

## Professional Liability in Australia

**Stephen Walmsley SC, Alistair Abadee and  
Ben Zipser**

This book views professional liability from the perspective of the professional. It aims to bridge the knowledge gap between rules of Acts and courts, and splits out the various issues of heads of claims. It is intended to be a comprehensive and definitive analysis of the law of professional negligence in Australia and fulfils an ever-increasing need for an authoritative text on the subject of professional liability.

The authors bring a wealth of experience to their writing and each chapter covers topics which include duties owed to clients and third parties; standard of care and skill required; principles of liability; liability for breach of duty; defences available; and damages.

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## Indefinite detention challenged

Alexis Goodstone, *Senior Solicitor*

When the alleged mastermind of the largest corporate scandal in Philippines history succeeded in manipulating the Australian immigration system and was granted Australian citizenship in 2002, the Minister for Immigration, Mr Ruddock said that it was 'a concern that a man of this character was able to bypass our mechanisms.' Mr Ruddock evidently regretted what had happened and agreed 'to continue to look into how we might improve the (Australian immigration) system.'

One way might be to overhaul a system which permits indefinite detention. In a series of applications which PIAC brought before the Federal Court earlier this year, our clients - four Iraqis, one Kuwaiti Bidoon and one stateless person, who had been in detention for between three and four years - were initially refused release from their indefinite detention.

Our clients had one ray of hope: the pending decision of the Full Federal Court in the case of the *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*.

At the initial hearing of the PIAC applications Justice Emmett held that there was no limit on the government's power to detain people, as long as the purpose of their detention could be broadly defined as being 'for the purpose of removal'. Justice Emmet said that 'unfortunate though it may be from a humanitarian point of view, the [Migration] Act is clear'. He however delayed making final orders pending the outcome of the *Al Masri* decision which addressed similar issues.

In April, the Full Federal Court handed down the *Al Masri* decision and confirmed that where there is 'no real likelihood or prospect of an applicant's removal (from Australia) in the reasonably foreseeable future, an applicant's continued detention is unlawful'. Justice Emmett was accordingly bound to follow this decision, and PIAC's clients were released.

### *Habeas corpus - the initial cases*

Section 196 of the *Migration Act 1958* (Cth) states that an unlawful non-citizen 'must be kept in immigration detention until he or she is' removed, deported from Australia or granted a visa.

The central claim supporting the habeas corpus applications is that, on principles of statutory interpretation, the Minister's power to detain must be read as subject to a temporal limitation - ie the power to detain cannot continue in circumstances where the removal is not reasonably foreseeable.

A further argument is that the Government's power to detain unlawful non-citizens arises from the aliens power in the Constitution. While there is a power to detain for the purpose of securing a person for removal, it was argued that no such power can arise where removal is unlikely in the foreseeable future.

The *Al Masri* case was the first to test these propositions. In *Al Masri*, brought by a Palestinian detainee, Justice Merkel found that where there is 'no real likelihood or prospect of an applicant's removal in the reasonably foreseeable future, their continued detention is unlawful'.

➔ p 2

# From the Director

## PIAC & PILCH celebrate 21 years of rocking the boat

After 21 rocking years of public interest triumphs (and some set-backs) PIAC and PILCH friends, supporters and groupies came together in late February to celebrate the past and prepare for the future.

It was a night of feeling relaxed and comfortable until MCs extraordinaire, Roy Slaven and HG Nelson awed the capacity crowd of 250 guests at the Tattersalls Club. The evening also featured NSW Attorney General, the Hon Bob Debus and debonair journalist Richard Ackland.

A PIAC and PILCH Roll of Honour was screened throughout the night,

acknowledging the contribution of colleagues, supporters and friends over the last 21 years.

The night ended with a spectacular rendition of Happy Birthday by well-known (in very elite jazz circles) Sydney trumpeteer, Alice 'PILCH' Stevenson.

The highly successful fund-raising night was due largely to the donations of time and generous spirit of PIAC and PILCH board members: Gabrielle Trainor, Jessica Block, Sarah Dunn, Shauna Jarrett and Jo Kalowski. Our thanks also to Lyndell Droga and Francis Trainor.

Congratulations to Shauna Jarrett who successfully bid for a week's accommodation in a Paris apartment (donated by Joanna Kalowski and Dr John Hempton) and 2 Qantas return airfares to Paris (thanks Michael Sharp of Qantas).

Our enormous appreciation also to those who generously donated their time and prizes:

- Australian Gourmet Traveller
- The Sydney Festival
- The Yoga Centre, Kings Cross
- The Sydney Symphony
- Gilbert d'Angleterre and Thales, the French-Australian Chamber of Commerce & Industry and ACCOR
- Helen Hooper for flowers
- Rebecca Hugonnet of Hugonnet Design Associates
- Mark Rivett and Nathan Henshaw for wonderful pre-dinner music. #

## Indefinite detention challenged

*continued from p 1*

Following Mr Al Masri's release, the Department of Immigration arranged his removal back to Gaza.

Notwithstanding the factual end to Mr Al Masri's detention, the Minister for Immigration appealed the decision to the Full Federal Court.

Prior to the Full Federal Court's decision in *Al Masri*, numerous single judges of the Federal Court were faced with similar applications. In three cases, applicants succeeded in their applications for release. However, a number of other applications were unsuccessful, including those brought by PIAC.

### *Full Federal Court affirms Al Masri*

In April this year, the Full Federal Court dismissed the Minister's appeal stating that the Minister was not authorised to

detain indefinitely and that such indefinite detention was an interference with Mr Al Masri's liberty.

The Full Court did however, state that a person cannot frustrate their own removal and then succeed in an application for habeas corpus. Thus, people whose removal is not practicable due to some action on their own part, for example withholding consent, would not satisfy the *Al Masri* test.

The Government has sought special leave from the High Court to appeal the *Al Masri* decision.

### *Who will benefit?*

The *Al Masri* decision has critically important implications for detainees who are unable to be removed to their countries of origin and remain in indefinite detention as a result. The Australian Government has indicated that arrangements are on foot for Iraqi detainees to be returned to post-war Iraq. No final arrangements seem to be have been concluded at this stage.

Similarly, some Bidoons from Kuwait are not permitted to return as the Kuwaiti Government does not recognise them as citizens.

Stateless people may also benefit from the *Al Masri* decision. While the *Al Masri* decision offers significant hope to those in indefinite detention it is important to stress that each case will need to be assessed on its own merits.

