National Human Rights Baseline Study: Submission by the Public Interest Advocacy Centre

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# Introduction

## The Public Interest Advocacy Centre

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

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

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

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the 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 the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC’s work on human rights

Much of PIAC’s current and previous substantive work involves human rights issues. This includes work on privacy, discrimination, freedom of information, detention, government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on human rights. A significant number of PIAC’s casework clients have direct experience of what it means to have their human rights infringed.

PIAC has provided responses to the various inquiries conducted across Australia in the last five years into human rights protection. For example, PIAC conducted a range of community consultations for the National Human Rights Consultation and worked closely with its diverse networks to encourage those least likely to respond to the Consultation to take part. This included working with people experiencing homelessness, people with mental illness, Indigenous people, prisoners and former prisoners, older Australians, people with disability, and migrant women.

PIAC has also focused specifically on human rights training and policy development for a number of years. Since 2003, PIAC has had a project, *Protecting Human Rights in Australia*, as a core area of its work.

In February 2011, PIAC also commented on the process for developing the National Human Rights Action Plan.[[1]](#footnote-1)

## Summary of Recommendations

**Recommendation One:** That the Baseline Study base its summary on Australia’s current human rights protection on the specific findings of the National Human Rights Consultation report and the findings of Australia’s Universal Periodic Review.

**Recommendation Two:** That the Baseline Study recommend the establishment of a review of the proposed Joint Committee on Human Rights to determine its effectiveness in ensuring compatibility with Australia’s international human rights obligations.

**Recommendation Three:** That the Baseline Study recognise implementation of the United Nations Declaration on the Rights of Indigenous Peoples as a key issue under the right to self-determination and consultation, and promote its implementation as an issue to be addressed under the National Human Rights Action Plan.

**Recommendation Four:** That the Baseline Study detail the need for an adequate period of consultation on Constitutional recognition as an item that needs to be addressed under the Action Plan.

**Recommendation Five:** That the Baseline Study incorporate the work of the National Aboriginal and Torres Strait Islander Healing Foundation under the right to the highest attainable standard of health

**Recommendation Six:** That the Baseline Study promote the establishment of a national compensation tribunal for Aboriginal and Torres Strait Islander people affected by removal as an issue to be addressed under the Action Plan.

**Recommendation Seven:** That the Baseline Study include ensuring national legislation is compatible with the *Racial Discrimination Act* and the Declaration on the Rights of Indigenous Peoples as issues to be addressed under the Action Plan.

**Recommendation Eight:**That the Baseline Study recommend investigation of good practice initiatives in Indigenous law and justice as an action to be addressed under the Action Plan.

**Recommendation Nine:**That the Baseline Study include a review of state, territory and federal government compliance with the recommendations of the Royal Commission into Aboriginal Deaths in Custody and appropriate actions to be addressed as part of the Action Plan.

**Recommendation Ten:** That the Baseline Study incorporate the recommendations of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system.

**Recommendation Eleven:**That the Baseline Study recognise the right to health as a separate rights issue impacting upon people experiencing homelessness and that it recommend the adoption of a legislated right to health care in national homelessness legislation as an issue to be addressed by the Action Plan.

**Recommendation Twelve:**That the Baseline Study recognise the right not to be subjected to cruel, inhuman or degrading treatment and the right to liberty and security of the person as separate issues impacting upon people experiencing homelessness.

**Recommendation Thirteen:** That the Baseline Study detail the role of government housing agencies and the crisis accommodation system in failing to protect the right to adequate housing for people experiencing homelessness.

**Recommendation Fourteen:**That the Baseline Study incorporate recommendations from the House of Representatives Standing Committee on Family, Community, Housing and Youth in regard to the right to adequate housing.

**Recommendation Fifteen:**That the Baseline Study recommend the adoption of a human right to adequate housing within new homelessness legislation as an issue to be addressed by the Action Plan.

**Recommendation Sixteen:**That the Baseline Study incorporate reference to the right of homeless people to participate in public affairs under the ‘right to vote’ section. This should also be a priority item under the Action Plan.

**Recommendation Seventeen:**That the Baseline Study include detail under the right to social welfare relating to the difficulties, faced by women and children who are made homeless as a result of family violence, in accessing social security.

**Recommendation Eighteen:**That the Baseline Study include the right to work, the right to education and social inclusion as additional human rights affecting people with a disability and make reference to the National Disability Insurance Scheme under the Action Plan.

**Recommendation Nineteen:**That the Baseline Study expressly include consolidation of anti-discrimination legislation as one of the positive steps Australia is taking in respect of the rights of people with disability.

**Recommendation Twenty:**That the Baseline Study recommend that the Action Plan include as an action item amending the *Australian Human Rights Commission Act 1986* (Cth) to make the Federal Court and Federal Magistrates Court a no-costs jurisdiction for all anti-discrimination complaints.

**Recommendation Twenty-One:**That the Baseline Study recommend that the Action Plan include as an action item:

1. broadening existing rules about standing to bring discrimination complaints; and
2. empowering the Australian Human Rights Commission to bring discrimination complaints.

**Recommendation Twenty-Two:** That the Baseline Study recommend the Action Plan incorporate mechanisms for the compliance, monitoring and enforcement of the *Disability Standards for Accessible Public Transport 2002* (Cth) into existing state and territory transport regulations.

