

Reparations are 'unfinished business': Commissioner Calma

Dominic O'Grady, Communications and Media Officer

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Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma recently launched the second edition of PIAC's *Restoring Identity*, using the event to describe reparations for Australia's Stolen Generations as a matter of 'unfinished business'.

Speaking at Tranby Aboriginal College on 20 November 2009, Commissioner Calma called on the Federal Government to take a leadership role in developing a national process for reparations for the Stolen Generations.

PIAC's *Restoring Identity* report addresses the failure of governments and churches to provide reparations for members of the Stolen Generations, as previously recommended by the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* in its *Bringing them home* report.

Restoring Identity proposes a Stolen Generations Reparations Tribunal, and includes a draft bill to establish that tribunal.

'First and foremost, the *Restoring Identity* report ensures that the struggles that our peoples have endured as a result of past government policies and practices of the forcible removal of our children from our families, are not forgotten,' Commissioner Calma said at the launch.

'There is no Aboriginal or Torres Strait Islander person in this country that has not been affected—either directly or indirectly—by the removal of our

people from our lands, from our communities, from our families and from our culture.'

Mr Calma encouraged all governments, churches and other stakeholders to adopt a national reparations tribunal model of the kind proposed in *Restoring Identity* and consider a collective approach that adequately acknowledges and addresses the experiences of the Stolen Generations nationwide.

'Now that we, Australia, are no longer in denial about the history of this country, let us work and walk together on the path of reconciliation and justice to heal this nation and each other together. And let us never forget that from self respect comes dignity and from dignity comes hope.'

Restoring Identity can be downloaded from PIAC's website at www.piac.asn.au

Photo: David Ottot



Commissioner Tom Calma with PIAC's Vavaa Mawuli at Tranby College.

Testing the Government's commitment to consultation

Robin Banks, Chief Executive Officer

By the time this edition of the *PIAC Bulletin* hits your desk, it is very likely that the Federal Government will have announced its response to the Brennan Committee's *National Human Rights Consultation Report* (available at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>). How the Government responds is a clear test of its commitment to community consultation and engagement.

A key theme of the Rudd Government has been community consultation. It began with the big shebang of the Australia 2020 Summit in Canberra in April 2008 that brought together 1,000 people from across Australia to work on the 'big issues' confronting our nation.

One of the strong messages from the Summit's Governance Stream, of which I was a part, was the need for governments to better engage with the people on an ongoing basis and to ensure that people are sufficiently informed about the mechanisms and work of government to have input to the various processes. This was described in the 'one big idea' of 'collaborative government ... to revolutionise the ways government and communities interact'. Concrete proposals included an online government portal providing free, searchable government information and a 'space for citizens to participate and share their view'; active citizenship training; third sector strengthening; and changes to electoral laws to abolish private campaign finances. (The full report of the Australia 2020 Summit is available at http://www.australia2020.gov.au/final_report/index.cfm.)

We've certainly seen some of these ideas being developed further with the Federal Government conducting 19 community cabinet meetings across Australia since January 2008, in cities and towns as far flung and diverse as Hobart in Tasmania and Ballajura, an outer suburb of Perth, WA; Narangba in south eastern Queensland to Hallett Cove, an outer suburb of Adelaide, SA; Yirrkala on the Gulf of Carpentaria in the Northern Territory to Bathurst in NSW. These meetings are promoted as an opportunity to hear directly from the Prime Minister and then ask questions of the Cabinet, before one-on-one meetings are held by Cabinet Ministers with individuals and community groups.

The Federal Government has also been seeking input from the community on its Gov 2.0 proposals and PIAC has contributed through a formal submission. The Government 2.0 Taskforce has a focus on how to 'make government information more accessible and useable', how to 'make government more consultative,



PIAC's Robin Banks at the Human Rights Consultation in Canberra, July 2009 (snapshot from video of proceedings).

participatory and transparent to maximise the extent to which government utilises the views, knowledge and resources of the general community', and 'how to build a culture of online innovation within Government'. Visiting the Gov 2.0 website at <http://gov2.net.au/> is a fascinating introduction into the possibilities of using new technologies to improve government engagement and accountability, both core outcomes sought by PIAC through its work.

The Federal Government has also sought community input to reforms of electoral laws and processes in Australia and, again, PIAC has contributed a response to the *Electoral Reform Green Paper – Strengthening Australia's Democracy* as well as to a number of other state and federal inquiries in this area over the past couple of years. (For more about the Federal Government's electoral reform processes, go to http://www.pmc.gov.au/consultation/elect_reform/index.cfm.)

These are all important opportunities for us all to engage in the business of improving representative democracy in Australia. And I hope that the Government will have taken the opportunity afforded it by the historic level of positive response to the National Human Rights Consultation to announce that it will proceed with a human rights act for Australia. To do otherwise will be to allow a powerful and vocal minority to maintain its power and lose the momentum to achieve a more balanced and equal future for everyone in Australia. It is the first big test of whether the Federal Government's commitment to consultative processes is real and meaningful. A test that if failed would likely result in disengagement by those most affected by government policies.

Juvenile Justice: Evidence based practice

Brenda Bailey, Senior Policy Officer

Over the past three years, New South Wales has experienced an increase of 40 per cent in admissions of young people to custody on remand.¹ As numbers in detention centres increased, a plethora of reports examining the increase was released. These reports document the failure to apply evidence to juvenile justice policy and resourcing.

This failure has occurred at the same time as the NSW Department of Premier and Cabinet has declared that the NSW State Plan commits the NSW Government to delivering Evidence Based Policy (EBP).² The Special Commission of Inquiry into Child Protection Services in NSW released its report in late 2008, dedicating a chapter to juvenile detention issues. It detailed how the majority of young people on remand have been granted bail, but were unable to meet the conditions of bail.

