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PIAC SUBMISSION ON THE DRAFT NATIONAL ACTION PLAN ON HUMAN RIGHTS

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The Public Interest Advocacy Centre ("PIAC")

The Public Interest Advocacy Centre ("PIAC") is an independent and non-profit legal and policy centre located in Sydney. Its charter is:

To undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Although located in New South Wales, the matters PIAC undertakes are often of national interest or importance or have consequences beyond state boundaries.

PIAC's work extends beyond the interests and rights of individuals as it specialises in undertaking matters that have systemic impact. The Centre's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

General Points

PIAC would like to congratulate the Australian Government and Attorney General's Department for its commitment to improving the protection of human rights in Australia. PIAC welcomes the opportunity to comment on the Draft National Action Plan on Human Rights ("The Plan") and has a range of comments it wishes to make in relation to the Plan. The Plan is a significant undertaking for the Australian Government and Attorney General's Department in particular. Commenting on the draft Plan is also significant undertaking for non-government organisations. As such, although we welcome the opportunity to make comments, we are disappointed that the deadline for return of submissions commenting on the Plan is 11 June 2004. PIAC received the Plan on 28 May 2004. Clearly, this is an insufficient time in which to give adequate consideration to such serious issues and to make comprehensive comments on the Plan.

Accordingly, PIAC makes a number of key comments regarding the Plan and to support these comments we highlight a number of deficiencies in the Plan.

1. The Plan is not an Action Plan

The Plan as drafted does not match PIAC's understanding of an action plan. We understand an action plan to included identified targets, key performance indicators and an implementation timeline. Rather, the Plan lists ongoing activities of the Australian Government and highlights the current situation in relation to human rights in Australia. In doing so the Plan tends to focus only on the strength of Australia's current human rights protections rather than adopting a balanced assessment.

2. Piecemeal Human Rights Protection

The Plan takes the form of a report, similar to that given to the UN, for the purpose of reporting on meeting human rights goals. The tenor of the Plan can be summarised by the statement "Australia's existing system for protecting human rights is comprehensive with requirements essential to such protections established and supported by successive governments".[1]

PIAC does not agree with the statement. Rather, we would suggest that Australia's existing system for protecting human rights is piecemeal and has been developed in an ad hoc manner. Australia's protection of human rights is based on various pieces of legislation, which include both protections and exemptions from the protections.

Australia does not have a Bill of Rights. It therefore lacks a central axis for the delineation and enforcement of human rights. As a consequence of this omission the current system has a series of systemic failures in which human rights abuses continue.

Significantly the Plan does not address this omission by identifying the Bill of Rights as a key pillar of human rights protection. While the Plan does[2] recognise the need for strong and robust democratic institutions such as "an independent judiciary, the rule of law well resourced and respected Opposition parties and a free media", it does not note the requirement of constitutional protection for human rights. Indeed we have seen over the past few years a number of attacks on the independent judiciary, including attempts to limit the power of the judiciary to review government decisions, and a reduction in the funds available for individuals to pursue their rights under the rule of law.

As an action plan PIAC believes that the Plan fails, not only in general terms but also as we will note below in specific terms.

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[1] Australia's National Action Plan on Human Rights, 2004, 4.
[2] Ibid, 4.

Specific failures

Human Rights education

While the Plan states that education raising public awareness of human rights is a lasting and effective way to minimise breaches of human rights[3] it has tended not to provide significant funding or direction for human rights education in Australia. The Plan notes that the Human Rights & Equal Opportunity Commission ("HREOC") and the National Committee on Human Rights Education are the two institutions that pursue the Government's objectives in human rights education.[4] Both organisations have limited funding and receive limited support from the Australian Government in pursuit of their objectives. In particular HREOC has often been ignored or criticised by the Federal Government when it has published reports into human rights in Australia. These reports perform both an educative as well as a assessment function.

Enhancing the effectiveness of the justice system

The Federal Government has in PIAC's opinion failed to enhance the effectiveness of the justice system over the last eight years. The most significant example of this failure is the reduction in funding received by the various Legal Aid Commissions of Australia from the Federal Government.

