C and De Bortoli L *The Cost of Child Abuse in Australia* (2008) (Australian Childhood Foundation and Child Abuse Prevention Research Australia: Melbourne), available at <http://www.childhood.org.au/for-professionals/research-and-advocacy/research>.

¹¹ As discussed in the Consultation Paper, above note 1, at pages 159 to 160.

¹² See Coroneo, A, above note 2, at page 5.

¹³ This is contemplated in the Consultation Paper, above note 1, at page 160.

2. *applicant survivors should be given the choice whether to accept their payment as a lump sum or in instalments; and*
3. *if monetary payment has been received via another redress scheme or by a litigious process, that this not be a bar to participation in the national redress scheme but could be a factor to be considered in the determination of any monetary payment.*

2.1.2 Eligibility and duration

The Terms of Reference are limited in that they only refer to child sexual abuse. As contemplated in the Consultation Paper, PIAC considers that the redress scheme should also encompass physical and emotional abuse suffered by children when in institutional care.¹⁴ Indeed all three forms of abuse may be inextricably linked. As discussed above, PIAC also supports all-encompassing eligibility criteria, even where a victim has already proceeded through a separate redress scheme.

As evidence before the Royal Commission has shown, the ramifications of child sexual abuse are felt far beyond the individual survivor. PIAC suggests any proposal to set up a national redress scheme address the position of family members and descendants of survivors who have died and provide that, in such circumstances, family members will be eligible to apply to the redress scheme for compensation.

PIAC agrees with the Royal Commission's conclusion that there should be no fixed closing date for the operation of the redress scheme.¹⁵ PIAC's experience with the three-and-a-half year limit on the operation of the AFTRS was that many individuals simply missed out. PIAC appreciates that certainty can be provided by the imposition of a limitation period. However, given the proven long-term impact of child sexual abuse, with damage manifesting in a range of problems for the individual many years after the acts were perpetrated, a limitation period for the redress scheme would undoubtedly lead to injustice.

Recommendation 3

PIAC recommends:

1. *physical and emotional abuse, as well as sexual abuse, be considered in the context of a scheme;*
2. *direct family members and descendants of a victim of childhood sexual abuse who has died be eligible to claim under the scheme; and*
3. *the scheme should not impose a strict closing date.*

2.1.3 Standard of proof and procedure

PIAC supports the conclusion drawn in the Consultation Paper that an effective redress scheme should follow a different decision-making process to a court, adopting a lower standard of proof that is commonly adopted in a court. PIAC agrees with suggestions of a standard such as 'plausibility' or 'reasonable likelihood'.¹⁶ PIAC considers a lower standard will reflect the purpose of the scheme as one of recognition, as opposed to compensation, which aims to provide applicants with both monetary and psychological support to assist their on-going recovery.

¹⁴ Consultation Paper, above, note 1, at pages 161 to 163.

¹⁵ Consultation Paper, above, note 1, at page 163.

¹⁶ Consultation Paper, above, note 1, at page 170.

Similarly, the rules or guidelines setting out what should be accepted as evidence should 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.¹⁷ It is likely that similar problems in relation to written documentary evidence will be encountered in the context of childhood abuse; as evidence already provided to the Royal Commission has shown, written records of complaints against perpetrators have been deliberately erased.¹⁸ 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 evidence of Aboriginal and Torres Strait Islander people relying principally on oral traditions rather than written documentation, which is more easily challenged under the hearsay and opinion rules.¹⁹

In addition, PIAC's experience of the Stolen Wages redress scheme 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:

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.²⁰

Finally, where there the victim is Aboriginal or Torres Strait Islander, there should be someone of Aboriginal or Torres Strait Islander background who assists both in making and determining their application.

Recommendation 4

PIAC recommends that in the proposed redress scheme:

- 1. a standard of proof be adopted which is lower than the civil standard;*
- 2. oral and circumstantial evidence be able to be relied upon in the absence of documentary evidence;*
- 3. the actual process of the determination and any oral hearing to do so be as informal as possible, in recognition of the potential for re-traumatisation; and*
- 4. where the survivor applicant is of Aboriginal or Torres Strait Islander background that there is a culturally appropriate means by which a determination is made.*

¹⁷ *Settling accounts*, above note 3, at page 21.

¹⁸ Quoted in *Settling accounts*, above note 3, at page 10.

¹⁹ 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>.

²⁰ Murphy, D and Browne, R "Victims of sex abuse at elite school say cries for help ignored" *Sydney Morning Herald Online*, 28 February 2015, available at <http://www.smh.com.au/nsw/victims-of-sex-abuse-at-elite-school-say-cries-for-help-ignored-20150227-13qgjl.html>.

2.1.4 Transparency of decision-making

It is vital that the decision-making process under the scheme be as transparent as possible so that survivors and the public have faith 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.

