



Rights and Responsibilities 2014

**Submission to the Australian Human Rights
Commission Discussion Paper**

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1. Introduction

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

PIAC welcomes the opportunity to respond to the consultation being conducted by the Australian Human Rights Commission (AHRC) as to how effectively the Australian state and federal governments protect everyday Australians' human rights and freedoms, which is to inform the future work of the Human Rights Commissioner.

PIAC bases this submission on the work it does in legal service provision, policy development and the delivery of training and education programs. A significant number of PIAC's clients, the majority of whom experience socio-economic disadvantage and are from marginalised groups, have direct experience of what it means to have their human rights infringed or their freedoms unduly restricted. In particular, PIAC works with Indigenous people, those with a disability, individuals who are experiencing or at risk of homelessness, and those in prisons and detention. PIAC works with its clients to give them a voice in consultations such as this; all comments in this submission are therefore based on evidence and practice, and address only those areas where PIAC has experience.

1.1 The Public Interest Advocacy Centre

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. 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 (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's expertise in human rights

Much of PIAC's current and previous substantive work involves human rights and freedoms. This includes work on access to justice, privacy, discrimination, freedom of information and accountable government, Indigenous justice and prisons and detention. As such, PIAC has direct experience of the impact of laws, policies, programs and conduct on human rights and freedoms.

PIAC has responded to the various inquiries into human rights protection conducted in recent years.¹ It made a substantial contribution to the National Human Rights Consultation,² based on a comprehensive program of community consultations conducted with a broad range of marginalised groups (including people who were experiencing homelessness, those with mental illness, Indigenous people, older Australians, people with disability and migrant women).³

PIAC has also undertaken legal and policy work in relation to the four rights and freedoms that form the focus of this Discussion Paper, particularly where these rights interrelate with anti-discrimination law and the promotion of equality in Australia, areas in which PIAC has leading expertise. For example, PIAC has a long history as a strong advocate of freedom of expression alongside our work advocating for the protection of people from racial discrimination. PIAC has provided legal advice, assistance and representation to clients in a number of matters relevant to vilification and defamation law in Australia.⁴ PIAC has also contributed its experience to a number of law reform processes in the area, most recently regarding the proposed repeal of s 18C of the *Racial Discrimination Act 1975*⁵ and the inquiry of the NSW Legislative Council Standing Committee on Law and Justice into racial vilification law.⁶

PIAC has also worked to safeguard the right to freedom of association. For example, based on our experience of the operation of the NSW criminal justice system, PIAC recently made a submission to the NSW Ombudsman's review of anti-consorting offences.⁷ In addition, PIAC has worked to safeguard the right to freedom of religion and made submissions with a view to identifying the most appropriate balance of this freedom with other rights in the context of non-discrimination.⁸

¹ See, for example, Santow, E and Bailey, B *Human Rights Charter Review – respecting Victorians*, Public Interest Advocacy Centre, 24 June 2011, available at <http://www.piac.asn.au/publication/2011/06/human-rights-charter-review-respecting-victorians>; Hartley, C et al *National Human Rights Action Plan Exposure Draft: Submission by the Public Interest Advocacy Centre*, Public Interest Advocacy Centre, 5 March 2012, available at <http://www.piac.asn.au/publication/2012/03/national-human-rights-action-plan-exposure-draft>.

² Banks, R et al, *Realising rights: submission to the National Human Rights Consultation*, Public Interest Advocacy Centre, 15 June 2009, available at <http://www.piac.asn.au/publication/2009/06/090615-piac-human-rights-sub>.

³ For detail of PIAC's past project, *Protecting Human Rights in Australia*, see PIAC's submission to the National Human Rights Consultation, *ibid*, at section 1.3.

⁴ For example, *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 in relation to homosexual vilification, and *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 in relation to defamation.

⁵ Roth, J and Santow, E *Protecting people from racism AND ensuring freedom of speech: Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s 18C) Bill 2014*, 30 April 2014, available at <http://www.piac.asn.au/publication/2014/05/protecting-people-racism-and-ensuring-freedom-speech>.