**Recommendation Twenty-Three:** That the Action Plan propose the *Disability Discrimination Act 1992* (Cth) be amended to include protection from disability vilification and harassment, modelled on s 18C of the *Racial Discrimination Act 1975* (Cth).

**Recommendation Twenty-Four:** That the Baseline Study promote the development of diversionary options for people with a mental illness out of the criminal justice system as an issue that should be addressed under the Action Plan.

# National Human Rights Action Plan Baseline Study

## Support for the National Rights Action Plan Baseline Study

## PIAC welcomes the opportunity to comment on the Consultation Draft for the National Human Rights Action Plan Baseline Study (the Baseline Study). PIAC supports the development of Australia’s National Human Rights Action Plan (the Action Plan) and hopes that the Baseline Study can effectively identify gaps in Australia’s human rights protection regime and provide specific measures on how such gaps can be addressed.

## PIAC acknowledges that the Baseline Study provides a good summary of existing government initiatives in the area of human rights. However, in order to achieve its aims, the Baseline Study also needs to address the relative effectiveness of these initiatives. The Baseline Study needs to identify, in a spirit of candid honesty, the areas in which Australia has not yet met its international human rights obligations.

This submission is intended to assist the government to assess Australia’s level of human rights protection in sufficient detail to ensure that the Baseline Study is an effective instrument in the protection and promotion of human rights. On the basis of our extensive work in the areas of Indigenous justice, homelessness, disability rights, health, and with children and young people, PIAC provides detail on additional rights that should be listed within the Baseline Study and specific action items that should be undertaken to ensure realisation of these rights. PIAC also provides analysis of the Baseline Study’s description of Australia’s current legal and constitutional framework.

## 1. Protection and promotion of human rights in Australia

### General Comments

**a) A constructive critique: identification of gaps in human rights protection**

While the stated purpose of the Baseline Study is to assist in the identification of human rights ‘gaps’, in its draft form it merely describes the current legal framework without analysis of its limitations. This approach is perplexing given the Baseline Study’s purported reliance on the recommendations of the National Human Rights Consultation Panel report (the Brennan Report), which found that the protection of human rights under Australia’s current framework patchwork ‘is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable’.[[2]](#footnote-2)

It is difficult to reconcile the Baseline Study’s approach to Australia’s legal and institutional framework with the Brennan Report, which candidly identified gaps in this area. The table below outlines some of those differences.

| Legal Framework  | National Baseline Study  | Findings of the Brennan Report  |
| --- | --- | --- |
| *Australia’s constitutional system* | 1.2 The Australian Constitution provides certain guarantees that are considered to be ‘express rights’ in addition to several implied rights indicated by the High Court of Australia. | Australia’s Constitution was not designed to protect individual rights. It contains a few rights, but they are limited in scope and have been interpreted narrowly by the courts.[[3]](#footnote-3) |
| *Federal and State Legislation* | 1.4 Strong democratic institutions are complemented by a number of legal protections for human rights, including an extensive anti-discrimination legislative framework. | Federal, state and territory legislation protects some human rights, but it can always be amended or suspended to limit or remove that protection. The legislative framework is inconsistent across jurisdictions and difficult to understand and apply.[[4]](#footnote-4) |
| *Administrative Law* | 1.4 Australia’s administrative law system protects individual rights by providing for review of government decisions and promoting transparency in government processes. | Administrative law enables individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions.[[5]](#footnote-5) |
| *Common Law*  | 1.4 The recognition and protection of many basic rights and freedoms derives from centuries of interpretive guidance provided by judges. The common law’s development is itself influenced by international human rights law and Australia’s human rights commitments. | The common law protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language.[[6]](#footnote-6) |

Most significant in its absence is the Baseline Study’s omission of discussion about the lack of a federal Human Rights Act. Under 1.4, the Baseline Study refers to the statutory charters of rights in the Australian Capital Territory, *Human Rights Act 2004* (ACT), and Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, the Baseline Study omits reference to the recommendations of the Brennan Report’s [[7]](#footnote-7)and the Working Group on the Universal Periodic Review Draft Report [[8]](#footnote-8) that Australia adopt a judicially-enforceable Human Rights Act to effectively protect the rights of vulnerable groups.

In order to assist in identifying gaps and areas for actions under the Action Plan, it is essential that the Baseline Study present a frank and accurate picture of Australia’s current human rights framework. PIAC believes a significant reason why previous attempts at creating national human rights action plans, including the last *Draft National Action Plan on Human Rights* (2004), have been problematic is because of the government’s failure to be robust and open in identifying the weaknesses, as well as the undoubted strengths, in the protection of human rights in Australia.

To assist in the development of this accurate picture, PIAC recommends that the Baseline Study adopt the findings contained in the Brennan Report and in the UPR in relation to Australia’s current levels of human rights protection.

Recommendation One:

*That the Baseline Study base its summary on Australia’s current human rights protection on the specific findings of the National Human Rights Consultation report and the findings of Australia’s Universal Periodic Review.*

**b) Need for clear and measurable targets**

PIAC is concerned that the Baseline Study as a whole is vague and fails to provide specific targeted measures to address shortcomings within the protection of human rights in Australia. PIAC supports the Baseline Study including a summary of identified areas that the Action Plan could address, but consistently these areas are vague and without clear metrics to identify and measure outcomes and targets.