Similarly, PIAC's experience representing clients seeking to claim money from the Stolen Wages scheme was that, 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; the procedure by which this occurs should be made clear.²¹

Similarly, any decision about the redress being offered to applicants through the scheme should be accompanied by clear and specific reasons for each individual decision. As with any process for administrative decision-making, the options to seek merits and judicial review should also be clearly set out in the notification of an offer of payment and other forms of redress.

Recommendation 5

PIAC recommends:

- 1. that the decision-making process for the redress scheme be as transparent as possible, taking into account the privacy of the applicant; and*
- 2. detailed reasons be provided to the applicant in respect of any determination that is made.*

2.2 Publicising and promoting the redress scheme

PIAC supports the development of a comprehensive communication strategy to publicise and promote the redress scheme.²² It is important that this strategy involves targeting hard-to-reach survivors.

PIAC's client base, particularly those who are homeless or at risk of homelessness, are often disengaged from mainstream methods of promotion, such as newspapers, internet, television and radio. Low levels of literacy among our most disadvantaged clients also limits the effectiveness of these forms of communication. To allow survivors to access redress in a fair and equal way, it is critical that the communication strategy is tailored to raising awareness of the scheme in these groups.

PIAC's experience is that referrals and word-of-mouth recommendations are some of the best ways of promoting services throughout its client base. Effective communication would also involve educating relevant service providers on how the scheme works, so that they can refer or assist survivors depending on the services they offer. Survivors who have had positive experiences with the redress scheme are likely to be very powerful at promoting the scheme.

PIAC's experience of the Stolen Wages scheme indicated that its success was dependent on its promotion. PIAC made its own efforts to raise awareness about the scheme by staging community forums and meetings around NSW, as a result of which more than 150 claims were registered. PIAC was also concerned that many Aboriginal people would miss out on claiming

²¹ See *Settling accounts*, above note 3, at page 14.

²² Consultation Paper, above note 1, at page 166.

their entitlement; accordingly, without funding, it produced posters and flyers promoting the scheme and warning of the deadline to register claims.²³

While it may make practical sense for the Royal Commission to use the existing networks established by community organisations, there should be funding provided for them to do so. If the redress scheme is to conduct its own promotion, it should be comprehensive, covering:

- community meetings, radio and television advertising;
- articles and advertisements in local newspapers; and
- ongoing attendances in person in communities throughout Australia.

PIAC also recommends that hearings of the redress scheme take place in regional areas to ensure that those survivors who live remotely have equal access to the redress scheme.

Recommendation 6

PIAC recommends:

1. *the communication strategy to promote the redress scheme specifically target hard-to-reach survivors through a variety of different approaches including community meetings, newspaper advertisements and attendance in person in communities;*
2. *where a community organisation can provide relevant networks to advertise the scheme that there be compensation for doing so; and*
3. *determination hearings under the redress scheme should take place in regional as well as urban areas.*

2.3 Legal support and assistance for survivors using the redress scheme

PIAC welcomes the recognition of the value of survivors having access to legal support at all stages of the redress process.

The experience of the Stolen Wages scheme shows that whether or not an applicant was legally represented 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.²⁴ 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.²⁵

As evidence given to the Royal Commission has established, those seeking redress for incidents of childhood abuse have complex needs. PIAC's experience with vulnerable HPLS clients shows that assisting these clients requires much effort and care, beyond the simple provision of legal advice. The findings of the *Journeys Home Project*, conducted by the Melbourne Institute of Applied Economic and Social Research, found that two-thirds of people in a national study of homelessness suffered physical or sexual violence as children or had been neglected or

²³ See *Settling accounts*, above note 3, page 15.

²⁴ See *Settling accounts*, above note 3, at page 17.

²⁵ See *Settling accounts*, above note 3, at page 17.

emotionally abused. About one-third had been sexually assaulted.²⁶ In PIAC's experience, experiencing homelessness or not having stable accommodation is frequently partnered with addiction, mental illness and disengagement from services. The HPLS clients generally have different priorities of need, meaning they struggle to address longer-term issues, including the identification and resolution of legal problems.²⁷ Accordingly, the support and advice from a legal representative will be crucial to the scheme's success in assisting survivors who are more likely than not to have complex needs.

PIAC's experience with the Victims Compensation scheme in NSW is that legal service providers receive compensation in accordance with a prescribed scale of costs. This is one possible model for funding legal support.