⁶ Pandolfini, C and Santow, E, *Regulating racial vilification in NSW – Submission to the Legislative Council Standing Committee on Law and Justice Inquiry into Racial Vilification Law in NSW*, March 2013, available at <http://www.piac.asn.au/publication/2013/03/regulating-racial-vilification-nsw>.

⁷ See, for example, Leibowitz, J *Targeting criminality: Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, available at <http://www.piac.asn.au/publication/2014/04/targeting-criminality>.

⁸ See, for example, Namey, G et al, *Improving Access to Equality, Submission to the Attorney General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, Public Interest

2. Protection of rights and freedoms in Australia

2.1 Effectiveness of the current framework

PIAC considers that the protection and promotion of human rights are integral to addressing social injustice and achieving equity for all Australians. In its work PIAC firmly adheres to the view that human rights are interdependent, which renders them indivisible, as recognised in international law.⁹ The reliance of one right on the existence of another can be demonstrated by the fact that freedom of association can become meaningless if there is no right to personal security, or that the right to education is meaningless if there is no freedom of thought. Accordingly, PIAC approaches the question whether the current framework is effective in protecting rights and freedoms by a consideration of not only the traditional civil and political rights central to Australian democracy but also the intersecting economic, social and cultural rights which support their fulfilment.

Individuals in Australia seeking to safeguard their rights and freedoms from disproportionate intrusion may have recourse to a combination of the common law, domestic legislation, and domestic and international policy and treaty processes. In the absence of an overarching human rights legal framework, such as a bill of rights, PIAC has recourse to all of these avenues in order to advocate for a fair, just and democratic society in which human rights and freedoms are protected and promoted. In doing so, PIAC's objective is systemic change, grounded in the experiences of everyday Australians and focusing on the practical impact of law and policy. PIAC has had many successes within the current framework, such as successfully challenging unlawful deprivations of liberty using the common law and facilitating freedom of movement for people with disability by ensuring public transport is safe and accessible.

There are, however, also considerable gaps and significant restrictions on what can be achieved within the current legal and political framework. These obstacles are identified below.

2.2 How rights and freedoms could be better protected

The most obvious answer to remedy the limitations of the current legal framework is evidently the most elusive in the current political environment: an overarching federal framework of human rights protection.¹⁰ In its submission to the National Human Rights Consultation, PIAC recommended the enactment of a comprehensive human rights law giving legal protection to rights and freedoms.¹¹ PIAC retains this view, based on the belief that the protection, promotion and fulfilment of human rights are vital to the effective removal of injustice and achieving equity for all people in Australian society, particularly those suffering disadvantage. Indeed, PIAC would like to see the kind of legal and social progress made under the Victorian and ACT charters of human rights extend to the rest of Australia's states and territories.

Advocacy Centre, 1 February 2012, available at <http://www.piac.asn.au/publication/2012/02/improving-access-equality>.

⁹ The Vienna World Conference on Human Rights in 1993 declared that the correct approach was to regard all categories of rights as indivisible, universal, interrelated and interdependent: see the *Vienna Declaration*, UN Con A/CONF 157/24.

¹⁰ See, for example, the views of the Liberal Party, while in Opposition, submitted to the National Human Rights Consultation, set out in "Chapter 13, The Case Against a Human Rights Act", *National Human Rights Consultation Report* (2009), at page 281.

¹¹ Banks, R et al *Realising Rights: submission to the National Human Rights consultation*; above note 2.

