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This brave new world: contemporary governance and the 'war on terror'

Jane Stratton, Policy Officer

Introduction

On 3 November 2005, the Anti-Terrorism Bill (No 2) 2005 (Cth) (the Bill) was tabled in the House of Representatives. This Bill will impose upon Australia momentous changes to the balance of powers between the Executive, the Parliament and the Judiciary that may never be reversed.

This Bill ought to serve as a wake-up call to each of us in the Australian community not only because of its substantive provisions, but because of the *way* in which the Federal Government has gone about achieving its ends.

It is a litmus test of Australian democracy, our common regard for freedom, and our attitude to fundamental rights for ourselves, for our families, for our neighbours, for members of our communities, and most tellingly of all, for those of whom we are afraid: 'terrorists'.

Anti-Terrorism Bill (No 2) 2005 (Cth)

The Prime Minister announced a twelve-point plan for new terrorism laws on 8 September 2005[1] in the lead-up to the Council of Australian Governments (COAG) meeting. A number of the proposals, specifically preventative detention proposals and policing powers, require the co-operation of States and Territories for constitutional and practical reasons.

On 14 October 2005, the ACT Chief Minister, Jon Stanhope, released a draft of the Anti-Terrorism Bill 2005 (Cth) for public comment and scrutiny.[2] Had he not, there would have been no public disclosure of the proposed legislation until its tabling in Federal Parliament.

PIAC's concerns about the current Bill are discussed below.

The lack of justification

The terrorist threat assessment in Australia was set at 'medium' on 12 September 2001, following the terrorist attacks in the United States. Australia's threat assessment remains at 'medium', consistent with advice from the 'competent authorities'. What, PIAC asks, has changed such that these laws must be passed, and more particularly, that they must be passed by Christmas? If there is a change in the threat environment, why has the Government failed to share that information with the Australian public, and re-assessed the current threat assessment?

The utility is questionable

Not only are the public not being entrusted with information about what it is we are being protected from, we are also not to have the benefit of public justifications as to why *this particular* model of regulation will have the preventive effect the Government claims. As members of the Australian

This article was finalised on 9 November 2005 and does not take into account any changes to the law subsequent to that date.

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From the CEO

This time of year inevitably brings the opportunity to reflect on the past year and its achievements for the organisation. In finalising PIAC's Annual Report (available on the website at piac.asn.au/publications), I had an opportunity to think about what the year had thrown up in terms of public interest challenges and also to think about what might be the emerging public interest issues not only for PIAC but all organisations concerned about access to justice and equity in society.

Along with other community legal centres and legal aid providers, PIAC continues to be challenged by the limited access to the means to exercise legal rights and protections that should sit at the core of an effective legal system. We have also been challenged by the extraordinary measures being proposed by the Federal Government to counter the threat of terrorism and the very significant potential those laws have to impact on communities and rights well beyond that particular focus.

So what might the next five to ten years hold. It is increasingly likely that individuals and communities in Australia will feel, in real terms, the impact of globalised markets through limits on local 'sovereignty', the focus on economic interests, effects of marketisation on essential services, and significant changes to industrial and employment rights. With such globalization, we are also likely to be increasingly challenged by unintended negative impacts of technological advances. Already, the capacity to use genetic testing to identify people at risk of particular diseases, illnesses or disabilities is raising the spectre of people being excluded from work and insurance protection on the basis of a potential future disability. We also face the challenge of how to ensure equitable access to the benefits of medical advances in light of the escalating costs to the health system that such advances create.

Hand in hand with these issues are questions about the increasing power of corporations and appropriate mechanisms to regulate such entities through, for example, recognition of interests beyond the purely economic interests of shareholders. There is a need to develop new ways to understand corporations and to ensure a clear distinction between the rights of the person and those rights that should properly flow on to corporations as 'persons' in a legal sense.

One of the core rights of individuals in a democracy is to have effective mechanisms for participating in the democratic process through voting and standing for public office. Increasingly, however, there is a trend to either actively disenfranchise voters, as we have seen in relation to prisoners, and to remove citizenship obligations. It is becoming more and more difficult for individuals without economic power to be heard by those elected to represent them. The drive for economic outcomes means that often it is corporations rather than individuals that are heard. This is a very real challenge, not only in Australia, but one faced in many western democracies.

It is important that we not see these changes and challenges as simply part of the inevitable process of change through development. Ideally, development should bring shared benefit to the whole community, it should strengthen communities and society and should create opportunities. This is our challenge: to realise those benefits for the whole community.

Health

PIAC has a history of working in the area of consumer health rights and has worked most recently on health privacy, electronic health records and open disclosure of medical errors. However, in the past couple of years health consumer issues have not been a focus of PIAC's work because of other demands.

Earlier this year PIAC made a decision to allocate funding from its Public Justice Project to employ a Solicitor – Health Policy and Advocacy on a full-time basis for two years to undertake policy and research in the area of health rights, as well as related training, legal advice and case work. The aims of PIAC's health project are:

- to make the health care system more accessible and transparent for health consumers;
- to ensure delivery of appropriate quality of health care services for people in various institutional settings;
- to ensure appropriate care and treatment of people with mental illness that respect the dignity and rights of the individual;
- to improve the interaction of the legal and health systems to ensure human and health rights are upheld.

In December 2005, Carol Berry will take up the position as PIAC's Solicitor – Health Policy and Advocacy. Carol comes to PIAC from Sexual Health and Family Planning Australia where she was the National Projects Officer.

Detention

Mother Wins Death in Custody Case

Charmaine Smith, Solicitor

The District Court of NSW recently awarded damages to the mother of young Aboriginal man who committed suicide in Cessnock Correctional Centre (the Centre). The young man had a history of psychiatric illness and previous attempts at self-harm which resulted in him being placed in the Acute Crisis Management Unit (the ACMU) of the Centre.

On the day of his release from the ACMU, the young man was placed into a cell on his own. The cell contained a bed supported by four moveable milk crates and various accessible hanging points.