In 1996/97 the Federal Government gave the Legal Aid Commissions in Australia $128 million funding.[5] This amount was drastically reduced in 1997/98 to $109 million. This amount was reduced further in 1998/99 to $103 million. The reduction in legal aid funding by the Federal Government has been so significant that by 2002/03 the federal funding level of the Legal Aid Commission ($122 million) had still not reached 1995/96 levels. By comparison state contributions to legal aid have progressively increased from $75 million in 1996/97 to $139 million in 2002/03. These cuts have significantly reduced the effectiveness of the justice system. In particular it has meant that greater numbers of people seeking redress in the justice system for alleged breaches of human rights have to do so unrepresented. This has created greater pressure upon the judiciary, the court structure in general and individuals seeking to enforce their rights.

Whilst community legal centres also receive funding from the Federal Government, funding is provided for a broad range of schemes. The level of funding has not been significantly increased since 1996/97 and has not kept pace with the level of demand and higher costs for community legal centres (CLCs).

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[3] Ibid, 6 and 18.
[4] Ibid, 6-7 and 18-20.
[5] National Association of Community Legal Centres, *Doing Justice – Acting together to make a difference* (2003), 9.

This has a serious bearing on the capacity of CLCs to attract highly skilled staff and deliver high quality services. The National Association of Community Legal Centres has argued that:

> *"After adjustments for new activities have been made, Commonwealth funding for community legal centres has increased by 2.45% per annum over the five years from 1997 to 2002. During this same period, Average Weekly Earnings rose by 4.5%. This discrepancy translates into 10.25% cumulative shortfall in the already low base line staffing budgets of CLCs."*[6]

While the Government's encouragement of pro bono legal work is a welcome step, pro bono legal work cannot be considered as a replacement for the assistance given by the Legal Aid Commissions and CLCs.

Addressing Indigenous disadvantage

The key development in the Federal Government's policy approach to Indigenous disadvantage appears to be the mainstreaming of services for Indigenous people. The United Nations Draft Declaration on the Rights of Indigenous People states that a key element of the pursuit of human rights for Indigenous people is the goal of self-determination.[7] The Federal Government has in this regard pursued a number of retrograde steps. The most obvious of these is the recent abandonment of an elected body for Indigenous people with the abolition of the Aboriginal Torres Strait Islander Commission.

In addition the Federal Government is determined to tender for the provision of legal services to Aboriginal and Torres Strait Islanders to non-Indigenous managed organisations. There has been general criticism by State governments legal service providers and Indigenous communities of the failure to stipulate as a term of the tender documents that a tendering organisation must be controlled by Indigenous people. It is also likely that the amount tendered for will be less than previously provided to Aboriginal legal services.

Significantly, the Plan fails to mention the *Native Title (Amendment) Act 1998* introduced by the current Federal Government after the *Wik*[8] decision of the High Court. These amendments made it harder for native title holders to negotiate on pastoral leases, exploration and government activities, and made successful native title claims less likely. This Act severely curtails the rights of Indigenous people to obtain their Native Title rights.

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[6] National Association of Community Legal Centres, *Community Legal Centres – An investment in value Investing in Community Law* (2003), 6.
[7] *Draft Declaration on the Rights of Indigenous People*, UN Doc E/CN.4/SUB.2/RES/1994/45, Article 3.
[8] *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40 (23 December 1996).

Addressing the human rights of people with disabilities

The development of disability standards could be a particularly effective method of advancing the rights of people with disabilities. Pursuant to s.32 of the *Disability Discrimination Act* 1992 it is unlawful to contravene a disability standard. Unfortunately in 12 years of operation only one disability standard has been formulated and approved by Parliament. We note that a draft disability standards in relation to access to premises was released for consultation in 2004. We also note that the Federal Government announced an intention to proceed with standards on education in July 2003. However there is in the Plan no timetable for the development of disability standards. Without timetables it is probable that the pursuit of disability standards will be slow.

