



National Human Rights Action Plan Exposure Draft: Submission by the Public Interest Advocacy Centre

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Chris Hartley, Senior Policy Officer

Vavaa Mawuli, Senior Solicitor

Laura Brown, Solicitor

Gemma Namey, Solicitor

Peter Dodd, Solicitor

Lou Schetzer, Policy Officer

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 able 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.

In February 2011, PIAC also commented on the process for developing the National Human Rights Action Plan¹ and on the National Human Rights Action Plan Baseline Study.²

Summary of Recommendations

Recommendation One: That the Australian Government ensure the participation of all States and Territories in the development of the Action Plan.

Recommendation Two: That the Action Plan commit to working with all States and Territories to develop similar rights-protective initiatives to those it identified as being positive in one particular jurisdiction.

Recommendation Three: That the Action Plan be redrafted to primarily contain new initiatives to promote greater human rights protection, with less emphasis on listing pre-existing government programs and policy responses.

Recommendation Four: That the Action Plan specifically detail the role of the non-government sector in measuring the success of the Action Plan process.

Recommendation Five: That the Action Plan provide a specific timeline for the ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

Recommendation Six: That model legislation on the implementation on the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* should provide clear direction on detention facilities subject to inspection and scrutiny, and set out minimum standards for the operation of national preventative mechanism systems.

Recommendation Seven: That the Action Plan contain a commitment to review all unratified international human rights treaties.

Recommendation Eight: That the Action Plan provide details of the process it will undertake to review unratified international human rights treaties. These details should include specific timeframes and mechanism to inform the community of its decisions.

Recommendation Nine: That the Australian Government through the Action Plan commit to the creation of a body separate to the Australian Human Rights Commission to enable complaints of discrimination to be brought before court.

¹ Brenda Bailey, *Human Rights Action Plan for Australia*, PIAC (2011).

² Chris Hartley, *National Human Rights Action Plan Baseline Study*, PIAC (2011).

Recommendation Ten: That the Action Plan under Action Item 18 include reference to the four guiding principles for the consolidation of Commonwealth anti-discrimination laws.

Recommendation Eleven: That the Action Plan provide a clear timeline for the Australian Government's response to the Expert Panel report on Constitutional Recognition of Aboriginal and Torres Strait Islander people.

Recommendation Twelve: That Action 79 be amended to detail the need for all States and Territories to implement effective responses to the issue of stolen wages and Stolen Generations.

Recommendation Thirteen: That the Australian Government commit to the establishment of a joint state and territory taskforce to provide advice on the most appropriate way of making reparations for Stolen Generations and repaying stolen wages in each State and Territory.

Recommendation Fourteen: That the Action Plan commit the Australian Government to adopting the recommendations of *Restoring Identity: the final report of the Moving forward consultation project*.

Recommendation Fifteen: That the Action Plan detail an external review process to enable evaluation and monitoring of the impact of the National Healing Foundation.

Recommendation Sixteen: That the Action Plan establish clear timelines for implementing the recommendations of *Doing Time: Time for Doing*.

Recommendation Seventeen: That the Action Plan commit the Australian Government to producing public report on the implementation of the recommendations from the *Royal Commission into Aboriginal Deaths in Custody*.

Recommendation Eighteen: That Action 147 of the Action Plan be amended to incorporate specific initiatives referred to in the 2008 White Paper, *The Road Home: A National Response to Reducing Homelessness*.

Recommendation Nineteen: That the Action Plan provide timelines for the implementation of the National Quality Framework for homelessness services.

Recommendation Twenty: That Action 151 of the Action Plan incorporate the recommendations of the House of Representatives Standing Committee on Family, Community, Housing and Youth report *Housing the Homeless – Report on the Inquiry into homelessness legislation* in relation to the development of new homelessness legislation.

Recommendation Twenty-One: That Action 152 of the Action Plan incorporate the recommendations of the House of Representatives Standing Committee on Family, Community, Housing and Youth report *Housing the Homeless – Report on the Inquiry into homelessness legislation* in relation to the development the auditing of laws that impact disproportionately on homeless people.

Recommendation Twenty-Two: That the Action Plan provide specific timeframes for the implementation of the National Disability Insurance Scheme.

Recommendation Twenty-Three That the Action Plan commit the Australian Government to introducing legislation to create the National Disability Insurance Agency by the end of 2012.

Recommendation Twenty-Four: That the Action Plan commit to providing funding to community legal centres that provide assistance under the proposed Equality Act.

Recommendation Twenty-Five: That the Action plan provide a commitment to ensure the participation of non-government organisations in the National Justice CEOs working group on Mental Illness and Cognitive Disability.

Recommendation Twenty-Six: That the Action Plan detail the role of non-government organisations and consumers in the review of the *Australian Standard Guidelines for Corrections*.