There was little monitoring or supervision of the cell by correctional staff, who had not been informed of his circumstances.

Within hours the young man had taken his life.

The Public Interest Advocacy Centre represented Mrs Appleton in the District Court of NSW (*Veronica Appleton v State of New South Wales*) and sought a finding of negligence against the Department of Corrective Services. In her decision dated 28 July 2005, Judge Quirk held:

"In my view the defendant breached its duty of care in not taking any further precautions to prevent impulsive self-harm by [the young man] *after his discharge from the ACMU and in particular by placing him in a cell with easy and immediate access to a hanging point by moveable milk crates... I also find that not monitoring him or assessing him in some fashion and placing him in a cell alone amounted to breaches of its duty."*

Judge Quirk found that Mrs Appleton suffered Post Traumatic Stress Disorder as a result of her son's death and awarded her judgement in the sum of $50,970.00.

The decision strongly highlights the need for a greater commitment from the Department of Corrective Services to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Children in Detention Advocacy Project

Anne Mainsbridge, Senior Solicitor

The right to liberty is a fundamental human right. According to Article 9 of the *International Covenant on Civil and Political Rights* everyone has the right to liberty and security of person and no one is to be subjected to arbitrary arrest and detention. Despite this, many children are arbitrarily and unnecessarily detained each year in Australia by law enforcement agencies and private security companies.

A joint initiative of the Public Interest Advocacy Centre (PIAC), the Public Interest Law Clearing House (PILCH) and Legal Aid NSW, the Children in Detention Advocacy Project seeks to challenge the unlawful and unnecessary detention of children in the criminal justice system, and provide *pro bono* or legally aided services to people, who as minors, were allegedly unlawfully detained by law enforcement agencies, or private security companies.

The Project is currently dealing with over 20 matters involving allegations such as false imprisonment, malicious prosecution and battery. Most of these matters have been referred by PILCH to PILCH member law firms and barristers. Other matters are being dealt with by PIAC, Legal Aid NSW and Community Legal Centres.

Lawyers involved in the Project met recently to discuss issues arising from current cases and to identify potential areas for policy and advocacy work. A number of systemic deficiencies within the criminal justice system administration were identified as contributing to the unlawful and unnecessary detention of children.

These include:

- Failure by relevant authorities to updaterecords relating to bail conditions.
- Defective record-keeping practices in relation to warrants, resulting in minors being arrested on the basis of warrants that have been recalled or are deficient in some other way.
- Inappropriate bail conditions that require minors to reside as directed by Juvenile Justice or the Department of Community Services.

Strategic policy and advocacy work is planned, aimed at addressing these practices.

It is also intended to broaden the scope of the Project by approaching Aboriginal Legal Services in metropolitan and regional areas.

For further information about the project, please contact Anne Mainsbridge, Senior Solicitor, at PIAC on (02) 8898 6516 or amainsbridge@piac.asn.

This brave new world

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community, each of us has a common interest in seeking to prevent terrorism. However, the Government is yet to mount a public and detailed justification as to why *this* model will achieve that aim. The Government says that these laws are necessary in the wake of the July 2005 London bombings. Yet similar laws were in place in the United Kingdom before those bombings took place and can hardly be said to have effectively prevented those attacks. It is yet to be publicly demonstrated by the Government that an approach that depends upon coercive powers and criminal liability should be adopted in Australia. We ought to be investing more in understanding the threats we are said to face, rather than creating more criminal offences and affording the Executive and its agencies more intrusive and coercive powers.

Irresponsible governance

It is irresponsible to introduce a Bill that is widely recognised as draconian and exceptional without adequate public and Parliamentary scrutiny and before having responded to the reviews of the efficacy and operation of existing counter-terrorism laws in Australia. There are two reviews currently underway of existing counter-terrorism legislation, neither of which have yet reported.

The Parliament should not be asked to consider any further laws to counter terrorism before the reviews of existing legislation are completed and understood. How can anyone plausibly claim that new powers are needed before the efficacy and operation of the existing legislation has been assessed?

The folly is compounded by the speed with which the Government is seeking to exploit its majority in Parliament. The Bill was referred to the Senate Legal and Constitutional Legislation Committee with a very short reporting deadline of 28 November 2005.

A question of trust

The Government wants to grant itself extraordinary powers. People who have not committed any crime can be detained preventively for up to fourteen days. They may be the subject of 'control orders' which could require that a person be detained in their home, or wear an electronic tracking device for continuously renewable periods of up to 12 months. The Government seeks these powers without effective judicial oversight and safeguards for individual liberties. Although judges are part of the Government's Bill, they will not exercise powers as a court in the ordinary way. Judges will be asked to act as an additional decision-maker in the issue of control orders, either confirming, revoking or varying order that are already in effect. They will be asked to issue preventive detention orders in their personal capacities, and will not exercise judicial oversight of the implementation of preventive detention orders, with the exception of constitutional writs. Instead, the Administrative Appeals Tribunal will consider preventive detention orders after they are no longer in force, and may award compensation if a person was wrongfully made subject to such an order.

That means that the independent, judicial authority that we expect judges to hold, as a check on the power of the Parliament and the Executive, will not operate.

The Government is asking us to trust its Ministers, its bureaucracy and its intelligence. In light of the Government's treatment of Rau, Alvarez-Solon, the recent deportation of peace activist, Scott Parkin, on 'national security grounds', and the complete intelligence failure over weapons of mass destruction, is this a Government that deserves our trust to this extent?[3]

Australia's counter-terrorism legislative framework is commonly acknowledged as an exceptional suite of legislation. It is proper that it be subject to the strictest standards of review because it gives to the Executive extraordinary powers and diminishes the rights and freedoms of each of us.

Australians should value the relative security we enjoy, and protect it. Part of protecting our security is to be vigilant against politicians who seek to make political hay under a fearful sun. We ought to demand that our politicians, as legislators, act dispassionately, upon sound evidence, and in accordance with fundamental human rights.

