

Australian Native Title Law

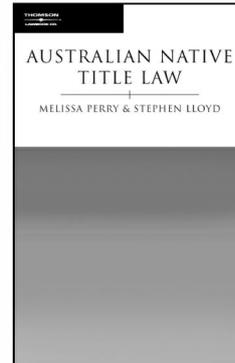
Melissa Perry and Stephen Lloyd

Native title issues continue to affect a wide range of interests, not only through native title litigation, but also in areas such as planning and development, and mineral exploitation.

This important new text provides a sound understanding of the law of native title in Australia. The *Native Title Act 1993* is annotated and explained in detail, with comprehensive references to relevant authority and materials. The introductory chapters place the Act in context, and explain essential concepts and principles, which underpin the Act, including relevant principles of constitutional, property and discrimination law. The authors' extensive experience in this and related areas finds reflection in the depth of analysis and practical insights provided by the book.

This outstanding new work will provide a valuable contribution to the area of native title law, and appeal to practitioners and those who advise in this area.

A resource CD is included for immediate access to the significant cases referred to in the text, and to key legislation.



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Pathway from homelessness — PIAC & PILCH launch new service

Judith Levitan, *PILCH solicitor**

“For those Australians living on the streets or in marginal accommodation — far from being a friend — the legal system can be a ferocious foe. With no money or permanent address — personal safety is precarious, small fines lead to big legal hassles, and access to welfare is often tenuous. No matter what the laws are in a particular jurisdiction, or the cultural and economic issues faced by a particular group, the homeless, wherever they live and whoever they are, consistently find themselves on the wrong side of the law.”

Damien Carrick, *The Law Report — Homelessness and the Law*, ABC Radio, 8 October 2002

Homelessness is a significant socio-economic problem¹ and constitutes a breach of the internationally recognised right to adequate housing.² Homelessness is experienced by a broad range of people —not only people sleeping rough on the streets. People moving from one form of temporary accommodation to another (such as women and children escaping domestic violence) and people living in marginal accommodation, such as boarding houses and caravan parks, also experience homelessness.

1 On Census night in 2001 there were around 100,000 people who were ‘homeless’ across Australia (26,600 in NSW) See Chamberlain, C and MaKenzie, D (2003) Counting the Homeless 2001, Australian Census Analytic Program, Australian Bureau of Statistics, Canberra

2 Goldie, C “Living in public space: A human rights wasteland?” (2002) 27(6) *Alternative Law Journal* 277-281.

The causes of homelessness are complex and may include structural factors (eg unaffordable housing, unemployment) and social factors (eg mental illness, gambling, substance abuse, domestic violence). People’s legal problems may also contribute to or exacerbate their homelessness.

With an ultimate aim of assisting people to forge a pathway out of homelessness, PIAC and PILCH committed resources to developing a project aimed at providing homeless people in New South Wales with access to legal services. Stage One of the project involved undertaking a legal needs analysis and feasibility study.

The analysis revealed that many homeless people face distinct legal problems and require targeted legal assistance appropriately delivered given the numerous barriers they face in accessing or using mainstream legal services. Some of these barriers include:

- Homeless people are often unaware of their legal rights, lack the networks to access knowledge of their basic legal rights or do not expect to be able to enforce those rights.
- Homeless people may not recognise the legal nature of their problems.
- Securing basic needs may be more of an immediate priority than dealing with legal problems.

From the Director

An increasing absence of vigilance

The professional responsibility of lawyers, the extent to which we see ourselves as agents of social justice, underlies many pro bono and access to justice initiatives. How we execute this responsibility takes many forms. Over three days in October, speakers from Australia, America, Argentina, South Africa and England, gathered in Sydney to address the 2nd National Pro Bono Conference and exposed us to different models of facilitating justice. The conference, convened by the National Pro Bono Resource Centre and the Public Interest Law Clearing Houses in NSW, Victoria and Queensland, offered us lessons from various perspectives and provided an opportunity for us to critically examine our own ways of providing legal services and programs and so

potentially transform and enhance accessibility to justice. Two of the international speakers, Prof Martin Bohmer, Dean of Palermo Law School in Buenos Aires and Vincent Saldanha, National Director of the South African Legal Resources Centre, also addressed PILCH seminars in Sydney and Melbourne. Their particular focus was on the changing role of the law and public interest lawyers in societies undergoing transition. At first glance, the history of these two countries and the work Martin and Vincent described in transforming institutions to reflect major political and social change, seemed remote from life in the 'lucky country'. To talk of Australian society undergoing transition against the backdrop of Argentina and South Africa, may appear to be an exaggeration. However, it was the "fragility of democracy" to which both Vincent and Martin referred, which

offered a disquieting parallel with Australia. As South Africa and Argentina struggle towards democracy – developing a culture of rights and ensuring the integrity of institutions to protect those rights – we in Australia are witness to a relentless rolling back of rights by the Federal government. "The first incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun."¹ As the Australian Government, and an increasingly complicit Opposition, use the law to take rights away, our responsibility as lawyers requires us to use our skills to resist this trend and challenge incursions upon our "fragile democracy" so carefully constructed over many decades.

¹ Justice Arthur Chaskalson, President of the South African Constitutional Court, address to the PIAC Annual Dinner, 21 June 2000.

Pathway from homelessness

continued from p 1

- Mental health problems, drug and alcohol problems, intellectual disabilities and poor literacy levels can impede a person's ability to seek assistance.
- The chaotic lifestyle of homeless people makes it difficult for them to attend scheduled appointments, receive post or respond appropriately to written correspondence.
- Homeless people may feel intimidated and reluctant to approach a generalist legal service for assistance.

The analysis also established that there is considerable demand for specialist legal services for homeless people that are designed to address the barriers described above. In Sydney, there are some legal services for people experiencing homelessness or who are at risk of homelessness that operate on a pro bono basis by private law firms and individual solicitors. However, there is a

strong view among welfare workers that the demand for these legal services outstrips the supply of the services and that a specialist legal service in Sydney can provide significant assistance to people at risk of or experiencing homelessness.

PIAC and PILCH (with the assistance of secondees from PILCH member firm Minter Ellison) developed a model of service in response to the identified legal needs of homeless people. The model of service is similar to the Homeless Persons' Legal Clinics that are operating with great success in Melbourne and Brisbane.