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

In addition to the work PIAC has done in the Stolen Wages context with the ATFRS, PIAC's Homeless Persons' Legal Service is another example of such legal service provision. This collaborative venture brings together community sector organisations, such as St Vincent De Paul Society and Wesley Mission, with Legal Aid NSW and 11 other commercial firms. PIAC trains and supervises over 400 lawyers to provide pro bono legal advice and representation to people experiencing or at risk of homelessness. The vast majority of lawyers do not come to HPLS with expertise in the areas of the law that the clients require assistance with, or with experience in dealing with people with complex needs, mental illness or those who have suffered from significant trauma. Consequently, oversight by PIAC and the training PIAC offers are vital components of the successful operation of HPLS. In 2013, PIAC worked with its commercial law firm partners to assist 1,384 clients through the provision of pro bono legal services.

Recommendation 7

PIAC recommends

- 1. the provision of independent legal support be directly funded by the scheme; and*

²⁶ Horin, A "Abuse as a child linked to longer term homelessness", *Sydney Morning Herald*, 19 April 2012. Available at <http://www.smh.com.au/federal-politics/political-news/abuse-as-a-child-linked-to-longer-term-homeless-20120418-1x7hx.html>.

²⁷ As noted in Coroneo, A, above note 2, at page 9.

2. *an intermediary be funded by the redress scheme, which co-ordinates, trains and supervises pro bono lawyers to assist survivor applicants throughout the redress process.*

2.3.1 Assistance with the application process

Although the Consultation Paper contemplates the application process being as simple as possible, in PIAC's experience, having an independent, experienced person involved in an application who is mandated to act in the best interests of the survivor can greatly assist both the experience of the survivor and the functioning of the scheme. Given Redress WA's experience in the variable quality of applications, it may be worthwhile incorporating a training component in this funding arrangement.

2.3.2 Obtaining evidentiary documents

For clients of PIAC, particularly clients of the HPLS who often have very limited access to funds, paying for evidentiary documents (such as medical reports) as disbursements may be outside their means. Depending on the nature and extent of the injury, several such documents may be needed. Under some statutory compensation schemes, the provision of this report is a precondition to lodging the application. This evidence is clearly necessary for determining an application; however, without it, an otherwise meritorious claim may not proceed.

PIAC would welcome incorporating a disbursement subsidy program into the scheme so that obtaining this evidence does not pose another barrier to accessing justice. PIAC has had very little success in obtaining the costs of disbursements under the NSW Victims Compensations scheme, which impede meritorious claims. Under any redress scheme recommended by the Royal Commission, applications for disbursements subsidies could be means-tested as appropriate.

2.3.3 Advice on acceptance and appealing an offer

PIAC supports the scheme encouraging and paying for applicants to have an additional consultation with a support service or community legal centre before deciding whether or not to accept the offer, in the event an application for redress is successful.²⁸ In addition to the purposes of this consultation as identified in the Consultation Paper, a lawyer can also advise the applicant regarding how acceptance of the offer would affect any subsequent civil litigation and the damages that would be awarded following a successful claim.

If the scheme includes a deed of release, the consultation paper suggests the funding of a legal consultation, at a fixed price, for the applicant before the applicant decides whether or not to accept the offer of redress and sign the deed of release.²⁹ We note that depending on the amount of material involved and the complexity of the claim, more than one appointment may be required before the applicant can be properly advised.

If an appeals process is built into the redress scheme, we believe that there would also be scope for an applicant to have legal support to prepare this appeal.

As discussed above, PIAC recommends an intermediary be funded to provide legal services for survivor applicants. This model of legal service provision should be extended to all stages and

²⁸ Consultation paper, above note 1, at page 172.

²⁹ Consultation paper, above note 1, at page 174.

aspects of the redress scheme process, including in relation to whether to accept or appeal an offer.

Recommendation 8

PIAC recommends that a redress scheme include funding for legal support for survivors at all stages of the process.

3. Civil litigation

3.1 Access to both redress scheme and civil litigation

PIAC believes that in order to ensure access to justice, a national redress scheme should not preclude the possibility of resorting to civil litigation if the survivor wants this. We welcome the distinction that the Royal Commission makes between ‘redress’ and ‘civil litigation’ as two methods for achieving justice for survivors.

As the Consultation Paper notes, justice is a subjective experience, and although we believe that the majority of survivors would prefer to use the redress scheme, there are situations where litigation is more suited to the matter at hand. This may be where the negligence of an institution is particularly egregious, or the abuse happened to a number of victims, or the survivor believes that the payment available under the redress scheme is inadequate to compensate them for the damage that they have suffered.

The differences between the two options, and the benefits and disadvantages of each, are explained well in the Consultation Paper and we consider that they are well tailored to achieve access to justice outcomes and broader policy objectives. However, care must be taken to ensure that survivors know what each option involves. For instance:

- while there may be a lower standard of proof in the redress scheme, which may increase the chances of a successful application, the monetary compensation payable is far less than common law damages;
- the forms of redress available contemplated under the redress scheme should include an apology and ongoing counseling, as opposed to a 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.