PIAC is working to ensure that the Government's responses to terrorist threats are justified and that as the Government claims, its counter-terrorism measures are 'evidence-based, intelligence-led and proportionate'.[4]

Notes

1 Prime Minister John Howard MP, 'Counter-Terrorism Laws Strengthened', (Media Release, 8 September 2005) <www.pm. gov.au/news/media_releases/media_Release1551 .html> at 8 September 2005.

2 See <http://www.chiefminister.act.gov.au/whats_new.asp?title=What's%20New> at 14 October 2005.

3 Laurie Oakes, *Liberties Overboard* (2005) The Bulletin <http://www.bulletin.ninemsn.com.au/bulletin/site/articleIDs/6DC3AF979D77B8B 4CA2570A4000F62B1?open&ui=dom&template=domBulletin> at 26 October 2005.

4 COAG Communiqué, 27 September 2005, <www.coag.gov.au/meetings/270905/> at 28 September 2005.

Access to Justice

Not such a Fine Thing — The impact of fines on disadvantaged people

Emma Golledge, HPLS Co-ordinator

An unmistakable trend has been evident to the Homeless Persons' Legal Service from its inception: people experiencing homelessness had lots of fines, many reaching thousands of dollars.

On-the-spot fines and court-imposed fines are now an accepted part of the legal system, utilised as a way of dealing with minor infringements such as public transport offences and minor criminal matters. However, for people living in poverty, the impact of mounting financial penalties that they cannot afford to pay can be severe.

Through consultations with agencies that work with clients who feel the impact of fines, HPLS identified the key areas compounding disadvantage and has developed proposals for change.

A reccurring theme in the consultations was the often inappropriate issuing of public transport fines to vulnerable groups. This included people with intellectual disabilities and people with mental illnesses.

HPLS has also identified that complex fine-enforcement processes decreases the likelihood that the fine will be resolved quickly and driver's licence suspension averted.

HPLS notes that many people issued with fines are unaware or reluctant to pursue their rights to contest the fine at court, especially when the individual is economically and socially disadvantaged. As courts are a key area of ensuring accountability, HPLS has also made recommendations to increase the access of these groups to the court, with the aim that fines matters can be resolved earlier.

The Homeless Persons' Legal Service will use the Report to argue for changes to the issuing and enforcement of fines as well as to the way in which fines matters are dealt with at court.

For a copy of the report contact homelessproject@piac.asn.au.

High Court upholds restriction of publication of legal information

Simon Moran, Principal Solicitor

PIAC represented the NSW Combined Community Legal Centres Group Inc and Redfern Legal Centre as *amici curiae* in *APLA & Ors v NSW Legal Services Commissioner & the State of NSW*.

The Australian Plaintiff Lawyers' Association (APLA) challenged the validity of Part 14 of the *Legal Professions Regulation 2002* (NSW) (the Regulation) made under the *Legal Professions Act 1987* (NSW). This Part makes it an offence of professional misconduct for a legal practitioner to publish an advertisement, which is broadly defined, that have a connection with personal injury.

The *amici* were concerned that the Regulation significantly impedes the work of its member community legal centres (CLCs) through preventing the solicitors working in CLCs from giving information to individuals about their rights. CLC solicitors provide legal advice and representation as well as community legal information and publications in a broad range of areas including discrimination, domestic violence, social security and victims' compensation matters. All of these areas may have a connection with personal injury as defined.

The High Court found that the Regulation did not impermissibly infringe the freedom of communication on political and governmental matters, or the requirements of Chapter III of the Constitution. In dissent, McHugh and Kirby JJ found that the Regulation did impermissibly infringe the latter.

The consequence of the decision for CLCs, which in the words of Justice Callinan 'provide useful legal services on a non-profit basis', is that they are bound by the Regulation and cannot publish information that relates to personal injury. As the *amici* pointed out in their affidavits in support of their application, the Regulation prohibits them from publishing information about civil liberties, discrimination, domestic violence, sexual assault, social security and victim's compensation. CLCs will now have to edit the information they provide and curb their services accordingly.

Government and Democracy

Robin Banks, CEO

Locked up and locked out of voting

PIAC took the opportunity earlier this year to make a submission to the Inquiry into the Conduct of the Federal Election 2004 by the Federal Parliamentary Joint Committee on Electoral Matters. An issue addressed in some detail in that submission was the limiting of the rights of prisoners to vote and the continuing push to remove all prisoners from the Federal electoral roll. Prior to the 2004 Federal Election, prisoners serving terms over three years were removed from the electoral roll.

Having signed the *International Covenant on Civil and Political Rights* (ICCPR) in 1972 and it coming into effect in 1980, Australia has an obligation to legislate to give effect to Article 25 of the ICCPR, which provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ... (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors ...

The requirement of universal and equal suffrage is clearly not being achieved.

An interesting aspect of this issue is the impact of provisions in the Australian *Constitution*. Section 41 of the *Constitution* prevents the Commonwealth from excluding a person from voting in a federal election if that person has a right to vote in a state election. So the entitlement of a prisoner to enroll to vote and to vote in federal elections depends, under the *Constitution*, on their entitlement under state law.

The situation of prisoners in relation to voting in state and territory elections differs across the country. For example, South Australia has no exclusion from voting for prisoners, while NSW prevents prisoners serving a sentence of 12 months or more from voting.

This results in the situation where individuals have different rights in respect of voting depending on where they live and, if they are a prisoner, the inter`action of state electoral law and the length of their sentence.

This is an unacceptable situation and one that should be resolved to ensure that enfranchisement of prisoners does not depend so significantly on where they are imprisoned.

Recent PIAC Submissions and Publications

The following submissions and reports have been published by or for PIAC since 1 July 2005. All of these publications are available on the PIAC website through the publications link on the front page.

Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD – Supplementary. 4 July 2005

Supplementary submission to the Review of Division 3, Part III of the ASIO Act 1979 (Cth), following the written submission of PIAC to the Parliamentary Joint Committee on ASIO, ASIS and DSD and the appearance of Jane Stratton and Robin Banks before the Committee on 6 June 2005.