The report quotes NSW Department of Juvenile Justice figures that 60 per cent of detainees are on remand, and of these, 90 per cent are detained because they cannot meet bail conditions. Of this group, 95 per cent are in detention because accommodation is not available in the community.³

In May, the Bureau of Crime Statistics and Research (BOCSAR) *Crime and Justice Bulletin* reported on a study into recent trends in juvenile crime found the increase in detainees was due to changes to the *Bail Act 1978* (NSW) and police enforcement. The study found no relationship between the increased numbers in detention and the rate of property crime.⁴

Mission Australia released a snapshot summarising the outcomes of a diversionary program, 'Pasifica', in June 2009. The program supports young people from south Pacific island backgrounds in Sydney's south-west. The study found the

program reduced offence rates by more than half and serious offences by about two-thirds. The cost of the program was a fraction of the cost of keeping a person on remand for the same period of time.⁵

In October 2009, the Australian Institute of Criminology released a report on a study comparing the effects of custodial penalties on juvenile reoffending. It concluded that juveniles given custodial sentences are no less likely to reoffend than juveniles given non-custodial orders.⁶

Later in the same month, the Youth Justice Coalition released *Bail Me Out: NSW Young Offenders and Bail*, a research report documenting the outcomes of 140 cases in the NSW Children's Court.⁷ It confirmed that young people granted bail by the Court were remaining in detention because they could not meet the conditions of bail.

The study found that the majority of arrests were not for new offences, but technical breaches of bail, such as arriving home 20 minutes outside an 8:00 pm curfew. The number and nature of bail conditions imposed were also examined. Failure to meet conditions was often inevitable as carers and young people struggled to manage the number, complexity and, at times, contradictory conditions. In two cases, the Court found the young person had no matter before the Court and should never have been arrested.

Coinciding with the release of *Bail Me Out* was a community sector paper led by UnitingCare Burnside, *Releasing the pressure on remand*.⁸ Based on evidence of non-custodial interventions for young people on remand, the sector recommended the Government fund a residential bail support program linking young people to appropriate educational, therapeutic and community support services.

This series of reports provides evidence that non-custodial interventions work; that custodial sentences make no difference to reoffending rates; and that police practices to monitor and detain young people for technical breaches of bail make no difference to crime rates.

In June 2009, the Minister for Juvenile Justice, the Hon Graham West, announced a review of the NSW juvenile justice system. Noetic, the consultancy firm undertaking the review, is expected to report by the end of 2009. It is hoped that in the report the consultants will recommend the adoption in NSW of policy based on the best available evidence.⁹

Footnotes

- 1 NSW Auditor General, *Report to NSW Parliament, Financial Audits Volume 5* (2008) <http://www.audit.nsw.gov.au/publications/reports/financial/2008/vol5/pdf/016_0368_public_trustee_nsw.pdf> at 2 December 2009
- 2 NSW Department of Premier and Cabinet, *Evidence Based Policy: From Rhetoric to Reality* (2009) <http://www.dpc.nsw.gov.au/public_employment/education_and_training/work_based_projects/content/evidence_based_policy_from_rhetoric_to_reality> at 27 November 2009.
- 3 The Hon James Wood, *Report of the Special Commission of Inquiry in Child Protection Services in NSW* (2008) 558.
- 4 S Vignaendra, Steve Moffatt, Don Weatherburn *et al*, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Crime and Justice Bulletin* 1.
- 5 Mission Australia, *Young people and the criminal justice system: New insights and promising responses* (2009).
- 6 Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, *The specific deterrent effect of custodial penalties on juvenile reoffending: AIC Reports – Technical and Background Paper 33* (2009).
- 7 Katrina Wong, Brenda Bailey and Dianna T Kenny, *Bail Me Out: NSW Young Offenders and Bail* (2009) <<http://www.yjonline.net/BailMeOut.pdf>>
- 8 UnitingCare Burnside, *Releasing the pressure on remand: Bail support solutions for children and young people in NSW* (2009).
- 9 Adele Horin, 'Answers sought on high youth jail rate', *The Sydney Morning Herald* (Sydney) 20 July 2009, p3.

A question of balance

Robin Banks*, Chief Executive Officer

In 2008, the Public Interest Advocacy Centre (PIAC) began working with partners on a research project to examine the impact of government contracts on the relationships between government and the not-for-profit (NFP) sector and on the work of the NFP sector. The project is a partnership with the Whitlam Institute within the University of Western Sydney and the Social Justice Social Change Research Centre, University of Western Sydney with support from Jobs Australia.

In July 2009, the project partners published the report of the project, *A question of balance: Principles, contracts and the government-not-for-profit relationship*¹, and submitted that report to the Productivity Commission's study of the Contribution of the Not for Profit Sector.

In approaching the research, the project partners reflected on the dramatic changes that have occurred in the provision of human services over the past two decades and to the forms of public administration over the same period.

Of particular interest was the increasing use of tendering and contracting by governments when seeking to have human services delivered outside of government. This has been a shift from the use of grant funding models. While there are many aspects of human services delivery that have seen this increasing contractualism, the research focused largely on the Federal Government's (then) Job Network contracts and the surrounding framework.

The research had three elements: a literature review, face-to-face interviews and legal analysis of contracts. The face-to-face interviews were conducted with the senior staff of 24 not-for-profit organisations, 14 of which were providers of employment services within Job Network. The legal analysis involved review of eight different government service delivery or funding contracts, with a particular focus on reviewing the Job Network contract. The project partners were greatly assisted in this contract analysis through the *pro bono* assistance of law firm, Holding Redlich, obtained through the Public Interest Law Clearing House (PILCH).