In addition, it is obvious that rights and freedoms would be better protected if Government policy and legislation reflected the various international agreements to which it is committed, including:

- Convention on the Prevention and Punishment of the Crime of Genocide;¹²
- International Convention on the Elimination of all Forms of Racial Discrimination (CERD);¹³
- International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁴
- International Covenant on Civil and Political Rights (ICCPR);¹⁵
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);¹⁶
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);¹⁷
- Convention on the Rights of the Child (CROC);¹⁸ and
- Convention on the Rights of Persons with Disabilities (CRPD).¹⁹

3. Restrictions on rights and freedoms

In a democratic society, protecting rights and freedoms is a delicate balancing act. Often the assertion of one right will conflict with another or with the greater public interest. Not all restrictions on rights and freedoms should be viewed negatively. Indeed there are few absolute rights and freedoms; most can be restricted where other rights and interests need to be accommodated. Restrictions should, of course, be closely monitored and their claimed justifications interrogated. However, PIAC accepts that certain restrictions will be justified where it is necessary to achieve a legitimate aim, such as public safety or to protect the exercise by another of their rights, and where the restriction imposed is strictly proportionate to that aim.

3.1 The right to freedom of expression

The right to freedom of expression is a good example of where restriction may be justified. Articulation of the freedom in the ICCPR acknowledges that this is a right that, because of the ramifications of its exercise, carries with it 'special duties and responsibilities' which may

¹² Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ratified by Australia on 8 July 1949 (entered into force for Australia on 12 January 1951).

¹³ 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.

¹⁴ 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).

¹⁵ 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).

¹⁶ 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 July 1983 (entered into force for Australia on 27 August 1983).

¹⁷ 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).

¹⁸ 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).

¹⁹ 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).

necessitate certain restrictions.²⁰ It is also a right that must be balanced with the prohibition of racial hatred in international law.²¹ Similarly, the Australian common law has established that the ‘right’ or ‘freedom’ of speech is not, and has never been considered, to be absolute.²² We have restrictions in our legal system on the right to freedom of speech in order to protect other rights and interests, from civil law actions in defamation to sexual harassment laws that make it unlawful to engage in unwanted or unwarranted sexual behaviour (including speech) that is offensive.

As PIAC’s work defending freedom of speech and protecting against harmful speech reflects, the critical task for our community involves finding the appropriate balance between competing public interests. In relation to racial vilification, for example, the law must strike a balance between permitting the expression of views that might be disagreeable or worse, but drawing a line to prohibit speech that causes unreasonable harm to others. One of the key motivations for PIAC’s opposition to the proposed rollback of restrictions on racist speech earlier this year was the evidence of the wide-ranging impact of racially motivated hate speech on PIAC’s clients.²³ Accordingly, PIAC welcomed the Australian Government’s decision to abandon the Draft Freedom of Speech (Repeal of s 18C) Bill 2014, thereby preserving the fine balance struck in Australian society between enabling freedom of speech to flourish but not tolerating racial vilification and intimidation.

In other contexts, there may be restrictions on the exercise of freedom of expression that cannot be justified. This may not be an obvious restriction in legislation or regulation, but as a result of systemic factors. This is particularly so when freedom of expression is not just viewed as the simple right to speak, but as inextricably linked to the right to participate in public affairs. Article 25 of the ICCPR states that every citizen shall have the right and opportunity without unreasonable restriction to take part in the conduct of public affairs, directly or through freely chosen representatives.²⁴ The United Nations Human Rights Committee (UNHRC) has asserted that the Article 25 right to participate in public affairs lies at the core of representative, democratic government,²⁵ which is of course also provided for, by implication, in the Australian Constitution. For those who are homeless and at risk of homelessness, the ability to exercise their freedom of speech in order to fully participate in Australian democracy is severely restricted by their disadvantage. Being excluded from mass media opportunities and from policy-making processes means that the voices of this group are effectively silenced when it comes to developing policy that will have a significant impact on their lives.

²⁰ Article 19(3) of the ICCPR.

²¹ Article 20 of the ICCPR states “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” In addition, Article 4 of the CERD states that signatory states should declare an offence the dissemination of ideas based on racial superiority or hatred and declare an offence all other propaganda activities promoting and inciting racial discrimination.