The precariousness of rights of people with disabilities was illustrated by the introduction of the Disability Discrimination Amendment Bill 2003. Introduced by the Federal Government the Bill seeks to remove the prohibition of disability discrimination the ground of a persons' addiction to a prohibited drug. If the Bill is enacted it will effectively sanction discrimination against people who are addicted to prohibited drugs unless they are receiving treatment for their addiction. The proposed amendments potentially contravened Australia's international human rights obligations and are likely to have an adverse impact on social groups that are already marginalised and vulnerable, particularly the homeless. The Senate Legal and Constitutional Legislation Committee received 118 submissions relating to the Bill, only two of which supported the Bill.[9] The Committee recommended that in its current form the Bill should not proceed.[10] While the Bill has not been passed it once again illustrated the not only the limitations of piecemeal legislation to address the human rights needs of disadvantaged people, but also the Federal Government's attempts to restrict current human rights protections.

Addressing age discrimination

PIAC congratulates the Government on the introduction of the Age Discrimination Bill 2003. This is certainly a step towards recognising the rights of people of all ages, especially older and young people. However, there are areas that are not covered by the Bill. The Bill specifically excludes youth wages, making it legal to discriminate against young people in employment.[11] Together with this exclusion, the Bill includes several general exemptions that weaken its protection against age discrimination. Comprehensive protection against age discrimination in line with international standards is required to ensure that people of all ages are treated fairly and with dignity.

Supporting the family – protection of children

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[9] Senate, Legal and Constitutional Legislation Committee, *Provisions of the Disability Discrimination Amendment Bill 2003*, 54.
[10] Ibid, ix.
[11] Age Discrimination Bill 2003 (Cth), Clause 23.

The Human Rights & Equal Opportunity Commission ("HREOC") conducted an Inquiry into the mandatory detention of children by the Federal Government. HREOC consulted widely and published a substantial report. The Inquiry Report, *A Last Resort*, made a number of significant findings, including that the immigration detention laws applied to unauthorised arrival children and administered by the Commonwealth create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child* (CRC).[12] In addition, the Inquiry found that,

> *"The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhumane and degrading treatment of those children in detention".*[13]

Finally the Report concluded:

> *"At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the following rights:*
> *the right to be protected from all forms of physical or mental*
> *the right to enjoy the highest attainable standard of physical and mental health*
> *the right of children with disabilities to 'enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'*
> *the right to an appropriate education on the basis of equal*
> *the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC."*[14]

Despite the importance of these findings and their significant implication for human rights in Australia, the Plan does not refer to or acknowledge the HREOC report. Indeed, the Plan does not identify any proposed programs or strategies that will address the issues raised in the HREOC report. The Plan is clearly deficient in this regard.

A Last Resort recommended that Children in immigration detention centres and residential housing projects be released with their parents no later than four weeks after the tabling of the Report.[15] This date is 10 June 2004. However, on this date children still remained in detention and the Government

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[12] HREOC, *A last resort? - The Report of the National Inquiry into Children in Immigration Detention*, 2004, Executive Summary, http://www.humanrights.gov.au/human_rights/children_detention_report/report/exec.htm (accessed on 10/6/2004).
[13] Ibid.
[14] Ibid.
[15] Ibid, Recommendation 1.

continues to have no plan in place for their release. This is a profound breach of human rights that should be addressed in any National Action Plan on Human Rights.

Enhancing the family law system

The Federal Government acknowledges that it is primarily responsible for the provision of legal aid for family law matters. The reduction in Commonwealth funding to Legal Aid Commissions around Australia has clearly not enhanced the family law system. PIAC notes that in the Law Council of Australia's submission on the review of Commonwealth Legal Aid Guidelines in 2002 the Law Council stated:

> *"The funding remains at inadequate levels which impacts directly on the ability of Australians to access the justice system. Inadequate funding has imposed additional burdens on those people and introduced inefficiencies into the system particularly the need to cater for unrepresented litigants. Failure to maintain adequate funding of the legal aid system threatens the sustainability of the system itself".*[16]

PIAC understands that in family law matters there are an increasing number of unrepresented clients. While the Plan sets out a number of initiatives that the Federal Government supports, the key initiative in PIAC's opinion should be a plan which sets out a timeline for a significant increase in legal aid funding and a resultant increase in the assistance provided to individuals in family law matters.

