Open Government Partnership and Australia's National Action Plan 2016

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Emily Mitchell, Senior Policy Officer

Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

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1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to provide a submission to the Department of Prime Minister and Cabinet regarding proposals for consideration of the National Action Plan as part of the Open Government Partnership (OGP).

1.1 The Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

2. Executive summary

The Australian Government's commitment to the OGP presents a unique opportunity to work towards increased open government in collaboration with civil society and other nations.

However, we note that the Australian Government's commitment to the OGP to date has faced significant delays. It is important going forward that the aims and principles of the OGP are upheld in the consultation phase for the development of the National Action Plan.

In this submission, PIAC will address the improvement of public services via increased transparency and consultation. Specifically, the submission covers the following key issues:

- An overview of the Australian Government's proposal for the National Action Plan;
- Measures to increase transparency and accountability in information access;

- Proactive disclosure across all levels of government, with a focus on PIAC's casework and policy experience in criminal justice, and energy and water;
- Improving public services via increased participation and consultation with Indigenous people, including introducing national justice targets and formalising the importance of participation and consultation with Aboriginal and Torres Strait Islander communities.

3. Summary of recommendations

Recommendation 1

Australia's consultation process in the development of the National Plan should maintain the spirit in which the OGP was created and focus on genuine partnership and collaboration in order to facilitate improved governance.

PIAC recommends that:

- *a list of all stakeholders who have contributed to the consultation be made publicly available to demonstrate the breadth of stakeholders who have participated; and*
- *further consultations should be advertised more widely, and engage with private companies, legal and human rights groups, academics and Indigenous organisations.*

Measures to increase transparency and accountability in information access

Recommendation 2

PIAC recommends that the Australian Government commit to restoring funding for the OAIC across the forward estimates, or create an effective alternative that can properly perform the functions that the OAIC was created to fulfil.

Recommendation 3

PIAC recommends that the Government implement the following recommendations of the Hawke Review:

- certain agencies should be required to justify their complete exemption from the FOI regime to the Attorney-General within a twelve-month period (Recommendation 19);
- the Act should be amended to provide that the Information Commissioner can declare requests to be 'vexatious requests' rather than empowering the Information Commissioner to declare applicants to be vexatious applicants (Recommendation 32); and
- FOI applicants should have a period of exclusivity with documents they have requested before those documents are publicly released (Recommendation 37).

Recommendation 4

PIAC recommends that the Government remove restrictions on the use of Commonwealth funding by community legal centres for law reform activities relevant to their casework, in order to facilitate greater dialogue and discussion on areas of community legal centre expertise.

Encourage proactive disclosure across all levels of government

Recommendation 5

PIAC recommends that the Commonwealth should publish, and negotiate for all state and territory government agencies to publish, the aggregate amount paid in legal settlements and ex-gratia payments to non-employees by government agencies in each financial year.

Recommendation 6

PIAC recommends that a national consultation be undertaken to identify nationally significant datasets that should be prioritised for public release.

Recommendation 7

PIAC recommends that the Commonwealth Government should consult with the Australian Securities and Investments Commission, the Australian Bureau of Statistics, the insurance industry, consumer advocates and lawyers to identify opportunities to make available actuarial and statistical data relating to mental illness.

Recommendation 8

PIAC recommends that that Council Of Australian Government Energy Council require that energy retailers report the emissions intensity of all energy sales they enter into within the National Energy Market to supply customers.

Recommendation 9

PIAC recommends that the States and Territories be required to disclose the results of their audits of the energy efficiency of their public housing stocks and the reports on the implementation of cost-effective upgrades. PIAC also recommends that consideration is given to sourcing such information about residential tenancies and owner occupied housing and making it publically available and accessible.

Recommendation 10

PIAC recommends that a wide-ranging consultation be undertaken to identify nationally significant datasets within the criminal justice area.

Recommendation 11

PIAC recommends that the Australian Government commit to ensuring that state-based police forces, the Australian Federal Police and any other relevant agencies be required to publish statistics regarding how many times Tasers have been used in the jurisdiction, in all relevant modes, including the age and gender of the person on which it was used.

Recommendation 12

PIAC recommends that the Australian Government work with the states and territories to ensure consistent reporting regarding self-harm incidents that occur in police and corrective services custody.

Recommendation 13

PIAC recommends that the Australian Government work with state and territory governments and relevant agencies to apply the recommendations of the ERA (or similar measures) on a national basis across the corrections system.

Recommendation 14

PIAC endorses the recommendation of the Australian Human Rights Commission that the Australian Government should expedite the ratification of OPCAT.

Balancing the public interest

Recommendation 15

PIAC recommends that the Australian Government should encourage a culture of disclosure, with a specific focus on departments engaging in national security or policing issues, at both a federal and state/territory level.

