Printed by Ligare Pty Ltd, Riverwood, NSW

PIAC Bulletin

Journal of the Public Interest Advocacy Centre

No 23 • June 2006

PUBLIC INTEREST ADVOCACY CENTRE

ACN 002 773 524 ABN 77 002 773 524
ISSN 1039-9070

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Designed and produced by:

THOMSON LAWBOOK CO.

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# Prison no place for the mentally ill

Carol Berry, Solicitor

The number of mentally ill people locked up in NSW prisons has become the focus of increased attention. The fact that people with mental illness are over-represented in the criminal justice system is of increasing concern to human rights advocates, especially as the population of prisons increases.

A chapter of the recently released report of the Senate Select Committee on Mental Health, *A national approach to mental health: From crisis to community*, was dedicated to mental health and the criminal justice system.

The report observed that 'people with a mental illness comprise a disproportionate number of the people who are arrested, who come before the courts and who are imprisoned'.[1]

A 2003 report detailing the prevalence of mental illness in NSW prisons, *Mental Illness Among New South Wales Prisoners*[2], reflected what has also been observed in other countries, such as the USA, that the occurrence of mental illness in the prison population is much higher than the general population. For example, the NSW study reported that the prevalence of psychosis in inmates was 30 times higher than in the general Australian community.[3]

The study found that 48% of reception inmates and 38% of sentenced inmates had suffered a mental disorder in the past 12 months (a psychosis, affective disorder or anxiety disorder). When a broader definition of 'any psychiatric disorder' was used, it was found that 74% of the NSW inmate population was affected.[4]

The study also reported that female prisoners have a higher prevalence of psychiatric disorder than male prisoners[5], with approximately 90% of female reception prisoners having experienced a mental disorder in the 12 months before their incarceration compared with 78% of male prisoners; among sentenced prisoners the relevant figures were 61% for men and 79% for women.[6]

These statistics suggest we need to be asking questions about serious systemic failings, such as why our community care system is falling down so dramatically that the mentally ill wind up in prison, and why we divert those suffering from mental illness, particularly serious mental illnesses, into the prison system at all.

Anyone who is familiar with someone who has a mental health problem is aware of the suffering that the mentally ill endure. The corrections environment is not an appropriate environment for the mentally ill because of the harsh conditions endured. There are examples of mentally ill prisoners being locked up for 23 hours a day in solitary confinement. This is considered cruel and inhumane treatment under international law, and yet is still practiced in the NSW corrections system.

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# Human rights are Australian values

Robin Banks, Chief Executive Officer

There has been much said in the last year about Australian values and un-Australian behaviour; mostly by elected politicians and media commentators. Yet when it is suggested that perhaps we develop and endorse a set of core human values there is a somewhat hysterical response from some of the same people. In 2005, the Victorian Government conducted an extensive community consultation on a Charter of Rights and subsequently tabled the Charter of Human Rights and Responsibilities Act 2006. The NSW Attorney General has recently indicated that he too is considered referring the option of a community consultation on a Charter of Rights to the NSW Cabinet.

These actions have, interestingly, been criticised by some of the same people who use the language of 'Australian values' and 'un-Australian'. Their arguments against a Charter of Rights range from the view that providing human rights protections in legislative form gives power to judges who are unelected, to the view that these laws are unnecessary and the states could simply enter into an arrangement whereby the Human Rights and Equal Opportunity's human rights complaints processes could be applied to them. The former argument fails to acknowledge that every day parliament makes laws that we rely on judges to interpret and that, under our Federal Constitutional system, the judiciary are one of the three recognised branches of government. The latter argument is disingenuous in that if fails to acknowledge that complaints of breaches of human rights to the Commission cannot result in any binding outcome. (Vijaya Raman's article on page 8 of this Issue deals in detail with some of the arguments.)

It is difficult to understand the level of hysteria that seems to accompany discussions of human rights in this country. The rights that we are talking about are, after all, simply the rights that the member states of the United Nations have agreed are fundamental to human beings. It is worth briefly reflecting on the preamble to the original document setting out these rights, the Universal Declaration of Human Rights, which states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. This document was agreed by the members of the United Nations on 10 December 1948. It is a statement of core human values that were agreed after much discussion, drafting and negotiation. That in itself should reassure most critics. These are not some ravings of a radical or extreme regime, they are the carefully crafted words of international diplomats.

It is even more difficult to understand the hysteria when you consider the rights protected. Again, there is nothing extreme about them. Indeed, surveys in Australia indicate that many people are under the misapprehension that such a charter already exists. I have often been told, when conducting training on discrimination law or human rights, that we have a right to vote, we have freedom of religion and freedom of speech. This is a comforting thought, but it is not accurate. However, it seems to reflect that many people consider that these rights are not up for grabs, they are core rights and if they are not already properly protected, they should be.

A guarded response is perhaps slightly more understandable when it comes from members of parliament or the executive, because a charter of rights and responsibilities will certainly provide a standard against which their actions and decisions may be measured by the citizenry. It is less clear why there is such resistance from media pundits whose daily work is enabled by a protection for free speech, but do not seem to be so concerned about other rights that are central to democratic values.

In mid-May the Administrative Review Council released its report, *The Scope of Judicial Review*. Speaking at the launch of the report, His Honour Chief Justice Gleeson relevantly observed:

> No minister needs to be told about the fallibility of human beings and human systems... No minister for defence needs to be told about that. No minister of immigration needs to be told about that. But I wonder how often people made the connection between these daily problems of the fallibility of human nature and human systems and the conferral of power upon government. I wonder how often people connect their knowledge of the imperfection of human nature with their judgments about the circumstances in which unreviewable authority or unreviewable power ought to be conferred upon fallible human beings exercising fallible such power?

What is being proposed in the Victorian Charter of Human Rights and Responsibilities is a mechanism that provides for an opportunity to ensure that power vested in the hands of the executive and the parliament is at least subject to review against a statement of agreed core values.

It does not empower courts to overturn laws made by parliament, but it does subject them to a level of independent scrutiny. This model is one that provides us all with a statement of shared values and a recognition of how those values underpin effective democracy. They are worth considering rationally, and the community in NSW deserves an opportunity to be informed about what is meant by the term 'human rights' and to consider whether or not those rights should be better protected in this State.