'Dear Bassina,

Thank you for all your wonderful work and that of PIAC in obtaining the release of Shaker Al Toubi. We see Shaker each week and whilst life is still tough for him at least he has his freedom and hope, thanks to you.

Regards, Kon Karapanagiotidis.'

*Card sent to Bassina Farbenblum, PIAC Solicitor, on behalf of detainee, Shaker Al Toubi from Kon Karapanagiotidis, Asylum Seeker Resource Centre, Footscray, Victoria.*

#

# PIAC rejects Government's attempts to further erode Human Rights Commission

Andrea Durbach, *Director* and Annie Pettitt, *Policy Officer*

On 27 March the Commonwealth Government introduced into Parliament the *Australian Human Rights Commission Legislation Bill 2003* (the Bill). The legislation, which proposed amendments to the executive structure and functions of HREOC, was the third attempt by the current government to implement legislative reforms that would restrict the independence and capacity of HREOC. The two previous Bills (1996 and 1998) failed to pass through the Senate.

The Bill was referred to the Senate Legal and Constitutional Legislation Committee for public inquiry by the Attorney General. The Committee received over 120 submissions, conducted public hearings in Sydney and Canberra and was due to table its report in late May.

Below is the an extract from PIAC's address to the Senate Inquiry. The full PIAC submission is available on the PIAC website at [www.piac.asn.au/publications/pubs/hreoc\\_20030501.html](http://www.piac.asn.au/publications/pubs/hreoc_20030501.html)

Over many years, PIAC has advised and acted for clients in numerous actions under the *Disability Discrimination Act 1992*, the *Sex Discrimination Act 1984* and the *Race Discrimination Act 1975*. PIAC has also made a number of submissions on proposed changes to the *Human Rights and Equal Opportunity Commission Act 1986* and has appeared as *amicus curiae* in a number of cases raising human rights considerations (eg *HREOC v Mount Isa Mines and Brandy v HREOC*). PIAC has also conducted various policy projects evaluating the law and practice of complaint handling by HREOC, examining Indigenous women's experience of discrimination and their access to complaint mechanisms and proposing alternatives to litigation for

seeking redress for members of the stolen generations.

As an organisation which has used HREOC and the legislation it administers to great affect in securing a cessation or change of conduct which has harmed our clients and constituents, most of whom are disadvantaged and marginalised, PIAC is concerned that the *Australian Human Rights Commission Legislation Bill 2003* will reduce the powers, functions, role and independence of Australian's only national human rights institution. In so doing, we are concerned that the observance of human rights in Australia will be further compromised.

## *Reduced Powers*

It appears that the Bill is an attempt by the Governments to strip HREOC of its key complaint function by over-emphasising its role as an educative body. In our experience, it is often via the complaint and conciliation process and the determination of complaints at a public hearing, that the public is educated about the rights of individuals and its responsibility to respect them. Without the sanction of confronting the harm of discriminatory conduct and the opportunity to fashion appropriate redress in the presence of both parties, education about rights and responsibilities lacks real enforceability.

## *Executive Structure*

Our first point, goes to the effective functioning of the Commission and its Commissioners. We argue that the reduction of Commissioners from three to five is in essence, the implementation of a *de facto* situation which has arisen given the government's failure or refusal to appoint independent Race and Disability Discrimination Commissioners. This provision suggests

a clear desire to reduce the resources and capacity of HREOC to fulfill its national role. We believe that to ensure coverage of the human rights needs of all Australians, the reinstatement of the original 5 Commissioners should occur without delay, as is stipulated in the HREOC Act of 1986.

In addition, we would recommend that the 5 Commissioners should be selected via an independent and transparent process with reference to specific criteria ie that the Commissioners demonstrate they possess the attributes, skill and experience relevant to communities whose rights require significant visibility and enhancement.

## *Intervention Powers*

The second point we raise deals with the provision that the Attorney General be permitted to usurp the role of the courts in determining whether HREOC intervene in legal proceedings which involve human rights issues.

We point out that this intervention role is distinct from the *amicus curiae* role which attaches to portfolio specific Commissioners, who may seek leave to intervene in relation to proceedings initiated pursuant to race, sex or discrimination legislation. Unlike an *amicus curiae* intervenor, where HREOC is granted leave to intervene in legal proceedings which raise 'human rights issues' external to portfolio specific areas, the intervenor assumes the rights, privileges and liabilities (including for costs), of a party to the proceedings.

As a potential party to proceedings in which important human rights issues require resolution, we argue that it is fitting that a court, and not the Attorney General, determines the appropriateness of an intervention by HREOC in an open forum in accordance with explicit, visible criteria.

# Protecting Human Rights in Australia

Dr Patricia Randal, *Principal Policy Officer*

United Nations human rights conventions contain civil and political rights, and economic, social and cultural rights which have been endorsed by successive Australian governments. These include:

- freedom from arbitrary arrest or detention,
- the right to due process and fair trial,
- the right to asylum,
- freedom of opinion and expression,
- freedom from discrimination,
- the right of association and assembly, including the right to join trade unions,
- the right to take part in government and in cultural life, and
- the right to a minimum standard of food, housing education and health services.

Recent legislation in Australia has eroded and attempted to encroach on many of these rights. Legal and administrative changes have included the detention of asylum seekers,

reductions in the right to join unions and anti-terrorism legislation that extends police powers. There are also proposed amendments to the role of the Human Rights and Equal Opportunity Commission (HREOC) and proposed reductions in affordable access to health and education services. The debates over these issues have given rise to a resurgence of interest in protecting human rights.

At the academic and political levels, there has been significant discussion in Australia about the need to promote and protect human rights through a Charter or Bill of Rights. For example, there is now some political commitment to examining a federal Charter or Bill of Rights from Opposition parties, including the ALP, the Democrats, and the Greens. However, this issue has not yet been widely debated at the community level.

In keeping with PIAC's commitment to work in the area of human rights

protection for the benefit of all in Australia, PIAC has designed a two-year community education project. The project has been designed to work with various sectors of the Australian community to develop a broad appreciation of the need for and increased protection of basic human rights in Australia.

Stage One of the project will produce education and discussion materials for use by community groups. These materials will explain human rights in plain language and introduce the varied debates about the protection of human rights.