It is envisaged that lawyers primarily from PILCH member law firms will provide legal assistance on a pro bono basis at welfare agencies where there is a significant homeless population (initially the inner city of Sydney and Parramatta). The lawyers will attend the welfare agencies regularly to provide on-the-spot advice to homeless clients and undertake any follow-up work required in civil and administrative legal matters. The project will raise and, where appropriate, address policy issues through law reform initiatives.

By providing legal information, advice and assistance to a group of people who otherwise may not access legal assistance, it is hoped that the service will:

- reduce inequality before the law for homeless people;
- remove legal barriers that prevent people from creating pathways out of homelessness; and
- prevent people at risk of homelessness from becoming homeless because of legal problems.

A legal service for homeless people will provide opportunities to forge a path out of homelessness.

Subject to securing funding for the service, it is envisaged that the PIAC/PILCH Homeless Person's Legal Service will commence operations in early 2004. For details please call Catherine Duff, PILCH Project Officer on 02 9299 7833.

*Judith Levitan was on secondment to PIAC from PILCH member law firm, Minter Ellison for 4 months. Judith conducted the legal needs analysis and feasibility study which led to the PIAC and PILCH Boards approving the establishment of the Homeless People's Legal Service.

WTO Cancun meeting shows the need for fairer trade rules

Dr Patricia Ranald, *Principal Policy Officer*

The Cancun hotel zone, site of the September WTO Ministerial Meeting, is a surreal place which mirrors in many ways the inequalities of world trade. Twenty kilometres of luxurious high rise hotels dominate a beautiful beach. The hotel workers, whose daily wage would barely buy a cocktail in the dollar economy of the zone, travel by bus from the town ten kilometres away. Huge steel barriers and massive numbers of police and military protected the meeting from demonstrations.

I attended the Cancun meeting as a representative of the Australian Fair Trade and Investment Network of 85 community organisations. As the official government delegates negotiated behind closed doors, community organisations lobbied and held peaceful symbolic protests and media events in the conference centre. Thousands more held seminars, concerts and marches in the town.

We were all shocked when Lee Kyung-hae, former leader of a South Korean farmers' organisation, climbed the steel barrier and stabbed himself in protest at the effect of WTO policies. Like many farmers in developing countries, he and his neighbours could not compete with subsidised imports from countries like the US and the EU after tariffs were reduced under WTO rules. Self-immolation is the strongest form of protest in Korean culture. Memorials commemorating his sacrifice were held at the barrier and inside the conference centre.

The Cancun meeting failed to reach agreement because ninety developing country governments, representing the majority of the world's peoples, refused to negotiate new WTO agreements on Investment, Competition Policy and Government Procurement. These new

agreements were promoted by the EU and the US as a condition for reducing their own unfair farm subsidies. The developing countries were led by a new grouping of twenty governments (the G20) which included Brazil, India, China and South Africa, and supported by a broader grouping of seventy smaller countries. They rejected the new agreements and produced their own agenda to reduce agricultural export subsidies. The new WTO agreements would have reduced national development options, by requiring foreign investment to be treated as if it were local investment. Governments could not then require foreign investors to transfer skills and technology, use local products or develop relationships with local firms. This is the discredited agenda of the Multilateral Agreement on Investment (MAI), which was attempted through the OECD but defeated by community campaigning in 1998.



Jeff Atkinson, Oxfam Community Aid Abroad; Dr Pat Ranald, and Andrea Durbach, PIAC at the Cancun Report Back seminar held in Sydney in October.

The Australian government, as leader of the Cairns group of agricultural exporting nations, was sidelined when over half of the Cairns group joined the G20. Australia supported the call for an end to agricultural subsidies, but did not support developing countries on issues of food security and rural development.

Australia also supported the proposals for new WTO agreements on investment and other issues. US Trade negotiators are continuing to pursue these new issues through bilateral agreements like the US-Australia Free Trade Agreement (see Policy report).

Four years after Seattle, Cancun shows that the WTO is still in crisis. As Nobel Prize economist Joseph Stiglitz wrote in *The Guardian* on 2 October, "the failed WTO meeting in Cancun should serve as a warning: something is fundamentally wrong with how the global trading system is managed".

The domination of the richest industrialised countries has been challenged by a coalition of developing countries, supported by global networks of civil society organisations. They call for a more open and democratic process, removal of the new issues from the agenda and negotiation of fairer rules on agriculture. AFTINET and other civil society groups will continue to campaign for fairer multilateral trade rules which will restrain the domination of the most powerful economies and corporations and advance the human rights of the majority of the world's peoples.

The Australian Fair Trade and Investment Network (AFTINET) was formed in February 2000. It is a national network of 85 community organisations and many more individuals concerned about trade issues. The organisational subscribers include environment groups, churches, unions, aid agencies and social service organisations. The national network includes the national peak bodies, state and local organisations in all these sectors. It also includes geographical networks in most states. PIAC is a founding member of AFTINET.

Asylum seekers & detention: PIAC offers assistance

Alexis Goodstone, Senior Solicitor

Over the last year, a key priority for PIAC has been addressing the rights of people in immigration detention. To this end, PIAC has undertaken legal and policy work in a range of cases and projects. Litigation has included:

- a number of *habeas corpus* proceedings in the Federal Court for the release of detainees facing 'indefinite' detention, where no visa applications or appeals are in progress and a detainee is awaiting removal but cannot be removed due to external factors beyond his/her control;
- a claim against Australasian Correctional Management (ACM) and the Department for Immigration arising from an alleged assault by an ACM officer against a detainee. The matter was subsequently settled;

- the review of a decision to cancel a visa on the ground of denial of procedural fairness;
- a Federal Court application to compel the psychiatric assessment of a detainee (a prerequisite to obtaining a bridging visa);
- an *amicus curiae* intervention to the High Court representing Amnesty International regarding the question of the Family Court's jurisdiction over children in detention.