# 'Enclosed space' and impacts of smoking

Anne Mainsbridge, Senior Solicitor, & Carol Berry, Solicitor

It is well known that not only smokers themselves suffer from the health consequences of tobacco smoking; Environmental Tobacco Smoke (ETS) presents a significant risk of harm to members of the public who are exposed to it, especially those employees who are exposed on a regular basis in their work environment. ETS contains approximately 4 000 chemicals, of which at least sixty are known to cause cancer.[1] Estimates suggest that between 73 and 97 deaths are caused annually as a result of workers' exposure to ETS in the NSW hospitality industry.[2]

It is PIAC's view that there is a clear public interest limiting the places and situations in which smoking is permitted, especially where those places are public places or workplaces.

Despite this, there has been some reluctance on the part of NSW Government to legislate comprehensively to protect patrons and staff of pubs and clubs in New South Wales from exposure to ETS.

## Smoking bans

In 2000, the NSW Parliament passed the *Smoke-free Environment Act 2000* (NSW). The Act banned smoking in enclosed public places, including restaurants and the dining areas of pubs and clubs. However, under the Act, pubs and clubs were exempt from having to ban smoking in non-eating areas.

In 2004, the Act was amended by the *Smoke-free Environment Amendment Act 2004* (NSW) to gradually phase in prohibitions on smoking in 'enclosed public spaces' in pubs and clubs, culminating in a complete prohibition by July 2007. The legislation was hailed as 'a vital public health initiative that will save lives by reducing the exposure of workers and the public to environmental tobacco smoke.[3] However, it appears that the impact of this legislation is to be significantly watered down.

## The Regulation 2006

In February 2006, NSW Parliament passed the *Smoke-free Environment Amendment (Enclosed Places) Regulation 2006* (NSW). The Regulation prescribes guidelines for determining what is an enclosed public place and when a covered outside area is considered to be 'substantially enclosed' for the purposes of the Act.

Under the Regulation, smoking will be allowed in 'outdoor' areas, so long as these areas are not more than 75% enclosed.

The practical effect of the Regulation will be that smoking will be allowed to continue in areas of pubs and clubs that are, in reality, mostly enclosed. For example, areas that have ceilings and some walls could be considered outdoor areas. In such areas, smoke is likely to become trapped, and to drift into non-smoking areas. Employees, including bar staff, musicians, entertainers and gaming machine technicians will be inevitably exposed to such smoke.

A key factor affecting the definition of an 'enclosed space' seems to be the pressure that has been brought to bear by the pubs and clubs industry, because industry members are concerned with the potential impact on business if a total ban is put in place.

PIAC recently provided its views to the NSW Parliamentary Joint Select Committee of Inquiry into Tobacco Smoking in New South Wales. PIAC focussed on the Regulation, arguing that it effectively sanctions continued exposure of the public and employees of pubs and clubs to the harmful effects of ETS. In particular, PIAC argued that the Regulation:

- is inconsistent with the purported aims of the Act and also with NSW Government health policy in this area;
- is confusing, making it difficult for consumers to challenge proprietors as to what is and what is not supposed to be a smoke-free area;
- is likely to be unworkable in practice;
- is likely to expose employers and proprietors to legal challenges for failing to provide a safe workplace and for contravening disability discrimination laws.

PIAC recommended that the Regulation be repealed and replaced by a regulation that more appropriately protects the NSW public from the effects of passive smoking. PIAC called for a total ban on smoking in all enclosed (partially or otherwise) public places.

PIAC's submission to the Inquiry is available on PIAC's website at piac.asn.au. For further information, please contact Anne Mainsbridge at amainsbridge@piac.asn.au, or Carol Berry at cberry@piac.asn.au.

**Notes**

1. NSW Parliament, *Parliamentary Debates*, Legislative Council, 17 November 2004, (Henry Tsang MLC).
2. J L Repace, *Estimated mortality from secondhand smoke among club, pub, tavern, and bar workers in NSW* (2004).
3. NSW Parliament, *Parliamentary Debates*, Legislative Council, 17 November 2004, (Henry Tsang MLC).

continued from page 1

## Forensic patients

In NSW, there are a special category of mentally ill patients: 'forensic patients'.

Forensic patients, most commonly, are those found not guilty of criminal offences on the basis of mental illness. Many of these individuals, after being found not guilty, are detained in special facilities, allegedly in order to protect the community, because they are considered too unwell to be released.

As far as PIAC can ascertain, there are approximately 250-270 forensic patients within the NSW corrections system. Some of these patients are kept for periods of time within the general prison environment because there are not enough beds available in appropriate facilities, such as the prison hospital. There is increased pressure on hospital resources due to the fact that some forensic patients are not released because they are held in the hospital (and the prison system) at the discretion of the NSW Minister for Health.

## Inappropriate Ministerial discretion

As the Senate Select Committee on Mental Health report outlines, most state jurisdictions have special courts or tribunals to oversee the administration of mental health legislation. In NSW, the Mental Health Review Tribunal (MHRT) performs this function.

However, in NSW, the MHRT only has the power to make recommendations to the NSW Minister for Health, who then ultimately makes decisions about, for example, the care and treatment of those found guilty on the grounds of mental illness. There are concerns that the possible political implications of decisions to release those found guilty on the grounds of mental illness (such as possible unfavourable media coverage) may unduly influence decisions by the Minister for Health.

This means that there are many individuals who have been found not guilty on the grounds of mental illness who are effectively incarcerated for much longer periods of time than is necessary or appropriate. The regime of ministerial discretion in this state in relation to forensic patients is quite outmoded and ultimately unjust.

The NSW Government is currently conducting a review of the *Mental Health Act 1990* (NSW), and many consumer groups are eagerly awaiting the release of the exposure draft of the proposed changes, to see the direction in which the NSW Government plans to move on this subject.

## Mental health: a human rights issue

Human rights are about protecting the dignity of every person. If members of a group within the community are treated without dignity, or in a way that is cruel and inhumane, it is important that this issue is addressed as a matter of urgency, to ensure a humane and civil society.

The enormous suffering caused by the poor resourcing of mental health services in the community has resulted in many mentally ill people winding up in the State's prisons. This is an unacceptable result, which must be addressed as a matter of urgency.