One clear example of the lack of specific targeted measures within the Baseline Study is the third ‘issue to be addressed’ under Chapter One. The Baseline study suggests that under the Action Plan, the Australian Government could ‘better engage the NFP (not-for profit) sector in all stages of human rights policy development’. Whilst supportive of the recognition of the need for NFP involvement in the development of domestic human rights policy, this suggestion does not provide detail on how such involvement is to be secured nor measurements on whether participation has been effective. PIAC believes that for the Baseline Study to be an effective instrument, it must not only identify human rights shortcomings, but provide clear, targeted and time-bound measures of how such shortcomings can be addressed. This submission will outline a number of targeted measures PIAC believes are essential to improve Australia’s compliance with human rights.

### 1.3 Parliamentary Committees

PIAC believes that if the Human Rights (Parliamentary Scrutiny) Bill 2010passes the Senate, the Joint Committee on Human Rightscan play a significant role in ensuring the compatibility of Acts, bills and legislative instruments with Australia’s human rights obligations.

However, it essential that the performance of the Parliamentary Joint Committee be measured on an on-going basis to ensure the above objectives are achieved. PIAC recommends that, in order to ensure accountability and the success of the Joint Committee on Human Rights, the Australian Government should commit to funding an independent and stringent evaluation process. The evaluation process should examine the effectiveness of the Joint Committee on Human Rights in identifying legislative incompatibility with human rights obligations prior to legislation being passed. PIAC believes such an evaluation process should be linked with the pre-existing commitment of the Australian Government to review the Australian Human Rights Framework in 2014.

Recommendation Two:

*That the Baseline Study recommend the establishment of a review of the proposed Joint Committee on Human Rights to determine its effectiveness in ensuring compatibility with Australia’s international human rights obligations.*

## 3. The human rights experience of specific groups in Australia

### 3.1 Aboriginal and Torres Strait Islander peoples

In 2001, PIAC established the Indigenous Justice Program (IJP) with the financial support of law firm Allens Arthur Robinson. The aims of the IJP are to:

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

The IJP has conducted policy and advocacy work in relation to issues such as policing in Indigenous communities, the effectiveness of the police complaint systems in NSW, children in detention, improving access to justice, race discrimination and a wide range of other civil matters. The IJP has acted for family members of Aboriginal inmates who have died in custody.

On this basis of the work of the IJP, PIAC makes the following comments on the human rights experiences of Aboriginal and Torres Strait Islander peoples.

#### 3.1.1 Right to self-determination and consultation

a) The United Nations Declaration on the Rights of Indigenous Peoples

PIAC is concerned that the Baseline Study fails to adequately address the role of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) in considering the right to self-determination for Aboriginal and Torres Strait Islander people. As a non-binding instrument, the Declaration is designed to inform national law reform and policy. However, since indicating its formal support for the Declaration in 2009, the Australian Government has failed to implement important components of the Declaration in its approach to Indigenous self-determination.

Although the Baseline Study notes that the Social Justice Commissioner in his *Social Justice Report 2010*[[9]](#footnote-9) called upon the Australian Government to develop a national strategy (in partnership with Aboriginal and Torres Strait Islander peoples) to ensure the full implementation of the Declaration, PIAC notes that this has not been included as one of the issues for the National Plan to address. PIAC submits that the implementation of the Declaration into binding law and process should be a key focus of protecting the rights of Aboriginal and Torres Strait Islander peoples in Australia.

Recommendation: Three

*That the Baseline Study recognise implementation of the United Nations Declaration on the Rights of Indigenous Peoples as a key issue under the right to self-determination and consultation, and promote its implementation as an issue to be addressed under the National Human Rights Action Plan.*

b) National consultation on recognition in the Australian Constitution

PIAC believes that the Baseline Study presents an incomplete picture of the Australian Government’s consultation process relating to the recognition of Aboriginal and Torres Strait Islander people in the Australian Constitution. In referencing the Australian Government’s appointment of an expert panel to lead this consultation process, the Baseline Study refers to a ‘wide ranging national public consultation and engagement program throughout 2011’.[[10]](#footnote-10)

However, in reality the consultation timeframes are far more limited, with the consultation process commencing in May 2011 and finishing in September 2011, providing a mere five months to consult the entire nation (both Indigenous and non-Indigenous Australians) on this key issue. PIAC recommends that the Action Plan should acknowledge the restricted nature of the consultation process.

Recommendation: Four

*That the Baseline Study detail the need for an adequate period of consultation on Constitutional recognition as an item that needs to be addressed under the Action Plan.*

#### 3.1.2 Right to the highest attainable standard of health and adequate housing

The Baseline Study fails to address the significant impacts of removal of the Stolen Generations under the right to the highest attainable standards of health.

1. National Aboriginal and Torres Strait Island Healing Foundation

PIAC notes that the Baseline Study does not mention the National Aboriginal and Torres Strait Islander Healing Foundation. The Healing Foundation was established by the Federal Government in 2009 to ‘support community-based healing initiatives to address the traumatic legacy of colonisation, forced removals and other past government policies’.[[11]](#footnote-11) PIAC believes the Healing Foundation, as the only form of reparations that has been made available to Aboriginal and Torres Strait Islanders by the Federal Government, should be monitored and reviewed under the Baseline Study and the future Action Plan.