Consultation

Recommendation 16

PIAC recommends that the Legislation Act 2003 *(Cth) include a minimum period for a Bill to be scrutinised by parliamentary committee processes, and that this minimum period should only be avoided in truly exceptional and urgent circumstances.*

Work collaboratively with Indigenous people

Recommendation 17

PIAC recommends that the Australian Government consider developing a Relationship Accord similar to New Zealand's Kia Tūtahi Relationship Accord, enshrining the importance of consultation with Aboriginal and Torres Strait Islander peoples.

Recommendation 18

PIAC recommends that the Australian government commit to setting justice targets through the COAG framework for Closing the Gap in Indigenous disadvantage, implementing a justice reinvestment approach, as recommended by the Change the Record.

Recommendation 19

PIAC recommends that Australia should amend section 3 of the Australian Human Rights Commission Act 1986 *(Cth) to include the Declaration of the Rights of Indigenous Peoples in the list of Declarations.*

Australia should amend section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 *(Cth) to include the* Declaration of the Rights of Indigenous Peoples *in the list of rights and freedoms recognised or declared by international instruments. This would enable Bills to be more appropriately scrutinised on the basis of Indigenous rights.*

Australia should amend the Racial Discrimination Act 1975 *(Cth) so that section 3 provides the definition of 'special measures' as meaning 'measures of a kind described in General Recommendation No. 32, issued by the UN Committee Against Racial Discrimination in August 2009'.*

Recommendation 20

PIAC recommends that Australia should formalise the importance of consultation with and participation of Indigenous peoples and should address increasing Indigenous participation and consultation in its National Action Plan. It would be appropriate for Australia's commitment to reflect and enshrine the spirit of the Declaration of the Rights of Indigenous Peoples*, as well as the provisions of General Recommendation No. 32. PIAC recommends legislative amendment to enshrine similar provisions within the* Racial Discrimination Act 1988 *(Cth).*

4. Overview – The Australian Government's proposal for the National Action Plan

The Australian Government has proposed two grand challenges for the National Action Plan:

- **Improving Public Services** – measures that address the full spectrum of citizen services including health, education, criminal justice, water, electricity, telecommunications, and any other relevant service areas by fostering public service improvement or private sector innovation**;** and

- **More Effectively Managing Public Resources** – measures that address budgets, procurement, natural resources, and foreign assistance.[1]

We note that each of the commitments made under a National Action Plan must address at least one of the following principles:

- **Transparency**: Publication of government-held information; proactive or reactive releases of information; mechanisms to strengthen the right to and open access to information.

- **Accountability:** The rules, regulations and mechanisms in place that call upon government actors to justify their actions, act upon criticisms or requirements made of them, and accept responsibility for failure to perform with respect to laws or commitments**.** Ideally these should include the public.

- **Participation:** Mobilisation of citizens on government policies or programs to provide input or feedback and make contributions that lead to more responsive, innovative and effective governance.

- **Technology and Innovation:** Providing citizens with open access to and capability with technology for greater innovation. To be relevant to OGP, these initiatives must advance government transparency, accountability and/or public participation.[2]

[1] Australian Government, 'Open Government Partnership – Australia, Preparing the National Action Plan', available at https://ogpau.govspace.gov.au/national-action-plan/ (accessed 25 February 2016).

According to the OGP Articles of Governance, OGP Participants commit to developing their country action plans through a multi-stakeholder process, with the active engagement of citizens and civil society. This includes OGP participants agreeing to develop their country commitments according to the following principles:

- Countries are to make the details of their public consultation process and timeline available (online at a minimum) prior to the consultation;
- Countries are to consult the population with sufficient forewarning;
- Countries are to undertake OGP awareness-raising activities to enhance public participation in the consultation;
- Countries are to consult through a variety of mechanisms - including online and through in-person meetings - to ensure the accessibility of opportunities for citizens to engage;
- Countries are to consult widely with the national community, including civil society and the private sector, and to seek out a diverse range of views; and
- Countries are to make available online a summary of the public consultation and all individual written comment submissions.[3]

PIAC notes that, to date, there has been limited promotion of and communication regarding the OGP in Australia. PIAC suggests that a greater opportunity existed to advertise the National Plan consultation more widely in the Australian media.

Potentially as a result of the inadequate promotion, the consultation process does not appear to have consulted 'widely with the national community, including civil society and the private sector'. Within the consultation, there appears to have been little to no representation by private companies, Indigenous organisations and few legal and human rights groups.

Similarly, the number of stakeholders engaged appears to be fairly low. If the number and variety of stakeholders participating in the consultation is not remedied, the benefit of the consultation is likely to be limited from the outset.

PIAC also notes that the process of developing Australia's National Action Plan has endured significant delay: more than 12 months have passed since the anticipated completion date of the National Action Plan. Documents from budget estimates in October 2014 noted that '[the Department of] Finance has commenced drafting a national action plan which is scheduled for completion in December 2014 and will take into account the Government's e-government and digital economy agenda'.[4]

In New Zealand, the consultation process in the development of the National Action Plan was described by stakeholders as 'under-funded, shallow and rushed'[5] and a tick-the-box exercise.