Recommendation Twenty-Seven: That the Action Plan commit the Australian Government to reviewing the implementation of the *Australian Standard Guidelines for Corrections* by state and territory governments.

Recommendation Twenty-Eight: That the Action Plan commit the Australian Government to conducting a review of State and Territory Government's operation of correctional facilities in light of the *UN Standard Minimum Rules for the Treatment of Prisoners*.

Recommendation Twenty-Nine: That the Action Plan commit to improving the current limitations in coronial law in Australia.

Recommendation Thirty: That the Australian Government commit to provide funding levels to enable Community Legal Centres to provide a broad range of legal services to people in prisons.

Recommendation Thirty- One: That the Action Plan commit to working to ensure access to quality mental health services in prison and detention facilities.

Recommendation Thirty-Two: That the Action Plan commit the Australia Government to ensuring prisoners have access to bulk-billed services under Medicare.

National Human Rights Action Plan Exposure Draft

Support for the National Rights Action Plan

PIAC welcomes the opportunity to comment on the Exposure Draft of the National Human Rights Action Plan (the Exposure Draft). PIAC supports the Australian Government's wish

for the National Human Rights Action Plan (the Action Plan) to play an essential role in ensuring ‘a continued commitment to improving human rights across all areas of government’.³

While supportive of the development of the Action Plan, PIAC has a number of concerns about the content of the Exposure Draft. One of PIAC’s major concerns stems from the fact that only the Commonwealth, Victorian and Northern Territory Governments have had input into the development of the Exposure Draft. The lack of participation of other State and Territory Governments has led to the development of a disjointed and ‘Victorian focused’ Exposure Draft. PIAC also considers the Exposure Draft in its current form is too focused on pre-existing government programs without providing or even identifying the need, for new initiatives aimed at increasing the protection of human rights in Australia.

In addition to the above, this submission also provides comment on many of the actions currently identified under the Exposure Draft in the areas of Indigenous people, people with a disability, those at risk of or experiencing homelessness and those in prisons and detention.

General Comments

a) Participation of States and Territories

PIAC is concerned about the lack of participation from States and Territory Governments in the Action Plan process. While the preamble to the Exposure Draft states that ‘State and Territory Governments have been consulted on actions they are undertaking with their own jurisdictions’,⁴ a review of the content of the exposure draft appears to indicate that only Victoria and the Northern Territory have provided input into the process. A considerable focus of the National Human Rights Action Plan Baseline Study was on initiatives in Victoria, and this focus has been replicated in the Exposure Draft with over 40 out of the 220 Action Items referring to Victorian policies and programs.⁵ PIAC believes that in order for the Action Plan to have an impact on rights protection, it must engage and be supported by all levels of government. This is consistent with the United Nations’ *Handbook on National Human Rights Plans of Action*, which details ‘the (action) plan should be a national undertaking, involving all levels of society’.⁶

The preamble of the Exposure Draft specifies that State and Territory Governments may provide later input during the consultation phase; however, PIAC believes providing comments at such a late stage in the process does not allow for non-government agencies to critique or comment further on state-based initiatives.

³ The Australian Government, *National Human Rights Action Plan*, Attorney General’s Department, Australia (2012) p 2

⁴ *National Human Rights Action Plan* p 2.

⁵ The Action Plan lists actions undertaken or to be undertaken by the Victorian Government in Actions: 19-20, 25, 31-34, 36, 42, 68, 69, 76, 77, 78, 79, 94, 95, 96, 97, 98, 108, 109, 110, 116, 118, 124, 126, 132, 138, 142, 146, 150, 163, 165 166, 177, 180, 205, 218.

⁶ Office of the High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, United Nations (2002) 13.

Recommendation One

That the Australian Government ensure the participation of all States and Territories in the development of the Action Plan.

b) Identification of positive state-based initiatives

PIAC is also concerned that the Exposure Draft highlights positive human rights initiatives in one jurisdiction without identifying the lack of such programs and policies in other jurisdictions. As was detailed above, of the 220 Actions identified in the Exposure Draft, 44 refer to state-based initiatives.

PIAC believes the identification of positive human rights initiatives in one State will often suggest that, if corresponding initiatives do not exist in other States and Territories, then there are gaps in these other jurisdictions. For example in Action 33, the Action Plan identifies the Victorian Government's continued support for 'the Criminal Justice Diversion Program to provide alternatives to first time offenders so that they can avoid a criminal record', but makes no reference to the lack of similar initiatives in other jurisdictions. This oversight is particularly glaring in relation to Action 25, which endorses the Victorian *Charter of Human Rights and Responsibilities Act 2006* as a mechanism for supporting the legal protection of human rights, without noting the lack of other state-based charters. Nor does it refer to the Australian Government's failure to implement the National Human Rights Consultation Report's recommendation for a federal Human Rights Act.⁷

In order for the Action Plan to be effective in identifying and addressing gaps in Australia's protection of human rights, PIAC believes it necessary for identified positive programs and legislative responses to be developed in all States and Territories. Where such initiatives are not present in other states, the Action Plan should commit the Australian Government to work with the other jurisdictions to establish a corresponding rights protecting mechanism.