Stage Two of the project will promote community discussion of these human rights and their protection mechanisms. PIAC will conduct train-the-trainers sessions in each state and 'graduates' will then conduct training in their own organisations or for their local communities.

▶ p 5

## PIAC rejects Government's attempts to further erode Human Rights Commission

*continued from p 3*

This is perhaps more significant when the Commonwealth and/or the Attorney General are parties to the proceedings. A conflict would arise whether or not the intervention is supportive of the other parties. However, a major concern which the Attorney General has himself highlighted, is where HREOC's submissions are contrary to the government's view.

The Attorney General suggested in his Second Reading Speech that the

proposed veto power is 'not intended to present Court submissions that are contrary to the government's views, but rather to prevent duplication and the waste of resources and ensure the Court's submissions accord with the interests of the community as a whole.'

What is apparent however is that the veto proposal goes directly to a desire on the part of the government to prevent interventions by HREOC which raise human rights issues and have the potential to embarrass the government or highlight its failure to remedy human rights abuses and/or comply with international human rights standards, as in the case of the *Tampa*.

Finally, we make the point that the exercise of a discretion by a member of a legislative organ of government involves the exercise of a political discretion, which of necessity takes into account

the political preferences of an electorate. The judicial process however, allows for an objective assessment of all the available material before it and the application of the relevant law.

### *Conclusion*

Since HREOC was established in 1986, it has been viewed as a valuable model for human rights commissions in the region and internationally. Over the years PIAC has met with many delegations from South Africa, Britain and Indonesia who have visited Australia to learn from our experience in protecting and promoting human rights through a statutory human rights body. At a time when human rights principles are open to compromise and erosion, it is regrettable that the government is now seeking to diminish Australia's role as a leading human rights advocate and attempting to undermine the Commission and reduce its independence and efficacy. #

# Before the High Court: A gay refugee couple from Bangladesh

Clare Wiseman, *PILCH* secondee

In early April, Amnesty International Australia (AIA) was granted leave to file written submissions as *amicus curiae* (friend of the court) in a refugee appeal heard before the full bench of the High Court of Australia.

AIA's intervention was coordinated by Clare Wiseman, whilst on secondment to PILCH and Naomi Reiner, a solicitor at PILCH member firm, Freehills. Clare and Naomi are the Convenors of Amnesty International's NSW Legal Network, and members of AIA's National Legal Team.

The case involves a gay couple from Bangladesh who are claiming asylum in Australia based on their sexual orientation. The men have been refused asylum in Australia, despite the Refugee Review Tribunal (RRT) having found that it is not possible to be openly gay in Bangladesh without a well-founded fear of persecution.

Since 1994 the High Court has accepted that sexual orientation can form the basis of a claim for refugee status under the Refugee Convention. However to date, the RRT, supported by the Federal Court, has considered that a relevant factor is whether the asylum seekers could avoid persecution by hiding their sexuality. For example, in the present

case, it was found that if the asylum seekers were able to be 'discreet' about their homosexuality in their own country, then they would not have a well-founded fear of persecution on return. The applicants were refused asylum in Australia on this basis and it is this issue which drew the attention of AIA, and formed the basis for its application to intervene in the appeal.

AIA's position was that it is discriminatory to require those claiming asylum as homosexuals to be 'discreet' about their sexuality, when the same is not required of those seeking asylum on the basis of religious or political persecution. AIA is hopeful that the appeal to the High Court will see the treatment of homosexuality under the Refugee Convention brought in line with the treatment of those seeking asylum on the basis of religious and/or political beliefs.

AIA also argued that the expectation that an applicant could suppress his or her homosexual identity in order to avoid persecution is a form of persecution in itself. In this regard, AIA relied on international jurisprudence from countries such as Canada, South Africa, New Zealand and the USA.

During the hearing, Justice Michael McHugh commented that the

Government's argument was to 'turn the whole object of the convention on its head - it's like saying to German Jews who came to Australia in 1938: 'You're not refugees, go back to hiding your Jewishness from the Germans ... you'll be safe'.'

Justice Kirby said the so-called discretion requirement would impose on the appellants '... the lifelong requirement to pretend to be something other than who they are'.

Refugee decision-makers closely monitor relevant decisions and the High Court of Australia has played an important role in developing international refugee jurisprudence to date. The outcome of this case has the potential to influence decision-making in all refugee-receiving states. The AIA played a critical role in the case by presenting the international legal and human rights perspective. The case also sets an important precedent for future interventions by AIA's in human rights matters.

Judgment has been reserved.

If you are interested in finding out more about the activities of the AIA NSW Legal Network, please contact Clare Wiseman or Naomi Reiner at [nswlegallnetwork@amnesty.org.au](mailto:nswlegallnetwork@amnesty.org.au). #



## amnesty international australia

### Protecting Human Rights in Australia

*continued from p 4*

Having conducted an extensive national human rights education and training program in Stage Three of the project, PIAC will focus on policy

development and law reform advocacy work with political parties and key stakeholders.

To date, PIAC has consulted with a wide range of community organisations about the project. We have received indications of support from Church groups, unions, social welfare organisations and human rights groups,

all of whom have indicated a keen desire to participate.

Funding for the project has been sought to enable PIAC to commence Stage One in the second half of the year.

For more information contact PIAC's Policy Officer Annie Pettitt, or the Principal Policy Officer, Dr Patricia Ranald. #

# US Free Trade Agreement poses threat to social policies

Louise Southalan, *AFTINET Campaign Officer*

Dr Meredith Burgmann, President of the NSW Legislative Council, hosted the launch of a publication, 'Trading Australia away?' in mid-May at NSW Parliament House. The publication was written by PIAC Principal Policy Officer Dr Patricia Ranald and Australian Fair Trade and Investment Network (AFTINET) campaigner Louise Southalan.

'Trading Australia away?' outlines the concerns of PIAC and other member community organisations of the AFTINET about the possible impact on Australian social policies which the US government has identified as barriers to trade.

Speakers at the launch included Dr Peter Sainsbury, President of the Australian Public Health Association, Richard Letts, from the Australian Media Coalition for Cultural Diversity, John Hepburn, GE Campaigner for Greenpeace, Alister Kentish, National Research Officer, Australian Manufacturing Workers Union and Dr Patricia Ranald, PIAC.

The publication discusses current negotiations between the Australian and US governments on a legally binding Free Trade Agreement (FTA) which would remove all barriers to trade between the two countries. The negotiations are proceeding despite economic studies which predict no significant economic gains for Australia from such an agreement.