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2 Ibid.

3 Open Government Partnership, Open Government Partnership: Articles of Governance (June 2012) at 19, available at http://www.opengovpartnership.org/sites/default/files/attachments/OGP%20ArticlesGov%20Apr%2021%202015.pdf (accessed 29 February 2016, updated March 2014 and April 2015).

4 Department of Finance, 'Estimates Brief: Hot Issue – Progress Towards Joining the Open Government Partnership', at 2 available at http://www.finance.gov.au/sites/default/files/FOI14-166-document.pdf (accessed 29 March 2016).

5 Ibid, at 13.

Australia must be careful to ensure that its own consultation process is properly funded, the subject of measured analysis and not rushed. In February 2016, the OGP Independent Reporting Mechanism published a progress report on New Zealand's progress, inviting public comment.[6]

The top five recommendations in relation to New Zealand's progress are of assistance in considering the types of issues that may be relevant to Australia:

1. Reform official information laws by extending them to Parliamentary bodies and adopting the Law Commission's recommendation to create an official information authority responsible for training, culture, advice, best practice guidance, and identifying necessary reforms.
2. Create a set of robust and government-wide practices in collaboration with civil society concerning timely public consultation on new bills, regulation and policy; base them on international best practice; make them mandatory where feasible; and include an effective complaint resolution mechanism or Ombudsman.
3. Commit to regular, standardized, technically independent "state of the nation" reporting on social policy and the environment.
4. Develop an express and public cross-government policy formally permitting public servants and those receiving public funding to speak out on significant public issues without facing any form of retaliation.
5. Strengthen the transparency of political party funding from donations and Parliamentary revenues.[7]

Recommendation 1

Australia's consultation process in the development of the National Plan should maintain the spirit in which the OGP was created and focus on genuine partnership and collaboration in order to facilitate improved governance.

PIAC recommends that:

- *a list of all stakeholders who have contributed to the consultation be made publicly available to demonstrate the breadth of stakeholders who have participated; and*
- *further consultations should be advertised more widely, and engage with private companies, legal and human rights groups, academics and Indigenous organisations.*

5. Measures to increase transparency and accountability in information access

5.1 Recent progress towards open government

PIAC notes that, in recent years, there has been progress towards increasing transparency in Australian government agencies.

6 Open Government Partnership, *Independent Reporting Mechanism (IRM) Progress Report: New Zealand 2014 – 2015,* available at http://www.opengovpartnership.org/sites/default/files/New%20Zealand_IRM%20Report_public%20comment.pdf (accessed 29 February 2016).

7 Ibid*,* at 5.

In previous submissions on Freedom of Information (FOI), PIAC strongly supported the fundamental aims of FOI law – namely, to make government information more accessible and useable, and to make government more consultative, participatory and transparent.

In April 2009, Senator Faulkner, then Special Minister of State, wrote to departmental secretaries and agency heads asking them to take a lead role in facilitating the government's policy objective of enhancing a culture of disclosure.

The correspondence noted the Government's intention to reform and subsequently strengthen the *Freedom of Information Act 1982* (Cth) (FOI Act), noting that the reforms

> will not deliver the openness and transparency so essential to accountability and to a robust democracy, unless FOI decision-makers embrace the disposition towards disclosure which informs the FOI Act reforms.
>
> In anticipation of these reforms, the Government is asking secretaries and agency heads to take a lead role in facilitating the Government's policy objective of enhancing a culture of disclosure across agencies. This includes making it clear to FOI decision makers in your department or agency that the starting point for considering FOI requests should be a presumption in favour of giving access to documents.[8]

Similar directions have been issued in other nations. In the United States, President Barack Obama issued a Memorandum to all executive departments and agencies concerning the *Freedom of Information Act* 5 U.S.C. § 552 (FOIA), directing agencies to adopt a presumption of disclosure with regard to all FOIA decisions, and to improve their administration of FOIA requests.[9] On the same day, a companion Memorandum directed government department and agency heads 'to disclose information rapidly in forms that the public can readily find and use' and to do so by harnessing 'new technologies' to make information about agency decisions 'readily available' to the public, thus complementing and explicitly reinforcing the FOIA Memorandum.[10] Such directions can be important in advancing the goals of the OGP.

In 2010, the Parliament of Australia passed the *Australian Information Commissioner Act 2010* (AIC Act), which established the Office of Australian Information Commissioner (OAIC) and the *Freedom of Information Amendment (Reform) Act 2010*,[11] which strengthened the provisions of

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8 Senator the Hon John Faulkner, Correspondence: 'Open Government and Freedom of Information', (30 April 2009), available at https://www.ag.gov.au/RightsAndProtections/FOI/Documents/Letter%20to%20Departmental%20Secretaries%20and%20Agency%20Heads.pdf (accessed 25 February 2016).