3.2 Limitation periods

PIAC supports the total removal of limitation periods as they apply to institutional child sex abuse. This amendment should be applied retrospectively. PIAC’s experience with Stolen Generations litigation has shown us that limitation periods, and the costs implications of an adverse decision regarding limitations periods, are a significant disincentive to people advancing otherwise meritorious claims.

Case study 2

In the 1990s, PIAC represented two non-Indigenous women who made claims against the NSW Government for the forced relinquishment of their babies in the 1960s. One of the potential

plaintiffs decided to withdraw from proceedings due to the likelihood that the matter would not progress past an application that the matter was out of time. The other plaintiff, Ms 'W', was unsuccessful in overcoming the limitations hurdle. The Court found that the defendant, the State of NSW, would suffer prejudice if the limitations period were extended. The Court's finding was on the basis that key witnesses were either deceased or had no recollection of the events giving rise to the action and, as such, there would be prejudice to the defendant in trying to defend a claim dealing with events that took place 28 years earlier in the face of uncorroborated statements from Ms W. A subsequent appeal of the decision by PIAC was also unsuccessful. In dismissing the claim, the court ordered that PIAC's client pay the legal costs of the defendant, which amounted to nearly \$30,000.

This case highlights the difficulties of seeking redress through traditional legal avenues for people affected by forced adoption practices. Moreover, the risk of an adverse costs order serves as a significant disincentive to bringing any court action as unsuccessful litigants could be exposed to a court order requiring them to pay the legal costs of the other party. In PIAC's experience with these kinds of cases in NSW, it is very difficult to obtain a grant of legal aid because the challenges of overcoming the limitations hurdle significantly reduce the prospects of success and legal aid commissions are generally reluctant to grant aid in cases with low prospects. Furthermore, in other states in Australia, a grant of legal aid would not necessarily protect the client against an adverse costs order.

3.3 Responsibility of institutions

PIAC supports the statutory clarification of the responsibility of institutions for institutional child sex abuse. The current scope of the legal responsibility is unclear, and it is foreseeable that this uncertainty deters meritorious claims. PIAC supports the third option for reform: that institutions could be made liable for child sex abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent this abuse, with 'reasonable precautions' being judged as at the time the abuse occurred.³⁰ We consider that option strikes the right balance.

3.4 Identifying the proper defendant

PIAC supports the statutory clarification of the legal identity of defendants, so that an institution (or its trust) can be named as a defendant for the purposes of legal proceedings arising out of institutional child sex abuse, regardless of its formal legal structure. Where the institution no longer exists, it is appropriate that a nominal defendant be appointed. In circumstances where the survivor was a ward of the State and at the time the abuse occurred, the State had a legal duty of care towards them, it is appropriate that the State be appointed as the nominal defendant in the place of the institution.

Recommendation 9

PIAC recommends that the law be reformed so that an institution (or its trust) can be named as a defendant in any institutional child sexual abuse.

Case study 3

██████ is a ████████ man who now lives in Melbourne. ████████ was sexually assaulted in

³⁰ Consultation paper, above note 1, at page 219.

1988 by a [REDACTED]. He was 16 and homeless at the time. [REDACTED] was taken to the perpetrator's house by another man and the perpetrator let him stay for the night in his house next door to the church. [REDACTED] stayed there for one night, during which time the perpetrator masturbated him without his consent. In 1989, [REDACTED] was assaulted again by the same perpetrator in similar circumstances.

[REDACTED] reported the incident to the Victorian police in [REDACTED] who advised him they could do nothing about it because of the length of time that had passed and because the perpetrator was now living in England. In [REDACTED], when the [REDACTED] was in the newspapers, [REDACTED] again made a police report, this time to the [REDACTED]. [REDACTED] was also prompted to report the assaults to the Church. He then made a complaint with the [REDACTED] however the matter was not investigated despite [REDACTED] being in contact with the PSU for more than two years. [REDACTED] also applied to the NSW Victims Compensation Tribunal however his application was dismissed on the basis that 'the first report was some 6-7 years after the incident and [there is] no evidence which supports the allegations', despite [REDACTED] statutory declaration, and signed statements to the Victorian police and NSW police.

[REDACTED] came to see HPLS seeking advice on what the church and police were required to do after a report of sexual abuse. We advised [REDACTED] on the differences between [REDACTED] a criminal prosecution and a civil law claim, and the process and quantum of damages. We provided [REDACTED] with some general information about limitation periods but did not advise on this as this fell outside the scope of our engagement. [REDACTED] also wanted to know whether he would still be able to give evidence in the royal commission, if he was successful under the scheme and there was a confidentiality clause in the deed of consent.

PIAC's involvement with [REDACTED] ceased after we completed the advices for him.