Recommendation: Five

*That the Baseline Study incorporate the work of the National Aboriginal and Torres Strait Islander Healing Foundation under the right to the highest attainable standard of health.*

1. A National Compensational Tribunal

PIAC firmly supports the recommendation in the Universal Periodic Review (UPR) of the need for the establishment of a national compensation tribunal for Aboriginal and Torres Strait Islander people affected by the stolen generations.[[12]](#footnote-12) A national compensation tribunal was first recommended in the *Bringing them Home* reportas a way of assisting healing in Aboriginal and Torres Strait Islander communities[[13]](#footnote-13) and was also identified during PIAC’s consultation with Aboriginal and Torres Strait Islander communities in 2001.

PIAC’s consultation process, which led to the release of the report *Restoring Identity* (2002, 2009), found that while compensation is an important part of any reparations package, other forms of reparation, such as guarantees against repeated or continuing abuses, rehabilitation and restitution are equally important to Aboriginal and Torres Strait Islander people. In order to reflect the needs of Aboriginal and Torres Strait Islander communities, PIAC believes the Action Plan should support the establishment of a tribunal with the power to award a large variety of reparations, including monetary compensation for affected individuals.

Recommendation: Six

*That the Baseline Study promote the establishment of a national compensation tribunal for Aboriginal and Torres Strait Islander people affected by removal as an issue to be addressed under the Action Plan.*

#### 3.1.5 Freedom from discrimination

PIAC supports the Baseline Study’s inclusion of the UPR recommendations for the Australian government to ensure that any legislation is compatible with the *Racial Discrimination Act 1975* (Cth), as well as ensuring that the Act is in itself compatible with the Declaration on the Rights of Indigenous Peoples. In order to ensure such compatibility, PIAC recommends this should be a key issue addressed as part of the Action Plan.

Recommendation: Seven

*That the Baseline Study include ensuring national legislation is compatible with* the Racial Discrimination Act *and the Declaration on the Rights of Indigenous Peoples as issues to be addressed under the Action Plan.*

#### 3.1.6 Community safety and interaction with the justice system

a) Harmonisation of successful approaches

PIAC notes that the Baseline Study focuses on the positive elements of the Victorian justice system in relation to Aboriginal people, particularly the Koori courts. However, it makes no recommendations about adopting these in other states and territories. PIAC submits that a scoping exercise to assess how these successful measures could be implemented in other jurisdictions would be a useful starting point for the Action Plan.

Recommendation: Eight

*That the Baseline Study recommend investigation of good practice initiatives in Indigenous law and justice as an action to be addressed under the Action Plan.*

b) Aboriginal deaths in custody

The Baseline Study fails to address the issue of Aboriginal deaths in custody. PIAC remains concerned that the majority of the recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) have not been followed, either by State, Territory or Federal governments. Some of the recommendations that have not been addressed include the right to effective and independent remedies, such as the review of the processes for dealing with complaints against police, and regular reporting and investigation of Aboriginal deaths in custody.

PIAC therefore recommends that the Baseline Study include a review of government compliance with the recommendations of the RCIADIC, to assess what continues to be required in this area.

Recommendation: Nine

*That the Baseline Study include a review of state, territory and federal government compliance with the recommendations of the* Royal Commission into Aboriginal Deaths in Custody *and appropriate actions to be addressed as part of the Action Plan.*

### 3.1 Children and Young People

### PIAC conducts a joint project with the Public Interest Law Clearing House NSW and Legal Aid NSW, known as the Children in Detention Advocacy Project (CIDnAP). CIDnAP aims to challenge the unlawful and unnecessary detention of young people through policy work and litigation, and find appropriate solutions to systemic problems that contribute to the over-representation of juveniles in the criminal justice system. CIDnAP provides legal representation on a pro bono or legal aid grant basis to young people who may have a cause of action arising from a false arrest, unlawful detention, malicious prosecution and/or the use of excessive force by police, transit authorities and/or private security companies.

### The project also works with relevant organisations to identify and rectify the causes of these detentions. In 2009, PIAC worked with the Youth Justice Coalition to produce the report *Bail Me Out*, which compiled and analysed data from observations at Parramatta Children’s Court regarding bail conditions imposed on young people.

On the basis of PIAC’s work on CIDnAP, the following comments are provided in relation to the Baseline Study’s section on human rights and children and young people.

**3.3.3 The rights of children in the criminal justice system**

a) Inquiry into high levels of involvement of Indigenous juveniles and young adults

PIAC believes that the Baseline Study should incorporate the recommendations contained in the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs*, Inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system***.**  PIAC notes that recommendations 23-31 of the inquiry have a particular relevance to the high levels of children and young people within the criminal justice system.

These recommendations include:

* increased Indigenous cultural awareness training for all police employees and incentives to increase employment of Indigenous people in the police force (rec 23);
* increased funding and requirements for interpretation services and hearing assistance (recs 24 and 25);
* increasing Commonwealth funding for Aboriginal and Torres Strait Islander Legal Services (to increase parity with Legal Aid Commission funding) (rec 26);
* increased funding for appropriate accommodation options for youths released on bail (rec 27);
* undertaking a study on sentencing and diversionary options, with a focus on proposing additional Indigenous alternative sentencing options (recs 28 and 29);
* establishing a national program of pre-court conferencing (rec 30); and
* establishing a pool of long-term funding for young Indigenous offender programs, particularly those that are locally and community based (rec 31).

Recommendation: Ten

*That the Baseline Study incorporate the recommendations of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system.*

### 3.6 People at risk of or experiencing homelessness

The Homeless Persons’ Legal Service (HPLS), a joint project of PIAC and the Public Interest Law Clearing House NSW, HPLS provides free legal advice and on-going representation for people who are homeless or at risk of homelessness. In addition, HPLS works closely with people experiencing homelessness to identify effective public policy responses to issues facing homeless people. On the basis of this experience, PIAC makes the following comments on the Baseline Study’s coverage of homelessness.