Promoting human rights internationally

While the Plan claims that the Federal Government plays "A leading role in promoting efficiencies and reform of the human rights treating body system,"[17] the Government's refusal to ratify the optional protocols in relation to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (CAT) does not demonstrate that the Federal Government has strong interest in promoting human rights internationally or in strengthening existing multilateral human rights forums.

Indeed the Federal Government as recently as March 2004 appeared to be actively opposed to extending the mandate of the United Nations Working Group on the Optional Protocol for the International Covenant on Economic, Social and Cultural Rights (ICESCR), to develop a draft Optional Protocol.

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[16] Law Council of Australia, *Review of Commonwealth Legal Aid Guidelines*, 1.

The Government's National Action Plan on Human Rights should identify concrete ways to support the international human rights system and for domestic implementation, including a timeline for ratifying the Optional Protocols on CEDAW, CAT and ICESCR, when it is drafted.

Strengthening human rights and bi-lateral relationships

Bilateral trade agreements can impact on human rights in Australia and other countries. The Government has recently negotiated a Free Trade Agreement with the US that proposes changes to the Pharmaceutical Benefits Scheme and to intellectual property law which could lead to higher prices for medicines for Australians. This would be contrary to the government's stated health policy of affordable access to medicines for all Australians, and would reduce the commitment of Australia to improving rather than reducing rights to health care which follows from Australia's ratification of the International Convention on Economic, Social and Cultural Rights.

The Government should ensure that bilateral trade agreements are carefully evaluated in terms of their impact on human rights in Australia and with treaty partners. This will particularly important in the proposed negotiations for a Free Trade Agreement with China.

Liberty, security and dignity

The Federal Court in *Al Masri* v *The Minister for Immigration & Multicultural & Indigenous Affairs*[18] held that the detention of an unlawful non-citizen pending removal from Australia was unlawful where there is no real likelihood or prospect of removal in the reasonably foreseeable future. In effect, the Federal Court found that the Federal Government was arbitrarily detaining individuals. The Government actively opposed the application by *Al Masri* and appealed the Federal Court's decision to the Full Federal Court. The Full Federal Court upheld the Federal Court's decision.[19] The Federal Government then sought to appeal this decision to the High Court. While leave was not granted to appeal the *Al Masri* decision a number of other decisions decided on a similar basis were granted special leave.

Whilst PIAC acknowledges the right of the Federal Government to appeal decisions determined against them we believe that the Government's actions in this case do not demonstrate a strong commitment to prevent arbitrary detention in Australia. Indeed it would appear that the Government is willing to fight strongly in the courts to maintain its right to detain people even where it is questionable whether they have power to do so.

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[17] Australia's National Action Plan on Human Rights, 2004, 51.
[18] *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009.
[19] *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70.

The same criticism applies of the Federal Government's pursuit of anti-terrorism legislation. The various pieces of anti-terrorism legislation[20] have significantly curtailed human rights protections in Australia. While we acknowledge that at times there may be a need to review some of Australia's security legislation, there was significant opposition to many of the provisions in the Bills from legal bodies and human rights advocates. In particular, concerns were raised in relation to the length of periods of detention without charge of both suspects of acts of terrorism and people suspected of having information about an act or suspected act of terrorism.[21]

PIAC continues to be concerned regarding provisions in the *ASIO Legislation Amendment (Terrorism) Act 2003*, which mean that it is now illegal to disclose information relating to ASIO's conduct in detaining and questioning persons while a questioning warrant is in force; and for two years after the expiry of such a warrant. This term is, however, broadly defined to mean, in effect, all knowledge relating to ASIO's activities. These offences mean that much of ASIO's activities in relation to terrorism cannot be subject to open and transparent public discussion. This is an unacceptable restriction on freedom of speech and public debate.