It in inappropriate, indeed, inhumane to lock up people suffering from serious mental illnesses in prison. People suffering from mental illnesses, particularly acute mental illnesses, need treatment, not punishment.

## PIAC's plans

PIAC's is working on this issue as part of its health project, which commenced at the beginning of this year.

PIAC aims to focus on a number of factors including the prevalence of mental illness in prisons, the quality of treatment currently available for the mentally ill in prisons, and the status of 'forensic patients'.

To assist it in undertaking this work, PIAC is developing a network of individuals and organisations involved in the sector.

PIAC hopes to contribute to the push to divert the acutely mentally ill out of prisons, and into more appropriate care, and to help prevent the mentally ill from being imprisoned in the first place.

PIAC hopes to work with others to achieve public policy changes around these issues in NSW. If you would like to become involved in PIAC's work on this issue, please contact Carol Berry, one of PIAC's solicitors on (02) 8898 6523, or by e-mail to cberry@piac.asn.au.

**Notes**

1 Senate Select Committee on Mental Health, *A national approach to mental health: From crisis to community* (2006) 329
2 T Butler and S Allnutt, *Mental Illness Among New South Wales Prisoners* (2003).
3 Ibid, 3.
4 Ibid, 2.
5 Ibid, 2.
6 Ibid, 15.

# Government and Democracy

## Whose Conscience Votes?

Elissa Freeman, Policy Officer

Earlier this year the Federal Parliament participated in a rare and divisive conscience vote. It was only the third time in the past ten years that this political freedom had been instigated by the major political parties, yet the conscience vote remains an important policy tool employed in controversial political issues. It offers the electorate an insight into the character and independent politics of their elected representatives.

The 'conscience vote' is a term, but not a concept, unique to Australia. In the USA, Canada and the UK such a vote is appropriately termed a 'free vote'. This more accurately reflects the status of a vote for which no official party position has been determined and members are not bound by party rules to vote in a particular way. In such votes, there is no party whip reining in members who may be tempted to stray from an agreed line. It is a vote free from party politics.

Party politics tend to dominate public debate in Australia with public analysis of policy issues generally focussing on the outputs of the caucus or party rooms. Occasionally the electorate is granted an insight into the independent views of a politician when a private member's bill is introduced or a member crosses the floor to vote. A conscience vote upsets the status quo, requiring all members of parliament to take a position independent of their political party usually on a controversial issue. Australian political parties commonly turn to a conscience vote where ethical questions arise. Interestingly, this means that personal judgment is applied to some of the most sensitive and important issues facing society.

This February it was about the administration of RU486, an abortifacient drug.

The Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Bill 2005 was introduced in the Federal Parliament as a private member's bill. Both major parties chose not to formulate a position, preferring instead to initiate a free (or conscience) vote. Elected representatives in the Federal Parliament were therefore obliged to exercise political independence on an issue intimately related to the role of government and the rights of women.

In a representative democracy, elected lawmakers act on the understanding that they will exercise their best judgment on matters that come before them for deliberation. Unlike other parliamentary votes, a free or conscience vote gives the electorate a direct insight into how its elected representatives, and not the political parties, understand the task before them. How each member chooses to vote can have massive implications for individuals within our community.

So whose conscience is on display in a conscience vote? Opinion polls can gauge the sentiment of the community but often fail to reflect the sentiments of politicians.

The controversial Euthanasia Laws Bill 1996 passed successfully through the Senate after lengthy debate and was dealt with by conscience vote. The result was to override the Northern Territory's legalisation of euthanasia. The 1996 debate around euthanasia saw many politicians' personal religious beliefs being used to justify their decision in the houses of parliament. The outcome was at odds with public opinion polls of the time that indicated that a consistently large majority of Australians support voluntary euthanasia.

For advocates in such a debate, a free vote means that individual members are lobbied rather than political parties, and preferably from within the member's own electorate. This poses a significant challenge to advocates seeking to influence the outcome of the debate.

The community was vocal and well engaged in media discussion on the RU486 matter around a wide range of relevant factors. In contrast, the Hansard reflects a much less wide-ranging debate. In the RU486 debate, politicians commonly and now famously referred to their personal experiences of unplanned pregnancy and abortion to validate their position. The Hansard of the debate is peppered with these personal anecdotes.

While it was individual member's judgments that were on display in parliament, their accountability to the electorate does not change. The free vote is one of the few opportunities granted to the electorate to hold members accountable for their individual judgements. In this unique circumstance the views of representatives must be reconciled with the will of the electorate. The RU486 Bill has now successfully passed though Parliament. However, the next conscience vote will again raise important ethical issues.

Elected representatives are never free from their conscience. The critical RU486 Bill enabled the electorate to see first hand, free from party politics, exactly what shape that conscience takes. The way in which politicians formulate views and vote on these rare and controversial issues needs to be closely considered, recalled and questioned at their election and in future conscience votes.

# Detention

## Seeking Asylum: the experiences of unaccompanied children

Anne Mainsbridge, Senior Solicitor

Most children who seek asylum in Australia arrive as part of a family group. However, in recent years, a significant number of children who have travelled to Australia seeking asylum have done so without the protection of a parent or adult guardian. It has been estimated that 290 of the 4,089 child asylum seekers who arrived in Australia between 1 July 1999 and 28 February 2003 were unaccompanied and separated children.[1]

This reflects a global increase in the numbers of children seeking asylum alone. Many of these children are forced to leave their families and countries of origin in response to serious and immediate threats to their lives and livelihoods. Generally, they have little or no control over the decision to leave and no means of accessing visas through regular channels. According to one unaccompanied teenage boy, later found to be a refugee:

> The Taliban took my father and my older brother and my mother was very devastated by what happened to us and she told me I had to leave. She thought that my cousin was going to leave and I could go with him and I had no idea of where we were going and what arrangements were made.[2]

The journeys of unaccompanied children to Australia are often traumatic, frequently involving dangerous journeys by sea. Having reached Australia, they then have to navigate their way through the minefield of Australia's border control and refugee processes. While many unaccompanied children ultimately succeed in gaining acceptance as refugees, their treatment during the assessment process has been the subject of much criticism. They tend to be overlooked in the midst of adult asylum seekers, they are more likely to suffer processing delays and they are at a disadvantage when attempting to have their stories both told and heard.[3]

The plight of unaccompanied children and separated children who have been smuggled or trafficked into Australia is the subject of a forthcoming report: *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* by Associate Professor Mary Crock. Associate Professor Crock's report is part of a larger study comparing policies and practices toward children seeking asylum alone in the USA, the UK and Australia. PIAC is one of the Australian partners involved in the research project, along with Australians Against Racism and A Just Australia.