²² See, for example, *Coleman v Power* [2004] 220 CLR 1, per Gummow and Hayne JJ at [185], Kirby J at [225], [250], [253]; *R v Secretary of State for the Home Department; Ex parte Simms* 1999 WL 477443; [2000] 2 AC 115; [1999] 3 All ER 400 per Lord Steyn.

²³ See the proposed changes to s 18C of the *Race Discrimination Act 1975* (Cth) as outlined in Roth, J and Santow, E *Protecting people from racism AND ensuring freedom of speech: Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s 18C) Bill 2014*, above note 5.

²⁴ 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).

²⁵ United Nations Human Rights Committee General Comment No. 25, paragraph 1.

PIAC believes that the right to participate in public affairs necessarily entails the provision of mechanisms by which this group can actively participate in policy design and implementation, thereby enabling their right to freedom of expression to be effectively realised and effected. There are precedents to ensuring the voices of those in poverty, which necessarily includes those who are homeless and at risk of homelessness, are heard and involved in the making of public policy. For example, in 2009 PIAC's Homeless Persons' Legal Service established its homeless consumer advisory committee, StreetCare, which is made up of people who have recent experience of homelessness. StreetCare provides a unique mechanism enabling an otherwise overlooked group to directly participate in policy-making processes. StreetCare's members have since been involved in government policy advisory committees, providing advice to the highest level of the NSW Government on issues such as reform of specialist homelessness services in NSW and the development and implementation of the revised Protocol for Homeless People in Public Places.

Accordingly, in determining the restrictions on the capacity of individuals to exercise their rights, PIAC urges the Commissioner to think widely about those who are prevented from fulfilling the right to freely express themselves and participate in our democracy due to being marginalised from mainstream society.

3.2 The right to freedom of thought, conscience or religious worship

Article 18 of the ICCPR protects the right to freedom of thought, conscience or religious worship. Protection of religious freedom also finds form in s 116 of the Australian Constitution, albeit this protection has been construed narrowly. This right serves an important function in Australian society, interlinked with many of the core rights and the underlying principle of the dignity of the individual inherent in the international human rights conventions. It is also a right that frequently conflicts with the exercise of other rights. This is particularly so in the context of anti-discrimination.

The right to believe what one chooses and freely manifest one's religious beliefs alone and in the company of others lies at the core of the freedom of religion. This is relatively uncontroversial. PIAC acknowledges that religious groups will necessarily need to discriminate on occasions, for example when making key religious appointments.

Difficulties arise, however, when religious organisations engage in service provision. Based on its work in defending the rights of marginalised groups in Australian society in the context of its discrimination work, PIAC endorses certain restrictions on the freedom of religion. Religious organisations play a large and important role in public life in Australia; for example, in the provision of education, aged care and other services. The extent to which they are allowed to discriminate affects a significant number of people, including potential and existing employees and recipients of these services. PIAC believes that in this context, particularly where in receipt of public funding and where performing a service on behalf of government, religious organisations should not be permitted to discriminate in a way that would otherwise be unlawful. The wide-ranging permanent exceptions for religious organisations in federal anti-discrimination law allows for on-going discrimination in this context. Blanket religious exception from anti-discrimination law also means that in many cases the right of individuals is not properly considered vis-à-vis the right to freedom of religion. PIAC recommends that if a religious body wishes to discriminate on certain grounds, it should be required to justify such discrimination in the specific circumstances

of the proposed discrimination so that the right to religious belief can be properly balanced against competing interests and a decision be made carefully about how the relevant conflicting rights should be accommodated in the particular situation.²⁶

PIAC does, however, appreciate that religious organisations have for some time felt that their religious freedom is at risk of being unduly restricted. There are, for example, few provisions in state or federal legislation that expressly provide for the protection of freedom of religion. In the absence of a bill or charter of rights, religious organisations must rely on the narrowly construed section 116 of the Constitution (which does not apply to state legislation) and the common law doctrine that necessitates legislation be interpreted so as to not abrogate the fundamental rights and freedoms to which the Executive has committed, in the absence of clear parliamentary intention to the contrary.²⁷