#### Additional Rights

a) Human right to the highest attainable standards of health

PIAC submits that the Baseline Study should make explicit reference to the right to the highest attainable standards of physical and mental health, as recognised in Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*. Under this right, Australia is required to ensure all individuals have access to adequate health care and services.

###### The links between homelessness and mental illness are well established, and are outlined within the Baseline study at 3.6.3(d). While the Baseline Study identifies mental illness rates being high among people experiencing homelessness, it fails to detail the considerable difficulties people who are homeless have in obtaining appropriate treatment under current service structures. One of these service structures is the requirement that homeless users of short-term crisis accommodation move away from the service after a period of three months. In HPLSʼs experience, this means that many homelessness service users hop between short-term accommodation centres, never having the systemic causes (including mental illness) for their homelessness adequately understood or addressed.

Under this right, mention should also be made of the inquiry into homelessness legislation conducted by the House of Representatives Standing Committee on Family, Community, Housing and Youth, *Housing the Homeless.* The inquiry recommendedadoption of new homelessness legislation to replace the old *Supported Accommodation Assistance Act 1994* (Cth).**[[14]](#footnote-14)** PIAC believes that the development of national homelessness legislation and national quality standards for homelessness services provides an opportunity to incorporate a legislated right to health services for people experiencing homelessness. In particular, the national homelessness legislation could provide for an enforceable right to adequate health care. The national quality standards could require all accredited homelessness and mainstream services facilitate equitable access to health services, in accordance with the legislated right to adequate health care.

Recommendation: Eleven

*That the Baseline Study recognise the right to health as a separate rights issue impacting upon people experiencing homelessness and that it recommend the adoption of a legislated right to health care in national homelessness legislation as an issue to be addressed by the Action Plan.*

b) The right not to be subjected to cruel, inhuman or degrading treatment and the right to liberty and security of the person

PIAC submits that the Baseline Study should make explicit reference to the right not to be subjected to cruel, inhuman or degrading treatment as recognised by Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), and the right to liberty and security of the person for all individuals, as recognised by Article 9 of the ICCPR, as being particularly relevant to the human rights of people experiencing or at risk of homelessness.

Experiences of violence and lack of personal safety are all too common for people who are homeless or at risk of homelessness. A recent study undertaken in Sydney found 48% of the 106 homeless respondents had experienced at least one episode of violent victimisation in the last year,[[15]](#footnote-15) in comparison with 5% of the housed NSW population, recorded in 2007 by the NSW Crime and Safety Survey.[[16]](#footnote-16) The considerable experience of violence among among homeless people was also confirmed in a 2009 report commissioned by PIAC, *Rough Living: Surviving violence and homelessness.*[[17]](#footnote-17) *Rough Living* traced the life-experiences of 12 rough-sleepers in Sydney and documented their victimisation at the hands of members of both the homeless and housed communities.

Recommendation: Twelve

*That the Baseline Study recognise the right not to be subjected to cruel, inhuman or degrading treatment and the right to liberty and security of the person as separate issues impacting upon people experiencing homelessness.*

### Right to adequate housing

a) Role of government agencies and crisis accommodation services

PIAC supports the Baseline Study’s identification of the right to adequate housing as a right that impacts directly upon people experiencing homelessness. However, the Baseline Study does not make clear reference to the role state and territory government housing agencies, as well as crisis accommodation services, play in relation to the right to adequate housing.

PIAC, through HPLS, frequently works with homeless people in NSW who have had their right to adequate housing undermined by government practice. HPLS has conducted several forums with people experiencing in which participants have identified considerable barriers to obtaining stable, long-term accommodation from Housing NSW. Some of those consulted by HPLS spoke of the devastating impact of having to wait for to up ten years on the NSW Housing list to receive accommodation. One respondent informed HPLS that he had became so sick of waiting for housing, that he simply gave up and has accepted he will live the rest of his life on the street (he had been homeless for over 20 years).

The Baseline Study should also recognise the role of the crisis accommodation system in often failing to protect the right to adequate housing for people experiencing homelessness. This failure is evident in the considerable number of people currently being turned away from SAAP accommodation. According to the Australian Institute of Health and Welfare (AIHW), in 2009-10, on an average day, 58.3 per cent of people who sought immediate accommodation from a specialist homelessness accommodation service were turned away. AIHW concluded that the dominant reason for people being turned away was an undersupply of accommodation.[[18]](#footnote-18)

Recommendation: Thirteen

*That the Baseline Study detail the role of government housing agencies and the crisis accommodation system in failing to protect the right to adequate housing for people experiencing homelessness.*

b) The right to adequate housing under homelessness legislation

PIAC submits that the Baseline Study should incorporate the findings of *Housing the Homeless*.[[19]](#footnote-19) In particular, PIAC submits that the Baseline Study should specifically refer to Recommendation 7 of that report:

That new homelessness legislation specify the right of all Australians to adequate housing. Such a provision should:

* include appropriate reference to Australia’s international human rights obligations;
* include a clear definition of adequate housing; and
* explicitly recognise the right to adequate housing will be progressively realised.[[20]](#footnote-20)

The Baseline Study should also refer to recommendation 9 of that report:

That the Minister for Housing include provision in new legislation for the independent monitoring of the progress towards the realisation of the right of all Australians to adequate housing. Data collection mechanisms should allow monitoring of progress for specified vulnerable and marginalised population groups**.**[[21]](#footnote-21)

Recommendation: Fourteen

*That the Baseline Study incorporate recommendations from the House of Representatives Standing Committee on Family, Community, Housing and Youth in regard to the right to adequate housing.*

Recommendation: Fifteen

*That the Baseline Study recommend the adoption of a human right to adequate housing within new homelessness legislation as an issue to be addressed by the Action Plan.*

### Impact of homelessness on other rights

###### Right to vote

While the Baseline Study refers to the barriers faced by people experiencing homelessness in exercising their right to vote, PIAC is concerned that this section does not also include reference to the right to participate in public affairs.

The fundamental right of affected people to participate in public affairs is enshrined in Article 25 of the ICCPR. This right includes the right of individuals to participate in public affairs, and to contribute to the development of public policy and legislative reform, particularly in relation to the issues that affect them.

The need for homeless people to be placed at the centre of service planning has been recognised by both the White Paper on Homelessness, *The Road Home,*[[22]](#footnote-22) and the NSW Homelessness Framework, *A Way Home*.[[23]](#footnote-23) However, in practice, genuine and meaningful inclusion of homeless people in public policy and service delivery decisions that affect them is rare.

PIAC submits that in the development of national homelessness legislation there needs to be express recognition of the rights of homeless people to participate in law reform and public policy development processes, by requiring federal, state and territory government departments and agencies to meaningfully involve those experiencing homelessness in those processes.

In addition, it is essential that national homelessness legislation promote the role of homeless people in service delivery by making consumer involvement a prerequisite to service accreditation. PIAC notes that the House of Representatives Standing Committee on Family, Community, Housing and Youth has recommended the introduction of a national standards and accreditation framework for specialist homelessness services and mainstream services.[[24]](#footnote-24) During 2010-11, the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) has been undertaking consultations regarding the development of national quality standards governing homelessness services and mainstream and allied services. These consultations should be acknowledged in the Baseline Study. It is submitted that making consumer involvement a prerequisite to service accreditation should be included in these national quality standards.

Recommendation: Sixteen

*That the Baseline Study incorporate reference to the right of homeless people to participate in public affairs under the ‘right to vote’ section. This should also be a priority item under the Action Plan.*

###### Right to social welfare

PIAC supports the Baseline Study’s inclusion of the right to social welfare.

In the two years to June 2011, 94 percent of the 976 HPLS clients who disclosed their source of income were in receipt of Centrelink benefits. A further 3 per cent reported that they had no income at all. The high cost of housing in Sydney means that many of these clients cannot find places to live that are affordable on that payment and located near their support networks in Sydney.

While the Baseline Study refers to some of the difficulties homeless people face in exercising their right to social welfare, does not to refer to the barriers and difficulties faced by women and children who are made homeless as a result of family violence, in accessing social security.

PIAC submits that there needs to be a consistent definitional approach across Commonwealth legislation. PIAC notes that the Australian Law Reform Commission has recommended a definition of ‘family violence’ which sufficiently encompasses the essential elements of family violence:

‘… violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

(a) physical violence;

(b) sexual assault and other sexually abusive behaviour;

(c) economic abuse:

(d) emotional or psychological abuse;

(e) stalking;

(f) kidnapping or deprivation of liberty;

(g) damage to property, irrespective of whether the victim owns the property;

(h) causing injury or death to an animal irrespective of whether the victims owns the animal; and

(i) behaviour by the person using the violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.[[25]](#footnote-25)

PIAC submits that this definition should be applied across consistently across Commonwealth legislation.

Recommendation: Seventeen

*That the Baseline Study include detail under the right to social welfare relating to the difficulties, faced by women and children who are made homeless as a result of family violence, in accessing social security.*

**3.7 People with disability**

PIAC has a long history of involvement in discrimination law and promotion of equality in Australia, particularly the rights of people with disability. PIAC has represented litigants in a number of significant discrimination cases in Australia including cases involving disability access to premises and public transport. PIAC has also been involved in a broad range of public policy development and review processes in relation to discrimination law and the promotion of equality.

**Additional Rights**

PIAC believes there are a number of additional human rights that should be listed in regards to people with a disability. In addition to rights currently listed, PIAC submits that the Baseline Study should also include the following human rights of people with disability: the right to work, the right to education and social inclusion.[[26]](#footnote-26) Although employment and education are addressed in relation to freedom from discrimination, these rights should be included separately as the issues relating to people with disability enjoying these human rights extend beyond discrimination.

PIAC notes that the Baseline Report does not refer to the recently released Productivity Commission Report, *Disability Care and Support,*[[27]](#footnote-27) which recommends the introduction of a National Disability Insurance Scheme. PIAC supports the introduction of such a scheme and submits that providing adequate and reliable sources of care and support will promote the human rights protection of people with disability.

Recommendation: Eighteen

*That the Baseline Study include the right to work, the right to education and social inclusion as additional human rights affecting people with a disability and make reference to the National Disability Insurance Scheme under the Action Plan.*

**3.7.1 Freedom from discrimination**

1. Need for Equality Legislation

Although paragraph 1.5.2 of the Baseline Study refers to the Australian Government’s intention to consolidate Commonwealth anti-discrimination legislation into a single, comprehensive Act, PIAC notes that there is no express reference to consolidation in the section about people with disability.