Key findings of the research include that contracts between government and not-for-profit providers of human services strongly codify the relationship and the importance of those contracts has, to date, been understated. The project partners concluded, in their report, that redevelopment of 'the contractual relationships from core principles down will have a significant and positive impact on both the ... relationship and on the delivery of quality services to those ... relying on them'.²

Eight recommendations were included in the report. These recommendations focused firstly on the development of a set of common principles to guide contracting between government and the not-for-profit sector and the delivery of human services. While the

The Proposed Principles

A. Foundations:

- (i) All parties should enter into the contract in *Good Faith*.
- (ii) There is a presumption of *Good Will*.

B. The relationship between the contracting parties:

- (i) The relationship between the contracting parties is one of *Trust*.
- (ii) The contracting parties will accord each other *Proper Respect*.
- (iii) The relationship between the contracting parties is *Supportive and Collaborative*.

C. Nature of the contract:

- (i) The contract should be *Clear and Readily Understood*.
- (ii) The requirements in the contract should be guided by *Proportionality*.
- (iii) The terms of the contract should be *Responsible and Reasonable*.
- (iv) The contract should establish *Meaningful Outcomes*.

D. Operation of the contract:

- (i) The contract should allow *Decisions* to be made at the *Appropriate Level*.
- (ii) The contract should operate *Consistent* with the presumption of *Good Will* and *Trust*.
- (iii) The contract should be based on *Full and Fair Costing*.
- (iv) The contract should allow that *Risk* exists, cannot be eliminated and will be *Shared*.
- (v) The contract should be administered in a *Timely Manner*.

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report includes detailed discussion of the proposed principles, they are summarised in the report as:

- A. Foundation principles
- B. Principles governing the relationship between the contracting parties
- C. Principles governing the nature of the contract
- D. Principles governing the operation of the contract.

The other recommendations dealt with prohibiting unfair contract terms in such contracts; requiring the principles to be reflected in enforceable obligations and remedies for both parties; developing shorter-form framework agreements to better reflect the range in size, risk and complexity of service delivery programs; ensuring usual interpretive rules are not excluded to the benefit of the government party; including clear preliminary provisions in contracts dealing with purpose and objectives and the particular expertise of the non-government contracting party; the development of standard-form provisions to deal with a range of core aspects of contracts (such as intellectual property rights, funding acknowledgment, reporting obligations, etc); and the adoption of a standard chart of accounts by all Australian governments.

Since the report was published, the project partners have been speaking to both government and the not-for-profit sector to outline the findings and recommendations and develop ideas for the implementation of the recommendations. In particular, the project partners are pleased that the Productivity Commission's Contribution of the *Not-for-Profit Sector: Draft Research Report*³ makes extensive reference to the report and that they have had an opportunity to meet with representatives of the Commission to discuss further the recommendations and how they can be implemented.

Footnotes

- * The report is jointly authored by Eric Sidoti, Robin Banks, Michael Darcy, Peri O'Shea, Rosemary Leonard, Rosalie Atie, Mauro Di Nicola, Sandra Stevenson and Deirdre Moor.
- 1 Eric Sidoti, Robin Banks, Michael Darcy, Peri O'Shea, Rosemary Leonard, Rosalie Atie, Mauro Di Nicola, Sandra Stevenson and Deirdre Moor, *A question of balance: Principles, contracts and the government-not-for-profit relationship* (2009) Public Interest Advocacy Centre, Whitlam Institute and Social Justice & Social Change Research Centre, University of Western Sydney <http://www.piac.asn.au/publications/pubs/sub2009074_20090731.html>.
- 2 Ibid 1.
- 3 Productivity Commission, *Contribution of the Not-for-Profit Sector: Draft research report* (2009) Productivity Commission <<http://www.pc.gov.au/projects/study/not-for-profit/draft>> at 26 November 2009.

PIAC highly commended in Privacy Awards

Robin Banks, Chief Executive Officer



From left: Special Minister of State, The Hon Joe Ludwig; PIAC CEO, Robin Banks; Federal Privacy Commissioner, Karen Curtis; and PIAC Chair, Shauna Jarrett.

The Office of the Privacy Commissioner presented the Australian Privacy Awards in November 2009, with PIAC short-listed for the Community and Non-Government Organisation (NGO) category along with the Association of Market and Social Research Organisations, the Biometrics Institute and Windermere Child and Family Services.

The Association of Market and Social Research Organisations won the award in this category, with the judges giving PIAC the highly commended award.

This award recognises PIAC's work on privacy rights and advocacy over many years and its work on its own privacy compliance. PIAC has been greatly assisted in improving its internal practices and policies by Anna Johnson, of Salinger Privacy Consulting.

PIAC will continue to promote awareness and better protection of privacy rights to all governments, and will seek to encourage others in the Community Legal Centre and NGO sector to become involved in this advocacy and in improving internal practices.

Special congratulations go to Dr Roger Clarke for his richly deserved Australian Privacy Medal and to the Victorian Department of Justice for winning the Grand Award as best overall from all the categories.

The following awards were also presented: Loyalty Pacific, winner of the Small-Medium Business Award, with Space-Time Research being Highly Commended; Australian Health Management, winner of the Large Business Award, with PayPal being Highly Commended; and the Australian Customs and Border Protection Service, winner of the Government Award, with the Human Services Portfolio (Cth) and Mildura Rural City Council both being Highly Commended.

Human Rights

Human Rights report: an important milestone

Lizzie Simpson, Solicitor

In December 2008, the Federal Attorney-General, the Hon Robert McClelland, established an independent committee, chaired by Father Frank Brennan SJ, to conduct a national consultation to find out whether Australians believe their human rights are adequately protected, and if not, how human rights should be better protected. On 8 October 2009, the Committee's report was publicly released and the Federal Government is currently considering the recommendations.

The key recommendation made by the Committee in its report is that Australia should adopt a Human Rights Act¹ along the lines of the UK/ACT/Victorian model (the dialogue model).²

This recommendation reflected the vast majority of the submissions³ that supported the enactment of comprehensive legislation that would protect human rights in Australia. The Committee indicated that if the Government does not legislate, many of the other recommendations, such as having a national human rights education campaign and creating a Joint Parliamentary Committee on Human Rights, could still be implemented. However, as the Committee indicated in its report, this approach is problematic: without the foundation of an Act many of the other recommendations such as an education campaign are meaningless.