Given this paucity of express legislative protection for religious freedom per se, PIAC recommends an approach that ensures appropriate protections for religious organisations in contentious contexts. This could take place by reference to the particular activity that is being regulated. Recent legislation, for example, introduced in the United Kingdom to allow for same-sex marriage clearly carved out exceptions for faith groups to eliminate any possible cause of action alleging discrimination against those faith groups who did not wish to perform same-sex marriage ceremonies.²⁸ Another approach may be to formalise the common law doctrine mentioned above, to interpret legislation in line with Australia's international human rights law obligations unless there is clear legislative intent to the contrary. This could be pursued as an amendment to the *Acts Interpretation Act 1901* (Cth): for example, an interpretive provision could require other legislation to be interpreted in a non-discriminatory way unless the legislature states that it intends to be discriminatory.

3.3 The right to freedom of association or peaceful assembly

The right to freely associate with others and peacefully assemble without fear of legal or political repercussion are cornerstones of a well functioning democracy. The freedom of association is protected in international law by Article 22 of the ICCPR and is inextricably linked to the exercise of many other civil, cultural, economic, political and social rights. The human right to freely associate is closely aligned with the implied freedom of political communication in the Australian Constitution:

Because freedom of communication on matters of government and politics is an indispensable incident of that system of representative and responsible government which the Constitution creates and requires, that freedom cannot be curtailed by the exercise of legislative or executive power and the common law cannot be inconsistent with it.²⁹

The interlinked freedoms of association, assembly and speech are an integral part of Australian democracy. The ability of individuals to assemble peacefully to protest, for example, is a feature of our society that we should go to great length to protect. The significance of the exercise of

²⁶ See Namey, G et al *Improving Access to Equality: Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, above note 8.

²⁷ See, for example, *Coco v The Queen* (1994) 179 CLR 427 at 437.

²⁸ *Marriage (Same Sex Couples) Act 2013 (UK)*.

²⁹ *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014), per Hayne J at [59].

these rights is evident from historic events in the development of modern Australia, from the 1972 Tent Embassy protest in support of Aboriginal land rights to the 2014 'March in March' protests expressing concern about the Federal Government's budget. It is only by minimising any restriction on these rights that democracy is best served.

A recent example of an incursion on the right to freedom of association is the implementation of consorting criminal offences in NSW contained in Division 7, Part 3A of the *Crimes Act 1900* (NSW). Fundamentally, any consorting law, by its very nature, impinges on a person's right to freedom of association and the principles enshrined in international human rights law. Section 93X of the Act makes it an offence for a person to habitually consort with two or more convicted offenders after receiving a warning from a police officer that they are convicted offenders and that consorting with them is an offence. The provision was recently considered by the High Court in *Tajjour & Ors v New South Wales*.³⁰

While the High Court in *Tajjour* considered the constitutional validity of NSW legislation, the case and indeed the impugned legislation have broader, national significance and in this sense should be seen as relevant to the AHRC.³¹ Anti-consorting offences by their very nature go beyond state and territory boundaries, not least because the acts constituting consorting will frequently involve interstate activities and actors. There are also implications of the decision for each of the relevant State and Territory anti-consorting laws. These laws have developed in a piecemeal way across the country.³² There is certainly a federal interest in developing uniformity across these various provisions, as well as the opportunity under the Constitution for the federal government to ensure that State legislation complies with Australia's obligations under international human rights law. On this basis, PIAC urges the Commissioner to address the undue restriction on the right to freely associate which occurs in the context of nationwide anti-consorting laws.

While it has been established that there is no implied right to freedom of association in the Australian Constitution,³³ the High Court in *Tajjour* concluded that the consorting provisions in the *Crimes Act* did present a burden on the implied freedom of political communication.³⁴ Yet while a burden, the majority of the High Court held that the section was nevertheless a proportionate approach to the legitimate purpose pursued by the creation of the offence, and accordingly did not find that the NSW consorting provisions were invalid by being in breach of the Constitution.³⁵

In his dissenting judgment, French CJ accepted that the objective of s 93X was legitimate, and noted that as the 'net cast by s 93X is wide enough to pick up a large range of entirely innocent

³⁰ [2014] HCA 35 (8 October 2014).