PIAC supports the proposal to consolidate Commonwealth anti-discrimination legislation. This process should seek to not only consolidate existing legislation but also improve equality by addressing the gaps and inconsistencies in the existing legislation. Furthermore, the consolidation process must not diminish the existing protections for persons with disability. For example, the *Disability Discrimination Act 1992* (Cth), (the DDA) imposes obligations to make reasonable adjustments for persons with disability.

Recommendation: Nineteen

*That the Baseline Study expressly include consolidation of anti-discrimination legislation as one of the positive steps Australia is taking in respect of the rights of people with disability.*

1. Access to justice

The ability of people with disability to enforce their right to freedom from discrimination is hampered by existing rules in relation to standing and costs for claims brought under the DDA. PIAC submits that the consolidation of Commonwealth anti-discrimination law should consider making the Federal Court and Federal Magistrates Court a no-costs jurisdiction for anti-discrimination complaints, including disability discrimination complaints.

PIAC also submits that existing rules in relation to standing under the *Australian Human Rights Commission Act 1986* (Cth) be considered in the consolidation and that the Australian Human Rights Commission be empowered to bring complaints on behalf of people with disability. This will assist in addressing systemic discrimination and take the burden off individuals with disability in pursuing court action.

Recommendation: Twenty

*That the Baseline Study recommend that the Action Plan include as an action item amending the* Australian Human Rights Commission Act 1986 *(Cth) to make the Federal Court and Federal Magistrates Court a no-costs jurisdiction for all anti-discrimination complaints.*

Recommendation: Twenty-One

*That the Baseline Study recommend that the Action Plan include as an action item:*

1. *broadening existing rules about standing to bring discrimination complaints; and*
2. *empowering the Australian Human Rights Commission to bring discrimination complaints.*
3. Transport

The Baseline Study refers to the disability standards made pursuant to the DDA, and in particular the *Disability Standards for Accessible Public Transport 2002* (Cth) (Transport Standards). The Transport Standards are required to be reviewed every five years,[[28]](#footnote-28) however, the review due in 2007 was not released until June 2011.[[29]](#footnote-29) PIAC submits that it is important that the review of the Transport Standards is conducted in a timely fashion, as it provides valuable information in relation to the implementation of the Transport Standards.

The recently released review of the Transport Standards noted that there is currently ‘no mandatory mechanism for reporting compliance with the Transport Standards, nor any body that monitors compliance in a systematic way.’[[30]](#footnote-30) PIAC submits that effective compliance, monitoring and enforcement of the Transport Standards is crucial to removing discrimination in the area of transport. Currently enforcement of the Transport Standards relies on an individual making a complaint to the Australian Human Rights Commission and then the Federal Court or Federal Magistrates Court. PIAC recommends that existing state and territory transport regulations incorporate the Transport Standards to ensure effective compliance, monitoring and enforcement.

Recommendation: Twenty-two

*That the Baseline Study recommend the Action Plan incorporate mechanisms for the compliance, monitoring and enforcement of the* Disability Standards for Accessible Public Transport 2002 *(Cth)* *into existing state and territory transport regulations.*

**3.7.3 Freedom from violence – vilification**

Persons with disability are particularly vulnerable to abuse, violence and targeted hate crimes.[[31]](#footnote-31) PIAC submits that the DDA should be amended to prohibit vilification or harassment of a person with disability. Currently, Tasmania is the only jurisdiction in Australia that prohibits inciting hatred towards persons with disability (see s 19 of the *Anti-Discrimination Act 1998* (Tas)). Furthermore, disability vilification should be criminalised as well as being prohibited under the DDA.

PIAC recommends that a provision along the lines of s 18C of the *Racial Discrimination Act 1975* (Cth) should be inserted into the DDA. Section 18C(1) provides:

It is unlawful for a [person](http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s5.html#person) to do an act, otherwise than in private, if:

1. the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another [person](http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s5.html#person) or a group of people; and
2. the act is done because of the race, colour or national or ethnic origin of the other [person](http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s5.html#person) or of some or all of the people in the group.

Recommendation: Twenty-three

*That the Action Plan propose the* Disability Discrimination Act 1992 *(Cth) be amended to include protection from disability vilification and harassment, modelled on s 18C of the* Racial Discrimination Act 1975 *(Cth).*

**3 7.4 People living with mental illness**

PIAC welcomes the Baseline Study’s recognition of the considerable human rights problems experienced by people with a mental illness. In addition to the material it presently contains, PIAC suggests the following as additional material the Baseline Study should incorporate.

Over-representation in the criminal justice system

While the Baseline Study mentions the disproportionate representation of people with a mental illness in the criminal justice system, it fails to provide action items to address this imbalance. On the basis of our work in the area of mental illness and detention, PIAC submits that the Baseline Study should support both increased use of diversionary options by the courts and the police and increased access to psychological and psychiatric services for people in prison with a mental illness.

In NSW, there are limited psychological and psychiatric services for prisoners. In NSW prisons, treatment for mental illness is focussed on the administration of psychotropic and anti-depressant medication, with often little or no counselling or use of talking therapies. In addition, the Action Plan should recommend adoption of better-coordinated and better-funded post-release services for people with a mental illness leaving prison. This has the potential to decrease homelessness and recidivism, as well as increasing the chances of the person accessing ongoing treatment in the community.