Recommendation Two

That the Action Plan commit to working with all State and Territories to develop similar right-protective initiatives to those it identified as being positive in one particular jurisdiction.

c) Lack of new initiatives

PIAC is disappointed that the Exposure Draft contains few new initiatives but rather is focused on listing pre-existing policies and programs. As specified in the United Nations' *Handbook on National Human Rights Plans of Action* (the UN Handbook), it is essential that Human Rights Action Plans are 'action-orientated' and include concrete and new initiatives to improve protection of human rights.⁸ Rather than focused on the development of new mechanisms to improve rights protection, 143 out of the 220 Actions within the Exposure Draft refer to already commenced State and Federal Government programs.

⁷ See Frank Brennan, Mary Kostakidis, Tammy Williams and Mick Palmer, *National Human Rights Consultation Report*, Attorney General's Department, Australia (2009).

⁸ Above n 6 at 18.

PIAC believes one reason for the lack of success of the Australian Government's two previous Action Plans,⁹ was their failure to commit to new initiatives to address identified gaps in human rights protection. Rather, the 1993 and 2004 Action Plans simply provided an overview of already implemented legislation and programs. In its current format, the Exposure Draft runs the risk of replicating the experience of previous Action Plan processes. PIAC believes that in order for the current Action Plan to avoid the mistakes of the past, it must contain new initiatives that are based on a candid analysis of gaps in Australia's current human rights protections.

Recommendation Three

That the Action Plan be redrafted to contain new initiatives to promote greater human rights protection, with less emphasis on listing pre-existing government programs and policy responses.

d) Monitoring mechanisms

PIAC welcomes the Australian Government's commitment to ensuring the implementation of the Action Plan is effectively monitored. PIAC notes that effective 'monitoring and review of implementation' are listed as essential components of successful action plans by the UN Handbook.¹⁰ The UN Handbook also details the failure of the 1994 National Action Plan to 'make provision for a monitoring and review process' as a reason for its lack of success in improving human rights protection in Australia.¹¹

While supportive of the current Action Plan's adoption of a three-year progress report and a five-year final report, PIAC would like the plan to provide further clarification of the role of the non-government sector in this reporting process. The UN Handbook correctly identifies that 'civil society' must be 'welcomed into the monitoring process to encourage greater transparency and objectivity in evaluation'.¹² The Exposure Draft refers to the development of an 'NGO Advisory Group' to assist in the development of outcome indicators, but provides no information on whether the Australian Government will seek NGO comment on whether these indicators have been met. PIAC believes such input is essential for the Action Plan process to be an effective and candid measurement of Australia's commitment to human rights protection.

Recommendation Four

That the Action Plan specifically detail the role of the non-government sector in measuring the success of the Action Plan process.

⁹ The Australian Government released the 'National Action Plan' in 1993/94. In 2004, the National Human Rights Action Plan was developed.

¹⁰ Above n 6 at 13.

¹¹ Above n 6 at 25.

¹² Above note 6 at 33.

1. Protection and promotion of human rights

1.1 Action 2: Ratification of OPCAT

PIAC supports the Australian Government's identification in the Exposure Draft of the need to ratify the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). PIAC believes ratification of OPCAT will promote greater transparency for places of detention.

PIAC notes that the Australian Government announced its intention to ratify OPCAT in 2007. In the intervening years some progress has been made most recently with the tabling in Parliament of the National Interest Analysis and the JSCOT process. However, ratification is yet to occur. In order to ensure it occurs without further delay, PIAC recommends that the Action Plan detail a specific timeline for ratification.

PIAC also supports the Exposure Draft's identification of the need for the development of model legislation for consideration by all jurisdictions. This legislation should set out the range of places of detention that should be subject to OPCAT complaint inspection and scrutiny, and set out minimum standards for the operation of state and territory national preventative mechanism systems.

Recommendation Five

That the Action Plan provide a specific timeline for the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Recommendation Six

That model legislation on the implementation on the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment should provide clear direction on detention facilities subject to inspection and scrutiny, and set out minimum standards for the operation of national preventative mechanism systems.