PIAC's project and policy work on refugee issues has led to an invitation from the University of Sydney to work with them on a project examining the treatment of unaccompanied minors seeking protection visas. PIAC has made submissions to government inquiries regarding proposed amendments to migration legislation. PIAC's Principal

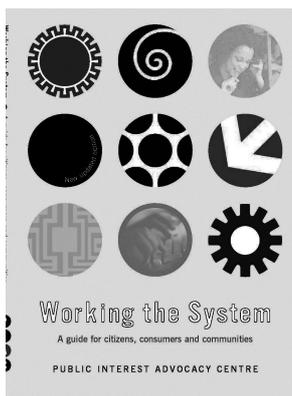
solicitor, Simon Moran is a Board member of Australians for Just Refugee Programs.

PIAC may be able to assist immigration detainees with legal advice and/or representation in relation to:

- Bridging visas
- *Habeas corpus* applications for release from detention
- Standards/conditions of detention
- Health issues
- Injuries sustained in detention.

PIAC can not generally assist detainees with their visa applications, or appeals relating to visa applications. However, exceptions may be made for cases that raise public interest issues. Please contact PIAC's Senior Solicitor, Alexis Goodstone for further information.

Second edition of Working the System: A guide for citizens, consumer and communities



"The second edition of Working the System is published at a time when the need to effectively participate in decisions that affect our lives is increasingly pressing.

This successful practical guide is for anybody who wants to participate in decisions that affect our lives and communities – whether they are social, political or legal. We hope that it equips readers with the knowledge and skills to influence society's governance."

Andrea Durbach, Director, PIAC

"The importance of Working the System is that it offers us complex information in clear language, reminds us of the power of narrative with its case studies and includes creative cartoons by Cathy Wilcox."

Wendy McCarthy AO at the launch of the 2nd edition of Working the System, June 2003

The second edition of Working the System with updated information and new case studies, is now available from PIAC for \$27.50 (incl GST).

Order forms can be downloaded from our website www.piac.asn.au/publications/pubs/wts2nd_20030414.html or obtained from Fabiola Rofael at PIAC on 02 9299 7833.

Genetic discrimination: A new layer of human difference

Anne Mainsbridge, *Solicitor*

PIAC frequently advises and acts for clients who allege that they have been discriminated against. Discrimination involves differential treatment of individuals or groups on the basis of human difference, such as race, disability and sex. State and federal discrimination laws make such differential treatment unlawful in certain circumstances.

Rapid advances in genetic technology over the last decade have uncovered a new layer of human difference – genetic makeup. It is now possible, through an increasing variety of genetic tests, to obtain detailed genetic information about a person.

With this has come the threat of a new form of discrimination —genetic discrimination. For example, an employer might refuse to recruit someone because pre-employment genetic testing has revealed that they have a predisposition to developing bowel cancer. The person concerned may never actually develop bowel cancer. Alternatively, they may develop it at a time when it is completely curable. In the meantime, however, they have been denied an employment opportunity because of their genetic makeup.

ALRC/ AHEC Joint Inquiry

In May 2003 the Australian Law Reform Commission and the Australian Health Ethics Committee released a Report, following a three year Joint Inquiry into issues associated with the protection of human genetic information. The Report, entitled “*Essentially Yours: the Protection of Human Genetic Information*”, found that while there is currently only limited evidence of employment-related genetic discrimination in Australia, this is likely to change. The Inquiry predicted that as genetic tests become cheaper and more efficient, employers are likely to be placed under more pressure to use them to make employment-related decisions.

A Public Interest Issue

The incentives for employers to access employee genetic information are obvious. Such information could enable employers to “screen out” potentially less productive employees, thereby reducing costs associated with sick leave, absenteeism and staff turnover.

PIAC considers that there are compelling public interest arguments against employers being given free range to employee genetic information:

- genetic information is often uncertain and of limited predictive value. Usually the most that it can show is that an individual has a predisposition to developing a particular genetic disease. Whether or not they actually go on to develop the disease will ultimately depend on a complex interaction between their genes and environmental and lifestyle factors;
- ill-informed and unfair use of genetic information by employers may lead to the development of a “genetic underclass” of people who are permanently locked out of employment;
- the threat of genetic discrimination by employers may deter people from undergoing genetic tests that may be beneficial for their health;
- genetic discrimination may “spill over” into other forms of discrimination, such as race discrimination. For example, in the 1970s, the US Department of Defence only tested African American employees for sickle cell trait because this trait tends to be found mainly in people of African descent. Employees of other races were not tested.

Need for Regulation and Reform

The Joint Inquiry noted that there is currently little regulation of the

collection or use of genetic information by employers in Australia. Existing discrimination laws do not specifically cover genetic discrimination and it is unclear whether definitions of “disability” in these laws would encompass genetic predisposition. The protection of employee genetic information under existing privacy laws is also limited. The Joint Inquiry recommended:

- amendments to discrimination laws to ensure they cover genetic discrimination;
- amendments to privacy laws to ensure that employee records are protected to the extent that they contain genetic information;
- the establishment of an independent statutory body, the Human Genetics Commission of Australia, to oversee and regulate genetic testing.

In general, PIAC supports these recommendations. However, even if discrimination laws are amended to cover genetic discrimination, significant barriers may deter victims of genetic discrimination from using these laws. They include high costs of legal representation, onerous burdens of proof and adverse costs orders against unsuccessful applicants.

We also note recent attempts by State and Federal governments to reduce the powers and functions of specialist statutory bodies (eg, HREOC and the NSW Privacy Commissioner). We therefore have some concern about the potential effectiveness of a Human Genetics Commission.

It remains to be seen when (and if) these Recommendations will be implemented. In the meantime, the issue of genetic discrimination will continue to be closely monitored by PIAC.

Indigineus Justice Project

Shahzad (Shaz) Rind, *Solicitor*

The Indigenous Justice Project was initiated in 2001, with the financial assistance of PILCH member firm, Allens Arthur Robinson. The Project seeks to address Indigenous peoples' needs and concerns through a mix of legal advice, casework, policy interventions and community education. Shaz Rind was appointed as PIAC's inaugural Indigenous Justice solicitor.

Over the past 12 months, much of the work of the project has focused on discriminatory practices, primarily based on race. An elderly Indigenous woman who had suffered a stroke and consequently has slurred speech and a limp, approached PIAC for assistance with a complaint against a hospital. Our client had sought medical treatment at her local hospital where the doctor on duty made several remarks that she should "give up the grog". Despite our client's attempts to inform the doctor that she does not drink or smoke, he continued to make similar remarks in her presence and that of family friends, hospital staff and patients. The matter was settled with our client receiving damages and an apology.