Submission to IPART on the draft determination for water supply, wastewater and stormwater pricing in the Sydney Water Corporation and Hunter Water Corporation. 18 July 2005

A response to the draft determination released by the Independent Pricing and Regulatory Tribunal for water prices for metropolitan Sydney to July 2009.

Further Submission to the Australian Bureau of Statistics on its Discussion Paper: Enhancing the Population Census: Developing a Longitudinal View 22 July 2005

PIAC's submission responded to the Privacy Impact Statement conducted on ABS proposals to collect more detailed data from the census. The Privacy Impact Statement pointed to lack of adequate privacy safeguards. PIAC pointed to methods used in the UK and other countries that limit these concerns. The ABS responded by abandoning the proposals for comprehensive census data matching and adopting a selective survey proposal based on the UK model. This will produce more detailed data than is currently possible, but with better privacy protection. This is a significant victory for privacy rights and maintaining public confidence in the Census.

Submission to the Parliamentary Joint Committee on ASIA, ASIS & DSD on the relisting of proscribed 'terrorist organisations'. 29 July 2005

PIAC's submission focussed on the need to incorporate an analysis of the threat to Australian interests domestically and abroad in determining that an organisation should be proscribed.

Submission to the national review of the GreenPower scheme for electricity. 8 August 2005

PIAC's comments in response to the options paper, *Green Power: From*

Strength to Strength produced by the National Green Power Steering Group.

Submission to the Human Rights Consultation Committee, Victoria on a proposed Charter of Rights. 17 August 2005

PIAC's submission argued for recognition of both civil and political and economic, social and cultural rights and outlined a blue print for effective human rights protection at a state, territory and federal level.

Joint submission by PIAC and the ACA on the abolition of advocates' immunity from civil suit. 19 September 2005

Currently, lawyers cannot be sued in negligence for what they do or say in court. The Standing Committee of Attorneys–General is considering whether this position should be changed. SCAG sought submissions on whether the immunity should be retained, modified or abolished. PIAC and the ACA submitted that the immunity should be abolished in order to protect consumers' rights, and to regulate the legal profession in the same way that other professionals are regulated.

Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures. 23 September 2005

A report prepared by a coalition of community legal centre lawyers, academics, policy workers and others on the proposed counter–terrorism laws. There are twelve measures proposed, that, in the view of the authors, represent further and unnecessary incursions into civil liberties and standards of criminal justice.

Submission to the Independent Pricing and Regulatory Tribunal on equity in the charges paid by Gosford residents for connection to sewerage services. 30 September 2005

PIAC submitted to the Tribunal its support for Option 2 as outlined in the *Pricing of backlog sewerage services for Gosford City Council : Issues Paper* and explained its reasons for this position.

Submission to the Inquiry into Corporate Responsibility on Corporations & Financial Services. 30 September 2005

This submission recommends a number of legal and regulatory reforms to improve corporate accountability. PIAC has consistently advocated that corporations should be legally bound to abide by internationally recognised human rights and environmental standards. In particular, this submission recommends that a corporate code of conduct be legislated to regulate corporate decision–making and that the directors duties under the Corporation Act be widened to force directors to take into account the concerns of social and environmental stakeholders.

Submission to the Standing Committee of Attorneys–General on proposed regulation of litigation funding entities. 4 October 2005

PIAC supports the concept of litigation funding as it has the potential to provide increased access to justice by enabling individuals to pursue meritorious matters in circumstances where they would not otherwise be able to do so, but is concerned that overly prescriptive regulation will negatively impact on LFCs.

Submission to the Independent Pricing and Regulatory Tribunal on the *Investigation into Water and Wastewater Service Provision In the Greater Sydney Region – Draft Report.* 5 October 2005

PIAC's response to the draft report by the Independent Pricing and Regulatory Tribunal on possible changes to the structure of the water and sewerage industry in the Sydney metropolitan region

Submission to the Department of Foreign Affairs and Trade on the Doha Round negotiations. 10 October 2005

This submission raises concerns about the human rights, labour rights, environmental and developmental impacts of the WTO's current Doha Round of negotiations. It recommends that trade negotiations be more transparent and subject to public and parliamentary debate. It also raises concerns about moves to include essential services in trade agreements and moves to label regulations for social and environmental purposes as potential barriers to trade. It was prepared in the lead-up to the WTO Ministerial Meeting in December 2005.

Submission to the Ministerial Council on Energy on the consultation paper about review mechanisms for regulatory decisions in the national energy market. 7 November 2005

PIAC's comments in response to the Discussion Paper on review of regulatory decision-making recently published by the Ministerial Council on Energy.

Submission to the Ministerial Council on Energy on the Proposed Framework Schedule for Transfer of Distribution and Retail Functions. 11 November 2005

PIAC's response to a proposal from the Ministerial Council on Energy for the allocation of regulatory functions between jurisdictions in the national energy market.

Submission to the Senate Legal and Constitutional Leglislation Committee on the Anti-Terrorism Bill. 11 November 2005

The submission prepared by PIAC to the Senate Legal and Constitutional Legislation Committee Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005, addressing all of the key provisions of the bill.

Submission to the Review of Metropolitan Water Agency Prices from 1 July 2006 Gosford City —Council and Wyong Shire Council. 11 November 2005

This submission, to the Independent Pricing and Regulatory Tribunal, identifies opportunities to improve the social equity outcomes of regulated monopoly water and wastewater services in the NSW Central Coast. The region is facing significant investment in capital expenditure to secure future water supply and PIAC is seeking to ensure that vulnerable customers are not further disadvantaged by pricing reforms.

Public Interest Law Clearing House (PILCH)

Referral Highlights

Ebsworth & Ebsworth Win For Detainee

In late April 2005, Ebsworth & Ebsworth accepted an urgent referral to assist an 18-year-old Ethiopian refugee being detained in Villawood Detention Centre and facing criminal deportation to New Zealand. The client was seeking advice and representation for his appeal against the cancellation of his visa, set down for hearing in the Administrative Appeals Tribunal (AAT).