Human rights institutions in Australia

The Plan notes the role of the HREOC in the protection of human rights in Australia. The Federal Government has been reluctant to give HREOC further powers and resources with which to promote and enforce human rights protection in Australia. In 2003 it introduced the Australian Human Rights Commission Legislation Bill 2003 ("the Bill"). One of the provisions of that Bill gave the Attorney General the power to veto a decision of HREOC to intervene in legal proceedings. The intervention power is a particularly important role for HREOC to play. As such, it should not be limited by the political considerations of the Attorney General who represents the Federal Government. This is particularly so in circumstances where HREOC may intervene in a matter in which a federal government Minister is a party and may also be presenting submissions, which oppose that minister. While the Bill ultimately did not proceed, due to strong objection by human rights groups and the community, it is again evidence of the Federal Government's attempts to limit rather than extend the protection of human rights in Australia.

Rather than attempting to limit the role of HREOC in protecting human rights in Australia the Federal Government should in this Plan be setting out strategies to augment and extend the power of HREOC to protect human rights. For example, the Plan might identify a timeline for scheduling the *International Covenant on Economic, Social and Cultural Rights* to the *Human Rights and Equal Opportunity*

[20] *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, *Security Legislation Amendment (Terrorism) Act 2002*, and the Anti-Terrorism Bill 2004.

Commission Act 1986. This Covenant is the only United Nations human rights treaty that has been ratified by Australia that has not in any way been incorporated into Australian law. Indeed, in 2000, the United Nations Committee on Economic, Social and Cultural Rights recommended that the Covenant be incorporated into Australian law.[22]

The Plan might also detail a timeline for the implementation of measures to give HREOC the power to seek injunctive relief in its own name where there has been a contravention of the *Human Rights & Equal Opportunity Commission Act*, the *Race Discrimination Act*, the *Sex Discrimination Act* and the *Disability Discrimination Act*. Such a power would be analogous to a function already exercised by the Australian Competition & Consumer Commission.

These are the types of recommendations and vision that PIAC would expect to see in a National Action Plan on Human Rights. We note, however, that there is no suggestion in the Plan of extending the mandate or powers of HREOC.

Achieving equality

The Plan makes no mention of the Federal Government's opposition to the protection of human rights for gay and lesbian people. In a number of areas the Federal Government has been expanding exemptions to relevant legislation to limit the protection afforded to gays and lesbians.

For example, in 2000[23] and again in 2002,[24] the Federal Government proposed an amendment to the *Sex Discrimination Act 1984*, which would enable states to discriminate on the grounds of marital status in relation to reproductive technologies. While neither of these bills has been passed in the Senate, it demonstrates the Federal Government's lack of commitment to the protection of human rights for *all* Australians. Access to reproductive technologies varies between states and territories.

In addition, the Federal Government has recently proposed amendments to the *Marriage Act 1961*, which would prevent gay and lesbian marriage. Further, it threatened to override ACT legislation, which will enable gay and lesbian families to adopt children. Finally, while the new Medicare Safety Net recognises the expanding health care costs for families, it specifically recognises 'a man and a woman in

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[21] Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* and *Provisions of the Anti-terrorism Bill 2004*.
[22] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, 01/09/2000. UN Doc E/C.12/1/Add.50, para. 24.
[23] Sex Discrimination Amendment Bill (No. 1) 2000.
[24] Sex Discrimination Amendment Bill 2002.

a de facto relationship'[25] thereby excluding same sex couples from registering for the Medicare Saftey Net rebate.

This once again highlights the piecemeal nature of Australian human rights protections and the precarious nature of human rights protection in Australia. The plethora of exemptions and limits placed on legislation and policy restricts the protection of human rights rather than developing a comprehensive and robust system of human rights protection.

One of the failings of the Australian human rights system is that it relies on the ad hoc development of the common law through individual complaints seeking enforce human rights protections. This has the practical effect of limiting both who can access the justice system to enforce their rights and the broader protection of human rights in Australian law. A National Action Plan on Human Right should seek to develop and implement a plan for the comprehensive protection of Australia's international human rights obligations, through a charter or bill of rights.

[25] Australian Government, *Strengthening Medicare – Medicare Safety Net family registration form*, 2004