Workplace race discrimination reared its head in a matter where fellow employees of our client displayed racist material on a work noticeboard. In resolving the matter, our client did not seek damages but requested the employer to draft and implement an equal opportunity policy (EEO), a grievance procedure and to appoint an employer contact for Indigenous personnel. The company has drafted an EEO policy and our client continues to be employed by the company.

In a case which considered the nature of age discrimination, where two young children of an Indigenous woman were denied access to a store, a complaint lodged with the Anti-Discrimination Board, was favourably settled. The store manager had argued that the children were denied access not by reason of their race, but allegedly because they were in a pram which he did not want in the store. The children were too young to walk and their mother was unable to carry them both while she shopped.

In a complaint of sex discrimination to HREOC against an Aboriginal corporation, our client was refused a

request for maternity leave and was subsequently dismissed from her employment with a Community Development Employment Program (CDEP). The CDEP corporation claimed she was not an employee and therefore not entitled to parental leave. After an unsuccessful conciliation, HREOC terminated the complaint and an application has now been filed in the Federal Magistrates Court.

An action in negligence has been commenced in the District Court against the Department of Corrective Services on behalf of a client whose son died in custody while in a correctional centre. Our client's son had been isolated and confined to an acute crisis section of the centre and committed suicide in his cell, soon after release from the crisis section.

Shaz is working with PIAC's Utility Consumers' Advocacy Program (UCAP) on a pilot project looking at indigenous peoples' access to water in NSW. The pilot will conduct consultations with three different Indigenous communities with a focus on issues such as access to water, affordability and quality of service. (See UCAP Report).

Correction from Bulletin 17

In the Litigation Update in our June edition of the Bulletin, we stated that the Full Federal Court in *Untan v The Minister for Immigration and Multicultural and Indigenous Affairs* upheld "Branson J's significant finding at first instance that Mrs Untan and her children were also owed a duty of procedural fairness".

This was incorrect as the Full Federal Court did not need to consider this question.

Litigation update

The impact of international law on the rights of children in detention was the focus of Amnesty International Australia's High Court amicus curiae intervention in the *Minister for Immigration & Multicultural and Indigenous Affairs (MIMIA) v B & B*. PIAC represented Amnesty. The appeal addressed the nature of obligations in Australian law, in particular, their impact on the jurisdiction of the Family Court of Australia, arising from the UN Convention on the Rights of the Child (UNCROC).

Amnesty argued that the ratification of UNCROC by Australia indicated that the legislature intended that the obligations under UNCROC be incorporated into Australian law, in this case, the Family Law Act. It also submitted that these obligations extended to the Family Court's jurisdiction to determine the welfare of children and ought to apply to all children in Australia, including unlawful non-citizens. Finally, Amnesty submitted that except in very limited circumstances, detention of children is a violation of Australia's human rights obligations.

The High Court reserved its decision. Felicity Hampel SC and Kate Eastman were instructed by PIAC.

In *NAVJ v MIMIA*, PIAC successfully represented a client seeking a Bridging Visa E provided to a "non-citizen" who, owing to a medical condition, cannot be cared for in detention. A prerequisite to obtaining the Bridging Visa E is that 'a medical specialist appointed by the Department of Immigration has certified that the non-citizen cannot properly be cared for in a detention environment.'

Our client made a number of applications to the Minister for a Bridging Visa E and requested him to authorise a medical assessment. The Minister failed to respond and refused the Bridging Visa E, arguing that the requisite medical assessment had not been carried out.

After a three month delay by the Minister, PIAC lodged an application in the Federal Court compelling the Minister to authorise the medical assessment. The Minister initially opposed the application but at the first directions hearing agreed to facilitate the assessment. The assessment was subsequently carried out and our client was granted a Bridging Visa E. Justice Sackville awarded costs against the Minister.

Racist bullying in schools was considered in *Director General, Department of Education & Training v FP and FQ on behalf of FR (EOD)*. At first instance, the NSW Administrative Decisions Tribunal (ADT) found that FR, a student of Korean origin, had been subject to racist bullying by students. Although the school had anti-bullying policies, these did not include race-based bullying. The ADT found discrimination on the grounds of race because FR had been denied access to a "benefit", namely an effective program of anti-bullying measures. On appeal, at which point PIAC represented the complainant, the ADT Appeals Panel found in favour of the Department on the basis that it had been denied procedural fairness in the Tribunal proceedings, and that the Tribunal had erred in its interpretation of the terms "access" and "benefit".

Despite the outcome, the matter highlighted racist bullying in schools and, in particular, the need for schools to implement comprehensive policies to deal with complaints of racist bullying. The Appeals Panel suggested that a school environment "poisoned by racial harassment" could potentially amount to racial discrimination if the response of school authorities is "inadequate".

PIAC is representing a client in a homosexual vilification complaint against John Laws, Steve Price and Radio Station 2UE. The complaint concerns a broadcast in June 2003 of the TV program *The Block*, a competition

between four couples, each of whom renovated an apartment in the same block. One of the couples was a male homosexual couple. Our client alleges that comments made by Laws and Price on 2UE about the homosexual couple incited hatred towards, serious contempt for, or severe ridicule of homosexuals, and amounted to unlawful homosexual vilification. Price allegedly said he didn't want to have to explain to his children "what a gay couple was" and that "Channel 9 shouldn't put a gay couple on TV at 6:30pm". The ADT will hear the matter in early 2004.

The accountability of government services was the focus of a Coronial Inquiry into the death of Jessica Gallacher, aged 4. PIAC, instructing counsel, James Hmelnitsky, represented Jessica's family. Jessica was killed by her mother's partner, William McGarrity. Mr McGarrity had a long history of mental illness and was living with Jessica and her mother at the time of Jessica's death. Two days before her death, workers from the Department of Community Services (DOCS) and the Central Coast Area Health Service (CCAHS) accompanied by police, attended Jessica's home with the intention of scheduling Mr McGarrity. Inexplicably, he was not scheduled.

The Inquest considered the action of DOCS and CCAHS in failing to schedule Mr McGarrity. Coroner Milovanovich found that the CCAHS had failed to implement policies preventing a similar event from occurring in the future. In contrast, he found that DOCS had investigated their actions, implemented policy changes and reviewed methods for assessing their effectiveness.