Ebsworth & Ebsworth represented the client in the hearing, assisted by *pro bono* counsel, Angela Seaward.

On 14 June, Deputy President Block found in favour of the client who was subsequently released from detention. Deputy President Block was strongly influenced by the compassionate grounds for overturning the visa cancellation decision. He was mindful that when the client was three years old, his mother, father and aunt fled from Ethiopia to an overcrowded refugee camp in Kenya to escape the civil war. His mother died very soon afterwards, and his father left the camp two years later and, when he did not return, was presumed dead. The client was left in the care of his aunt, who was fourteen years old at the time. They remained in the refugee camp for a total of eight years, living in conditions of extreme hardship and deprivation. In 1997, they were sponsored to migrate to New Zealand. In 2000, they moved to Australia so that his aunt could escape a violent relationship. In Australia they suffered great financial difficulty. The client left school when he was 14 years old and over the next few years committed a number of relatively minor offences. This led to the Department's decision to cancel his visa. The decision of the AAT has given the client the chance for a new start.

Allens Arthur Robinson – Afghan Boy Reunited with Family

In June 2005 a long-running immigration matter handled by Allens Arthur Robinson was successfully resolved, enabling a fourteen year-old Afghan boy to be reunited with his parents and three siblings, all Australian permanent residents.

The boy's parents and siblings arrived in Australia on special humanitarian visas in early 2003. However, their son was not included in the application because he had been presumed dead after disappearing two years earlier. Extensive searches involving police, hospitals, friends, neighbours and missing persons advertisements turned up no trace of the boy who was being held by captors. In mid-2003 (shortly after his family arrived in Australia) the boy escaped and made contact with relatives in Pakistan.

There being no automatic right for the boy to join his family in Australia, it was necessary to file a separate visa application based on his status as a dependent child of Australian permanent residents. After considering the matter for more than a year, the Australian High Commission in Islamabad rejected the application on grounds that it considered the boy was not the biological child of the family in Australia but rather a separate individual who had previously had an application for residency in Australia rejected. The High Commission found that the evidence supporting the application (including birth certificates, statements from relatives, and a copy of the missing persons advertisement) had likely all been fabricated and refused to even permit the individuals concerned to undertake DNA testing to prove their relationship.

An appeal was filed on behalf of the family with the Migration Review Tribunal (MRT) in Australia. When that appeal also looked like it might be rejected on the documentary evidence, it was decided that the family should undertake DNA testing regardless of the fact that those tests had not been sanctioned by the High Commission in Islamabad and would likely be rejected as inconclusive. After overcoming several obstacles to arranging for simultaneous DNA testing in Pakistan and Australia, results were obtained and the results of the DNA testing together with the documentary evidence convinced the MRT that the child was in fact the biological child of the family in Australia. The matter was remitted to the High Commission in Islamabad and in April this year the visa was granted. The child was finally reunited with his family in June this year after being separated for almost five years.

PILCH thanks all its members for their ready acceptance of referrals and the work they undertake on a *pro bono* basis for individuals and non-profit organisations.

New Member

PILCH is delighted to welcome new member firm Maddocks. We look forward to working with the firm in the coming year.

News and Views

Sandra Stevenson, PILCH Co-ordinator

Court and Tribunal Fee Waiver Manual

The *PILCH Court and Tribunal Fee Waiver Manual* was launched on 12 October 2005 by her Honour Justice Ruth McColl AO at Minter Ellison. The Manual fulfils a commitment made by PILCH to the National Pro Bono Resource Centre (NPBRC) to develop a resource for *pro bono* practitioners in NSW. It provides details of the circumstances when a court or tribunal fee may be waived or postponed, including when parties are being represented on a *pro bono* basis. The Manual has been published with the assistance of Minter Ellison in hard copy and as a CD Rom and is being distributed by PILCH.

Our thanks to the author of the Manual, Sarah Winter, who researched and compiled the Manual during her employment with the PIAC undertaking paralegal work for PILCH. Sarah has continued to work on the Manual whilst a paralegal at Minter Ellison.

The Manual is available on the both NPBRC website www.nationalprobono.org.au and the PIAC website www.piac.asn.au. If you wish to obtain a hard copy of the Manual, please contact Sandra Stevenson at sstevenson@piac.asn.au.

Homeless Persons' Legal Service (HPLS)

PILCH members continue to work with PIAC to provide free legal services at six HPLS clinics. Member firms working in the HPLS clinics include Allens Arthur Robinson, Baker & McKenzie, Clayton Utz, Ebsworth & Ebsworth, Gilbert & Tobin, Henry Davis York and Minter Ellison. PILCH members also support the training program for HPLS lawyers. PricewaterhouseCoopers Legal recently hosted training on victims' compensation and Allens Arthur Robinson hosted criminal law training.

Children in Detention Advocacy Project

A joint initiative of PILCH, PIAC and the NSW Legal Aid Commission, this project has been implemented to address systemic issues in the criminal justice administration system relating to the detention of minors. Our thanks to PILCH member firms and barristers who are supporting the project through acceptance of referrals in civil matters and participating in the project meetings. PILCH encourages members to support this project aimed at redressing issues adversely impacting on the liberty of young people in NSW. For further information, please see the article on page 3.

PILCH AEIFRS Seminar

On 24 June 2005, Pricewaterhouse-Coopers and thePricewaterhouse-Coopers Foundation hosted a PILCH seminar designed to provide non-profit organisations with an understanding of the basics of the Australian Equivalent of the International Reporting Standards (AEIFRS).

Our thanks to Cassandra Michie, Board member and PricewaterhouseCoopers' Partner, for her support, and to Karen Toole, Senior Manager, PricewaterhouseCoopers Australia for presenting the seminar.