³¹ The impact of anti-consorting provisions on the freedom of association has been noted by the Human Rights Commissioner, see, for example, Wilson, T 'The Forgotten Freedoms' *Speech to the Sydney Institute*, 13 May 2014, available at <https://www.humanrights.gov.au/news/speeches/forgotten-freedoms>.

³² All jurisdictions apart from the ACT have anti-consorting legislation; see, for example, *Serious and Organised Crime (Control) Act 2008* (SA), *Criminal Organisation Act 2009* (Qld), *Criminal Organisations Control Act 2012* (WA), *Criminal Organisations Control Act 2012* (Vic), *Serious Crime Control Act 2009* (NT), *Police Offences Act 1935* (NT) and *Police Offences Act 1935* (Tas). For an overview of the applicable state and territory laws see NSW Parliamentary Research Service, *Issues Backgrounder: Anti-Gang Laws in Australia*, Number 5 of 2013, available at [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/AntiganglawsinAustralia/\\$File/Anti+gang+aws+in+Australia.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/AntiganglawsinAustralia/$File/Anti+gang+aws+in+Australia.pdf).

³³ See French CJ in *Tajjour* at [46]; citing *Wainohu v New South Wales* (2011) 243 CLR 181; Gageler J in *Tajjour* at [143]; Keane J in *Tajjour* at [242].

³⁴ Per Crennan, Kiefel and Bell JJ at [112]; French CJ at [40]; Hayne J at [71]; Gageler J at [159].

³⁵ Per Crennan, Kiefel and Bell JJ at [133]; Hayne J at [91]; Gageler J at [167]; Keane J at [241].

activity' its operation 'evidently relies upon the exercise of police discretion or an appropriately narrow focus in its actual application'.³⁶ The Chief Justice concluded that the offence is invalid by reason of the imposition of a burden on the implied freedom, stating that the section fails to 'discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not'.³⁷ Accordingly, the offence, given the

breadth of its application to entirely innocent habitual consorting, is not appropriate and adapted reasonably, or otherwise, to serve the purpose of the section.³⁸

In its response to the recent review of the provisions by the NSW Ombudsman, PIAC similarly voiced concern about the practical operation of s 93X and its unintended consequences. PIAC's central recommendation to the Ombudsman was to repeal the laws on the basis that the provisions fundamentally breach international human rights law.³⁹ The recent decision in *Tajjour* indicates that repeal of the provisions is unlikely. However the concern remains, as pointed out by French CJ, that the breadth of the provisions means that in practice they are criminalising a population of community members far beyond the 'criminal milieu' the offence was intended to capture. Indeed this was the evidence gathered by PIAC from its clients and from extensive consultation with experts in the field, including the criminal bar, Legal Aid NSW, the Aboriginal Legal Service in Western NSW and a number of Local Area Commands across the Sydney region.

Despite the constitutional validity of the provisions as recently established by the High Court, the unnecessary criminalisation of often vulnerable individuals means that there should still be amendments to mitigate as much as possible the most damaging aspects of the operation of the laws. In its submission to the Ombudsman PIAC made a number of detailed recommendations of how the legislation could be amended, accompanied by updates to the NSW Police Force's Consorting Standard Operating Procedures, which would go some way to address the damaging incursion of the offence on the right to freely associate. These included:

- ensuring that the application of the consorting provisions be limited to a targeted group of persons involved in serious criminal activity;
- specifying a time frame for the period (a) between the commission of an indictable offence and the issuance of a consorting warning, (b) for which warnings remain valid and (c) during which 'habitual' consorting must occur;
- providing protections under the law to address the specific needs of vulnerable persons;
- clarifying the procedural requirements for the issuance of warnings against consorting under the act; expand the defences available to a person warned or charged with the offence of consorting;
- introducing an internal and external review mechanism for a person to challenge the issuance of a warning; and
- minimising privacy concerns that arise in the context of the offence of consorting.⁴⁰

³⁶ *Tajjour*, *ibid*, at [41]-[42].