1.2 Action 3: Unratified international human rights agreements

PIAC welcomes the Australian Government's commitment in the Exposure Draft to review its position on a number of previously unratified international human rights treaties. PIAC supports the commitments to consider ratification of the *International Covenant for the Protection of All Persons from Enforced Disappearances* (Action 4) and the *International Labor Organization Convention* (ILO) 169 (Action 5). PIAC recommends that the Action Plan contain a similar commitment to review other unratified international instruments such as the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*, ILO Convention 102, ILO Convention 103, ILO Convention 184.

In committing to consider Australia's position on previously unratified international agreements, PIAC believes that the Action Plan must provide timetables and detailed information about how this review process will be conducted. Currently, the Action Plan lists the vague timelines of 'ongoing' (Action 4) and 'in 2012' (Action 5) as performance indicators and provides no detail on how these reviews will be conducted (including whether NGO participation will be sought). In order to ensure transparency and

accountability in its deliberations, the Australian Government should provide a detailed plan for conducting its reviews, indicate the role of the NGO sector in the process as well as providing specific timeframes and mechanisms for making its decision available to the community.

Recommendation Seven

That the Action Plan contain a commitment to review all international human rights treaties that are currently unratified by Australia.

Recommendation Eight

That the Action Plan provide details of the process it will undertake to review unratified international human rights treaties. These details should include specific timeframes, the review process and mechanisms to inform the community of its decisions.

1.3 Action 17: Powers of the Australian Human Rights Commission

PIAC supports the commitment under Action 17 to ensure the Australian Human Rights Commission (AHRC) is empowered and funded to deal with complaints of discrimination. PIAC supports the continued role of the AHRC in investigating and conciliating complaints.

One of the main problems with the enforcement of discrimination laws at a federal level in Australia is that it relies on individual complaints. This places an enormous burden on individuals, who are often marginalised or vulnerable, requiring court action which is costly, lengthy and emotionally demanding. Given these impediments, there is insufficient incentive for duty holders to comply as the risk of a complaint being brought to the courts is relatively low. Also, the individual complaint-based system is reactive and as a result there are inadequate mechanisms to prevent discrimination. Moreover, the individual-complaint model means that complaints are resolved, at conciliation or through the courts, with a focus on individual remedies. Consequently, it is difficult for areas of systemic discrimination to be properly addressed, as remedies are often suited to individual circumstances only.

PIAC proposes that either the AHRC, or preferably another separate independent body, be empowered with a number of additional functions. These functions should include powers to:

- monitor duty holders' compliance with anti-discrimination legislation, including any Disability Standards or other Standards;
- investigate breaches of the anti-discrimination legislation, including by acts of the States or Territories, of their own motion in the absence of an individual complaint; and
- commence litigation in court, of their own motion in the absence of an individual complaint.

Empowering a body, and ensuring it is adequately funded to undertake such monitoring, investigation and enforcement activities, will have a deterrent effect and encourage compliance. In addition, empowering a body to take such action will take the pressure off individuals, such as PIAC's clients, who bring proceedings in the public

interest. Moreover, the Commission, or some other body, is more suited than individuals to bring cases addressing systemic discrimination or harassment.

PIAC notes that empowering the AHRC with these additional functions may result in criticism of the AHRC and perceptions that the AHRC is not a neutral conciliator and biased towards complainants. The separation in roles between Fair Work Australia and the Fair Work Ombudsman may provide useful guidance. For these reasons, PIAC suggests consideration under the Action Plan should be given to separating the conciliation functions from the educative, investigative and enforcement function, to be performed by a new body.

Recommendation Nine

That the Australian Government through the Action Plan commit to the creation of a body separate to the Australian Human Rights Commission to enable complaints of discrimination to be brought before court.

1.4 Action 18: Consolidation of anti-discrimination law

PIAC supports the proposed consolidation of Commonwealth anti-discrimination law and has recently made a submission to the Attorney-General's Department Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper.¹³ PIAC notes that the Attorney-General's Department has identified four principles to guide this process, which are:

- a reduction in complexity and inconsistency in regulation to make it easier for individuals and business to understand rights and obligations under the legislation;
- no reduction in existing protections in federal anti-discrimination legislation;
- ensuring simple, cost-effective mechanisms for resolving complaints of discrimination; and
- clarifying and enhancing protections where appropriate.

Action Item 18 does not accurately reflect these important principles, in particular that there be no reduction in existing protections. PIAC recommends that these principles be contained within the Action Plan.

Recommendation Ten

That the Action Plan under Action Item 18 include reference to the four guiding principles for the consolidation of Commonwealth anti-discrimination laws.

¹³ See PIAC's submission on the consolidation, Gemma Namey, Lizzie Simpson, Jess Roth and Edward Santow *Improving access to equality: submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* PIAC (2012).