Practising in the Public Interest (PIPI) Course

The PIAC/PILCH PIPI Winter School, was held in conjunction with Macquarie University, from 18 to 22 July 2005. PILCH member firm, TressCox, provide the venue for the three-day training component of the course. PILCH member firms and other public interest organisations hosted students for the placement component of the course.

National Meeting of PILCH Organisations

The second national meeting of the three Public Interest Law Clearing Houses (NSW, Queensland and Victoria), for staff and Board members, was held in Melbourne on 16 June 2005. The meeting provided a forum to address issues of national identity, membership, working with barriers such as conflicts and costs and identified opportunities for joint projects.

Human Rights

Ya'el Frisch, Student Volunteer

Advocacy for Local Charters of Rights

PIAC'S campaign for Human Rights Charters at the local level is part of the third stage of the Protecting Human Rights in Australia Project. As reported in the previous issue of the *Bulletin*, the Project has focussed on raising community awareness through education, emphasising that human rights protection is a local issue.

Local government has a crucial role to play in protecting human rights, as it is the level of government closest to the people. The only level of government to give an electoral voice to non-citizens, local government has the capacity to be the most democratic level of government. A Human Rights Charter could reinvigorate local democracy and participation, improve awareness of local services and allow local government to set an example to the state, territory and Federal governments in terms of best practice in human rights protection. Local governments already express commitments to social justice through Social Plans: redrafting these commitments into Human Rights Charters would build community cohesiveness and symbolically 'transfer' rights from the government to the people.

Local protection of human rights in Australia: Hume City Council

In 2001, Victoria's Hume City Council became the first local government in Australia to implement a Social Justice Charter. The inspiration for a Charter stemmed from Hume's poor performance in a postcode survey, whose results highlighted the economic and social disadvantage experienced by Hume's residents. Committed to guaranteeing its community a high quality of life, Hume's local government drafted an aspirational Charter, outlining its vision and core values and pledging to use social justice indicators to evaluate its work. Like PIAC, Hume recognises that local government has the power and capacity to influence other levels of government.

The centrepiece of the Charter is an Inaugural Citizens' Bill of Rights. The Bill of Rights drew on the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although governments often prioritise 'democratic' rights, Hume's broader recognition accords with the indivisibility of human rights.

Hume's Charter drew on existing obligations rather than creating new rights, as seen in the section of participatory rights. The Hume community already has rights such as the right to vote and access information, but a Charter restates these rights in an accessible form and emphasising that the rights are 'owned' by the people.

Community consultation was a central feature of the Charter's evolution. From consultations with a wide variety of community leaders in February 2004, it emerged that the community had a preference for simple and inclusive language. The Charter drafters wanted to create a 'simple, lyrical document' that would evolve to meet changing community needs. Local needs also shaped the Charter: findings from a 2003 empirical study into poverty in Hume led to an emphasis on communal ownership of public space.

The campaign

Using Hume as an inspiration, PIAC is aiming to assist NSW local governments to develop Charters of Rights for their local communities.

Hume's experience demonstrates that community involvement is essential to the development of a successful Charter, PIAC representatives have already met Councillors and senior staff of a number of metropolitan councils in order to gather support for the project. PIAC will present local councils with a briefing paper highlighting the role of local government in protecting human rights and drawing on case studies from Hume, San Francisco (where the Convention on the Elimination of All Forms of Discrimination Against Women was implemented locally in 1998) and Montréal (which has recently adopted a Charter of Rights and Responsibilities).

To ensure a wide network of information sharing, PIAC hopes to target local governments from each Regional Organisational Council, so the forum will give local governments an opportunity to inspire each other to take an active role in human rights protection. While the experience of other jurisdictions can serve as a guide, it is crucial that each Charter be responsive to the specific needs of the local community.

Together with local governments and their communities, PIAC will identify the ways in which human rights are protected in a local area, the gaps in human rights protection and the community expectations for the protection of rights and the establishment of a cohesive community. The campaign aims to push human rights onto the local government agenda, strengthening recognition that human rights play a central part in the lives of individuals and communities.

Charmaine Smith, Solicitor

The Unsettled Debt: Update on Stolen Wages

Between 1900 and 1969 the NSW Government took monies earned by or owed to Aboriginal people and placed this money into trust fund accounts operated by the Aborigines Protection Board and Aborigines Welfare Board. This money included wages, pensions, inheritances, child endowment payments and lump sums of compensation. The money was never repaid and the debt is estimated to be in the tens of millions of dollars.

Consultative Panel

In June 2004, the NSW Government established an Aboriginal Trust Funds Reparations Panel comprising Mr Brian Gilligan, Ms Terri Janke and Mr Sam Jeffries (the Panel). The role of the Panel was to consult with the Aboriginal community in New South Wales on the issue of stolen wages and how a repayment scheme should operate.

The Panel's consultation process involved a series of visits to locations across the State to seek opinions from Aboriginal people. The Panel also accepted submissions from individuals and organisations, including PIAC.

Report to Government

The culmination of this process was a report entitled *Report of the Aboriginal Trust Fund Repayment Scheme Panel* setting out 27 recommendations for the establishment of a repayment scheme to operate for five years to receive claims, undertake research, and determine payments owed to claimants.

The report was submitted to Cabinet in October 2004 and on 15 December 2004, the NSW Minister for Community Services held a media conference to announce the NSW Government's acceptance of the recommendations of the Panel.

PIAC's Review of the Report to Government

PIAC reviewed the report of the Panel and considered that much of what was recommended provided a workable and equitable solution. In particular, the Panel adopted a number of PIAC's recommendations including that:

- the scheme not be housed in the Department of Community Services;
- payments under the scheme not remove an individual's rights;
- funding be available to provide counselling;
- support be provided to assist potential claimants;
- the research to identify available documentary evidence be undertaken by the Scheme, rather than claimants having to do this;
- oral evidence be used to assist in identifying entitlements;
- the amount available to pay to claimants not be capped, but rather be the amount necessary to pay all amounts owing;
- the Scheme provide for payments to be made to descendants where the person owed the money has passed away; and
- any costs of collecting evidence, researching claims or distributing monies be the Scheme's responsibility, rather than reducing the amount to be paid to the claimants.