³⁷ At [45].

³⁸ At [45].

³⁹ See Leibowitz, J *Targeting criminality*, above note 7.

⁴⁰ See Leibowitz, J, *Targeting Criminality*, above note 7.

3.4 Other rights and freedoms

In addition to the four rights forming the focus of this Discussion Paper, there are glaring restrictions on freedoms and infringements of human rights that form part of the broader picture of current government policy. From mandatory detention of asylum seekers to sweepingly wide counter-terror laws, there are a number of areas engaging our human rights that should be reviewed and addressed.

Accepting that whole-scale review of government policy is not the intention of this Discussion Paper, there are still a number of areas of PIAC's work that involve the undue or disproportionate restriction on rights and freedoms and which PIAC urges the Commissioner to address during his tenure. For example:

- **Access to legal remedies for discrimination:** The individual complaints-based model in federal discrimination legislation is a serious impediment to systemic change and preventing discrimination in the first place. The need to rely on individual complainants to address discriminatory treatment places an enormous burden on individuals, who are often marginalised or vulnerable, requiring court action which is costly, lengthy and emotionally demanding. 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 recommends that organisations should have standing to bring a complaint on behalf of an individual or in their own right.⁴¹
- **Conditions in prison and detention:** much of PIAC's legal casework involves representing and advising adults and young people in prison and detention in NSW. Many of our clients are Indigenous, homeless or at risk of homelessness or suffering from a mental illness. PIAC has for some time advocated for the ratification of the Optional Protocol to the Convention Against Torture in order to provide a structured, human rights based approach to improving conditions in places of detention.⁴²
- **Government transparency:** a vital element to the fulfilment of our civil and political rights rests on access to government decision-making as facilitated by the *Freedom of Information Act 1982* (Cth). Based on its extensive use of the legislation and representing others in seeking information, PIAC believes that the wide exemptions and fees imposed in the Act greatly impede the ability of public interest organisations and individuals to freely access information and ensure that government decision-making is transparent and therefore accountable.⁴³ We believe that the proposed Freedom of Information (New Arrangements)

⁴¹ See Namey, G *Improving Access to Equality*, above note 8.

⁴² See Dodd, P, *OPCAT – preventative, proactive and non-punitive*, Submission to the Joint Standing Committee on Treaties National Interest Analysis, Public Interest Advocacy Centre, 30 March 2012, available at http://www.piac.asn.au/sites/default/files/publications/extras/12.03.30_opcat_preventative_proactive_and_non-punitive_submission.pdf.

⁴³ See Cohen, M et al, *Review of Freedom of Information Laws*, Public Interest Advocacy Centre, 7 December 2012, available at http://www.piac.asn.au/sites/default/files/publications/extras/12.12.07_review_of_freedom_of_information_laws.pdf.

Bill 2014, which is currently being debated in Parliament, contains measures that will further impede the ability of citizens to access information and hold government to account.⁴⁴

- **Same-sex equality:** Australia lags behind other comparable democracies in the recognition of same-sex relationships. PIAC urges the Commissioner to support amendment to the *Marriage Act 1961* to permit same-sex marriage.⁴⁵

4. Promoting a culture of rights and responsibilities

4.1 Rights *and* responsibilities?

Human rights come coupled with corresponding responsibilities in the sense that the ability to exercise one's human rights is balanced against everyone else's ability to exercise their rights. The coupling of 'rights and responsibilities' in political discourse, however, should be treated with extreme caution. Debate in this area can lead to assertions that the exercise of rights and protection of freedoms is preconditioned on acting 'responsibly'. Indeed, there are clearly those who believe that rights should be preconditioned particularly in relation to the rights of prisoners, alleged offenders and asylum-seekers and other non-citizens.