The US Trade Representative is required to inform Congress of the US targets in the negotiations. Corporate lobby groups have also given evidence to the US Trade Representative in public hearings. The US targets include:

- the Pharmaceutical Benefits Scheme, which ensures that prescription medicines are affordable in Australia, especially to those on low incomes. US medicines are over three times the price of those in Australia, and US pharmaceutical companies want higher prices for their products in Australia.
- essential services like health, education and water, which in Australia are regulated and often delivered by governments to ensure equity of access. US private service companies want to invest in these services, as they do in the US. This is the same agenda as the Trade in Services Agreement (GATS) in the World Trade Organisation, but it is more comprehensive, in that it is a 'negative list' agreement which would include all services unless they were specifically excluded. The GATS agreement is limited by being a 'positive list' agreement which only includes those services listed by each government. Community campaigning recently influenced the Australian government not to include health, education and water services in its initial offer for the GATS negotiations (see Policy Report, page 10). However, we now face this threat again from the US FTA.
- labelling of genetically modified food and regulation of genetically modified crops, which gives Australian consumers choice about their consumption. US agribusiness has successfully lobbied against labelling laws in the US.
- local content rules in film, television and music which ensure that Australian voices are heard and

Australian stories are told. Without them, Australia's cultural identity and diversity would be swamped by US imports, which already have a large share of the Australian market.

- the Foreign Investment Review Board and limits on foreign investment in media, telecommunications and airlines. The US also wants to give corporations the right to challenge laws and sue governments if such laws harm their investments. Under similar provisions in the North American Free Trade Agreement (NAFTA), US companies have challenged environmental regulation and sued Canadian and Mexican governments for millions of dollars.

Most Australians support these social policies, which make Australia a more equitable society with a distinctive culture. A survey by UMR Research reported in the *Australian Financial Review* on 21 March 2003 showed that 90% of respondents rejected a trade deal that changed the Pharmaceutical Benefits Scheme and 70% opposed a deal that threatened Australian content in film and television.

'Trading Australia away?' argues that social policies which protect the public interest should be publicly debated in Australia and decided by parliaments at the national or state level, rather than negotiated in a trade agreement.

AFTINET has made submissions to government and has successfully lobbied for a Senate Inquiry into the AUSFTA, which is currently conducting hearings.

Copies of the publication can be ordered from Sarah Mitchell at PIAC. For further information see [www.aftinet.org.au](http://www.aftinet.org.au). #

# Litigation update

The Indigenous Justice Project, sponsored by Allens Arthur Robinson, continues to expand and develop. Shahzad (Shaz) Rind is the project solicitor.

Shaz has been acting for Indigenous clients in a range of matters. One case of note is *Appleton v State of NSW*. Mrs Appleton, whose son hung himself while in Cessnock Correctional Centre, claims that her son's death was the result of negligence by the State. She also alleges that she suffered nervous shock after hearing of her son's death and being shown his body in his cell soon after his death. Mrs Appleton's Statement of Claim has been filed in the District Court of NSW and the matter is proceeding to hearing, with Daniel Brezniak as Counsel.

PIAC's litigation team is developing a focus on judicial review of administrative decisions. While in the past we have predominantly acted in matters in the Administrative Decisions Tribunal (ADT), we have over the last six months received an increasing number of enquiries in relation to judicial review in the Supreme and Federal Courts.

In the Supreme Court, PIAC clients Victor Jeffrey, Jack Ireland, Barry Glendenning and William Coombe successfully defended a decision of the ADT to dismiss a councillor on the Great Lakes Council from office. PIAC's clients had initially sought the dismissal in the ADT of the councillor because of irregularities in his election campaign. These included use of posters bearing the National Party logo when the councillor was not an endorsed candidate of the party and placing advertisements which incorrectly stated that he had authorisation from the deputy mayor.

The ADT upheld our clients' application and the councillor sought review of the decision in the Supreme Court. In dismissing the councillor's application for review, Justice Bell found that 'the

Tribunal's judgment is a considered one. It stated the principles of law which it was required to apply, it made careful findings of fact and applied the principles that it had stated to those findings'.

The decision of *Roberts v Jeffrey & Others* is available on Austlii at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/recent-cases.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/recent-cases.html).

In *Untan v The Minister for Immigration and Multicultural and Indigenous Affairs* our client, Mr Untan, was unsuccessful on appeal to the Full Federal Court. Mr Untan, a Romanian refugee, arrived in Australia 20 years ago and has an Australian wife and 3 Australian born children.

His permanent residence visa was cancelled by the Minister for Immigration on character grounds due to a criminal record. In proceedings before the Federal Court, Mr Untan claimed he had been denied procedural fairness as his visa had been cancelled without regard being had to available material on the best interests of his children. While Branson J found that procedural fairness had been denied to Mrs Untan and their children, she held that the privative clause in the Migration Act prevented a review of the decision to cancel his visa.

On appeal, the Full Federal Court found that there had been no denial of procedural fairness but it upheld Branson J's significant finding at first instance that Mrs Untan and her children were also owed a duty of procedural fairness.

In our last Bulletin we referred to the case of **Simon Odhiambo**, an unaccompanied minor who arrived in Australia as a stow away on a boat from Mombasa. PIAC lodged an application to the High Court on his behalf. At the time the application was made, Simon's guardian was the Minister for Immigration, the Hon Phillip Ruddock. We argued that Simon's initial application for refugee status, which

was refused, could not be independently evaluated given that he relied on his guardian, Minister Ruddock, to assist him make his applications. At issue was the fact whether Simon had been afforded procedural fairness in making his initial applications without an independent guardian to assist him.

Unfortunately despite the matter being progressed before the High Court, Simon was unable to wait for its final determination, given he had been in detention since 2000. He therefore opted to return to an uncertain future in Tanzania.

Arising out of the Odhiambo case, PIAC will undertake a project with Dr Mary Crock of the **University of Sydney** which focuses on the **rights of unaccompanied minors in the refugee application process**. Initial funding for a pilot project has been granted by The Myer Foundation. Funding for an extended three year project is currently being sought.

**Rukhiyo Mohamed** has settled her long running claim for an alleged assault at Villawood Detention Centre in 1999. The case had potential to focus attention on the conditions in detention centres and the conduct and practices of Australasian Correctional Management. Ms Mohamed however, was offered a favourable settlement proposal and decided to settle the matter.