Coroner Milovanovich said that "the system had failed Jessica and the system had failed McGarrity". He indicated that he and other coroners would make submissions to the State government on the need for enhanced services to people with mental illness.

PILCH News and Views

Second national pro bono conference *Transforming Access to Justice*

The National Pro Bono Resource Centre, in conjunction with PILCH NSW, PILCH Victoria and QPILCH, convened the Second National Pro Bono Conference *Transforming Access to Justice* in Sydney in October 2003.

The conference was attended by almost 200 delegates from across Australia and overseas and provided an opportunity for delegates and speakers to share experiences, build networks and develop innovative responses to the legal needs of disadvantaged communities. Keynote speakers from the United States, South Africa, Argentina and England offered important insights and perspectives for Australian practitioners.



Martin Bohmer and Vincent Saldanha at the Global Pro Bono seminar.

Pro bono initiatives – a global perspective

PILCH member firm, Ebsworth & Ebsworth, hosted a PILCH seminar addressed by Prof Martin Bohmer, Dean of the Law School of the University of Palermo, Argentina and Vincent Saldanha, National Director of the Legal Resources Centre, South Africa. In Australia to address the Second National Pro Bono Conference, they spoke about their work as public interest lawyers and

developing pro bono initiatives in response to the challenges presented by societies undergoing transition. Martin and Vincent also addressed a PILCH Victoria seminar in Melbourne during their visit.

New Members

Corporate counsel and in-house legal departments can now become PILCH members due to a recent change to the PILCH Rules to expand the category of PILCH membership to include corporate law departments. We are delighted to welcome MLC Legal as our inaugural corporate member.

Breakfast Seminar for Corporate Counsel

Damian Murphy, General Counsel of MLC, hosted a PILCH breakfast seminar for corporate counsel during the week of the National Pro Bono conference. Esther Lardent, President of the Pro Bono Institute in Washington DC, a keynote speaker at the conference, addressed the breakfast, sharing with guests her extensive experience working with corporate counsel in America on pro bono initiatives.

Practising in the Public Interest

The PIAC/PILCH *Practising in the Public Interest* course aims to foster a pro bono culture amongst law students as they enter the legal profession. The course is held twice a year with five NSW-based partner universities. In July 2003 PIAC and PILCH conducted a Winter School in conjunction with the University of Western Sydney and Macquarie University, hosted by PILCH member firm PricewaterhouseCoopers Legal.

In February 2004 PIAC and PILCH will conduct the PIPI Summer School in conjunction with the University of Sydney and the University of

Wollongong. Students participating in the course continue to benefit from placements with law firms and organisations that undertake public interest and pro bono work. Dean of Macquarie Law School, Professor Ros Atherton wrote to PIAC saying that "PIPI has proved a wonderful opportunity for students and a great partnership."

PILCH Secondees

Secondee solicitors continue to play a vital role in operating the PILCH assessment and referral scheme as well as assisting with PILCH projects and promotional activities.

Shyama Chatterjee, solicitor from Allens Arthur Robinson, completed a three month secondment in November 2003. Our current solicitor, Graeme Edgerton from Gilbert + Tobin completes his secondment in February 2004 and will be followed by a solicitor from Freehills.

PILCH is currently seeking secondees for the remainder of 2004. If you are able to provide secondees to PILCH, or have any queries in relation to secondments, please contact Sandra Stevenson or Andrea Durbach at PILCH on 02 9299 7833.

PILCH Referrals

Discrimination/human rights

Barrister, Sarah Pritchard represented families of two Indigenous men suffering chronic organic brain syndrome who were institutionalised in inadequate and culturally inappropriate settings. Complaints of race and disability discrimination were successfully conciliated.

Minter Ellison assisted a community legal service with a sex discrimination matter in the Northern Territory Anti-Discrimination Commission.

Allens Arthur Robinson advised a family support service in relation to a privacy complaint. **Philips Fox** provided advice to a community legal centre regarding the publication of precedents in *habeas corpus* proceedings.

Kate Eastman, barrister, is advising a coalition of community organisations on a discrimination complaint arising from photo identification requirements.

David Robertson, barrister, represented the family of a child alleging race discrimination arising from school-yard bullying.

Management and governance

Holding Redlich advised an environmental organisation in connection with its obligations regarding the disbursement of donated monies. A non-profit arts organisation winding up its operations, received assistance from **Ernst & Young, Ebsworth & Ebsworth** provided legal advice to a peak community organisation on its memorandum and articles of association. **Graham Jones Lawyers** reviewed the constitution of a non-profit childcare organisation.

Freehills provided advice to a community transport organisation on a subcontracting agreement. **Carroll & O'Dea** assisted a peak community services body on the development of a plain English policy on fraud prevention. **Blake Dawson Waldron** is advising a community organisation on the establishment of a foundation.

PriceWaterhouseCoopers Legal, Ebsworth & Ebsworth and The Seidler Law Firm advised three non-profit community organisations in respect of their lease agreements. **Allens Arthur Robinson** reviewed and negotiated the lease of a community legal centre.

Gilbert + Tobin provided advice to a community recycling organisation in relation to a dispute. **Makinson d'Apice** advised a tenancy organisation on contractual issues relating to a rights manual for tenants.

Workplace issues

Blake Dawson Waldron advised a community organisation operating family support services and a neighbourhood centre seeking to review and redraft its employment contracts.

Harmer's Workplace Lawyers provided employment advice to a group concerned with the housing and employment needs of low income and low skilled people.

Maddens Commercial Lawyers provided advice to a community sector body regarding the content of its website advertising volunteer opportunities. **Freehills** advised a community legal centre on employment contracts.

Funding

Mallesons Stephen Jaques assisted a disability information and referral service with its funding arrangements and management structure.

Coudert Brothers provided advice to a student representative body and **Gilbert + Tobin** advised and represented members of an organisation providing supported accommodation for people with intellectual disabilities.

Henry Davis York drafted an agreement for a non-profit organisation in relation to a fundraising event.

Tax

Corrs Chambers Westgarth assisted a welfare rights organisation with an application for deductible gift recipient status. A women's health centre was

advised by **Blake Dawson Waldron** on its constitution and tax status.