Drawing on information obtained through interviews with unaccompanied and separated children and their advisers, the report provides a unique insight into the physical, legal and administrative experiences of unaccompanied and separated children seeking refugee protection in Australia.

In particular, the report compares the treatment of unaccompanied children who arrived on Australian soil with the treatment received by those who were intercepted en route to Australia and deflected to off-shore centres to have their claims processed. This is of crucial importance in the light of the latest round of proposed amendments to the *Migration Act 1958* (Cth), which, if passed, will see all unauthorised boat arrivals being transferred to offshore centres such as Nauru, Manus Island and Christmas Island to have their claims for refugee status assessed.[4] PIAC is concerned that this regime will aggravate the difficulties already faced by unaccompanied children.

It is likely that many will have to spend long periods of time in remote off-shore detention centres without the opportunity for assistance and support from advocates and legal representatives and with no independent oversight by the Human Rights and Equal Opportunity Commission or the Commonwealth Ombudsman.

It is anticipated that Associate Professor Crock's report will be launched in August 2006. As part of its ongoing role in helping to publicise the findings of this report, PIAC will also help to co-ordinate conferences in Sydney and Melbourne later in the year focussing on issues relevant to unaccompanied and separated children seeking asylum.

For further information, please contact Anne Mainsbridge on (02) 8898 6516 or amainsbridge@piac.asn.au.

**Notes**

1. Evidence to Senate Estimates Committee, Immigration and Multicultural and Indigenous Affairs Portfolio, 11 February 2003, (Response to Question on Notice from Senator Brian Harradine).
2. NSW Commission for Children and Young People, cited in Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004) 3.3.
3. Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120.
4. See the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Cth). This was introduced into Federal Parliament on 11 May 2006 and has been referred to the Senate Legal and Constitutional Committee for Inquiry and Report by 13 June 2006.

# Stolen wages update

Charmaine Smith, Solicitor

## The Government's Guidelines

The Aboriginal Trust Fund Repayment Scheme released its long overdue operational guidelines in February 2006. The guidelines define the role of the Scheme, the role of the Panel and the procedures associated with making a stolen wages claim.

The guidelines include:

1. the procedural distinction between direct and descendant claimants;
2. the process of priority allocation;
3. the conversion rates to be used to achieve current monetary value;
4. how applications will be investigated;
5. evidential considerations; and
6. the cut-off date for applications.

(The deadline for submitting claim forms is set at 31 December 2008 and not in five years' time as initially announced. This is of particular concern given the current delays associated with the determination of claims and the likely complexity of descendant claims.)

A full copy of the guidelines can be downloaded from the Scheme website at www.aftrs.nsw.gov.au.

## Troubleshooting

PIAC's initial concerns with the claims process have centred on access to records and the release of information. The archivist at State Records NSW has the discretion to determine which documents are relevant to the Scheme's decision-making process. A copy of this documentation is provided to the Scheme and forms the basis for the Interim Assessment.

PIAC has submitted to the Scheme that a claimant should have access to all their records and not just those items selected by the Scheme. However, the situation remains that if a claimant wishes to access all the documentation a separate application must be made to the Department of Aboriginal Affairs and State Records at the claimant's expense. This creates delays in the claims process.

## *Pro bono* assistance

The number of PIAC's stolen wages clients has increased to the stage where PIAC no longer has the capacity to represent them all. PIAC is working with various PILCH member law firms to obtain *pro bono* assistance for direct living claimants with their applications. This will help to reduce the delays for these claimants.

It is likely that this approach will be continued once the Scheme starts dealing with descendant claims.

# Talkin' Justice out west

Charmaine Smith, Solicitor

In March 2006, PIAC teamed up with the Arts Law Centre of Australia to travel through western NSW to present a series of informal lunch-time forums about our Indigenous-specific services, 'Talkin' Justice' and 'Artists in the Black'.

The aim of the trip was to meet with community workers in remote NSW with large Aboriginal populations in a culturally appropriate forum to share information and identify public interest issues that impact upon the community.

Our first meeting took place on Wiradjuri country at the Yarradamarra Centre in Dubbo, where in addition to considerable interest in stolen wages, we dealt with queries about public housing and the police. Local residents in Bourke expressed concerns about the high numbers of Aboriginal people being barred from local pubs and clubs. Our meeting in Walgett took place at the Euragai Goondi Meeting Hall where we were pleased to meet with many members of the Dharriwaa Elders Group. Our trip concluded with a journey out to Lightning Ridge and Collarenebri, accompanied by Gamillaroi community member John Walford.

Each forum was attended by representatives from local Aboriginal organisations including community workers, health workers, legal staff, education providers and elders. Many elders became aware for the first time about the operation of the Aboriginal Trust Fund Repayment Scheme, a sign that information is not being effectively disseminated by the Scheme.

The trip generated over thirty new stolen wages clients and a number of legal queries of a general civil law nature. A mailing list for the Indigenous Justice Project is now being developed with a view to distributing quarterly newsletters to maintain contact with interested individuals and organisations.

If you would like to be included on the Indigenous Justice Project mailing list please contact Charmaine Smith at PIAC on (02) 8898 6517 or csmith@piac.asn.au.

# Human Rights

## A Charter of Rights for NSW#

Vijaya Raman, Policy Officer

Recently the NSW Attorney General, the Hon Bob Debus, announced that he would be putting a proposal to Cabinet to seek public consultations on 'the values and rights Parliament should protect' in a NSW Charter of Rights.

This initiative follows developments in the ACT and Victoria. The *Human Rights Act 2004* (ACT) has been in place for two years and the Victorian *Charter of Human Rights and Responsibilities* has recently been tabled in the Victorian Parliament. Similar initiatives are proposed by Tasmania and WA.