9 US Government, *Presidental Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act,* 74 Fed. Reg. 4683 (21 Jan 2009), available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf (accessed 30 March 2016).

10 The White House, *The Obama Administration's Commitment to Open Government: A Status Report,* at 6, available at https://www.whitehouse.gov/sites/default/files/opengov_report.pdf (accessed 18 March 2016).

11 Australian Government, Attorney-General's Department, 'Freedom of information reforms', available at https://www.ag.gov.au/RightsAndProtections/FOI/Pages/Freedomofinformationreforms.aspx (accessed 25 February 2016).

the FOI Act. At the time, PIAC made submissions to the Senate Public Administration and Finance Committee supporting the Bills but contending that the reforms did not go far enough, particularly in relation to exemptions and exclusions.[12]

As a result of the 2010 amendments to the FOI Act, Australian Government agencies that are subject to the FOI Act are required to publish a range of information on their websites as part of an Information Publication Scheme (IPS). This includes the agencies' structure, functions, appointments, annual reports, consultation arrangements, and details of the agency's freedom of information (FOI) officer. Information routinely released through FOI requests and routinely provided to parliament must also be published online. The OAIC notes:

> The IPS is intended to form the basis for a more open and transparent culture across government, with agencies encouraged to take a proactive approach to publishing the information they hold, and to consider publishing information over and above what they are obliged to publish.[13]

The 2010 reforms also established a requirement, under s11C(6) of the FOI Act, that agencies and departments must publish information released under the FOI Act within 10 working days.

PIAC supports many of the reforms implemented in 2009 and 2010 to improve the effectiveness of the FOI regime. Nevertheless, PIAC continues to have concerns about some of the ways in which federal FOI law and practice seek to achieve accessibility, openness and transparency.[14]

5.2 Ensure continuation of the Office of the Australian Information Commissioner

Prior to the introduction of the OAIC, there were problems with the review of FOI requests. While the OAIC was not a perfect solution, it addressed many of these challenges.

Since 2013, there has been a change in approach to the OAIC. This has included proposing legislative amendments to remove the OAIC and to revise the FOI Act. This appears incongruent with the Australian Government's public commitment to open government demonstrated by its involvement with the OGP. PIAC's view is that a stronger practical commitment to open government must be implemented within a holistic framework.

After only a few years, the reforms implemented in 2010 to encourage open government and increase transparency, have faced sustained challenge. In the 2013-14 federal budget, it was

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12 See PIAC, 'Freedom of information repackaged', available at http://www.piac.asn.au/publication/2010/02/100129-piac-sub-re-cth-foi-reforms (accessed 23 February 2016).

13 Australian Government, Office of the Australian Information Commissioner, 'Our information publication scheme', available at https://www.oaic.gov.au/about-us/access-our-information/our-information-publication-scheme/ (accessed 24 February 2016).

14 See Public Interest Advocacy Centre, 'Review of Freedom of Information Laws', (7 December 2012), Submission to the Review of Freedom of Information Laws conducted by Dr Allan Hawke AC, available at https://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/PIAC.pdf (accessed 16 March 2016).

announced that funding for the OAIC would be withdrawn. Three former Victorian Supreme Court judges questioned whether this proposal was constitutionally permissible.[15]

In 2014, the Government introduced the Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth),[16] which intended to abolish the OAIC, with functions performed by the OAIC to be abolished or shifted to other areas of government. The Bill also proposed 22 consequential amendments to other Acts, including that the Attorney-General should be responsible for FOI guidelines. The findings of a Senate committee inquiry into the Bill were split on party lines with both the Labor Opposition and the Greens issuing dissenting reports; the Bill failed to pass in the Senate.

In the 2014-15 federal budget, funding for 'about half the office's total funding was restored, in recognition that the office was still legally established, the bulk of which was earmarked for the privacy function'.[17] The OAIC received transitional funding, which enabled the OAIC to continue to conduct Information Commissioner reviews. However, Professor Richard Mulgan notes that this was approximately one third of the amount allocated in the last full year of the office's operation.[18] Similarly, the OAIC's budget allocation for 2015-16 did not include activities in the area of information policy.[19]

In September 2015, former Australian Information Commissioner Professor John McMillan called the government's struggle to abolish the office as 'shameful', noting that 'no political party can truly claim to subscribe to a policy of open government while this impasse continues'.[20]

PIAC submits that that the creation of the OAIC addressed significant problems in the FOI regime. Given the changes in funding are impeding the effective functioning of the OAIC, these problems are re-emerging. PIAC considers that the Government has two options to address these challenges: to properly fund the OAIC in order that it can complete its objectives, or to implement an effective alternative.

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15 Tim Smith, David Harper, Stephen Charles, 'Abbott government skirts Parliament and muzzles the FOI watchdog', *The Age,* 26 May 2015, available at http://www.theage.com.au/comment/abbott-government-skirts-parliament-and-muzzles-the-foi-watchdog-20150525-gh9ju2 (accessed 25 February 2016).