Kate Richardson, barrister, is assisting an individual in relation to an appeal against a decision of a regulatory body. **Acuiti Legal** is helping a community organisation to seek tax exemptions.

Refugees/immigration

Nye Perram, barrister, advised an asylum seeker regarding the legality of his transfer from detention to gaol.

Henry Davis York and RL Whyburn & Associates are assisting a number of asylum seekers in relation to habeas corpus proceedings.

Trademarks

Tress Cocks & Maddox advised a peak body representing neighbourhood centres on a trademark issue. A suicide prevention organisation received trademark advice from **Baker & McKenzie**.

Environmental/planning

Etheringtons Solicitors advised a residents' action group on the sale of Crown land.

Other matters

Holding Redlich assisted an individual seeking redress for property lost during the course of his detention.

Mark Brabazon, barrister, provided assistance to a health centre in relation to a subpoena.

John Thompson, barrister, advised a community legal service in respect of the merits of a negligence action by a former state ward.

James Stevenson SC advised on a High Court special leave application arising from alleged contractual breaches by a financial institution.

Human rights in Australia: Who do we look to for their protection?

Annie Pettitt, *Policy Officer*

Government attacks on human rights principles and practices, including anti-terrorism legislation, multiple amendments to the *Migration Act*, changes to Native Title legislation and the *Workplace Relations Act*, and attempts to erode the Human Rights and Equal Opportunity Commission's powers and independence, highlight the fragility underlying human rights protection in the Australian legal system.

What is perhaps of even greater concern, is that the strongest check against Government intrusions on human rights – those in Opposition – are increasingly toeing the party line and crossing the floor to support Government policy. The following three recent examples illustrate this trend.

As recently as November 2003 the Federal Government introduced legislation into parliament to increase the Australian Security Intelligence Organisation's (ASIO) powers. If passed, the maximum time for interrogating detainees from non-English speaking backgrounds will double from 24 hours to 48 hours. The Government has argued that the additional time is required for interpreting delays. The new measures will also give ASIO the power to seize the passports of foreign nationals to prevent them fleeing the country.

In addition, the new powers will make it an offence for detainees and their lawyers to disclose any information about the interrogation for two years. This provision will severely limit public comment and discussion of the implementation of the legislation. Labor's Shadow Attorney-General, Robert McClelland, indicated that the proposed measures "may well be propositions that Labor could support." (SMH, 26/11/03, p1).

Indeed, on 6 December, following Senate endorsement of amendments to the

ASIO Act 1979, Labor Senator John Faulkner said: "They address a limited number of technical flaws ... identified. They don't change the framework at all of the legislation."

The new, expanded powers arguably constitute a breach of several fundamental human rights – the right not to be detained without charge, the right not to be discriminated against on the basis of race, ethnicity or language, the right to freedom of expression and freedom of movement.

Secondly, the Government's secrecy and deception surrounding asylum seekers and the, so-called, 'Pacific Solution' continues. The Government misled the Australia public in November 2003 by having us believe that the 14 Kurdish asylum seekers who clearly sought refuge in Australia, did not claim asylum when they landed on Melville Island. Moreover, the Government rushed through regulations excising Melville Island from Australia's migration zone, which effectively barred the 14 and future asylum seekers from seeking protection under Australia's migration legislation.

Both the Greens and the Democrats moved quickly to seek a disallowance of the regulations in the Senate. The Greens were however unable to convince Labor to deal with a motion to disallow the regulations some three days after they were passed. Opposition Leader (as he then was) Simon Crean, declined to comment on this insidious move by the Government "before a briefing." Almost three weeks after the regulations were passed, Labor finally saw fit to join forces with the minor parties to overturn the regulations.

At every opportunity, the Government attempts to circumvent international and domestic law in its treatment of asylum seekers and refugees. Australian Democrats Leader, Andrew Bartlett, has

argued: "The Government's insistence that it is not breaking international law is a joke. Towing asylum seekers back out to sea and refusing to assess their claims for protection is a flagrant breach of international law, as well as common decency and humanity. We are not meeting our obligations; rather the Government is wasting millions of dollars trying to avoid them." (Australian Democrat's Press Release, 11 November 2003).

Finally, the Federal Government recently demonstrated its disregard for international human rights standards, despite being a signatory to the International Covenant on Civil and Political Rights. In August 2003 the United Nations Human Rights Committee (UNHRC) found that a Sydney man who was the surviving and dependant same-sex partner of a war veteran, should be entitled to a war pension as would be the case for a heterosexual "member of a couple." The Government, in denying a pension under the Veterans' Entitlement Act, was found to have breached its international obligations not to discriminate. A spokeswoman for the Veterans' Affairs Minister, Danna Vale, said that: "the Government takes its human rights obligations seriously, both internationally and domestically." The Government has however failed to respond to the UN determination within the requisite 90 days.

While Australia has a long history of promoting the protection of basic human rights internationally and domestically, the current Federal Government continues to undermine and breach these protections. The record of the Opposition is regrettably less and less impressive in this regard.

Policy Report

Protecting human rights

PIAC has obtained funding from The Myer Foundation for the production of a human rights education kit, the first stage of our Protecting Human Rights Project. Annie Pettitt has commenced work on the kit, which explains in plain language which human rights are protected and which have been eroded in Australia, and introduces options for more effective protection through a Charter or Bill of Rights. The reference group for the project includes representatives from Australian Lawyers for Human Rights, Community Legal Centres, HREOC, the Gilbert + Tobin Public Law Centre, ACOSS, the Australian Education Union, the Community and Public Sector Union, Jumbunna Indigenous House of Learning, the YWCA, Women's Electoral Lobby, the Uniting Church, the Australian Federation of Islamic Councils, the Australian Youth Affairs Council, and the National Association of Community Legal Centres National Human Rights Network.

We hope to complete the kit early in 2004. Stage Two of the project, yet to secure funding, will see the kit used to train 60 community trainers who will in turn conduct training in their local communities. Stage Three will focus on policy development and advocacy work with political parties and key stakeholders.

Principal Policy Officer Pat Ranald was funded by the Australian Manufacturing Workers Union to write curriculum materials for a course on Globalisation and Human Rights for their organisers. The topics include global inequality and global trade, the influence of transnational corporations and institutions like the United Nations and the World Trade Organisation. The course aims to empower participants to develop strategies to advance workers' rights and human rights through building links in Australia and internationally.