PIAC is supportive of these moves to enact Charters of Rights. However, it appears that the same questions are being raised to challenge the need for such charters.

### Aren't human rights already protected in Australia?

On the international stage, Australia is the only western democracy that does not have a Charter or Bill of Rights. Australia's implementation of human rights protection has been inconsistent and can be characterised as a piecemeal approach providing some protections across many different laws.

At the same time, very few rights are actually protected in Australia. The *Australian Constitution* is primarily a document governing the relationship between the Commonwealth and State governments and as such only details a small number of rights, for example freedom of religion, freedom from discrimination on the basis of state residence, trial by jury and acquisition of property on just terms. To date the High Court has tended to interpret these rights narrowly.

Australia has ratified all key international human rights instruments. However, this does not mean that those human rights detailed in the International Bill of Rights automatically become part of Australian law. In Australia, the dualist approach to the implementation of international conventions and treaties means that specific legislation is required to make treaties operate domestically.

Australian anti-discrimination law is one area in which international human rights law has been incorporated into domestic law. However, even in this area protection is not comprehensive. For example, their is only limited prohibition against discrimination based on religion or sexuality.

Other human rights have no protection at all.

### Doesn't a Charter just mean more money for lawyers?

Other countries have introduced legislation similar to the type of Charter that NSW would be likely to adopt. As has been the case in NSW, concerns were raised about the potential rise in litigation and drain on the courts' resources. However, these countries have seen either no increase, or only a very small increase, in cases brought before the courts.

The UK brought in the *Human Rights Act 1998,* which incorporated the major rights found in the *European Charter of Human Rights* into domestic law. The experience of the UK has shown that the Courts have had a very limited role under the *Human Rights Act* and that there has been an extremely small increase in litigation.

In its first year of operation, the ACT *Human Rights Act* was cited in 14 Supreme Court cases and this was mainly in relation to interpretation of laws. Even if litigation slightly increases immediately after a Charter of Rights is introduced, it is likely return to normal within a short period of time. This was the experience of New Zealand when it passed its *Bill of Rights Act 1990*.

This argument fails to understand that one of the main impacts of a Charter of Rights is the community education element. Citizens develop a greater understanding of their rights and how to enforce them. As an aspirational document, a Charter of Rights voices the rights and values that the community views as important.

### Doesn't a Charter give judges too much power?

Some have argued that a Charter of Rights will increase the power of the courts at the expense of parliament. However, a Charter of Rights will not stop parliament from making laws to protect and advance the interests of the community. The role of the courts would simply be to make sure that the laws that are passed are in harmony with fundamental human rights.

In fulfilling this role, however, the courts would recognise that there may be times when parliament needs to balance some rights against other important rights, for example, the need to balance the right to freedom of speech and the right to freedom from racial vilification. Judicial review and interpretation are not new; they have always been an integral part of the legal system in democracies.

What is often forgotten in this argument is that **both** the legislature and the courts have a role to play in the

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# Thanks to Alice Grey for her assistance with research for this article.

## More care needed: challenging a discriminatory workplace

Jo Shulman, Solicitor

In the absence of adequate avenues of redress in discrimination law, PIAC relying on untested provisions of the *Workplace Relations Act 1996* (Cth) to argue that Qantas discriminates against flight attendants with Family Responsibilities.

Since July 2004, PIAC has been assisting a group of Qantas short-haul flight attendants who claim that they have been discriminated against by Qantas on the basis of their family responsibilities. PIAC's clients cannot meet their family responsibilities due to a system of rostering contained in the Workplace Agreement between the Flight Attendants Association of Australia and Qantas Airways Limited. The Agreement provides that flight attendants bid for rosters each month and work is allocated according to seniority, as determined by the length of time each flight attendant has worked for Qantas. Flight attendants with low seniority tend to be placed on reserve, which means that they are given short notice of when they will be required to fly and of how long they will be away from home. The system contained in the Agreement effectively allows some individuals considerable choice in terms of working conditions, days off, leave availability and earning capacity, at the expense of others who have the same rank, role and responsibilities. The conditions for those allocated reserve rosters, because of their low seniority, make it difficult for them to meet their obligations as parents and carers.

Usually in circumstances where workplace practices and policies are discriminatory on the basis of family responsibilities, an individual has an avenue of redress under either state and federal anti-discrimination laws. However, in this matter because the system of rostering is contained in a Workplace Agreement, section 40 of the *Sex Discrimination Act 1984* (Cth) applies and so there is an exemption from compliance with the Act. Further, it is likely that the *Anti-Discrimination Act 1977* (NSW) would not assist our clients because of the exemption contained in section 54(1)(b) of that Act, which is similar in effect to section 40 of the *Sex Discrimination Act 1984*.

Thinking creatively about what it could do to assist its clients, PIAC looked to section 170CK(5) of the *Workplace Relations Act 1996* (Cth), (prior to the amendments made by the Workchoices legislation), which prohibits the certification of an agreement that discriminates against an employee on the basis of, among other things, family responsibilities. (Section 170CK has been removed from the *Workplace Relations Act* by the Workchoices legislation. However, the *Workplace Relations Regulations 2006* contain a similar provision at Clause 8.6, which lists prohibited content in Workplace Agreements. This means that such an argument is still possible on the basis that a discriminatory provision of a Workplace Agreement is prohibited content.)

On 4 April 2006, PIAC's clients sought to intervene in the certification proceedings for the new Workplace Agreement between Qantas and the Flight Attendants Association. In the proceedings before the Australian Industrial Relations Commission, PIAC argued that the agreement should not be certified pursuant to section 170CK of the *Workplace Relations Act* on the basis that it was discriminatory against flight attendants with family responsibilities.

Unfortunately, PIAC's clients were not successful at first instance in relation to their invention, and the Agreement was certified on 10 May 2006 on the basis that it was not discriminatory. PIAC's clients are considering appealing to the Full Bench of the Australian Industrial Relations Commission.

This provision had not been tested before, but has great potential for employees wishing to challenge discriminatory systems of work that are contained in Workplace Agreements, and PIAC encourages their use in the future. PIAC is also grateful to Claire Howell who acted as *pro bono* Counsel in these cases.

