Ms Anita Mackay
Public Consultation: Acts Interpretation Act
Justice Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

2 March 2011

Dear Ms Mackay,

Exposure draft of amendments to the *Acts Interpretation Act 1901*

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to make a submission in response to the exposure draft of a bill to amend the *Acts Interpretation Act 1901* (**AI Act**). This submission draws on a chapter by Edward Santow in Gleeson and Higgins (eds), *Constituting Law: Legal Argument and Social Values* (2011, *forthcoming*), Federation Press.

About PIAC

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

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

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

Established in July 1982 as an initiative of the 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 NSW Government Department of Water and Energy for its work on utilities, 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.

General comments about the Bill

PIAC has reviewed the exposure draft of the Bill and does not raise any concerns about the amendments the Bill would make to the AI Act.

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However, PIAC strongly recommends that an additional clause be added to the Bill, requiring that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation should be interpreted consistently with Australia's international human rights obligations (**human rights interpretation provision**).

A human rights interpretation provision

In December 2009, the Attorney-General, Robert McClelland appointed an independent committee, headed by Father Frank Brennan AO to conduct a national consultation about human rights protection in Australia (the Brennan committee). In its report, the Brennan Committee recommended the introduction of a 'dialogue model' Act,[1] similar to the human rights statutes in the United Kingdom, New Zealand, Victoria and the Australian Capital Territory.[2]

The Brennan Committee also recommended amendments to other legislation—especially, the *Administrative Decisions (Judicial Review) Act 1975* (Cth) and the AI Act with a view to enhancing human rights protection.

PIAC endorses the Brennan Committee's recommendation that the AI Act should be amended to include a human rights interpretation provision. In support of this submission, PIAC makes two points.

First, this recommendation does not constitute a major departure from the established common law principle that the courts will interpret legislation on the rebuttable presumption that the legislation in question was not intended to infringe human rights.

In Australia, judicial acceptance of this presumption goes back at least to *Potter v Minahan*,[3] but the High Court's modern encapsulation was in *Coco v The Queen*:

> The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[4]

This is closely related to the common law presumption that the courts should interpret ambiguous legislation in conformity with Australia's international law obligations.[5] As Spigelman CJ has observed extra-curially, the courts have generally set a low bar in deeming a statutory provision to be 'ambiguous', applying the rights presumption "to any case of doubt as to the proper construction of a [statutory] word or phrase".[6] These principles combine to create what Spigelman CJ described as 'the common law bill of rights', which protects a range of human rights.[7]

If anything, the recommendation to include a human rights interpretation provision in the AI Act would do no more than codify this common law principle, preserving all of its key elements. One potential objection that some people may raise in response to this proposal is that judges could use a human rights interpretation provision as a vehicle to pursue their own political

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1 Frank Brennan et al, *National Human Rights Consultation Report* (2009).

2 *Human Rights Act 1998* (UK) c 42; *New Zealand Bill of Rights Act 1990* (NZ); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

3 (1908) 7 CLR 277, 304 (O'Connor J).

4 *Coco v The Queen* (1994) 179 CLR 427, 436-7.

5 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

6 James Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 149.

7 See James Spigelman, *Statutory Interpretation and Human Rights* (2008).

agenda. This is a real risk, but it should not be overstated. As the Honourable Murray Gleeson has said of *Coco*, there is "nothing revolutionary" about this principle but judges must not wield it in a way that calls into question the "legitimacy" of their constitutional role.[8] However, if judges were to overstep the mark, or even if Parliament simply disapproved of a court's rights-compatible interpretation, Parliament would retain the ability to override the court's decision by using clear statutory language.

Secondly, amending the AI Act to include a human rights interpretation provision would allow Parliament to establish unambiguous parameters regarding the application of the interpretive principle. Under the common law's *Coco* principle, judges must choose, unaided by legislative guidance, which 'fundamental rights' can be invoked. Parliament leaves the courts to determine for themselves questions such as whether they should refer only to rights that have some longevity in common law history, or whether they should favour rights that have been recognised at international law. There are already signs that the judiciary has unilaterally started to shift in its thinking. For instance, in 1994, the High Court in *Coco* referred to the protection of 'fundamental rights', a term that generally refers to rights that have been recognised at common law.[9] Just over a decade later, in *Evans v NSW*[10], the Full Federal Court preferred the term 'human rights', suggesting a greater inclination to refer international and comparative law.

Similarly, Parliament has provided no guidance to the courts on how they should deal with conflicting rights. Through inaction, Parliament seems tacitly to encourage the courts to develop their own principles on statutory interpretation. PIAC takes the view that including a human rights interpretation provision in the AI Act would enable Parliament more consistently and clearly to determine which rights should be applied, how they should be applied, and how to deal with the inevitable inconsistencies between rights. In order to assist courts in interpreting legislation consistently with Australia's international human rights obligations, it may also be helpful to include a 'reasonable limitations' clause in this part of the AI Act. One possible model for such a provision is section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Additionally, the phrase "Australia's international human rights obligations" should be defined in the AI Act as the following seven core human rights treaties that Australia has signed and ratified:

- International Convention on the Elimination of all Forms of Racial Discrimination[11] (CERD);
- International Covenant on Economic, Social and Cultural Rights[12] (ICESCR);
- International Covenant on Civil and Political Rights[13] (ICCPR);
- Convention on the Elimination of all Forms of Discrimination Against Women[14] (CEDAW);

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8 Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 33-34.

9 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

10 *Evans v NSW* (2008) 168 FCR 576.

11 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ratified by Australia on 30 September 1975.

12 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

13 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

14 Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ratified by Australia 28

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[15] (CAT);
- Convention on the Rights of the Child[16] (CROC); and
- Convention on the Rights of Persons with Disabilities[17] (CRPD).

These treaties could then be annexed as schedules to the AI Act.

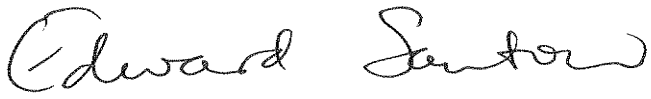
PIAC therefore strongly recommends that a new clause be inserted into the Bill, with a view to amending the proposed Part 5 of the AI Act to include a provision. This provision should state:

(1) In the interpretation of a provision of an Act, a construction that would be consistent with Australia's international human rights obligations shall be preferred to a construction that would not be consistent with Australia's international human rights obligations, so far as it is possible to do so consistent with the Act's purpose.

(2) For the purposes of the AI Act, "Australia's international human rights obligations" means the seven human rights treaties (namely CERD, ICESCR, ICCPR, CEDAW, CAT, CROC and CRPD), a copy of the English text of which is set out in the schedules.

PIAC further recommends that the treaties set out above be annexed as schedules to the AI Act.

If you have any questions about this letter, please contact the writer of this letter on the number below Ms Lizzie Simpson, Acting Senior Solicitor, on 8898 6530.



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July 1983 (entered into force for Australia on 27 August 1983).

15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ratified by Australia on 8 August 1989 (entered into force for Australia on 7 September 1989, except articles 21 and 22, which entered into force for Australia on 28 January 1993).

16 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991).

17 Convention on the Rights of Persons with Disabilities, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008), ratified by Australia on 17 July 2008 (entered into force for Australia on 16 August 2008).