Transparent and accountable medical disciplinary processes

The need for medical disciplinary processes that can protect consumers more effectively was dramatised recently by media publicity about the case of an anaesthetist who was permitted to continue practising despite complaints about his drug addiction. He was only identified publicly and deregistered after a patient died. PIAC has developed a project which will examine medical disciplinary processes from various perspectives with the object of addressing ways in which they can be made more transparent and accountable. We are currently seeking funding to progress the project.

US Free Trade Agreement Statement of Concern

On 24 November the Australian Fair Trade and Investment Network (AFTINET) held a media conference at NSW Parliament House to launch a statement of concerns about the US Free Trade Agreement. The statement calls upon the government to exclude social, health environmental and cultural policies from the agreement and to submit it to full debate and voting by the Federal parliament. 61 organisations and many individuals have endorsed the statement.

The conference was hosted by Dr Meredith Burgmann, President of the Legislative Council and facilitated by Tina Bursill. Speakers included actor, John Howard, Maree O'Halloran, President of the NSW Teachers Federation, Megan Mitchell, Director, ACOSS, Bishop Pat Power, Australian Catholic Social Justice Council, the Rev. Harry Herbert, UnitingCare, Peter Trebilco, Public Health Association of Australia, Dr Robert Marr, Doctors' Reform Society and Georgia Miller, Environment Liaison Officer for ACF and Greenpeace. The USFTA negotiations are entering a critical time

with the final round scheduled for the first week of December, and the Minister indicating that the latest date for signing would be mid-January. For the statement and more information go to www.aftinet.org.au.

Protecting privacy

Major reforms to privacy protection, including abolition of the Office of the Privacy Commissioner, were proposed by the NSW Government in October 2003. PIAC took its concerns with the *Privacy and Personal Information Amendment Bill 2003* to the NSW Parliament's Legislative Review Committee and non-Government members of Parliament. The Committee's Final Report echoed the concern of PIAC that the proposed changes to privacy laws would have detracted from the public interest. PIAC's Anne Mainsbridge and Jim Wellsmore met with the Shadow Attorney-General, Andrew Tink and also raised certain issues with representatives of the minor parties in the Legislative Council. Ultimately, the Opposition and the minor parties combined to block passage of the Bill through the Upper House. PIAC now expects the Government to review privacy protections as required by the *Privacy and Personal Information Protection Act 1998*.

ADB funding crisis

In response to a severe reduction in funding of the Anti-Discrimination Board, PIAC wrote to the NSW Premier and Attorney on behalf of a number of organisations. PIAC and other organisations, have represented clients who have had to wait up to 18 months for their discrimination complaints to be investigated. We are concerned that the funding cuts will only exacerbate these delays and lead to a slowing of policy initiatives required to redress this situation. At a meeting with the NSW Attorney General, the Hon Bob Debus said that while the cut was unfortunate, a number of reforms to the ADB would lead to a reduction in delays.

UCAP Report

Jim Wellsmore and Trish Benson, *Utility Consumers' Advocacy Project*

Household energy and regulation

The cost of electricity has remained a major issue for UCAP. The NSW Independent Pricing and Regulatory Tribunal (IPART) was expected to release its draft determination on electricity distribution pricing prior to Christmas. PIAC has continued to participate in the broad consultative processes undertaken by the Tribunal. Key issues have been discussed both with the Tribunal secretariat and key stakeholders in the community and industry. The UCAP Reference Group, comprised of a number of key community organisations, has provided important policy input.

Particular concerns have been expressed concerning proposals for 'two-step' or block tariffs and the introduction of locational pricing —raising prices for people in some areas and lowering them in others.

PIAC continues to argue that the distribution industry (the poles and wires elements of the supply system) must do more than continue to build new assets which are funded by higher prices. The alternative which has been raised with industry and the Tribunal is a greater effort in demand management.

Innovative research commissioned from the Institute of Sustainable Futures has pointed to the need for the Tribunal to change the rules of economic regulation of electricity distribution. This would address the current bias in regulation toward continued building of new, costly infrastructure.

The maximum retail prices of electricity and gas will be the subject of public consultation commencing early in 2004.

Again, a final decision will come in the form of a determination made by the independent Tribunal. In spite of retail energy currently operating as a competitive market it is expected that considerable pressure will be mounted for increases in the maximum prices charged to households.

The way in which maximum prices and other important consumer protections are fixed may undergo dramatic change in the near future. Currently a number of state and territory governments are pursuing the establishment of a national energy regulator. This would assume many of the functions of current state-based bodies such as IPART. Precisely which functions and customer protection decisions will be handed over are yet to be determined. PIAC is anxious to see that a new structure does not lead to reduced protection for NSW households.

Restrictions on water

Price is a current topic for Sydney households in their use of water. The Minister for Energy and Utilities, the Hon. Frank Sartor, has requested the NSW Independent Pricing and Regulatory Tribunal (IPART) to undertake a review of the level and structure of prices for household water use. Any changes would be aimed at encouraging Sydney households to reduce their per capita consumption of water. A number of proposals to use higher prices in this way have been made in the recent past. PIAC will play a key role in ensuring the outcomes of the review are both effective and equitable. Any final decision on new prices for Sydney households will rest with the Tribunal.

The Minister also has introduced mandatory restrictions on water use for homes and businesses in the wider Sydney metropolitan area. This was in response to the problem of the wider Sydney community continuing to use more water than can be sustained by the environment in the longer.

Unfortunately, the restrictions were introduced without community consultation. It remains an open question as to whether a system of fines can be effective in reducing per capita usage. PIAC was, however, consulted by Sydney Water on the guidelines developed for their staff in policing the new restrictions and issuing fines.

Access to water is the subject of two new policy projects within PIAC. The first is a discussion paper examining access to water as a human right. A contribution to this paper will be made by the Environmental Defenders Office (EDO). The second is a larger research project looking into the current provision of adequate, safe drinking water to Indigenous communities in rural NSW. UCAP staff, in collaboration with PIAC's Indigenous Solicitor, Shaz Rind, have begun a scoping study.