One of the controversies during the consultation was whether the dialogue model would be constitutionally valid. It was suggested that because declarations of incompatibility made by courts would not directly bind the parties or affect their legal rights, this may not be a proper exercise of 'judicial power' or constitute a 'matter' as required by Chapter III of the *Australian Constitution*.⁴ These

concerns have been assuaged by an advice from the Commonwealth Solicitor-General that an Act based on the dialogue model would be constitutional provided that a declaration was made in the context of an existing legal complaint or matter.

Economic, Social and Cultural Rights

Many of the submissions to the Committee highlighted economic, social and cultural rights as the rights most important to Australians.⁵ For example, of the specific rights discussed in submissions, the right most commonly mentioned is the right to health.⁶

However, the Committee did not recommend that economic, social and cultural rights be given the same protection as civil and political rights. Indeed, the Committee adopts a compromise position indicating that if an Act were to include these rights, they should not be enforceable by the courts.⁷

This compromise position appears to have been at least partly based on the Solicitor-General's advice that the inclusion of economic, social and cultural rights in a Commonwealth Human Rights Act would not be constitutional as these rights are not 'sufficiently detailed'.⁸

This conclusion is premised on the fact that determinations about economic, social and cultural rights inevitably involve questions about resource allocation.⁹ One solution to this problem may be to draw on the overseas jurisprudence¹⁰ to incorporate criteria or indicia that could assist in ensuring that these rights are sufficiently precise, immediate and expressed in negative terms that they could be considered to be proper 'judicial standards'. For example, the relevant test could be

that these rights should be negatively protected from improper, irrational or unreasonable interference by public authorities.¹¹

However, these possibilities are not fully explored either in the advice or the report. The compromise position adopted in the report is therefore disappointing: while the recommendations about economic, social and cultural rights would improve the protection of these rights, the Committee effectively reinforced the view that these rights are lesser rights or mere aspirations. It is also contrary to the very strong message that is apparent throughout the report that most people are particularly concerned about improving the protection of these rights in Australia.

Conclusion

The Committee's report is an important milestone in the campaign to improve Australia's protection of human rights as it represents the highest public participation in any public inquiry in Australia's history. Thus, its central message—that human rights in Australia need better protection and that one of the key mechanisms to improve this protection is by enacting federal human rights legislation—is a particularly strong one.

However, those campaigning for increased protection for human rights may still wish to go further, particularly in relation to arguments about economic, social and cultural rights, Indigenous rights¹² and the application of the Act to states and territories.

While there is cause for optimism and celebration about the report, there is still a long way to go before human rights are properly realised in Australia, for all Australians.

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Charges against homeless man dismissed

Jeremy Rea, Solicitor Advocate, Homeless Persons' Legal Service*

The Solicitor Advocate for the Homeless Persons' Legal Service (HPLS), Jeremy Rea, represented a homeless man at the Downing Centre in November 2009 after the man was charged under the *Summary Offences Act 1988* (NSW) with carrying a knife in a public place

The man, 'Bob', had moved from a town in regional NSW to Sydney for work but was later retrenched. He was living on the streets and carried all his possessions in a backpack, including a 10 cm kitchen knife that he used to cut up fruit.

In July this year, he decided to return by bus to his home town. He bought some fruit and had a couple of drinks, and when he got to the concourse of Central Station he was observed by police to be unsteady on his feet.

Police stopped and questioned Bob, then searched him because they suspected he may have been carrying a prohibited drug.

No drugs were found but the kitchen knife in a sheath was. When asked why he had the knife, Bob told the officers he used it to cut up fruit. The officer in charge inspected the knife and formed the opinion that it had not been used recently. As a consequence, Bob was charged with carrying a knife in a public place.

Bob was referred to the Homeless Persons' Legal Service. It was clear that section 11C(2)(a)(ii) of the *Summary Offences Act 1988* might be relevant. This section provides a defence if the knife is used for preparation of food. Further, section 11C(2) of the Act provides a defence if the person with the knife has it on his person for reasonable purposes of travel to and from the place where he ate. As

Bob was homeless and carried all his personal possessions with him, section 11C(2) was an important defence.

A Magistrate heard the matter at the Downing Centre. Under cross-examination, the police officer in charge conceded he had not considered the possibility that the sheath may have wiped any fruit residue off the knife. The officer also conceded he had not inspected the inside of the sheath for fruit residue. Police did not dispute that Bob was at Central Station for the purpose of travel.

In dismissing the charge, the Magistrate accepted that Bob could have used the knife for preparation of food. The Magistrate noted that Bob was homeless, had nowhere to put the knife except in his backpack or on his person, and found that a homeless person in Bob's position had reasonable grounds for carrying a knife.

This is a good indication of how courts will consider particular circumstances affecting homeless people. Bob had a couple of prior knife charges that could have exposed him to a term of imprisonment if he had been found guilty.

This case illustrates the value of the position of HPLS Solicitor Advocate. As Solicitor Advocate, I can take the time to thoroughly engage with a client who is facing a particular encounter with the criminal justice system and prepare a response to the Court that highlights the context of the person's life.

* The Homeless Persons' Legal Service (HPLS) is a joint initiative of the Public Interest Advocacy Centre and the Public Interest Law Clearing House. For more information about HPLS, go to PIAC's website at www.piac.asn.au.