The question of accessible road crossings for blind people has arisen in a disability discrimination case brought against the Inverell Shire Council by PIAC client, **Lyle Andrews**. The case will raise 2 significant issues for consideration by the Federal Magistrates Court. Firstly, the notion of unjustifiable hardship and secondly, the remedy sought by Mr Andrews. Unlike the majority of disability discrimination cases which seek damages as the remedy, Mr Andrews will be seeking remedial changes to the streetscape to accommodate his disability. #

# PILCH News and Views

## Legal Services for Homeless People

PIAC and PILCH have committed resources to undertaking a project aimed at providing homeless people with access to legal services and advocacy. To this end, PILCH member firm Minter Ellison is supporting the development of the project by providing a solicitor on secondment to assist PIAC and PILCH develop and implement a model to best serve the legal needs of homeless people in NSW.

The experiences of the Victorian and Queensland Homeless Persons Legal Clinics show that the support of PILCH member lawyers, working in collaborative relationships with key welfare and housing agencies, underpins the viability and success of those clinics. In the coming weeks, project staff at PIAC and PILCH will consult with agencies and peak bodies providing services to homeless people, to gain their input, ideas and support for the project. We will also be contacting PILCH members to outline the opportunities for supporting the legal services which the project will offer.

Should you require further information or have any queries or suggestions regarding the project, please do not hesitate to contact PIAC Director Andrea Durbach [adurbach@piac.asn.au](mailto:adurbach@piac.asn.au) or PILCH solicitor Sandra Stevenson [sstevenson@piac.asn.au](mailto:sstevenson@piac.asn.au).

## Practising in the Public Interest

The PIAC/PILCH *Practising in the Public Interest* course, conducted twice a year with participating universities, is now entering its fourth year.

In February 2003 PIAC and PILCH conducted the course as a Summer School in conjunction with Sydney University and the University of Wollongong. PILCH firm Blake Dawson Waldron hosted the course.

A Winter School will be held for law students from Macquarie University and the University of Western Sydney in July 2003 at PricewaterhouseCoopers Legal. Students participating in the course continue to benefit from placements with law firms and organisations which undertake public interest and pro bono work.

## Past PILCH President Appointed to Court of Appeal

Immediate Past President of PILCH, Ruth McColl SC, was recently appointed to the Court of Appeal. Justice McColl made a significant contribution to PILCH as a member and Board member, in particular promoting the work of PILCH to the Bar and broader community.

## PILCH referrals of note

PILCH members continue to provide a range of legal advice and representation to an extraordinary number of diverse individuals and organisations. Below are the highlights from the last quarter.

### *Tax / Insurance*

**Phillips Fox** advised a community organisation providing cultural and educative services to migrants in relation to obtaining tax exemptions. **Mallesons Stephen Jaques** assisted a peak community sector body in relation to establishing a bulk insurance scheme for the sector. **Makinson & d'Apice** provided advice in relation to liability issues to community groups which held a peace march on Palm Sunday.

### *Incorporation/Associations Management*

**Deacons** revised the constitution of a peak body supporting organisations that care for terminally ill patients. **Freehills** provided advice to a Brazilian cultural organisation in relation to management issues. **Henry Davis York** are assisting with the establishment of a body to

provide support to terminally ill and chronically disabled adults. **Minter Ellison** is reviewing the constitution of an association which works to protect the quality of the Australian environment. **Baker & McKenzie** is reviewing the constitution of an association which provides educational and other services to seniors.

### *Workplace Issues*

**Gilbert & Tobin** provided employment advice to a working group seeking to promote environmental sustainability. **Baker & McKenzie** drafted a privacy policy and provided privacy policy training to a peak national body for the community sector. **Harmers Workplace Lawyers** are assisting a women's centre to draft an employment contract for practitioners providing services to the centre's clients. **Minter Ellison** is assisting an organisation which supports people suffering from infertility.

### *Refugees / Immigration*

**Henric Nicholas QC**, (as he then was), provided defamation advice to an organisation assisting children in detention. **Allens Arthur Robison** provided a volunteer interpreter to assist TPV holders with applications for permanent protection. **Allens Arthur Robison** also assisted an organisation providing training services to refugees with advice in relation to the legality of refugees undertaking volunteer work. **John Basten QC** provided an organisation assisting asylum seekers with advice in relation to visa applications.

### *Environmental*

**Woolf Associates** provided defamation and funding advice to an environmental network. **Blake Dawson Waldron** are assisting an environmental organisation to create a structure to manage water resources to improve wetland health. **Caroline Dick**, barrister, 5th Floor Wentworth Chambers, is representing a residents action group in its appeal to the Land & Environment Court against

the development of a power facility. **Gadens Lawyers** are drafting a licensing agreement for an animal protection society which will be used to enable corporates to donate a percentage of their profits to the society.

#### *Indigenous clients*

**Michael Windsor**, barrister, 2nd Floor Wentworth Chambers, advised an Indigenous client in relation to injuries he suffered following a police assault. **John Thompson**, barrister 2nd Floor Wentworth Chambers, advised a community legal centre in relation to victims compensation claims lodged out of time by Indigenous clients. **David Robertson**, barrister, is providing an advice on merits to a community legal centre in relation to a complaint of age discrimination by an Indigenous client. **Patrick Griffin**, barrister, is providing advice to an Indigenous women's council on the merits of their client's complaints of racial/disability discrimination.

#### *Other matters*

**Allens Arthur Robison** has agreed to provide administrative support to a peak body to catalogue its library resources to facilitate use of the resources by its members. **Carroll & O'Dea** provided advice to an organisation campaigning for labour rights by way of leaflet distribution. **The Seidler Law Firm** advised a cultural centre running a community art show in relation on a deed of indemnity between the centre and the artists. **Corrs Chambers Westgarth** is assisting a client in relation to a fidelity fund claim. An organisation providing services to the hearing impaired is being assisted by **Coudert Brothers** in relation to intellectual property issues. **Dominique Hogan Doran**, barrister 5th Floor Wentworth Chambers, is assisting a community legal centre to challenge a

subpoena requesting sensitive documents held by the centre.

A peak community sector body is being assisted by **Acuiti Legal** to negotiate an agreement for the supply of IT services to the community sector. **R L Whyburn** advised the same organisation regarding advertisements on its website seeking consultants willing to provide services to the community sector.