Social impact in utilities

PIAC has commenced a research project into the social impact of withdrawal of supply of energy and water services. This will examine the impact on households of disconnections or restrictions in supply initiated by utility companies where, for example, people experience difficulty in paying utility bills. A literature review has been completed and a full study of disconnections will be commissioned early in 2004.

PIAC Training News

Carolyn Grenville, Training Co-ordinator

PIAC training – a brave new world

At PIAC we strive to bring you high quality, affordable training in the knowledge and practical skills needed to be an effective advocate, whatever your issue or cause.

PIAC has been a Registered Training Organisation since 1999. Last year our registration was extended until 2007. This means that PIAC has complied with a set of standards that are the basis for high-quality, national vocational education and training.

PIAC delivers public and in-house training programs including our nationally accredited advocacy course *Work the System: an introduction to advocacy*. The NSW Vocational Education and Training Accreditation Board accredited the course in 1999.

With re-accreditation of the course due in 2004, PIAC is now facing the challenge of how we can take *Work the System* into the new and changing world of Vocational Education and Training. In particular we are hoping to develop our training program so that we can offer our course participants the option of undertaking more substantial assessment to earn a unit of competency in systems advocacy. Participants can then use the unit of competency to count towards a nationally recognised formal qualification such as a certificate or diploma. Watch this space!

Partnerships in training

Cancer Council NSW

2003 has seen PIAC form an exciting partnership with the Cancer Council NSW to train consumer advocates.

The Cancer Council NSW recognises that cancer patients and carers have a valuable role to play in campaigning to reduce cancer risks and improve services. Advocacy activities include lobbying to restrict smoking in public places, promoting population-based screening programs and education on other ways of being cancer-smart.

PIAC has been working with the Cancer Council to give consumer advocates the skills and knowledge to become active and effective advocates for improved health policies and systems. To date a total of 45 cancer advocates from around NSW have attended two intensive two-day training courses.

At the courses consumer advocates raised the following needs:

- improved access to radiotherapy treatments
- population-based screening for bowel cancer
- promotion of patient focused health care delivery, and
- development of a cancer program for the Spanish speaking community.

In March 2004 we will be presenting the training in Orange for local consumers.

Our Strong Women

PIAC is again partnering with the National Network of Indigenous Women's Legal Services Inc (NNIWLS), to take the next step in Indigenous women becoming self-sufficient in running leadership and advocacy training.

During 2002-2003 the *Our Strong Women – Indigenous Women, Law and Leadership* project was highly successful, with 200 Indigenous women across Australia completing two-day training workshops

in eleven locations around Australia.

We have applied for funding for 2004 to develop a training kit that is tailored and relevant for Indigenous women and trial it at two NSW workshops. The longer term aim is to train members of the NNIWLS to run the advocacy and leadership training themselves, for their own communities.

PIAC acknowledges the hard work of Libby Carney, former *Our Strong Women* Project Coordinator, and Denese Griffin, NNIWLS Coordinator, together with the many Network members who organised *Our Strong Women* workshops in their own regions. We congratulate the NNIWLS on all they have achieved in the past few years and wish them well in their future pursuit of social justice for Indigenous women and Indigenous people.



Participants at the Canberra *Our Strong Women* workshop in May 2003

2004 training

PIAC's training calendar for early 2004 will be announced in late January. Our public courses, *Work the System* and *Effective Advocacy Skills and Strategies* are scheduled for March and April.

If you would like to receive notification of PIAC's upcoming public training courses, please contact Sarah Mitchell or Carolyn Grenville at PIAC on 02 9299 7833. To join PIAC's mailing list either call PIAC or send us an email with your details to piac@piac.asn.au.



Board News

At PIAC's Annual General Meeting, held in October, Elizabeth Evatt AC was re-elected as Chair of the PIAC Board and Annette O'Neill, the NSW Law and Justice Foundation nominee, was re-elected as the Vice-Chair of the Board. A full list of PIAC's Board of Directors

appears on the next page.

As always, PIAC's Board has provided incredible support to the staff over the year and has implemented some important initiatives to enhance PIAC's overall effectiveness. The Board have

established Audit and Risk Management and Governance sub-committees which are addressing issues such as internal financial controls and risk management systems, performance assessment of PIAC and the Board, structure and accountability.

Staff News

The past six months have been a very productive time for PIAC and this is due, in no small way, to the contribution of the many secondees, placements and volunteers that have been assisting PIAC staff in their work.

Freehills generously agreed to extend the secondment of PILCH secondee, Clare Wiseman, for an additional 3 months to assist PIAC's legal practice while PIAC Senior Solicitor, Alexis Goodstone, was on leave. Clare's expertise in human rights law and her energy and enthusiasm greatly contributed to PIAC's legal work particularly in relation to refugee matters. Our thanks to Freehills for their extraordinary contribution to PIAC and PILCH's work.

In November, PILCH appointed a part-time Project Development Officer, Catherine Duff, for a 12 month term. Cath will be assisting PILCH Solicitor Sandra Stevenson in designing and

implementing PILCH projects, a communications plan and will also be involved in the running of PILCH seminars and conferences.

As always, PILCH member firms have made an enormous contribution by seconding solicitors to PIAC and PILCH to assist with projects and matters. Minter Ellison, Allens Arthur Robinson and Gilbert + Tobin have all assisted with seconding solicitors to PILCH for a period of 3 months. PILCH thanks these firms and Marcel Savary, Shyama Chatterjee and Graeme Edgerton for their work.

This year, PIAC and PILCH have been fortunate to secure two additional secondee solicitors and a Summer Clerk from Minter Ellison. Judith Levitan, Kristen Howden and Cynthia Li have all worked on developing the Homeless Peoples' Legal Project. Judith conducted the legal needs analysis and feasibility study which led to the PIAC and PILCH

Boards approving the establishment of the Service.

To support the work of the refugee practice of the litigation team, Theresa Baw from Minter Ellison and Nick Furlan from Freehills have volunteered for 1/2 day per week to assess the legal situation of a number of asylum seekers who are presently in detention, investigating their circumstances for a possible habeus corpus applications.

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

Our most recent College of Law placements, Farhana Islam and Vanessa Liu provided excellent support to the litigation team from July to December. Melissa Bromley, a student from the University of Sydney Law School, worked with PIAC lawyers as part of her clinical studies course.

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