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Footnotes

- 1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) xxxiv (recommendations 18 and 19).
- 2 Ibid xxxiv-xxxviii (recommendations 19-31).
- 3 Eighty-seven per cent of those submissions that considered the question of human rights legislation, supported the enactment of a Federal Act. In the opinion poll conducted as part of the consultation, 57 per cent were in favour of an Act, 14 per cent were against and 30 per cent were neutral.
- 4 See, for example, M McHugh, *A Human Rights Act, the Courts and the Constitution* (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009) cited in the National Human Rights Consultation Report, above n 1, 328.
- 5 National Human Rights Consultation Committee, above n 1, 344.
- 6 Ibid 345.
- 7 Ibid xxxv (recommendation 22).
- 8 Stephen Gageler QC and Henry Burmester QC, 'SG No 68 of 2009' [17] cited in National Human Rights Consultation Report, above n 1, 317. See also *Thomas v Mowbray* [2007] HCA 33 per Kirby J at [312]-[322].
- 9 Gageler and Burmester, above n 8, [49].
- 10 See, for eg, *Government of the Republic of South Africa v Grootboom & Ors* (2000) (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721 (CC).
- 11 See Julie Debeljak, *Submission to the National Human Rights Consultation* (2009) [7-11] <[http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/41EF53D74D7CDD2DCA25760700160A6A/\\$file/monash_Julie_Debeljak_AGWW-75X5TB.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/41EF53D74D7CDD2DCA25760700160A6A/$file/monash_Julie_Debeljak_AGWW-75X5TB.pdf)> at 19 November 2009.
- 12 See, for example, Larissa Behrendt, *The Pointed View: More wrongs than rights* (2009) National Indigenous Times <<http://www.nit.com.au/opinion/story.aspx?id=18802>> at 17 November 2009.

Access to Justice

Making mental health rights real

Dominic O'Grady, Communications and Media Officer



The NSW Attorney General, the Hon John Hatzistergos MLC, launched the Mental Health Legal Services Project pilots and training at NSW Parliament House on 24 November 2009, saying the project would improve access to justice for members of the community with mental illness.

The Public Interest Advocacy Centre, with funding support from Legal Aid NSW, established the Mental Health Legal Services Project in early 2008 to research and develop approaches to improving access to justice for people in NSW who are mentally ill.



After initial research, the project developed four partnership service-delivery pilots and two training modules. In March 2009, the NSW Public Purpose Fund with the support of NSW Attorney General provided PIAC with funding for the pilots for a two-year period, and in June 2009, the Federal Attorney-General,

the Hon Robert McClelland MHR, provided additional funding to support this work.

'Each of the four pilot projects adds a specialist worker to an existing health, community or legal service. This enables holistic service delivery that can at once meet the legal, practical and emotional support needs of people with mental illness,' said PIAC Chief Executive Officer, Robin Banks.

'Many people with mental illness are living with complex, entrenched problems and often have great difficulty in accessing appropriate services. These pilot projects aim to resolve those current problems and prevent further problems from occurring.

'By addressing legal and other needs such as accommodation, employment and mental health





treatment, people are experiencing better outcomes and an overall improvement in quality of life,' Ms Banks said.

The project funding is being used to:

- Place a PIAC Social Worker, Jamie Alford, at Shopfront Youth Legal Centre (Shopfront, www.theshopfront.org), a joint project of Mission Australia, the Salvation Army and the law firm Freehills.
- Place a PIAC Lawyer, Anne Mainsbridge, at the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS, www.startts.org.au).
- Place a PIAC Lawyer, Nancy Walker, with the Multicultural Disability Advocacy Association of NSW (MDAA, www.mdaa.org.au).
- Place PIAC's Indigenous Men's Access to Justice (IMAJ) worker,

Ken Zulumovski, with the Gamarada Indigenous Men's Healing Program, www.gamarada.org.au.

- Engage WestWood Spice to undertake an ongoing, independent evaluation of the project components. This evaluation will produce data about individual, service and systemic issues and outcomes.

The other funding received by PIAC enables it to co-ordinate the project and undertake the further development and delivery of the two training modules: 'How to Work With Consumers', for lawyers and other professionals; and 'How to Sort Out Your Pre-Legal Problems', for consumers, carers and advocates.

For more information about the Mental Health Legal Services Project, go to PIAC's website at www.piac.asn.au.



Advocacy training with the Australian Women's Coalition

Carolyn Grenville, Training Co-ordinator



From left: AWC Past President Robyn Gaspari, PIAC Training Co-ordinator Carolyn Grenville, AWC President Dr Gabrielle Casper, AWC Vice-President Sheryl Scott.

During the second half of 2009, the Public Interest Advocacy Centre (PIAC) worked with the Australian Women's Coalition (AWC) to present a series of advocacy training workshops for women from its member organisations.

PIAC partnered with the AWC to present a one-day training workshop, *Effective Advocacy Skills and Strategies*, to representatives from AWC member organisations around Australia. Nine workshops ran in Sydney, Adelaide, Brisbane, Melbourne and Canberra between early November and mid-December.

The AWC is one of the four Alliances funded by the Federal Office for Women. AWC is a coalition of 19 national women's organisations; collectively the AWC's member organisations and their networks have the ability to reach three million women. The organisations represented are as diverse as could be imagined: from Girl Guides Australia to Hindu Women's Council of Australia, Mothers Union Australia, Muslim Women's National Network Australia and National Council of Jewish Women of Australia. With so many women from such diverse groups the AWC can pack quite a punch when it comes to advocacy.

Members of the AWC were recently horrified to learn that Aboriginal women's cervical cancer mortality rate is five times greater than that of non-Aboriginal women.

The AWC is now working with the Durri Aboriginal Medical Corporation Services to provide improved access to sexual health services for women living in Macleay and Nambucca Valleys. This is a pilot program with a nurse offering a holistic and integrated approach to female sexual health.

The purpose of the advocacy training is to equip both AWC member organisations and interested non-members to be able to more effectively advocate for issues of importance to their members. The training also aims to build a platform for inclusion of women's organisations that are not currently members of the AWC.