16 Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth), available at http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5350

17 Richard Mulgan, 'The slow death of the Office of the Australian Information Commissioner', *The Canberra Times,* 1 September 2015, available at http://www.canberratimes.com.au/national/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html (accessed 23 February 2016).

18 Ibid.

19 Australian Government, Office of the Australian Information Commissioner, 'Australian Government's budget decision to disband OAIC', available at https://www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic (accessed 24 February 2016).

20 John McMillan, 'Commitment to freedom of information bolsters our democracy', *The Australian,* 30 September 2015, available at http://www.theaustralian.com.au/subscribe/news/1/index.html?sourceCode=TAWEB_WRE170_a&mode=premium&dest=http://www.theaustralian.com.au/opinion/commitment-to-freedom-of-information-bolsters-our-democracy/news-story/a76fe5aa312e04ff728d4fe9b80bd09a&memtype=anonymous (accessed 25 February 2016).

Given that the OAIC is already established, PIAC suggests that ensuring the continuation of the Office presents an efficient option to address these challenges.

Recommendation 2

PIAC recommends that the Australian Government commit to restoring funding for the OAIC across the forward estimates, or create an effective alternative that can properly perform the functions that the OAIC was created to fulfil.

5.3 Strengthening the freedom of information framework

A strong FOI framework is central to open government, ensuring transparency and accountability for decisions made by government agencies, and has flow-on impacts for the improvement of public services. While reforms in 2010 strengthened the framework, further changes are required to ensure better access to information and review of decisions.

Based on its legal casework experience, PIAC has made a number of submissions to consultations and inquiries regarding the development of FOI legislation and reviews of its operation.[21] PIAC documented a number of these specific concerns and recommendations in our submission to the Review of Freedom of Information Laws undertaken by Dr Allan Hawke AC in 2013.[22]

PIAC supported some, but not all, recommendations made by the Hawke Review, including that:

- certain agencies should be required to justify their complete exemption from the FOI regime to the Attorney-General within a twelve-month period (Recommendation 19);
- the Act should be amended to provide that the Information Commissioner can declare requests to be 'vexatious requests' rather than empowering the Information Commissioner to declare applicants to be vexatious applicants (Recommendation 32); and
- FOI applicants should have a period of exclusivity with documents they have requested before those documents are publicly released (Recommendation 37.[23]

Recommendation 3

PIAC recommends that the Government implement the following recommendations of the Hawke Review:

- certain agencies should be required to justify their complete exemption from the FOI regime to the Attorney-General within a twelve-month period;

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21 This includes submissions to the statutory review of FOI laws undertaken by Dr Hawke in 2012 (the Hawke Review); the Australian Information Commissioner's review of charges under the *Freedom of Information Act 1982* in November 2011; the Senate Finance and Public Administration Committee on the Commonwealth FOI reforms in 2009; and the Commonwealth Government in response to its exposure drafts of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009.

22 See Public Interest Advocacy Centre, 'Review of Freedom of Information Laws', (7 December 2012), Submission to the Review of Freedom of Information Laws conducted by Dr Allan Hawke AC, available at https://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/PIAC.pdf (accessed 16 March 2016).

23 PIAC, 'Monitoring Commonwealth FOI Reforms', available at http://www.piac.asn.au/project/monitoring-commonwealth-foi-reforms (accessed 18 March 2016).

- the Act should be amended to provide that the Information Commissioner can declare requests to be 'vexatious requests' rather than empowering the Information Commissioner to declare applicants to be vexatious applicants; and
- FOI applicants should have a period of exclusivity with documents they have requested before those documents are publicly released.

5.4 Contribution of community legal centres and the not-for-profit sector

Community legal centres (CLCs) are well placed to engage with vulnerable groups within the community that government often finds difficult to reach. CLCs often specialise in a particular field of legal assistance or in assisting a specialised target group – often the most vulnerable members of the community.

The experience of CLCs is vital to government as it provides valuable insight as to the impact of legislative amendments and government programs on vulnerable people, which assists in delivering improved public services.

For example, PIAC's Homeless Advisory Committee, StreetCare, provides direct input from homeless people that PIAC feeds into its policy advocacy. StreetCare also advises government agencies on policies relating to homelessness and housing, as well as giving assistance on how best to consult with homeless people.

StreetCare provides a mechanism for PIAC to engage actively with other people who are homeless or at risk of homelessness, to facilitate their input into public policy and law reform initiatives.

The importance of the not-for-profit sector's contribution to a robust government/civil society dialogue was acknowledged in 2013 with the passage of the *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth). The Act invalidated clauses in Commonwealth agreements with not-for-profit sector organisations that restricted or prevented them from advocating on Commonwealth law, policy or actions.