Commencement of Scheme

The Aboriginal Trust Fund Repayment Scheme (the Scheme) commenced operation in December 2004 and a new Aboriginal Trust Fund Repayment Scheme Panel was appointed in May 2005. The new Panel members are Mr Aden Ridgeway (Chair), Ms Robynne Quiggan and Mr Sam Jeffries. The new Panel's role in the process is understood to be as an appeals body for claimants dissatisfied with decisions of the Scheme.

How the Scheme Operates

The Scheme has distinguished between two major categories of claimants:

1) direct living claimants who had trust fund accounts; and
2) descendant claimants who are immediate relatives of trust fund account holders who have now passed away.

Claimants are required to submit a written claim form to the Scheme. The information on the claim form is sent to the Department of Aboriginal Affairs and State Records for searches of all available historical records for documentary evidence showing the existence of trust funds.

The results of the search are provided to the Scheme which then makes a decision with respect to the claimant's entitlements. If the claimant disagrees with the decision, the claimant may ask the Panel to reconsider the claim. At this stage the Panel can accept further evidence before making a decision. While the Scheme is now receiving claim forms, it is yet to make its first widely anticipated decision.

Trade Justice

Jemma Bailey, Trade Justice Policy Officer

Whose Trade Organisation?

The next Ministerial Meeting of the World Trade Organisation (WTO) looms on the horizon. PIAC, through the Australian Fair Trade and Investment Network (AFTINET), has stepped up its advocacy to argue that the negotiations must be democratic and consistent with human rights, workers' rights and environmental sustainability. Unfortunately, the Australian Government's position in the WTO negotiations has not been subject to full public and parliamentary scrutiny and has potentially negative social, environmental and regulatory impacts.

Essential services and democracy undermined

The Australian Government is playing a key role in pushing proposals to radically change the negotiating process in the trade in services agreement (GATS). If accepted, these proposals will pressure countries to make more and 'higher quality' commitments to liberalise their service sectors. It is feared that these proposals will undermine the growing community campaign to make essential services exempt from GATS.

The proposed changes will undermine the supposedly voluntary nature of GATS. Under the current structure of GATS, countries determine whether and in which sectors they will make commitments according to the conditions in each country. The proposed changes will replace this flexible approach with a system of mandatory liberalisation 'benchmarks' that will force countries to open their service sectors to a minimum level across a minimum number of 'commercially valuable' sectors. For 'commercially valuable', read services such as health, education, energy, water or postal services.

These proposed changes would be most greatly felt in developing countries. Transnational corporations from developed countries control 80% of services trade. Forced liberalisation will mean that governments have to give transnational service companies the same treatment as local service companies. Local industries will not be able to compete, which will jeopardise affordable access to essential services such as health, education and water. A large group of developing countries has rejected the benchmarking proposals, but our Government continues to support the new proposals.

Public interest regulations labelled as trade barriers

The negotiations on trade in goods (so-called 'non-agricultural market access') are wide-ranging and cover sectors from manufacturing to natural resources. Negotiations behind closed doors in these sectors are likely to have negative impacts on workers' rights and the environment.

A recent development in this area has been the negotiations on 'non-tariff barriers'. These negotiations threaten the ability of governments to regulate in the public interest. In these negotiations, countries can notify the WTO that another country's law is deemed to be a barrier to trade. Notifications to date include laws designed to protect the environment and promote social welfare.

The Government has lodged some notifications on non-tariff barriers and has had some notifications lodged against Australian laws. PIAC strongly opposes the labelling of regulations made in the public interest as barriers to trade.

Access to medicines and trade in intellectual property (TRIPS)

The Doha Statement on TRIPS and Public Health supports the right of developing countries to ensure access to medicines at affordable prices to treat serious health problems. In line with this statement, the WTO General Council adopted an interim decision in 2003 granting a waiver from TRIPS rules so that poor countries in need can import generic copies of patented drugs that are produced under compulsory licence in another country.

The latest developments in the TRIPS negotiations surround efforts to make this interim decision a permanent TRIPS waiver. Controversially, the US has proposed wording that includes some conditions on developing countries wanting to use the waiver. PIAC has pressured the Government to support the waiver that is most aligned to the Doha Statement on TRIPS and Public Health.

Where to from here?

PIAC and AFTINET have held public forums and workshops to raise community debate about the WTO negotiations and to pressure the Government for more transparency. We have been in contact with the Department of Foreign Affairs and Trade and ran a mass e-mail campaign to highlight Australia's role in pushing for changes to the GATS. Jemma Bailey will attend the WTO Ministerial in December to join civil society activities and to lobby Australia's negotiators.

Utilities

Elissa Freeman, Policy Officer (UCAP)

Water: A public good

In the midst of an extended drought, communities across New South Wales have been debating the environmental, economic and social demands required of water policy. Increasing attention has been paid to water pricing and service delivery, water demand management programs and the overall structure of the water industry. PIAC, through its Utility Consumers' Advocacy Program (UCAP), has represented the interests of consumers and in particular the interests of low-income and disadvantaged communities in these debates.

In September 2005, the Independent Pricing and Regulatory Tribunal (IPART) released its final determination for the prices of water supply, wastewater and stormwater services in the Sydney, Illawarra and Hunter regions. IPART's price determination provides an opportunity for PIAC to challenge the water businesses' forecast expenditure, the regulated rate of return earned by the 'corporatised' businesses and the structure of retail prices charged to residential and non-residential consumers. It is in the public interest to ensure a safe and efficient supply of water through prudent capital and operating expenditure, and the scale of revenue generated by the businesses warrants even closer attention to the determination . The Sydney Water Corporation, for example, will earn an estimated $6 billion over the course of the four-year determination.