It is hoped that the women who have attended the training will feel empowered to address their issues and build stronger networks to promote their interests and causes.

If you would like to talk to PIAC's Training Co-ordinator, Carolyn Grenville, about how PIAC can customise training to meet the needs of your organisation or network, please telephone her on 02 8898 6500 or e-mail her at cgrenville@piac.asn.au.

For more information about the AWC, visit its website at www.awcaus.org.au.

Maurice Corcoran and Tom Ferguson flying high

Dominic O'Grady, Communications and Media Officer

Maurice Corcoran has quadriplegia. He has spent the past three years fighting Virgin Blue in the Federal Court because the airline expected him to pay for two seats when he travelled: one for himself and one for a carer.

So Virgin Blue's announcement in September 2009 that it would change its policy regarding passengers with disability was a long-awaited and very welcome outcome for Mr Corcoran.

Before that announcement, the airline's independent travel criteria advised that passengers must travel with a carer if they were unable to carry out the following four tasks unassisted: securing an oxygen mask, putting on a lifejacket, fastening a seatbelt, and understanding and responding to emergency directions.

Maurice Corcoran and a fellow passenger, Tom Ferguson, claimed those guidelines discriminated against them, directly and indirectly, because of their disability. The Public Interest Advocacy Centre took their cases to the Federal Court and in June 2008 secured a ruling that the case was in the public interest and should proceed with a cap on the costs that could be awarded against the losing party.

Justice Annabelle Bennett capped costs in any judgment against

Mr Ferguson at \$15,000 and at \$40,000 for Mr Corcoran. The decision allowed them and PIAC to proceed with their case with limited risk.

'The ability of disabled persons to fly with Virgin, a major commercial airline in Australia, without the extra cost of a carer raises questions of public interest beyond the private interests of the applicant,' Justice Bennett said as part of that ruling.

Fast forward to 10 September 2009. Following the Federal Court challenge, and after extensive consultation with advocacy and disability groups, Virgin Blue announced that any passenger who is able to understand and respond to briefings about emergency procedures and who does not require

highly personalised assistance during flight may travel unaccompanied.

PIAC Chief Executive Officer, Robin Banks, commended Virgin Blue for taking an inclusive approach to the travel needs of passengers with a disability.

'The changes promote equitable travel and are a positive example to all airlines,' she said. 'PIAC will continue to advocate for other improvement in the airline industry to further increase equitable access for people with disability as members of the travelling public.'

Dr Chris Birch SC and Simeon Beckett appeared for Mr Corcoran and Mr Ferguson in the Federal Court proceedings.



Success for two applicants in a discrimination complaint against Virgin Blue.

Wesley Mission rejects same-sex foster parents

Wesley Mission's refusal in 2002 to accept an application from a male same-sex couple to become foster parents continues to be challenged by the couple with PIAC's help.

The NSW Administrative Decisions Tribunal found that Wesley's refusal of OV & OW constituted discrimination and that Wesley Mission was not entitled to rely on the 'religious bodies' exception in section 56 of the *Anti-Discrimination Act 1976* (NSW). Wesley Mission appealed the finding.

After successfully resisting an application by Wesley Mission to refer the appeal to the Supreme Court, the case has been referred back to the Tribunal for a re-hearing because the Appeal Panel has found that the Tribunal applied the wrong definition of 'religion' to the evidence. OV and OW are appealing the Appeal Panel decision.

Chris Ronalds SC and Rachel Pepper have been counsel in the proceedings to date. PIAC congratulates Rachel Pepper on her appointment this year as a Judge of the Land and Environment Court.

E-health rollout raises privacy concerns

Peter Dodd, Solicitor – Health Policy and Advocacy

The possibility of rolling out electronic health records (e-health records) to all Australians has been canvassed for some time. NSW has a pilot project called Health-e-link that is operating with selected age groups in selected geographic areas.

Now the major policy focus has moved to the Commonwealth Government, with state and territory involvement through the Council of Australian Governments (COAG) and the meetings of the Commonwealth, State and Territory Health Ministers. PIAC and most consumer groups do not oppose wider use of e-health records and see the advantages for consumers if their records are portable and can be accessed in an emergency, when they travel or when they choose to visit a different medical practitioner.

PIAC has previously stated that any system of e-health records for Australian consumers should comply with the following principles.

- Only individuals who choose and consent to be included are included (the 'opt-in' principle).
- All individuals participating should clearly understand how the system works, including who can access particular information and in what circumstances.
- Individuals have control over their records to the extent that they can control who can see what parts of their health records (with an exception for life-threatening emergencies).
- The system should only collect information that is relevant to an individual's health care.
- The system must ensure that information technology systems, procedures and policies are in place to minimise unauthorised access, modification disclosure or deletion.

- Individuals must have access to their record to ensure the information is correct and assigned to the right person and have the right and ability to have corrections and/or annotations made if they find mistakes.
- The system must strictly limit circumstances where healthcare providers can disclose health information.
- The system must not impinge on a person's right to seek healthcare anonymously.

In February 2006, COAG agreed to 'a national approach to developing, implementing and operating systems for healthcare identifiers for individuals and providers as part of accelerating work on a national electronic health records system to improve safety for patients and increase efficiency for healthcare providers'. COAG again affirmed this decision in 2008.

The Australian Health Ministers' Advisory Council (AHMAC) issued a discussion paper in July 2009 on the Commonwealth Government's proposals for healthcare identifiers and privacy. PIAC and others were immediately concerned about some of the content in the discussion paper.

In an open letter in response to the paper, PIAC expressed serious concerns about the policy process. These concerns were as follows.

- That there had been a failure to release relevant completed Privacy Impact Assessments (PIAs) commissioned by the National e-health Transition Authority (NEHTA). PIAC made the point that without the PIAs, PIAC and other organisations and individuals could not appropriately respond to the contents of the discussion paper.