Since then, however, new Commonwealth funding agreements with CLCs have specified that the funds are only to be used for front-line legal services, excluding any law reform or advocacy work. This appears to sidestep the 2013 Act and appears to run counter to Parliament's objective. Commonwealth funds account for approximately 57 per cent of CLC funding, with separate contributions by the states and territories.[24]

One impact is that CLCs are less able to advocate for a systemic solution for common problems facing their clients. This is despite the number of people affected by such a measure, and the potential that the CLC could be one of very few service providers with direct awareness of the systemic nature of the issue.

[24] Parliament of Australia, Legal and Constitutional Affairs Committee, 27/3/15, Estimates, Attorney-General's Portfolio, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/69bdcf30-4975-4715-8c99-dc6dc917b52c/0001%22 (accessed 23 March 2016).

Some CLCs receive funding from a number of other sources, and so have been able to quarantine such other funds to support their law reform work. However, the extent to which this has been possible varies greatly depending on the individual CLC's access to alternative funds. Systemic solutions take time to develop, and ongoing secure funding for CLCs is a necessity.[25] Public services could be improved by lifting existing funding restrictions.

PIAC notes that similar recommendations have been made in New Zealand. In the 2014-2015 OGP Independent Reporting Mechanism Report evaluating New Zealand's progress, one of the top five recommendations included the recommendation that the NZ Government:

> Develop an **express and public cross-government policy formally permitting** public servants and **those receiving public funding to speak out on significant public issues without facing any form of retaliation**.[26] [Emphasis added]

Recommendation 4

PIAC recommends that the Government remove restrictions on the use of Commonwealth funding by community legal centres for law reform activities relevant to their casework, in order to facilitate greater dialogue and discussion on areas of community legal centre expertise.

6. Encourage proactive disclosure across all levels of government

While there was a shift towards open disclosure in 2010, more needs to be done to ensure that proactive disclosure occurs at all levels of government. It is also important that proactive disclosure is made consistent among the states and territories, so that a clearer picture is provided of public services across the nation.

At present, governments, at both state and federal levels, retain a large amount of information. While information is currently released in the conduct of parliamentary inquiries, and through questions at estimates, Royal Commissions, journalists' investigations, via FOI applications and in the course of legal proceedings, without the proactivity of individuals, organisations and bodies undertaking this work, important public interest information would not be made available by departments and agencies.

PIAC submits that the principles of transparency and accountability should not depend on the proactivity of individuals and non-government bodies, and the flow of information should occur more proactively via disclosure by relevant government agencies.

6.1 Proactive disclosure of payments made by government agencies

PIAC has represented clients in claims for damages against the NSW Police. In recent years, almost all such claims settle before reaching the courts, with the settlement subject to

[25] See PIAC, 'Equal access: Submission in response to the Productivity Commission Draft Report, Access to Justice Arrangements', (22 May 2014) at 4, available at http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test2/submission-counter/subdr246-access-justice.pdf (accessed 18 March 2016).

[26] Open Government Partnership, above n 6, at 5.

confidentiality. This deprives the public from knowing about the payment or the incident that gave rise to it.

PIAC notes that at both a state and federal level, there is little transparency regarding the aggregate amounts paid by government agencies to settle claims.

PIAC considers that it is appropriate to require the disclosure in relevant state and federal annual reports, of the total aggregate amount paid in the year, as ex-gratia payments or compensation to non-employees. These amounts should be separated by relevant government agency.

PIAC notes that statistics have previously been published under the FOI Act by the Commonwealth Department of Finance and Deregulation regarding the number of claims lodged, open and closed; total aggregate amounts paid in the year and the average value of a claim in that year, in relation to persons detained in immigration detention.[27] (Legal costs were not included in these amounts.)

There is an opportunity for further proactive disclosure of aggregate amounts paid by other government agencies in each financial year. This would assist in increasing the transparency and accountability of government agencies.

Recommendation 5

PIAC recommends that the Commonwealth should publish, and negotiate for all state and territory government agencies to publish, the aggregate amount paid in legal settlements and ex-gratia payments to non-employees by government agencies in each financial year.

6.2 Nationally significant data

PIAC submits that there exists a category of 'nationally significant data' that is held by state and federal governments, the release of which would be in the public interest. This is because greater transparency and accountability in certain areas can have a significant impact in improving the:

- public understanding of vital government activities;
- quality of government services; and
- economic activity and entrepreneurship (eg, the increased public availability of government mapping data has been hugely useful in a range of sectors from agriculture, hospitality to transport and logistics).

PIAC recommends that further steps be taken to identify and release nationally significant data at a state and federal level. Where possible, such data should be released in a user-friendly format.

Ideally, a broad-based national consultation should help identify datasets that are of national significance, drawing also on the work of key government agencies such as the Australian Bureau of Statistics. This would include consideration of human rights, criminal justice, insurance, environment, migration, Indigenous affairs, legal affairs and finance. We suggest that this should be an additional consultation to the National Plan, as it would require specific terms of reference to guide relevant parties.