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continuous discussion about human rights. A democracy continually seeks to balance the representative principles embodied in democratic legislatures with a respect for individual rights enforced by the courts. And despite what some have argued, Australia has never operated in a system where Parliamentary sovereignty was an absolute doctrine.

### The importance of rights

Every person, regardless of where they live, possesses fundamental human rights. Human rights are universal, interdependent and inalienable. They are essential to our democratic system and ensure that we can live our lives with dignity and respect.

A Charter of Rights would play a vital role in protecting the rights of everyone in NSW.

# Trade Justice

## Why does trade justice matter?

Jemma Bailey, Policy Officer

***Everything has been globalised, except our consent. Democracy alone has been confined to the nation state.***

**George Monbiot**

Tariff lines, import quotas, subsidies, customs duties, non-tariff barriers, WTO, GATS and NAMA. A compelling and exciting list, I know. But try not to be fooled—or lulled to sleep—by the camouflage of techno-jargon that sometimes clouds debate on trade agreements. The trade debate is not a debate between economists about levels of tariffs and import duties, it is a debate between citizens and their governments about the extent to which parliament can sign away its ability to make laws and policies in the public interest.

Over the last decade, trade agreements have increasingly encroached on the policy space of governments, subjugating social policy and health and environmental safeguards to corporate interests. And to add insult to injury, the promised economic gains of trade liberalisation have not materialised. The World Bank recently released a study on projected gains from the current Doha Round of WTO negotiations. This study predicted that the lion's share of gains from the Doha Round would accrue to developed countries.

### The increasing reach of trade agreements

The traditional image associated with trade agreements is one of ships laden with coffee beans, copper and cotton trousers. Since the establishment of the World Trade Organisation (WTO) in 1995 however, the reach of trade agreements has dramatically expanded beyond the commercial matters relating to the sale of goods. In 1995, the WTO introduced a range of new international trade agreements that potentially extend to almost every aspect of social policy.

Trade agreements now impact on food labelling laws, the provision of health, education and aged care services, environmental protection regulations, access to medicines and cultural policy. In fact, most aspects of free trade agreements actually have very little to with the free trade philosophies of Adam Smith and are more reminiscent of 'corporate managed trade'. For example, the Australia-USA Free Trade Agreement mandates monopoly-style limits on trade in intellectual property in areas such as medicines, which leads to increased prices of medicines for consumers.

### Trading away accountable government

Lori Wallach from USA non-government organisation, Public Citizen, warns that trade agreements represent a 'slow motion coup d'etat over democratic governance worldwide'. The coup d'etat has come in the form of a distinct shift in decision-making from elected governments to secretive trade agreements. Provisions of these agreements on essential services, investment and government procurement effectively place the legal rights of corporations above those of elected governments, and limit the policy choices of present and future governments at a local state and national level. A recent report released by Action Aid, *Under the Influence*, tracks the privileged access to trade negotiations given to corporate lobbyists at the WTO Ministerial Meeting in December, in contrast to the restricted access given to public interest groups.

Trade agreements are negotiated largely behind closed doors. In Australia, decisions about trade agreements are made by Cabinet, not Parliament and the dispute mechanisms in trade agreements are much more robust than the dispute mechanisms in international human rights law. Through these dispute processes, Country A can challenge the laws of Country B on the grounds that that law is a 'barrier' to trade. The dispute is heard by trade experts in trade tribunals and decided on the basis of trade law, without regard to whether the purpose of the law was to reduce social harm or protects human rights. In two recent cases, the USA and Antigua were successful in challenging the laws of other countries that regulated the growing of genetically engineered crops and the availability of internet gambling.

### Another world is possible

PIAC advocates for a strong multilateral framework of trade rules that mitigate the influence of powerful governments and transnational corporations and that is founded upon respect for democracy, human rights and environmental protection. Specifically, PIAC calls for:

- Strengthening and enforcement of international conventions on human rights, labour rights and the environment, including mandatory standards to regulate corporate behaviour.
- Reassessment of the WTO's structure and decision-making to ensure transparency and equal participation of governments.
- Clear exclusion of essential services from trade agreements, including public health, education, water, postal and energy services, and no trade rules that could threaten funding and provision of public services.

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# Trade Justice

## Monitoring the Australia-USA Free Trade Agreement

**Pat Ranald,** Principal Policy Officer

Trade figures published on the first anniversary of the Australia-USA Free Trade Agreement revealed that Australia's trade deficit with the USA has increased by over one billion dollars. The USA announced at the same time that it would seek, in the March review, to change the implementing legislation of the Agreement. The USA was demanding the removal of the provision in the legislation that prevents pharmaceutical companies from using particular legal tactics to extend patents

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- Repeal of trade rules that restrict the ability of governments to regulate in the public interest
- More democratic and accountable process for trade negotiations and ratification in Australia, including independent studies of the social and environmental impacts of proposed trade agreements and public and parliamentary debate before trade agreements are signed.

PIAC's community campaign for trade justice has achieved a number of wins. In May 2005, PIAC pressured the Government to exclude water for human use from Australia's commitments in the WTO's trade in services agreement. PIAC's key campaigns this year are: safeguarding essential services in the WTO negotiations, preventing the race to the bottom on human rights and labour rights in the China-Australia Free Trade Agreement negotiations and follow up work on the Australia-USA FTA.

To find out more or to get involved in PIAC's trade justice policies and campaigns, contact Jemma Bailey on jemma@piac.asn.au or visit the AFTINET website: aftinet.org.au.

and thus to continue to charge higher prices for their products.

PIAC publicly urged the Australian Government not to give in to this pressure. The Trade Minister responded by giving assurances that there would be no concessions that would affect access to medicines and none were made.

Another area of concern is the impact of the Agreement on Australia's blood fractionation services (services that separate blood into its components). These services are being reviewed to determine whether they should be opened to competitive tendering by international firms, and possibly supplied from overseas. Australia's current policy is that Australia should be self-sufficient in both voluntary blood collection and processing of blood products, for both health and national security reasons. PIAC, AFTINET the Red Cross and other community organisations have all submitted that this policy should be retained in the public interest.

# Access to Justice

## Renewing law for non-lawyers training

**Carolyn Grenville,** Training Co-ordinator

Many people need to know about the legal system for their work, or to protect their own rights. Recent studies have found that members of the community often do not understand the legal system or know where to go for legal assistance when they need it. People such as community workers, social welfare workers, and anyone who gives advice or assistance as part of their work, particularly need to know how to identify legal problems and point people in the right direction for help.