**Ebsworth & Ebsworth** are providing advice and assistance to a youth centre in relation to the adverse impact of refurbishments to its premises. **Freehills** provided a Brazilian cultural organisation with advice in relation to its leased premises.

**Phillips Fox** is advising an organisation that supports people with HIV/AIDS in relation to access to trust funds.

### **David Marr Seminar - Rescuing the Rule of Law**



Award-winning author and journalist, David Marr, addressed a capacity crowd in early April at a PIAC / PILCH seminar hosted by PILCH member firm, Henry Davis York.

Together with journalist Marian Wilkinson, David recently wrote *Dark Victory*, an account of the political and legal manoeuvring that surrounded the *Tampa* case. David gave a chilling account of the lack of transparency and accountability which has increasingly become a feature of Australian politics.

Copies of *Dark Victory* were sold on the night with proceeds going to PIAC and PILCH's work on behalf of refugees. Our thanks to Henry Davis York, in particular Kathy Merrick, Allen and Unwin and David Marr for their generosity.

See the review of *Dark Victory* on page 13.

### **PILCH Secondees**

Secondee solicitors continue to play a vital role in the operations of PILCH by assessing and referring matters of public interest to PILCH member firms and barristers. Secondees also assist with PILCH projects and promotional activities. During its ten years of operations, PILCH member firms have provided a total of 33 solicitors on secondment to the Clearing House.

Clare Wiseman, solicitor from Freehills, completed a three-month secondment in May 2003. Our current solicitor on secondment is Marcel Savary from Minter Ellison. Marcel completes his secondment in August and will be followed by a secondee from Allens Arthur Robison.

PILCH is currently seeking secondees for 2004. If you are able to provide secondee solicitors to PILCH during next year, or have any queries in relation to secondments, please contact Sandra Stevenson or Andrea Durbach at PILCH on 02 9299 7833. #

# Policy Report

Dr Patricia Randal, *Principal Policy Officer*

## Progress in Trade in Services Campaign: 'confidential' information released

PIAC has been working with other community organisations through the Australian Fair Trade and Investment Network (AFTINET) to obtain greater transparency and accountability for Australia's policy in the current Trade in Services (GATS) negotiations in the World Trade Organisation (WTO). The danger in these negotiations is that governments have been asked to treat essential public services like health, education, water and postal services as traded goods under WTO rules. This could mean challenges to government regulation and provision of these services, making them less accessible to low-income groups.

Until now, the negotiations have been conducted in secret, with governments claiming that they were 'commercial in confidence.' PIAC and AFTINET wrote submissions to government seeking publication of key documents in the negotiations, and sought access to them under Freedom of Information legislation.

In early April the government published its initial 'offer' in the GATS negotiations, acknowledging that the publication was a response to widespread community concern.

This is an important victory for the work of PIAC and other community organisations through AFTINET. It is the first time that such offers have been

published, and is an important step towards transparency in trade negotiations. The European Union, Canada, the USA and New Zealand have also published their offers in response to similar community campaigns.

The substance of the offer shows the influence of a well supported community campaign. No new offers have been made on health, education, postal services, water for human use or audio visual services. There are no changes to the Foreign Investment Review Board or to the limitations on foreign investment in Telstra or Qantas. The offers are available on the Department of Foreign Affairs and Trade website [www.dfat.gov.au](http://www.dfat.gov.au)

While we welcome this first step, much is still to be achieved in relation to transparency and accountability given that:

- the offer was only published after it had been lodged with the WTO in Geneva. We sought public discussion before it was lodged.
- the offer is an initial offer only, subject to change at any time over the next 18 months of further negotiations. We would argue that community consultation process should occur before any changes are made.
- the government has not released its requests to other countries, which we have requested. We do not know, for example, whether Australia has made requests about health, education or water to other

countries, including developing countries.

- there is still ambiguity in the definition of public services in the GATS. We are asking for all public services to be clearly excluded and for a review of the impact of the existing GATS agreement before any new commitments are made

PIAC and AFTINET are continuing to raise these issues with government and in the community. For more information see [www.aftinet.org.au](http://www.aftinet.org.au)

## PIAC Submission on National Health Privacy Code

PIAC Policy Officer Jim Wellmore wrote a submission in April to the National Health Privacy Working Group on the proposed National Health Privacy Code. The Code is designed for use by all organisations and individuals who collect or handle personal health information.

The PIAC submission emphasised the right of health consumers to privacy and argued that the consent of the health consumer must always be sought before personal health information is disclosed to another party. The submission also supported the right of individuals to have access to their own health care information. The submission against proposals to allow the charging of fees for such access, since fees would impact most on those with greater health care needs who often have the least capacity to pay. #

# UCAP Report

Trish Benson and Jim Wellsmore, *Senior Policy Officers, UCAP*

## Government election commitments

The recent State election saw the returning Labor Government commit itself to a number of important initiatives in relation to utilities and residential consumers.

One of the key commitments was the allocation of a further two years of funding for UCAP. This follows a very positive external review of UCAP undertaken in 2002. The results demonstrated not only the effectiveness of the Program in advocating for low-income and disadvantaged consumers but the strength of support from other stakeholders in these industries.

Particularly noteworthy was the decision of the Government to take up the proposal of providing additional funds to UCAP to undertake specific research projects. To date UCAP has lacked the resources and skills to undertake research into specific questions about low-income households and their consumption of energy and water. This research will inform future debates about the affordability of essential services.

Other key initiatives were announced in relation to water. In particular, the NSW Government has flagged its intention to improve consumer protection for households living outside the Sydney and Hunter regions. This includes providing a similar level of access to the Energy and Water Ombudsman (EWON). Also targeted are guidelines for disconnection of rural households by local government water providers. PIAC is especially pleased with this commitment as it echoes some of the concerns we have raised previously over the regulation of local government water supply in NSW.

## Price pressure follows industry reforms

PIAC has continued to give attention to the affordability of essential services in electricity and gas for low-income and disadvantaged consumers. Despite the recent restructuring of the electricity and gas markets in NSW, household users continue to experience pressure for increases in the cost of these essential services.

A large hike in NSW retail gas prices has been implemented by AGL. The Independent Pricing and Regulatory Tribunal (IPART) was required to approve the increase. PIAC pointed out that the rise sought by AGL was well beyond the expectations of consumers following competition reform and, importantly, would impose an added burden on households with a large reliance on gas. AGL claimed rises in the wholesale cost of gas are the main reason behind the move. This is a difficult argument for consumers to assess since AGL has insisted that for competitive 'commercial-in-confidence' reasons they cannot reveal the details of their various wholesale gas supply contracts. The result is that 'competition' has seen default customers experience an increase in regulated prices while being denied access to crucial information about the reasons why.