[27] See Australian Government, Department of Finance and Deregulation, 'Freedom of information request FOI 13/69', available at http://www.finance.gov.au/sites/default/files/foi-13-69-summary-table.pdf (accessed 23 March 2016).

Following this, the Federal Government could evaluate the recommendations and create a workplan to release such datasets at a federal level, and through the Council of Australian Governments (COAG), work with state and territory governments to streamline the consistent release of such datasets.

Recommendation 6

PIAC recommends that a national consultation be undertaken to identify nationally significant datasets that should be prioritised for public release.

Drawing from our casework experience, PIAC has developed specialist knowledge in relation to nationally significant data relevant to consumers and human rights issues, including in the fields of insurance, energy and water and criminal justice.

6.2.1 Insurance and mental health data

Section 46 of the *Disability Discrimination Act 1992* (Cth) provides that it is not unlawful for providers of insurance and superannuation products to discriminate against a person on the ground of a person's disability if the discrimination is based on actuarial or statistical data on which it is reasonable to rely, or, 'in a case where no such actuarial or statistical data is available and cannot reasonably be obtained – the discrimination is reasonable having regard to any other relevant factors'.

PIAC has partnered with the Mental Health Council of Australia and *beyondblue* to provide legal advice and representation to consumers who have had their applications or claims for insurance denied by insurers on the ground of mental illness.

Insurers routinely claim that the statistical and actuarial data upon which they base otherwise-discriminatory decisions is commercial in confidence. As such, it is extremely difficult (if not impossible) for consumers to obtain and so an individual cannot readily assess whether an insurer has engaged in unlawful discrimination. PIAC's casework suggests systemic problems in how the insurance industry assesses risk about mental illness and that risk decisions may often be contrary to law because they are not based on robust evidence informed by contemporary understanding of mental illness. PIAC has provided legal assistance to many individuals who have lodged insurance claims that are declined, in circumstances that appear to be unreasonable and unsupported by actuarial and statistical data.

The Senate Economics References Committee is currently conducting an inquiry into the scrutiny of financial advice, which includes terms of reference in relation to the insurance industry, and is intended to report by August 2016.[28] PIAC anticipates that this inquiry will provide further recommendations regarding the regulation of the insurance industry.

[28] Parliament of Australia, Senate Standing Committee on Economics, 'Scrutiny of Financial Advice', available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice (accessed 23 March 2016).

Recommendation 7

PIAC recommends that the Commonwealth Government should consult with the Australian Securities and Investments Commission, the Australian Bureau of Statistics, the insurance industry, consumer advocates and lawyers to identify opportunities to make available actuarial and statistical data relating to mental illness.

6.2.2 Energy and water

PIAC's Energy + Water Consumers' Advocacy Program (EWCAP) focuses on the interests of residential users of electricity, gas and water. EWCAP develops policy and advocates in the interests of low-income and other residential consumers for fair, transparent and sustainable provision of utilities.

PIAC anticipates that a number of concurrent reviews will provide further guidance in their recommendations that will be relevant to improving transparency and therefore also improving competition and consumer knowledge, and the services more generally.[29]

Reporting emissions intensity of all energy sales

PIAC understands that energy retailers are not required to disclose the carbon intensity of the energy supply they offer customers. PIAC believes that this information should be collected and reported on to improve the quality of information on which consumers make decisions about which retailer they purchase energy from, ensuring consumers are able to make effective choice in a competitive retail market. This should include retailer-owned generation assets, energy produced through power purchase agreements, energy purchases through the spot and futures markets. In addition, this information is essential in ensuring full transparency within the market, which is vital as Australia transitions to a low-carbon economy.

Recommendation 8

PIAC recommends that that Council Of Australian Government Energy Council require that energy retailers report the emissions intensity of all energy sales they enter into within the National Energy Market to supply customers.

Energy efficiency

Energy efficiency is vital in tackling the cost of living. States and territories should disclose the results of their audits of the energy efficiency of their public housing stocks and the reports on the implementation of cost-effective upgrades. Moreover, consideration should be given to how to source information about energy efficiency measures in rental tenancies and owner-occupied homes, for example through broad-based voluntary surveys to a range of residencies. This is important information on which further work on potential minimum energy efficiency standards can be based so that measures can be put in place to ensure everyone, especially those most affected by high utility bills, benefits from them.

[29] See, for example ACCC, 'East Coast gas inquiry 2015: Overview', available at https://www.accc.gov.au/regulated-infrastructure/energy/east-coast-gas-inquiry-2015 (accessed 23 March 2016); Australian Energy Market Commission, 'Market Reviews and Advice', available at http://www.aemc.gov.au/Markets-Reviews-Advice (accessed 23 March 2016).

Recommendation 9

PIAC recommends that the States and Territories be required to disclose the results of their audits of the energy efficiency of their public housing stocks and the reports on the implementation of cost-effective upgrades. PIAC also recommends that consideration is given to sourcing such information about residential tenancies and owner occupied housing and making it publically available and accessible.