The Law and Justice Foundation of NSW has recently made a grant to PIAC to take the first steps in redeveloping a community legal education program for people who want to develop an understanding of the law and how the legal system works: *Law for Non-Lawyers*. *Law for Non-Lawyers* was previously run by Redfern Legal Centre Publishing, a community legal centre and publisher of *The Law Handbook*.

PIAC Training Co-ordinator Carolyn Grenville has gathered a reference group of representatives from a number of legal and community organisations to help PIAC take a fresh look at the need for this training. The reference group has already identified the need for a clear explanation of the framework and basic principles and structures of the law and the legal system as being the top priority for the training.

Carolyn is also talking to possible partners and supporters to investigate the feasibility of PIAC offering *Law for Non-Lawyers* as a regular part of its training program in the future. Carolyn believes that *Law for Non-Lawyers* should be a good match for PIAC's current advocacy training programs. If the decision is to go ahead, the first course will run in March 2007.

For more information about Law for Non-Lawyers, or to contribute your ideas, please contact Carolyn Grenville, PIAC Training Co-ordinator by e-mail at cgrenville@piac.asn.au.

# Access to Justice

## Is Australia preventing or entrenching homelessness?

Emma Golledge, HPLS Co-ordinator

A raft of legislation was rushed through the Commonwealth Government last year signalling major reforms to the industrial relations system and the social security system. Viewed from the perspective of the homelessness sector we might wonder whether these changes might serve merely to increase the risk that greater numbers of Australians will experience homelessness at some point in their lives.

In 2001, the (then) Federal Department of Family Services produced a report based on consultations with the sector entitled *Working Towards a National Homelessness Strategy - Response to Consultation*. Part two of that report identified 'factors that contribute to or prevent homelessness'.[1] The report identified employment and income support as key areas in preventing and reducing homelessness.

The passing of the 'WorkChoices' and 'Welfare to Work' legislation last year highlights the disconnection between the Federal Government's homelessness strategy and wider Government policy. It ignores some key findings of homelessness strategy consultations and further isolates homelessness prevention as Government policy to the Department of Family and Community Services and Indigenous Affairs (FaCSIA), rather than a filter through which all Government policy direction should be considered. While the Government may argue that freeing up of the labour market will create more work opportunities for people experiencing homelessness and under-employment, other views suggest that the imbalance in the WorkChoices legislation will not create greater employment opportunities but will create a labour pool that is 'characterised by low pay, low skill and high turnover'.[2]

Lower wages, decreased job security, casualisation and marginal employment need to be understood in the context of housing unaffordability across Australia. In major cities across Australia, housing unaffordability in the rental market results in people allocating high percentages of their income to housing costs. This leaves less income available to cover other day-to-day living expenses and also seriously curtails or completely removes the capacity of low-paid workers to save some money to deal with unforseen crises.

Within this context, reforms to industrial relations legislation—including the removal of legal redress for unfair dismissal for many workers—undermine some of the key protections against arbitrary loss of employment and income. These changes may undermine the ability of individuals to insulate themselves against homelessness by increasing the uncertainty of income levels and, as a consequence, increasing the instability of their housing. It's also important in this context to recognise that many casual employees are using casual loadings to meet basic costs such as rent and food. A loss of these loadings may make already marginal rent levels completely unsustainable.

The 'Welfare to Work' changes to social security law also suggest that people may be at increased risk of homelessness with the very real risk that the limited income security provided by social security benefits could be lost to many people. The changes include a reduction in the basic payment for some recipients. An issue of potential impact for people experiencing or at risk of homelessness is the shifting of people capable of working between fifteen and twenty-nine hours per week from the Disability Support Pension to the Newstart Allowance, resulting in a loss of income per week and more onerous reporting requirements.

There is particular concern for people who experience mental illness who may be shifted from the Disability Support Pension onto the Newstart Allowance on the basis of their capacity to work part time. The problem for these people will be the impact of the episodic nature of their condition on their capacity to maintain employment over a period of time and, indeed, to obtain employment in the face of discrimination.

The importance of a national approach to addressing, reducing and supporting people out of homelessness cannot be understated. However, this approach must be developed—and assessed—across the totality of policy initiatives by Government. Applying this consideration, the adequacy of the current National Homeless Strategy seems highly questionable while there are major Government reforms that significantly remove support for low-income and disadvantaged people. There can be no doubt that in the present policy environment homelessness is a growing industry.

**Notes**

1. Department of Family and Community Service, *Working Towards a National Homelessness Strategy – Response to Consultation by Commonwealth Advisory Committee on Homelessness* (2001) Department of Family and Community Service <http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/housenat_homeless_strat.htm> at 17 May 2006.
2. David Plowman and Alison Preston, 'The New Industrial Relations: Portents for the Lowly Paid', (2006) 56 *Journal of Australian Political Economy* 17.

# Public Interest in energy and water supply

Jim Wellsmore, Senior Policy Officer

While households may be the largest group of users of energy and water it is not always clear how governments, regulators and the supply industries actually identify what is in the best interests of the general community. A new *National Electricity Law* came into force in 2005 and it establishes the objective for the national energy market as being to provide for the 'long term interests of consumers'. An issue for PIAC is what that means.

PIAC has been active in a number of debates both in NSW and nationally about how to determine and deliver what is in the best interests of consumers. For PIAC this is very much a debate about the public interest rather than what gains might be enjoyed by particular groups in the community.

In developing a better understanding of the nature of that public interest, PIAC has over the last 12 months commissioned research, written submissions, participated in regulatory debates and consulted with other community and consumer groups.

## Water regulation through pricing

In NSW, the utilities regulator has determined that higher prices for water are an appropriate response to the problem of consumer demand outstripping supply. PIAC argued that there is better evidence for supporting consumers in their efforts to use less, for example, through the implementation of compulsory water restrictions and provision of water savings retrofits for residential properties. These measures are important in communities such as the Central Coast where residents have shown marked reductions in water use and there are large numbers of low-income families who will be most affected by increases in the cost of essential services. Such measures would serve the public interest by achieving the goal of reduced water use without having a negative impact on households.