- That the proposed national legislative framework for health privacy may not be in place until after the health identifiers are in place.

PIAC consequently joined with other non-government organisations to form a Consumer Centred e-Health Coalition. Members of this group are concerned about privacy, security and confidentiality issues related to the roll out of e-health in Australia.

The Consumer Centred e-Health Coalition recognises the potential benefits of e-health for maximising patient safety and the quality of health care in Australia but maintains that unless there is consumer confidence in the system, patient safety will be threatened. If consumers are not confident in the confidentiality, privacy and security aspects of any e-health regime, they will not participate or, worse, not disclose vital information.

Government assurances about patient control and the maintenance of privacy are insufficient if there are no effective governance arrangements in place before e-health reforms are introduced. PIAC and the Consumer Centred e-health Coalition are concerned that policy proposals about e-health are being rushed into the public arena without adequate consideration of the privacy and security concerns of consumers.

PIAC understands that the question of harmonising Australia's privacy laws will be discussed in COAG in early 2010. This will not be a quick or easy process.

PIAC is concerned that PIAs has been commissioned and not released before the closing date for comment on the Government's Discussion Paper. The relevant PIAs about healthcare identifiers have only just been made public in mid-November 2009, five months after the release of

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It's time for national consumer water advocacy funding

Joel Pringle, Policy Officer, Energy + Water Consumers' Advocacy Program

Affordable access to clean household water is a fundamental expectation of Australians. Increased attention by the Federal Government on water security is heading towards major regulatory changes to the industry, including the supply of urban potable (drinking) water.

Given that the Commonwealth is new to this area of policy, it is even more important that the Government makes use of existing experts through meaningful consultation. There are many community organisations with experience advocating for access to essential services for low-income and disadvantaged households, including PIAC through the Energy + Water Consumers' Advocacy Program (EWCAP). But with existing funding limited to state jurisdiction water consumer advocacy, it's time for the Federal Government to fund these organisations to provide the advice required.

EWCAP is funded by the NSW Government to advocate on behalf of consumers and disadvantaged households to ensure access to energy and water. EWCAP works closely with organisations in other jurisdictions, such as the Consumer Utilities Action Centre (CUAC) of Victoria, to achieve these aims. Historically, funding came from state governments as the laws and regulations protecting consumers were the responsibility of the states.

With the advent of the National Energy Market, and the realisation of the importance of inter-jurisdictional co-operation and advocacy, the Consumer Advocacy Panel was set up to fund consumer advocacy in electricity and gas markets on a national level and this saw organisations such as the Australian Council of Social Service (ACOSS) become involved. This may be a model that water consumer advocacy could follow.

With the intent of ensuring Australia's cities and regional communities maintain water security, the Commonwealth Government is now becoming more involved in the governance of water supply. The Federal Department of Environment, Water, Heritage and the Arts has begun approaching community and consumer organisations to begin discussions about householder concerns.

PIAC is concerned that without adequate resources to focus on this area of work, any advice provided will be ad hoc and inadequate. If the Federal Government wants quality support from the sector, and wants to ensure that consumers and disadvantaged households are not negatively affected by the reforms, it is time for adequate funding for national advocacy on water consumer reforms.

New Medical Energy Rebate announced

The NSW Government has announced a new Medical Energy Rebate of \$130 a year to ease the financial burden of people with thermoregulatory diseases. People whose condition worsens on extreme hot or cold days can now use heating and cooling with less impact on their energy bills.

PIAC commends the NSW Government for progress towards ensuring that medical conditions do not become a factor excluding households from access to energy. People with chronic disease have many financial pressures, including the cost of treatment and at times temporary or permanent inability to work. The Medical Energy Rebate will assist with one component of these costs. The change follows a campaign led by MS Australia and supported by Parkinson's NSW and PIAC.

The report, *Keeping Cool Survey: Air Conditioner Use by Australians with MS*, published by MS Australia in 2009 with a financial contribution from PIAC, highlighted some of the impacts of multiple sclerosis on energy use and bills. The report showed that having a thermoregulatory disease in NSW can add over \$600 to the annual energy bill. The report went on to highlight the need for an appropriate rebate in NSW and further recommend a program of home modifications to reduce reliance on air conditioning.

The announcement of the Medical Energy Rebate was a positive step from the NSW Government. PIAC will continue to encourage the Government to assist households at risk of disconnection by expanding the Energy Rebate eligibility to include all holders of the Commonwealth Health Care Card.

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the Discussion Paper. PIAC believes there is need for legislative change to ensure mandatory timely public access to PIAs commissioned by all levels of government. Another round of discussion and consultation about

healthcare identifiers began in late 2009. At least the Government appears to be keen to talk to consumer groups.

PIAC will continue to lobby to ensure that privacy and security safeguards

are in place before e-health proposals are rolled out. PIAC will be particularly watchful for 'function creep' to ensure that healthcare identifiers linked to Medicare do not become a de facto Health Access Card.

Submissions & Publications

May 2009 – October 2009

Submission to Senate Community Affairs Committee into the National Registration Scheme for Doctors and Other Health Care Workers (May 2009)

PIAC calls for a single national registration board for all health professionals.

Putting public interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009 (May 2009)

PIAC urges the Federal Government to enact freedom of information legislation.

What's rights got to do with it? (May 2009)

A consideration of human rights protection in Australia, presented to the NSW Young Lawyers' 'A Charter of Rights' Conference.

Inquiry into Australia's Judicial System and the Role of Judges: Submission to the Senate Legal and Constitutional Affairs Committee (May 2009)

PIAC identifies concerns about the tendency to appoint judges on a temporary basis.

Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice (May 2009)

PIAC examines the adequacy of legal aid.

Carbon & Consumers: report on the 2009 Energy & Water Consumers' Advocacy Program (EWCAP) Conference (June 2009)

Presents EWCAP conference proceedings.