Consumers also face costs for the distribution of electricity – the local systems of 'poles and wires'. These costs comprise an average 50% of household utility bills. The electricity distributors, too, are regulated by IPART which sets an annual revenue cap. The distributors are arguing that significant increases in the revenue cap are needed to fund large additional investment in their systems. PIAC supports public investment in

utility infrastructure. However, we are concerned at the impact of the proposed increases on some residential users. In particular, two distributors have proposed a change to the structure of their prices which could see some households experience rises in their total electricity bills of around 15%.

In response, PIAC has expressed the concern that the networks have not placed a greater emphasis on assisting customers of all sizes to reduce their use of electricity and thus postpone the need for some capital spending.

It is worth noting, however, that the commencement of a competitive market for household electricity in South Australia last January saw household prices rise 25% overnight.

## Cost and benefit of meters

Innovations in metering of household consumption remain a major topic in the electricity industry. PIAC continues to assert that new technology should be mandated for households only where the benefits clearly exceed the costs. With Victoria proposing to force some households to adopt new 'time of use' meters it is becoming increasingly important to accurately gauge the costs of new meters and to assess where the benefit lies – with customers or the electricity suppliers.

The NSW industry is continuing to debate a possible introduction of electronic 'pre-payment' meters. PIAC remains cautious about whether all customers could benefit from this technology. Of particular concern is whether all the current consumer protections can be retained if pre-payment meters are introduced. #

# Training News

Carolyn Grenville, *Training Co-ordinator*

## Our Strong Women – Indigenous Women, Law and Leadership workshops

With the recent completion of the tenth *Our Strong Women- Indigenous Women, Law and Leadership* workshop in Canberra, 190 Indigenous women around Australia have now completed the intensive two-day advocacy training. The upcoming Geraldton workshop will push these numbers to over 200 women – quite an achievement for both the National Network of Indigenous Women’s Legal Services and PIAC who have been working in partnership on this ground-breaking project.

The first 9 workshops were funded by the Commonwealth Office of the Status of Women. The success of the early workshops has led to demand for additional courses.

The *Our Strong Women* workshops aim to equip Indigenous women with knowledge and skills to speak up for their interests and improve the quality and delivery of services to Indigenous communities.

Indigenous women come together for two days of training in lobbying, media, negotiation, government structures and processes. They also work on self-identified advocacy issues, and develop plans that they can take back to work on with their communities. The workshops have built stronger support networks of Indigenous women around the nation who are working to promote the status and wellbeing of their communities.

## Welcome back Cathie

PIAC welcomes back Cathie Sharp who ran PIAC’s training program until the beginning of 2002 when she took extended leave. Cathie’s return to run PIAC’s public training courses increases our capacity to meet the training needs of more individuals and organisations. PIAC Training Co-ordinator Carolyn Grenville continues to work on in-house training and special projects such as *Our Strong Women*.

## Working the System second edition

The second edition of PIAC’s popular book, *Working the System, A Guide for Citizens, Consumers and Communities* which was launched in late June by ABC Radio National’s Julie McCrossin and Wendy McCarthy AO is now available from PIAC for \$27.50 (incl GST).

The second edition, which continues PIAC’s commitment to equip individuals and communities with the skills to effectively participate in decision making, is published at a time when the ability to influence public decision making is increasingly restricted.

With the publication of the book, materials used in PIAC’s *Work the System: an Introduction to Advocacy* training program have been reviewed and updated and include new case studies and contemporary contributions.

## Tips from PIAC training

Do you need to find out more about the political system to help you with your advocacy work?

There is a wealth of information on government web-sites that can help you find out about the activities of governments. In particular, the web sites of parliament houses around Australia contain such information as what laws are before parliaments, and details about current parliamentary inquiries.

Do you want to read the Australian Constitution? It is available on the Federal Parliament web site, along with other information about our system of government.

Here are some helpful web sites to get you started, no matter where you live in Australia:

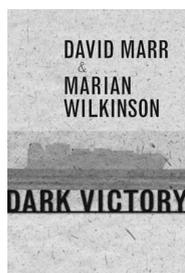
- Parliament House in Canberra (Federal)  
<http://www.aph.gov.au>
- Parliament House in Sydney (NSW)  
<http://www.parliament.nsw.gov.au>
- Parliament House in Melbourne (Vic)  
<http://www.parliament.vic.gov.au>
- Parliament House in Brisbane (Qld)  
<http://www.parliament.qld.gov.au>
- Parliament House in Adelaide (SA)  
<http://www.parliament.sa.gov.au>
- Parliament House in Perth (WA)  
<http://www.parliament.wa.gov.au>
- Parliament House in Hobart (Tas)  
<http://www.parliament.tas.gov.au>
- Parliament House in Canberra (ACT)  
<http://www.legassembly.act.gov.au>
- Parliament House in Darwin (NT)  
<http://www.nt.gov.au/lant>

Good luck with your advocacy work. If you want more information about how PIAC can help you to meet your advocacy training needs please call Carolyn Grenville or Sarah Mitchell at PIAC. #

# Book Review

## Dark Victory

**David Marr & Marian Wilkinson, 2003, Allen & Unwin**



Damn, this book is well written! Reviewing it is a real bind – wanting to encourage people to read it, and yet feeling that a few paragraphs of review can't convey the

excellent prose of *Dark Victory's* nearly 300 pages.

The book roughly follows a time-line of Australia's main political events from August to November 2001, leading up to the last Commonwealth election. The opening chapter starts with people on the boat picked up by the Norwegian ship, *Tampa*, in late August. The final chapter focuses on election day, just 11 weeks later.