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 the 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 Action 67: Constitutional recognition

PIAC believes that as the Expert Panel Report on *Constitutional recognition of Aboriginal and Torres Strait Islander people* (the Expert Panel Report) has been provided to the Australian Government, it should be removed as a future action under the Action Plan. Instead, PIAC recommends Action 67 be redrafted to focus on the government's response to the Expert Panel's report. In particular, PIAC believes the Action Plan should detail a specific timeline for the Australian Government's response including for the conducting of a referendum on constitutional recognition.

Recommendation Eleven

That the Action Plan provide a clear timeline for the Australian Government's response to the Expert Panel report on Constitutional recognition of Aboriginal and Torres Strait Islander people.

3.1.2 Action 79: Stolen Generations

PIAC is concerned that the only action listed in the Exposure Draft in regard to the Stolen Generations relates exclusively to Victoria. PIAC notes that a number of State and Territories are yet to take effective action in relation to either stolen wages or Stolen Generations.

In particular, PIAC is concerned that the Western Australian Government is yet to release results of its inquiry into stolen wages in that state as well as a government response and plan for repayment, and that the New South Wales Government has failed to develop a state-based Stolen Generations reparations tribunal. PIAC believes that Action 79 should be redrafted to recognise and address these gaps in relation to stolen generations and stolen wages and that the Australian Government should commit to the establishment of a joint state and territory taskforce to provide advice on the most appropriate way of making reparations for Stolen Generations and repaying stolen wages in each state and territory.

In addition, PIAC recommends that the Action Plan should contain a commitment by the Australian Government to establish a national reparations tribunal for members of the Stolen Generations, as set out in the 2009 report *Restoring Identity: the final report of the Moving forward consultation project*.¹⁴

Recommendation Twelve

That Action 79 be amended to detail the need for all States and Territories to implement effective responses to the issue of stolen wages and Stolen Generations.

Recommendation Thirteen

That the Australian Government commit to the establishment of a joint state and territory taskforce to provide advice on the most appropriate way of making reparations for Stolen Generations and repaying stolen wages in each State and Territory.

Recommendation Fourteen

That the Action Plan commit the Australian Government to adopting the recommendations of Restoring Identity: the final report of the Moving forward consultation project.

3.1.3 Action 80: National Healing Foundation

While supportive of the concept of the National Healing Foundation, PIAC is concerned that the Exposure Draft provides no detail on how its effectiveness will be measured. PIAC recommends that in addition to details on the intended funding of the National Healing Foundation, that the performance indicator/timeline for this action contain a mechanism to review actions taken by the National Healing Foundation and their outcomes, in order to measure its ability to provide reparations and assistance for members of the Stolen Generations.

Recommendation Fifteen

That the Action Plan detail an external review process to enable evaluation and monitoring of the effectiveness of the National Healing Foundation.

3.1.4 Action 83: Over representation of Indigenous juveniles

PIAC supports the Action Plan's recognition of the need to address the over-representation of Indigenous juveniles, and in particular supports the findings of *The Doing Time: Time for Doing* report. However, PIAC believes Action 83 should detail how the Australian Government will work with State and Territory Governments to implement its recommendations as well as work towards new goals and achievements in this area. Therefore, PIAC recommends that the performance indicator/timeline for this action item be expanded to include some clear timeframes for implementing the recommendations of the *Doing Time: Time for Doing* report.

Recommendation Sixteen

That the Action Plan establish clear timelines for implementing the recommendations of Doing Time: Time for Doing.

¹⁴ Amanda Cornwell, *Restoring Identity: the final report of the Moving forward consultation project*, PIAC (2009).

3.1.5 Action number 85: Indigenous deaths in custody

While PIAC commends the continued monitoring of Indigenous deaths in custody by the Australian Institute of Criminology, particularly the detailed reports it provides, PIAC remains concerned that Action 85 does not appear to envisage any action in relation to the number of Indigenous deaths in custody. Nor does it address the lack of action on the majority of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, which occurred more than 20 years ago. PIAC suggests that an appropriate performance indicator/timeline might be to revisit the recommendations of that Royal Commission and provide a report on the implementation of those recommendations.

Recommendation Seventeen

That the Action Plan commit the Australian Government to producing public report on the implementation of the recommendations from the Royal Commission into Aboriginal Deaths in Custody.

3.2 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, 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 Exposure Draft's coverage of homelessness.