Alternative dispute resolution in the civil justice system: Submission to NADRAC's Inquiry (May 2009)

PIAC recommends that reforms should ensure that courts oversee compulsory alternative dispute resolution (ADR).

Hunter water prices: submission to IPART draft report on prices for water, sewerage, stormwater and other services for Hunter Water Corporation (May 2009)

Advocates for better water rebates.

Energy White Paper: response to Strategic Directions Paper and discussion papers (May 2009)

PIAC expresses concern about the consultation process for the Energy White Paper.

Achieving an inclusive society through human rights and social justice: comments on the ALP 2009 Consultation Draft National Platform (June 2009)

PIAC emphasises the need to ensure that consumer voices are properly represented.

First Exposure Draft legislation of the National Energy Customer Framework: Submission to the Ministerial Council on Energy (June 2009)

PIAC identifies the priority concerns for NSW consumers.

Improving government accountability through information access: submission in response to the NSW Government's public consultation draft, Open Government Information legislative package (June 2009)

A response to the Open Government Information Bill 2009 (NSW), the Information Commissioner Bill 2009 (NSW).

Realising rights: submission to the National Human Rights Consultation (June 2009)

PIAC advocates for a Human Rights Act.

Our rights matter! The voices of those who are or have been homeless in Sydney. Submission to the National Consultation on Human Rights (June 2009)

This Homeless Persons' Legal Service submission recommends that Australia adopt a Human Rights Act.

Restoring Identity: Final report of the Moving forward consultation project (2nd edition) (June 2009)

First published in 2002, this report proposes a Stolen Generations Reparations Tribunal.

Well Connected No 34 (June 2009)

EWCAP Newsletter.

Street Rights NSW Edition 14 (June 2009)

Homeless Persons' Legal Service Newsletter.

The adequacy of human rights protection and impact of gaps (July 2009)

Presentation to the National Human Rights Consultation Hearings.

Putting healthcare rights to work: The Health Practitioner Regulation National Law, a step closer to best practice in healthcare complaints (July 2009)

PIAC raises concerns about the lack of consultation with the general public and consumer groups about the exposure draft Bill.

Ensuring effective consumer voices: proposed consultation and research framework (July 2009)

PIAC proposes an integrated consumer advocacy framework.

A question of balance: Principles, contracts and the government-not-for-profit relationship (July 2009)

An examination of the contractual relationship between governments and non-for-profits.

Keeping connected: PIAC submission on the Customer Assistance Policy (July 2009)

PIAC urges the NSW Government to commit to ensuring no increase in the rate of household energy disconnections in 2009-10.

More than just a roof over our heads! Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth Inquiry into homelessness legislation (August 2009)

PIAC supports the Federal Government's commitment to develop legislation addressing homelessness in Australia.

Access to energy: Response to IPART's Issues paper on the review of regulated retail tariffs and charges for electricity 2010 – 2013 (August 2009)

PIAC highlights concerns about competition levels in NSW electricity retail markets.

A step in the human rights direction: Submission on the National Security Legislation Monitor Bill 2009 (August 2009)

PIAC supports moves to ensure anti-terrorism legislation complies with human rights obligations.

Balancing information, privacy and accessibility: some comments on Towards Government 2.0 (August 2009)

PIAC supports moves towards making government more consultative.

Inquiry into the Marriage Equality Amendment Bill 2009 (Cth) (August 2009)

PIAC supports the Marriage Equality Amendment Bill 2009.

Getting the balance right: response to the NSW Law Reform Commission's Privacy and Access to Personal Information: Points for Discussion (August 2009)

PIAC argues the merit of accessing personal information under the *Privacy and Personal Information Protection Act 1998* (NSW).

Considering non-custodial sentencing options: response to the NSW Sentencing Council's review of the use of non-conviction orders and good behaviour bonds (August 2009)

PIAC rejects the notion that non-conviction orders and good behaviour bonds are over used.

Protecting free speech: submission to the Alice Springs Town Council in relation to the draft Alice Springs (Management of Public Places) By-laws 2009 (August 2009)

Argues against a proposed by-law that restricts freedom of political communication.

Consumer protection: a submission to the review of the Aged Care Complaints Investigation Scheme (August 2009)

PIAC examines the Aged Care Investigation Scheme (CIS).

Healthcare identifiers and privacy: discussion paper on proposals for legislative support (August 2009)

PIAC expresses concerns about the policy process referred to in the discussion paper.

Bail me out: NSW young offenders and bail (September 2009)

Report released by the Youth Justice Coalition examines 145 cases before the NSW Children's court.

Smart Meter Customer Protection and Safety Review - Draft Policy Paper One (September 2009)

PIAC argues for amendments to the proposed National Energy Customer Framework.

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

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Valuing the not-for-profit sector: comments on the National Compact Consultation paper (September 2009)

Successful implementation of a compact requires government to address key issues such as funding.

Least restrictive practices: submission to the NSW Legislative Council Standing Committee on Social Issues Inquiry into substitute decision-making for people lacking capacity (September 2009)

PIAC recommends amendments to the *Trustee and Guardian Act 2009* (NSW).

Express human rights compliance needed: submission in response to the Federal Attorney-General's National Security Legislation Discussion Paper (October 2009)

PIAC responds to proposed changes to the *Criminal Code 1995* (Cth).

Access to personal information: supplementary submission to the NSW Law Reform Commission on the administration of privacy and access to government information legislation (October 2009)

PIAC urges establishment of an Information Advisory Committee.

Submission to the NSW Attorney General on the review of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and Terrorism (Police Powers) Act 2002 (NSW) (October 2009)

PIAC expresses concern at the NSW Government's extension of 'emergency' police powers.

Street Rights NSW Edition 15 (October 2009)

Homeless Persons' Legal Service Newsletter.

PIAC Annual Report 2008-2009 (October 2009)



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- Public Law Review 1990+
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