The magic of the book is the way the events are explained, and characters introduced, almost as if they were in a novel. The authors avoid a sterile, legalistic, approach of simply describing the relevant details for each day. Instead, the authors select events with the story regularly departing from the strict chronology to give a more detailed history or context of a particular person, organisation, or action. Sadly, however, this 'novel' is not a work of fiction. By avoiding a simple re-telling of the chronological events, the book presents not just the historical record, but a far more troubling 'bigger picture' of some invidious patterns of action. Some of these include:

- how the Commonwealth's aim for financial aid to the Pacific, namely 'good governance and economic reform', was ignored when millions were paid to poor countries to gain their acceptance of refugees the Government wanted to transport there;
- how various government officials and agencies illegally spied and reported on communications in Australia, and the Government knew of proposed legal proceedings before it had even been told;
- how the rhetoric, posturing and policies about asylum seekers, by some government and media representatives, was unrelated to the actual number of refugees seeking asylum in Australia;
- the decrease in legal checks on Government detention of, and actions against, people (a worrying parallel between Australia and the USA's efforts at Guantanamo Bay).

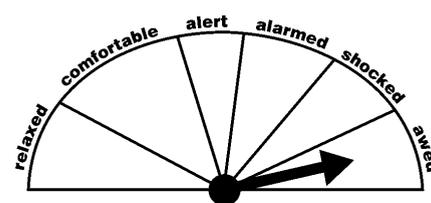
Every silver lining must have its cloud, however, and there is an aspect of the book that will likely hinder its wider acceptance. Too many of the characters are given extreme descriptions that seem irrelevant. Examples include 'portly Max Moore-Wilton', 'whey-faced and stubborn Philip Ruddock', 'John Howard ... His clothes are dull, his tastes are dull, his speeches are dull', and 'Downer is ... not a rogue, but weak. In tight corners he grows shrill'. These are obviously not the good guys of the story. The goodies include '[Norwegian Government official] Longva ... an open, sharp man in his mid-fifties with a ruddy, well-worn face and an easy laugh', 'Melbourne's Public Interest Law Clearing House, a small organisation staffed by a few bright

young lawyers', and '[*Tampa* Captain] Rinnan ... a salt-dried sailor with a sharp eye and a cocky sense of humour. At 61 he still cut a bit of dash in a stiff white shirt and epaulettes'. These descriptions do give colour, and some of them provide more character, but they distract from the main game. The attention of readers who were largely untroubled by the events at the time will focus on these trivialities instead of seriously thinking about the many, many important issues covered in *Dark Victory*.

Happily, this isn't a party political book which only criticises the Coalition Government. Marr and Wilkinson have been equally as scathing about Labor's actions, particularly during 2001. Surely, this book is essential reading for as many people as you can lend your copy to, in the months before we next vote at a Commonwealth election. The story of the dark victory must not be forgotten.

Australia has many events and people in its history of which we should be proud. The events in this book aren't among them. It is an outstanding presentation of some of the more shameful events of Australia's recent times.

With credit to an anonymous friend who invented the Howardometer, I'd rate this book on that scale at 'awed'.



[Reviewer wishes to remain anonymous.]

#

## Staff News

Senior Solicitor, Annemarie Devereux, resigned from PIAC in February in order to take up a Visiting Fellowship at Queensland University of Technology Law School. Annemarie's expertise in human rights law greatly contributed to PIAC's training program and refugee practice.

Alexis Goodstone has been appointed as PIAC's new Senior Solicitor. Alexis has been a solicitor at PIAC for five years and has considerable experience in discrimination, Indigenous and refugee matters.

PIAC has also recently appointed Anne Mainsbridge as solicitor. Anne has extensive litigation, teaching and policy experience. Anne's litigation experience has spanned time with Freehills and the Australian Government Solicitor and she was most recently a lecturer at Macquarie University.

In the last few months, PIAC has also welcomed Annie Pettitt as our new Policy Officer. Annie has extensive policy experience and skill, including working as a policy analyst at VCOSS, a policy and training officer for the Youth

Action and Policy Association (YAPA), a community development worker at the Brotherhood of St Laurence and project co-ordinator for the Australian Social and Economic Rights Project.

Bassina Farbenblum, PIAC Solicitor will be leaving PIAC in August to undertake an LLM in Public Service Law at New York University. Bassina will join 14 other 'Global Public Service Law Scholars' from around the world to undertake the specialised LLM program, the first of its kind in the world. The Program aims to bring together lawyers from the developing world, the New York University School of Law community and American and international public interest institutions. In addition to receiving a Global Public Service Law Scholarship from NYU towards her tuition costs, Bassina has been awarded the 2003 Lionel Murphy Overseas Postgraduate Scholarship to undertake her LLM studies at NYU. Bassina will specialise in human rights and public interest legal practice.

Marion Grammer joined PIAC in June as a part-time bookkeeper to assist with

our growing accounting and training needs. She will be assisting the Madeleine Bennison, PIAC's financial manager with the centre's day-to-day financial administration and she will co-ordinate registrations for PIAC's training program and other functions.

PIAC's work is enhanced from time to time by College of Law placements and other volunteers.

Our most recent College of Law placement, Cathy Stirling, provided excellent support to the litigation team from January to June. Also joining us have been Azadeh Dastyari and Louise Pounder, 2 volunteers from the University of Sydney Law School who have been working with the litigation team on refugee matters.

The admin team managed to score a volunteer as well. Leyla Joffe ably assisted with many routine administrative tasks in the months of December to February during her university break.

Our thanks to all our volunteers whose work is invaluable. #

## Board News

One of PIAC's longest serving Directors, Gabrielle Trainor, has resigned from the PIAC Board after almost seven years of sterling service and magnificent support. An increasingly busy professional and family life has finally caught up with Gabrielle who will be enormously missed by the Board and staff of both

PIAC and PILCH.

Board Member Jessica Block, who made an incredible impact in a concentrated time has also resigned from the Board. Jessica, who was the Business Development Manager for the Sydney Festival, is taking up a new position as

the Deputy General Manager of the Australian Chamber Orchestra.

Both Gabrielle and Jessica have promised ongoing support for PIAC's work and fundraising activities. PIAC Staff and Board extend our appreciation for their efforts. #

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Annette O'Neill  
Philip Bates  
Alan Cameron  
Bill Grant  
Shauna Jarrett  
Joanna Kalowski  
Rodney Lewis  
Gary Moore  
Merrilyn Walton

Chairperson  
Vice Chairperson, Consultant (Law and Justice Foundation nominee)  
Barrister, Sir Owen Dixon Chambers  
Management Consultant  
Chief Executive Officer, Legal Aid Commission of NSW  
Agostini Jarrett Solicitors (NSW Law Society nominee)  
Mediator and consultant  
Solicitors, Dormers Legal  
NSW Premier's Department  
Faculty of Medicine, University of Sydney