Responsibilities are, of course, expressly incorporated in a number of the articulated rights; the right to freedom of the expression, for example, incorporates 'special duties and responsibilities'.⁴⁶ However, responsibilities should not be legally enforceable in themselves, and recognition of human rights should not be dependent on the performance of certain responsibilities. Human rights vest in the individual regardless of how they act. Any other view is inconsistent with the underlying principles of human rights articulated so forcefully in the opening paragraph of the preamble to the *Universal Declaration of Human Rights*, which places at the heart of the human rights framework

recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

PIAC urges extreme care when debating rights *and* responsibilities and recommends that the AHRC separate the two topics in its discussion of the future of human rights promotion in Australia. The AHRC must be unequivocal, for the benefit of everyone in the community, that human rights belong to everyone, regardless of race, age or gender, and regardless of whatever social wrongs a person may have committed.

4.2 Promoting respect for human rights

The responsibility to promote respect for human rights and freedoms in Australian society extends from the smallest community organisation to the highest levels of political office. Indeed, this objective lies at the core of PIAC's overall aims and underlies much of its legal and policy work. While PIAC welcomes the focus of the Discussion Paper on the activities of civil society, it is vital that this work be accompanied by

⁴⁴ See the *Freedom of Information Amendment (New Arrangements) Bill 2014*.

⁴⁵ See Banks, R *Submission to the Senate Legal and Constitutional Committee Inquiry into the Marriage Equality Amendment Bill 2009 (Cth)*, 26 August 2009, available at http://www.piac.asn.au/sites/default/files/publications/extras/09.08.26-PIAC_Marriage_Act_sub.pdf.

⁴⁶ Article 19(3) of the International Covenant on Civil and Political Rights.

- legislative amendment to address undue interference on rights and freedoms, examples of which are outlined above;
- government policies that approach any restrictions on rights and freedoms with caution and balance;
- adherence to Australia's international human rights law commitments and ratification of all conventions to which Australia is a signatory; and
- responsible political speech that respects minorities and promotes tolerance.

PIAC also supports the centrality of the AHRC and the role of Human Rights Commissioner in promoting a culture of rights and improving protection of human rights. This role must incorporate robust critique of legislation and policy that infringes human rights and freedoms across the full scope of Australia's commitment to the international human rights mechanisms. PIAC welcomed, for example, the caution urged by the Human Rights Commissioner regarding recent tabling of sweeping counter-terror legislation accompanied by a declaration by the Prime Minister that Australian society must prepare for a shift in 'the delicate balance between freedom and security',⁴⁷ raising questions as to whether the loss of our rights and freedoms are being too easily traded in a time of heightened fear and insecurity.

PIAC also urges the Human Rights Commissioner to take into account not only 'traditional' freedoms which underpin liberal democracy, but also the capacity of human rights to address inequality, promote tolerance and protect against executive overreach. To do so will reflect the will of everyday Australians. As established in the National Human Rights Consultation, Australians seek protection for the rights that give meaning to their lives. Taking into account discussion at a series of community round tables across Australia, written submissions and a population survey, the consultation committee formed the view that the majority of Australians placed a priority on the promotion of an adequate standard of living, education and the highest attainable standard of health.⁴⁸ Accordingly, while the focus of this consultation raises important issues of current concern, the opportunity for the Commissioner to use human rights more expansively for a better outcome for everyone in Australian society is a significant one and PIAC urges the Commissioner to embrace it.

⁴⁷ Hirst, D "Tim Wilson warns against trading liberties for security over terrorism" *The Guardian*, Tuesday 23 September 2014, available at <http://www.theguardian.com/world/2014/sep/23/tim-wilson-warns-against-trading-liberties-for-security-terrorism-threats>.

⁴⁸ Brennan F, Kostakidos M, Williams T and Palmer, M *National Human Rights Consultation Report* (2009), available at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Documents/NHRCReport.pdf>. See Chapters 2, 4.