3.2.1 Action 147: White paper on homelessness

PIAC welcomes the Australian Government's commitment in Action 147 of the Exposure Draft to continue to work towards the goals of the 2008 White Paper *The Road Home; A National Approach to Reducing Homelessness* (the White Paper).¹⁵ While supportive of this commitment, PIAC believes the Action Plan should refer to specific initiatives articulated in the 2008 White Paper, identifying key performance measures and timelines for each initiative. In particular, the Action Plan should refer to the following initiatives contained in the White Paper:

- Provide additional support for private and public tenants, including advocacy, financial counselling and referral services to help people sustain their tenancies;
- Regulate tenancy database to prevent exclusion and work with states and territories to review impact of tenancy laws on rates of homelessness;
- Implement a policy of 'no exits into homelessness' from statutory, custodial care or risk of homelessness;
- Deliver additional services to assist people with mental health issues and/or substance abuse issues who have been homeless to maintain their housing and participate in the community;
- Develop a National Plan to Reduce Violence against Women and their Children with evidence-based strategies to reduce domestic violence;

¹⁵ Commonwealth of Australia, *The Road Home, A National Approach to Reducing Homelessness* (2008).

- Provide additional assertive outreach programs to locate rough sleepers and connect them to long term housing and health services;
- Improve legal services for people who are homeless or at risk of homelessness.
- Examine enrolment issues for people who are homeless as part of electoral reforms;
- Improve collaboration between mainstream and specialist homelessness services;
- Develop agreed national accreditation, service standards and service charters for people who are homeless;
- Enact new legislation to ensure people who are homeless receive quality services.

In relation to the last three initiatives, PIAC notes that in 2010, the Australian Government announced that it would work with States and Territory Governments to progress the development of a National Quality Framework to achieve better outcomes for people who are homeless or at risk of homelessness by improving the quality and integration of services they receive. The Government initiated a two-stage national consultation process. The consultations have found strong consumer support for a National Homelessness Charter that would identify the rights and responsibilities of service providers and consumers. There was also strong consumer support for a national complaints handling system.

The Australian Government has not given any indication as to how it will now progress the development of a National Quality Framework for homelessness services. PIAC believes that the Action Plan should provide specific timelines on when the National Quality Framework will be developed and implemented.

Recommendation Eighteen

That Action 147 of the Action Plan be amended to incorporate specific initiatives referred to in the 2008 White Paper, The Road Home: A National Response to Reducing Homelessness.

Recommendation Nineteen

That the Action Plan provide timelines for the implementation of the National Quality Framework for homelessness services.

3.2.2 Action 151: National homelessness legislation

PIAC believes Action 151 of the Action Plan should be amended to incorporate the specific recommendations of *Housing the Homeless – Report on the Inquiry into homelessness legislation*, by the House of Representatives Standing Committee on Family, Community, Housing and Youth (Housing the Homeless).¹⁶ In particular, Action 151 should refer to the recommendations in the Housing the Homeless report that:

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

¹⁶ House of Representatives Standing Committee on Family, Community, Housing and Youth, Parliament of the Commonwealth of Australia, *Housing the Homeless: Report on the inquiry into homelessness legislation*, 2009.

- 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. (Recommendation 7)¹⁷
- the new homelessness legislation include a provision for independent monitoring of the progress towards the realisation of the right of all Australians to adequate housing. (Recommendation 9)¹⁸
- data collection mechanisms allowing the monitoring of progress for specified vulnerable and marginalised population groups be developed. (Recommendation 9)¹⁹

Recommendation Twenty

That Action 151 of the Action Plan incorporate the recommendations of the House of Representatives Standing Committee on Family, Community, Housing and Youth report Housing the Homeless – Report on the Inquiry into homelessness legislation in relation to the development of new homelessness legislation.

3.2.3 Action 152: Homelessness and discrimination

PIAC is disappointed in the Exposure Draft's lack of focus on the impact of discrimination on people experiencing homelessness. Whilst Action 152 is titled 'freedom from discrimination', the action itself does not identify the limited protection available for those experiencing homelessness. PIAC believes that Action 152 should be redrafted to incorporate the findings of Housing the Homeless, in particular Recommendation 10, which recommends that the Australian Government, in cooperation with state and territory governments, conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness.²⁰ In particular, PIAC recommends priority under this review should be public space and anti-discrimination laws.

Recommendation Twenty-One

That Action 152 of the Action Plan incorporate the recommendations of the House of Representatives Standing Committee on Family, Community, Housing and Youth report Housing the Homeless – Report on the Inquiry into homelessness legislation in relation to the development the auditing of laws that impact disproportionately on homeless people.

3.3 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 test cases in Australia including cases involving disability access to premises and public transport.²¹ PIAC has also been involved in a

¹⁷ *Housing the Homeless* xv.

¹⁸ *Housing the Homeless* xv.

¹⁹ *Housing the Homeless* xv.

²⁰ *Housing the Homeless* xv

²¹ For eg, *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658 (18 May 2000); involving discrimination in education: *Maguire v Sydney Organising Committee for the*

broad range of public policy development and review processes in relation to discrimination law and the promotion of equality.