The NSW Government now is moving to introduce competition to the water industry in the Sydney metropolitan area. A consultative process has been initiated and PIAC intends to play a key role in those discussions. Among the issues of concern to PIAC are the objectives identified by the Government for this new regime. Public health and the environment are among those objectives as is, again, the 'long-term interests of consumers'. The challenge for the Government, however, is to make a compelling case that competition can deliver on these aims where it has failed in energy.

## Energy regulation

Similarly, the NSW Government decreed that the community would be well served by changes to the supply quality obligations imposed on the State's electricity distributors. The decision was taken by the (then) Minister for Energy and Utilities without any consultation with the community. Improved reliability certainly will benefit some sections of the community. The price of achieving the new standard will, however, flow to consumers already trying to absorb big jumps in the cost of power over the last two years.

Within the national energy market there currently is a proposal to reduce the obligations on the supply businesses. The argument from the industry (and from some in government) is that these obligations, for example, controlling the marketing behaviour of retailers or procedures for disconnecting customers, should be weakened in order to lower costs to the businesses and their customers.

## Protection for vulnerable consumers

Yet it is clear that the public interest is not served by making consumers more vulnerable in relation to the supply of essential services like electricity and gas. Meanwhile the industry is arguing in other forums for higher consumer prices for energy to ensure private investment with the goal of 'keeping the lights on'. This is an appropriate goal but the question is whether it should be achieved at any price.

The issue of consumer prices for energy and water are expected to remain key issues for PIAC and its work in utilities. Rising numbers of electricity disconnections for non-payment in NSW point to the problems already faced by many people. The NSW Government appointed a working party to recommend steps to address hardship in relation to electricity and gas but has been slow to take up the recommendations. Since then the Government has announced it will review the Energy Account Payment Assistance scheme.

PIAC is keeping a close watch on developments in both these areas, particularly as the energy industry and governments around Australia move to lift controls on consumer prices for this essential service.

# PIAC and PILCH People

## Jane King, Centre Co-ordinator

The past six months have seen some additions to the staff at PIAC as well as some departures.

Staff were sad to say goodbye to Katharine Slattery in December and to welcome Alex Price-Randall. Katharine has taken up a position of Project Officer in the First Year Teaching and Learning Unit in the Faculty of Arts in the University of Sydney and we will miss her humour and efficiency. Alex has taken on the role of administering PIAC's training programs and AFTINET.

We were also sad to see Ellena Galtos leave in December. Ellena was the Policy Officer with the Homeless Persons' Legal Service and due to lack of funding for her position we were unable to extend her one-year contract. Ellena's commitment to the homeless community in NSW will be missed. Ellena has taken up the position of Co-ordinator at St George Backstop Family Support Service.

Policy Officer, Jane Stratton, resigned in February to take up the position of Acting Pro Bono Co-ordinator at Gilbert + Tobin. We will miss Jane's energy and enthusiasm around the office and look forward to being able to continue working with her in her new role.

Vijaya Ratnam-Raman was appointed to fill Jane Stratton's position. Before coming to PIAC, Vijaya worked as a Project Officer for UNICEF in Port Moresby. Vijaya brings a passion for human rights and community development and will be continue the work on PIAC's Protecting Human Rights in Australia project.

Our Protecting Human Rights in Australia project is also currently being very ably assisted by Alice Grey. Alice is a law student from Sydney University on placement at PIAC for the first semester of the year.

PILCH will miss secondee, Susanna Taylor, from Deacons who finished her secondment in February when we welcomed our new secondee, Kate Cust from Allens Arthur Robinson.

College of Law students doing their practical legal training continue to provide excellent support to PIAC and PILCH. Sophie McWilliam and Che Huy Chhour finished their placements in February, and Courtney Mitchell and Dane Clapson have continued to maintain the high standards set by their predecessors.

# PIAC Publications

## December 2005 to May 2006

**Local government charters for social justice / human rights. 30 October 2005**

This paper provides information about initiatives by local governments in Australia and overseas to developing Charters to protect human rights at the Local Government level.

**NSW Water Pricing Guidelines and Country Town Communities: Assisting vulnerable residents. November 2005**

This report examines the impact of NSW Government guidelines for pricing of water services by local council providers and proposes reforms designed to reduce negative outcomes for rural households.

**Regulation and Consumer Benefit: Compliance in the National Energy Market. 8 December 2005**

This report examines the role of operating licences and business authorisations as a form of regulation of essential service industries.

**Submission to the Security Legislation Review Committee. January 2006**

PIAC's submission focusses on the impact of anti-terrorism legislation in discouraging community participation and increasing a sense of insecurity.

**Public Consultation on Energy Regulation. 13 January 2006**

This submission responds to a recent consultation paper on regulation of energy in the national market.

**Submission to Ministerial Council on Energy on national energy regulation. 13 January 2006**

A response to a consultation paper on the national reform of the regulation of the energy industries, focussing on concerns for household users of energy.

**The public interest in effective regulation. February 2006**

This submission identifies the need for effective regulation to achieve the community's social, environmental and economic needs. It presents some concerns about weakening regulation, compliance and enforcement.

**Paying for what? The impact of utility tariff structures. March 2006**

This paper analyses the case for changes to tariffs for energy and water and the impact these can have on residential users.

**Comments on the draft ALP policy platform. 31 March 2006**

**Not such a fine thing! Options for reform of the management of fines matters in NSW. April 2006**

This report examines the impact of the current on-the-spot fines system on people who are homeless or face other disadvantage.

**Public participation or urging disaffection. Submission to the ALRC review of sedition laws. 18 April 2006**

In this submission PIAC calls for the repeal of the sedition law amendments and for incitement legislation to be dealt with in the framework of anti-discrimination laws.

**Submission to the NSW Parliament Joint Select Committee on Tobacco Smoking. Inquiry into tobacco smoking in New South Wales. 21 April 2006**

See article on page 4.

**Submission to the Ten Year Review of the Police Oversight System in NSW. 15 May 2006**

PIAC's submission calls for an overhaul of the system of investigation of complaints against police to ensure such complaints are subject to independent investigation rather than conducted by the police.

**# All PIAC publications are available on PIAC's website: piac.asn.au.**

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| | | |
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