PIAC was critical of IPART's consideration of the social impact of its determination as required under the IPART Act. The determination saw IPART distance itself from the direct impact of price increases and tariff reforms and characterise its role primarily as balancing high-level environmental and social priorities. PIAC continues to assert that where regulated tariff reforms generate a specific social impact, robust measures need to be built into the regulated structure to provide relief for affected households. This ensures that price increases do not infringe on the capacity to meet essential water needs.

Price increases in the 2005-2009 price determination are primarily the result of Government expenditure commitments under the Metropolitan Water Plan, which directed the Sydney Catchment Authority and Sydney Water Corporation to undertake a range of supply augmentation, leakage reduction and infrastructure investment. There is a general consensus that it was the right time to review Sydney's water infrastructure, however, PIAC has raised concerns that inadequate attention was paid to the community's support of recycling initiatives. Subsequent criticism of the Plan by the NSW Auditor General suggests that there was inadequate consultation and a poor contingency planning framework.

Private sector involvement

This criticism buoyed the private sector's bid to gain greater access to the planning aspects of Sydney's water industry. In June and September PIAC made submissions to the Government's independent review of water and wastewater service provision in the Sydney region (conducted by IPART). The review is investigating mechanisms to encourage more innovation and greater private sector participation. PIAC was chiefly concerned that any industry restructure not compromise the socially equitable pricing principles that underly retail water prices. Recalling the 1998 Sydney Water contamination crisis, PIAC also reiterated the need to have direct governmental accountability for water supply.

The draft findings of that review have been important in the Services Sydney matter being heard in the Australian Competition Tribunal. Services Sydney is a private company seeking access under the *Trade Practices Act* 1974 (Cth) to Sydney Water's wastewater network, enabling it to compete with Sydney Water. PIAC presented a submission to the Tribunal identifying a range of public interest concerns that arise when introducing competitive pressures in an essential service. Many of PIACs concerns are addressed in IPART's review, which recommends that a state-based access regime be established and limited only to the largest users of the network.

Water in regional NSW

PIAC is now focussing its attention on the provision of water services in regional New South Wales. In May 2004 the Government introduced a new pricing regime for Local Water Utilities (LWUs). These guidelines introduced massive changes to water pricing and revenue bases for the LWUs. PIAC has contracted the Institute for Sustainable Futures to research the issues and has been working closely with the Local Government and Shires Association, the Department of Energy, Utilities and Sustainability, rural members of UCAP's community-based Reference Group and representatives of the LWUs. PIAC is seeking a review of the framework to ensure that the interests of consumers and rural communities are better integrated into the Best Practice Guidelines.

For a copy of the research conducted by the Institute for Sustainable Futures contact Elissa Freeman on 8898 6518 or efreeman@piac.asn.au.

PIAC People

Jane King, Centre Co-ordinator

PIAC finally moved into its spacious and accessible new premises at the end of June with a great sigh of relief from the Directors, staff and volunteers. Since then PIAC has seen more welcomes than good-byes as it continues to grow to fill the additional available space in the office.

Alexis Goodstone, Senior Solicitor, began maternity leave in August to have her first baby. On 14 September Alexis's and Dave's son Marly was born and we were all delighted to welcome a new member to the PIAC clan. Our best wishes go with Alexis as she embarks upon her new adventure!

PIAC solicitor, Anne Mainsbridge, will act as Senior Solicitor for the period of Alexis's leave and we are thrilled that Jo Shulman has now joined us to fill Anne's position over the next year. Jo previously worked as a solicitor with the Inner City Legal Centre.

Staff were very sad to say goodbye to Sarah Mitchell in November after almost eight years at PIAC. Sarah has taken up a position as Administrator with the National Association of Community Legal Centres and we will miss her enthusiasm and her sense of humour around the office.

In December we were also delighted to welcome Carol Berry as Solicitor — Heath Policy & Advocacy. Carol comes to PIAC from Sexual Health and Family Planning Australia where she was the National Projects Officer.

PILCH member firms have continued to make an enormous contribution by providing secondee solicitors to PIAC and PILCH to assist with projects and litigation. Over the last six months Mallesons Stephen Jaques and Deacons have provided secondees and PILCH thanks these firms for their generous commitment. Our appreciation also goes to the seconded solictors Alex Newton, who was seconded to PILCH from June to September and Susanna Taylor, who began her secondment at the beginning of October.

PIAC has also engaged a librarian, Christine Johnson, to revitalise PIAC's library and to update the library catalogue to make it a more effective resource management tool.

PIAC's continues to recruit volunteer College of Law placements. Hugh O'Neill completed his placement in June and we thank him for all his hard work. Hugh was followed by Sarah Bassiuoni who left in October to travel to Kiribati as a member of AUSAID's Youth Ambassadors for Development Program.

Recently PIAC expanded its College of Law program to include a College of Law placement position to assist PILCH. In November we welcomed Sophie McWilliam as the new PIAC placement and Che Huy Chhour as the inaugural placement with PILCH.

PIAC would also like to extend its thanks to volunteer law students, Laura Thomas and Thalia Anthony, students from the University of Sydney, for all their hard work assisting the litigation team over the last few months and to Ya'el Frisch, a UNSW Social Work and Law student, who assisted policy staff with PIAC's Protecting Human Rights Project.

PIAC training – bigger and better in 2006

PIAC is planning some exciting initiatives for advocacy training in 2006. We are hoping to partner with some regional community legal centres to take PIAC training to rural and regional areas in NSW.

We are also considering expanding PIAC's community legal education program to address the need for plain language legal education, especially in the community sector.

We would also like to add to our scope as a Registered Training Organisation. This would mean that training participants can be assessed against an additional unit of competence in the area of advocacy, resulting in an additional qualification for successful training participants.

Of course, PIAC will continue to offer quality training about advocacy at our public training courses and customised courses with organisations and groups.

For more information, please contact Carolyn Grenville, PIAC's Training Co-ordinator on 02 8898 6500 or cgrenville@piac.asn.au.

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