Recommendation: Twenty-four

*That the Baseline Study promote the development of diversionary options for people with a mental illness out of the criminal justice system as an issue that should be addressed under the Action Plan.*

1. Brenda Bailey, *Human Rights Action Plan for Australia*, PIAC (2011). [↑](#footnote-ref-1)
2. Frank Brennan, Mary Kostakidis, Tammy Williams and Mick Palmer, *National Human Rights Consultation Report*, Attorney General’s Department, Australia (2009) 127. [↑](#footnote-ref-2)
3. Ibid 128. [↑](#footnote-ref-3)
4. Ibid 128. [↑](#footnote-ref-4)
5. Ibid 128. [↑](#footnote-ref-5)
6. Ibid 128. [↑](#footnote-ref-6)
7. Frank Brennan, et al *National Human Rights Consultation Report*, 378. [↑](#footnote-ref-7)
8. General Assembly, *Draft report of the Working Group on the Universal Periodic Review (Australia)*, (2011) 14. [↑](#footnote-ref-8)
9. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (2010) 2011. [↑](#footnote-ref-9)
10. *National Human Rights Action Plan Baseline Study*, 20. [↑](#footnote-ref-10)
11. National Aboriginal and Torres Strait Islander Healing Foundation, *About the National Aboriginal Torres Strait Islander Healing Foundation* (2011), National Aboriginal and Torres Straight Healing Foundation <http://healingfoundation.org.au/?page_id=2> at 23 August 2011. [↑](#footnote-ref-11)
12. UPR recommendations 86.97 (Slovenia). [↑](#footnote-ref-12)
13. Human Rights and Equal Opportunities Commission, *Bringing them home*: *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), chapter 14. [↑](#footnote-ref-13)
14. House of Representatives Standing Committee on Family, Community, Housing and Youth (2009), Housing the Homeless, *Report on the inquiry into homelessness legislation*, <http://www.aph.gov.au/house/committee/fchy/homelessness/report/fullreport%20as%20at%2025%20Nov.pdf> at 2 August 2011. [↑](#footnote-ref-14)
15. Larney, S., Conroy, E., Mills, K., Burns, L., and Teesson, M., 2009. ʻFactors Associated with Violent Victimization Among Homeless Adults in Sydney, Australiaʼ, Australian and New Zealand Journal of Public Health 33, 4: 347-351. [↑](#footnote-ref-15)
16. Australian Bureau of Statistics, 2007. Crime and Safety: New South Wales, Cat. No. 4509.1,

 http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4509.1Apr%202008?OpenDocument

at 2 August, 2011. [↑](#footnote-ref-16)
17. Robinson, Catherine (2010), *Rough Living, Surviving Violence and Homelessness*, UTS Press, Sydney, 2010. [↑](#footnote-ref-17)
18. Australian Institute of Health and Welfare, *People turned away from government-funded specialist homelessness accommodation 2009-10* (2011) Australian Institute of Health and Welfare <http://www.aihw.gov.au/publication-detail/?id=10737419235&tab=2> at 2 August, 2011. [↑](#footnote-ref-18)
19. House of Representatives Standing Committee on Family, Community, Housing and Youth (2009), *Housing the Homeless, Report on the inquiry into homelessness legislation*, House of Representatives Standing Committee on Family, Community, Housing and Youth <http://www.aph.gov.au/house/committee/fchy/homelessness/report/fullreport%20as%20at%2025%20Nov.pdf> accessed 2 August 2011. [↑](#footnote-ref-19)
20. Ibid 69, 70. [↑](#footnote-ref-20)
21. Ibid 79. [↑](#footnote-ref-21)
22. Commonwealth, *The Road Home, A national approach to reducing homelessness* (2009) viii. [↑](#footnote-ref-22)
23. New South Wales, *A Way Home, Reducing homelessness in NSW, NSW Homelessness Action Plan 2009-2014* (2009) 19. [↑](#footnote-ref-23)
24. See above n 17, 96-97. [↑](#footnote-ref-24)
25. Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Recs 5–1, 6–1, 6–4. [↑](#footnote-ref-25)
26. See article 27 (work and employment), article 24 (education), article 19 (living independently and being included in the community), article 29 (participation in political and public life) and article 30 (participation in cultural life, recreation, leisure and sport of the *Convention on the Rights of Persons with Disabilities* opened for signature 31 March 2007, Doc.A/61/611, art 16(1) (entered into force 3 May 2008), ratified by Australia on 17 July 2008 (entered into force for Australia on 16 August 2008). [↑](#footnote-ref-26)
27. Productivity Commission, *Disability Care and Support*, (2011) Productivity Commission <http://www.pc.gov.au/projects/inquiry/disability-support/report> at 23 August 2011. [↑](#footnote-ref-27)
28. *Disability Standards for Accessible Public Transport 2002* (Cth) s 34.1(1). [↑](#footnote-ref-28)
29. Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport Final Report* (2009) Allen Consulting Group <http://www.infrastructure.gov.au/transport/disabilities/review/> at 23 August 2011. [↑](#footnote-ref-29)
30. Ibid 30. [↑](#footnote-ref-30)
31. Dr Mark Sherry, *Hate Crimes Against People with Disabilities* (2000) Women with Disabilities Australia <http://[www.wwda.org.au/hate.htm](http://www.wwda.org.au/hate.htm)> at 11 August 2011. [↑](#footnote-ref-31)