3.3.1 Action 160: Disability Services National Minimum Data Set

PIAC supports the commitment in the Exposure Draft to improve data collection mechanisms in considering developing options for the Disability Services National Minimum Data Set. At present the most frequent and detailed data set in relation to disability, the *Survey of Disability, Ageing and Carers*, is infrequently updated. The most recent data set available from the Survey of Disability, Ageing and Carers is from 2009; the previous survey was conducted in 2003. PIAC submits that surveys should be conducted every three years to provide more accurate and reliable data.

3.3.2 Action 168: National Disability Insurance Scheme

PIAC welcomes the inclusion of the National Disability Insurance Scheme (NDIS) in the Action Plan. 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. PIAC submits that the Action Plan should provide greater detail as to the timeframe for the implementation of the NDIS. PIAC supports the position of the advocacy group, Every Australian Counts, for the introduction by the end of 2012 of legislation into the Australian Parliament to create the National Disability Insurance Agency (NDIA).

Recommendation Twenty-Two

That the Action Plan provide specific timeframes for the implementation of the National Disability Insurance Scheme.

Recommendation Twenty-Three

That the Action Plan commit the Australian Government to introducing legislation to create the National Disability Insurance Agency by the end of 2012.

3.3.3 Action 171: Funding of community legal centres

PIAC notes the commitment under Action 171 of the Exposure Draft to continue to fund community legal centres that provide assistance in relation to the *Disability Discrimination Act 1992* (Cth) (DDA). Given the consolidation of Commonwealth anti-discrimination laws

Olympic Games [2000] FCA 1112 (3 August 2000); involving discrimination in the provision of information and services: *Grosvenor v Eldridge* [2000] FCA 1574 (19 October 2000); involving disability discrimination in access to retail premises: *Travers v New South Wales* [2000] FCA 1565 (3 November 2000); in relation to independent travel: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008). Involving alleged failure to comply with the Disability Standards for Accessible Public Transport 2002 (Cth) (Disability Transport Standards) in relation to the provision of bus stop infrastructure: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007); in relation to wheelchair accessible taxis: *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27; in relation to non-wheelchair accessible buses and coaches: *Haraksin v Murrays Australia Ltd* [2011] FCA 1133 (final decision by Federal Court pending); in relation to audio announcements on trains: *Innes v Rail Corporation NSW* (currently before the Federal Magistrates Court).

is likely to result in the repeal of the DDA, PIAC recommends that the Action Plan specifically commit to continuing to fund disability law focused community legal centres when a new Equality Act commences and replaces the DDA.

Recommendation Twenty-Four

That the Action Plan commit to providing funding to community legal centres that provide assistance under the proposed Equality Act.

3.4 People in prisons

PIAC has considerable experience in conducting strategic litigation and law reform work to make systems of detention fairer and to ensure that any limits placed on an individual's freedom of movement are justifiable.

3.4.1 Action 179: National Justice CEOs working group

PIAC supports the development of a National Justice CEO's working group on Mental Illness and Cognitive Disability (the working group) to examine mechanisms to divert and support people with a mental illness or cognitive impairment in the criminal justice system. PIAC believes some of the issues that the working group should address include:

- increasing access to mental health care in prisons (not limited to medication centered care but also including counseling and therapy based treatment programs)
- improving the quality of the existing care provided;
- developing effective diversionary options to keep as many people with a mental illness as possible, out of prison;
- coordinated post-release programs to ensure, amongst other things, continuity of treatment and to reduce recidivism.

PIAC believes that in order for the working group to effectively research and implement strategies for the above issues, that the participation of the non-government sector is essential. PIAC recommends that the Action Plan provide a commit to ensure the participation of representatives from the non-government sector in the development of the strategic priorities of the working group as well as an on-going basis.

Recommendation Twenty-Five

That the Action plan provide a commitment to ensure the participation of non-government organisations in the National Justice CEOs working group on Mental Illness and Cognitive Disability.

3.4.2 Action 181: Review of the Australian Standard Guidelines for Corrections

PIAC supports the Australian Government's undertaking to conduct a review of the Australian Standard Guidelines for Corrections. However, the Exposure Draft is currently not clear on whom will participate in this 'peer review' process. PIAC believes it is essential that NGO's working in the area of prisons and detentions, as well as consumers are provided an opportunity to have input into this review process. PIAC also recommends that the Australian Government not only review the current principles of the Australian Standard Guides for Corrections but also their implementation by State and Territory

Governments. As the Australian Standard Guidelines for Corrections is a voluntary code, in PIAC's experience its principles are often ignored or undermined in practice.

Recommendation Twenty-Six

That the Action Plan detail the role of non-government organisations and consumers in the review of the Australian Standard Guidelines for Corrections.

Recommendation Twenty-Seven

That the Action Plan commit the Australian Government to reviewing the implementation of the Australian Standard Guidelines for Corrections by state and territory governments.

3.4.3 Action 182: UN Standard Minimum Rules for the Treatment of Prisoners

PIAC is concerned that Action 182 commits the Australian Government to working with State and Territory Government's to "continue to deliver corrective services in accordance with standard guidelines which comply with the UN Standard Minimum Rules for the Treatment of Prisoners". PIAC believes the Action is based on an erroneous presumption, namely that the corrective services are currently being delivered in a manner consistent with the UN Standard Minimum Rules for the Treatment of Prisoners (the UN Standard Rules). In PIAC's experience, the human rights of people in correctional facilities, including in the areas of the access to appropriate medical treatment are not being protected by State and Territory Government practice. In order for the Action Plan to be an effective instrument in identifying and redressing such breaches, PIAC recommends the Action Plan contain a commitment to conduct a review of State and Territory Government's operation of correctional facilities in light of the UN Standard Rules.

Recommendation Twenty-Eight

That the Action Plan commit the Australian Government to conducting a review of State and Territory Government's operation of correctional facilities in light of the UN Standard Minimum Rules for the Treatment of Prisoners.

3.4.4 Action 184: Role of State and Territory Coroners

PIAC is concerned that the Exposure Draft does not highlight and address the current limitations in coronial law in Australia. PIAC believes there are a number of essential reforms required in the area of Australian coronial law and practice. These reforms include:

- Clarifying and strengthening the coroner's role in prevention. PIAC submits there should be legislative provisions to clarify beyond doubt that making recommendations by Coroners with the aim of preventing similar deaths occurring in future is one of the primary purposes of inquests;
- Ensuring that governments listen to and respond to the recommendations of coroners
 - PIAC submits that there should be in all Australian jurisdictions, legislation that mandates a timely public government response to recommendations by Coroners and that there should be a mandatory tabling in Parliament of recommendations and the consequent Government response, in all cases of deaths in custody and where there is a death in police presence;
- The importance of accessible legal representation of families at inquests;

- The need for support for and liaison with families in inquests;
- The need for independent investigation of deaths in custody or deaths where there is a police presence.²²

Recommendation Twenty-Nine

That the Action Plan commit to improving the current limitations in coronial law in Australia.

3.4.5 Action 187: Legal needs of prisoners

PIAC welcomes the recognition in the Exposure Draft of the need to ensure continued funding Community Legal Centres (CLCs) to provide legal assistance and information to people in correctional facilities.

Prisoners have a wide range of legal issues that go beyond criminal law. As noted in a 2008 research report by the Law and Justice Foundation, many prisoners also face a range of other civil and family law issues, such as outstanding debt, unpaid fines, unresolved family issues, tenancy problems, and issues in relation to social security payments.²³ These legal problems, if not adequately addressed, can reinforce and exacerbate the already entrenched economic and social disadvantage that many prisoners face and can hinder their effective and positive reintegration into the community upon release.

PIAC submits that it is essential that the Australian Government continue to fund CLCs to provide legal services to prisoners. Further, in providing such funding, the Commonwealth Government must ensure that the funding provided is adequate to enable CLCs to carry out the broad range of legal services that they provide in prisons.

Recommendation Thirty

That the Australian Government commit to provide funding levels to enable Community Legal Centres to provide a broad range of legal services to people in prisons.

3.9.2 Access to quality mental health services in prisons

PIAC believes that the Action Plan should commit States and Territory Governments to the provision of accessible and quality mental health services to those detained in prisons and detention facilities. PIAC notes that prisoners are not eligible to receive fee for service or bulk-billed health care services under Medicare and currently, at least in NSW, no Commonwealth money goes to mental health services for prisoners and forensic patients. PIAC believes that prisoners should be able to access any such services provided by the Commonwealth and supports extra assistance being provided in this way to the prison medical services in the states and territories.

PIAC strongly urges the Australian Government to reverse the ban on prisoners being able to access bulk-billed and fee for service health services under Medicare so that

²² Please see Peter Dodd ‘*Western Australia: An opportunity to take the lead on coronial law reform*, PIAC (2011).

²³ Anne Grunseit, Suzie Forrell & Emily McCarron, *Taking Justice into Custody* (2008).

prisoners can obtain second opinions and access services, such as psychological counselling under the Better Access program and dental services under the Chronic Disease Dental Scheme. PIAC believes the lack of appropriate dental services under the public dental services available to prisoners (which excludes essential treatments such as root canal therapy) exacerbates existing chronic physical and mental health problems experienced by many prisoners.

Recommendation Thirty-One

That the Action Plan commit to working to ensure access to quality mental health services in prison and detention facilities.

Recommendation Thirty-Two

That the Action Plan commit the Australia Government to ensuring prisoners have access to bulk-billed services under Medicare.