6.2.3 Criminal justice

PIAC considers that policing, corrective services and health care in prison could be improved through the release of nationally significant data, as such transparency would increase accountability.

Relevant state-based corrective services, juvenile justice, the police, and justice health services retain nationally significant datasets. Compiling such data would require the Federal Government to negotiate with the states and territories to ensure the release of relevant and consistent datasets at a national level.

Of the national inquiries addressing issues in criminal justice, the most well-known is the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). In 1991, the RCIADIC recommended the establishment of a national monitoring program of deaths in custody. In 1992, the Australian Institute of Criminology established the National Deaths in Custody Program (NDCP), which provides comprehensive data on relevant deaths.[30]

The OGP presents an opportunity to develop further mechanisms similar to the NDCP that measure risks within the criminal justice system, as well as the proactive release of further datasets across a range of other criminal justice issues.

Issues of criminal justice are still largely state-based and law reform on criminal justice issues is piecemeal and state-centric. This is despite the fact that significant criminal justice issues are national in scope and would benefit from a nationally coordinated approach, for example:

- the over-representation of Indigenous people in custody;
- the unreasonable use of force;
- racial profiling, discrimination and harassment; and
- lack of independent oversight in police critical incident investigations.

[30] This includes: people who at their time of death were in prison custody, police custody or youth detention; attempting to escape from prison, police custody or youth detention; people whose death was caused or contributed to, by traumatic injuries sustained or by lack of proper care, while in such custody or detention; people who died or were fatally injured in the process of police or prison offices attempting to detain that person. See Australian Institute of Criminology, 'Deaths in Custody in Australia: National Deaths in Custody Program 2011-12 and 2012-13: Introduction', available at http://www.aic.gov.au/publications/current%20series/mr/21-40/mr26/04_introduction.html (accessed 16 March 2016).

PIAC considers that there would be benefit from more information to be made readily accessible to the public, and for the Australian Institute of Criminology to be provided with a larger amount of data from all Australian police agencies.

Given the significant human rights issues posed by policing, increased transparency regarding police accountability would increase consumer confidence as well as creating greater accountability for police acts and omissions.

Recommendation 10

PIAC recommends that a wide-ranging consultation be undertaken to identify nationally significant datasets within the criminal justice area.

Tasers

Tasers are used by Australian law enforcement in all States and Territories and by the Australian Federal Police.[31] The use of Tasers by police in Australia presents an example of a nationally significant dataset that is currently not consistently available at either a state-based or national level.

Access to information regarding Taser use is important, given the human rights implications and significant risk of injury or death posed by their use on vulnerable groups.

The UN Committee Against Torture (CAT) has previously held that the use of Tasers can be a form of torture.[32] In 2008, the CAT recommended that the UK cease its practice of using Tasers on children. In 2014, the CAT recommended that the US should 'expressly prohibit their use on children and pregnant women'[33] and urged the US to 'provide more stringent instructions to law enforcement personnel entitled to use electric discharge weapons, and to strictly monitor and supervise their use through mandatory reporting and review of each use.'[34]

New Zealand provided comprehensive statistics regarding the use of Tasers to the CAT in its sixth periodic report in December 2013.[35] Similarly, the United Kingdom regularly publishes statistics regarding the use of Tasers, along with comprehensive analysis of these statistics.[36]

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31 *SBS News*, 'At a glance: Taser use in Australia', 23 August 2013, available at http://www.sbs.com.au/news/article/2010/10/05/glance-taser-use-australia (accessed 16 March 2016).

32 'Tasers are a form of torture', *CBS News,* 25 November 2007, available at http://www.cbsnews.com/news/un-tasers-are-a-form-of-torture/ (accessed 31 March 2016).

33 United Nations, Committee Against Torture, 53rd session, 3-28 November 2014, *Concluding observations on the third to fifth periodic reports of the United States of America,* at [27]. Available at http://www.state.gov/documents/organization/234772.pdf (accessed 15 March 2016).

34 Ibid.

35 United Nations, Committee Against Torture, *Consideration of reports submitted by States parties under Article 19 of the Convention pursuant to the optional reporting procedure, Sixth periodic reports of States parties due in 2013, New Zealand, received December 2013* (CAT/C/NZL/6) at 42, available at http://www.un.org/ga/search/view_doc.asp?symbol=CAT/C/NZL/6 (accessed 10 March 2016).

36 United Kingdom, Home Office, 'Official statistics: Police use of taser statistics, England and Wales 2014', available at https://www.gov.uk/government/publications/police-use-of-taser-statistics-england-and-wales-1-january-to-31-december-2014/police-use-of-taser-statistics-england-and-wales-2014 (accessed 10 March 2016).

However, there is little transparency in Australia regarding the use of Tasers. Statistics are not available regarding the number of times that:

- Tasers have been drawn, discharged or applied in 'drive stun' mode;
- Tasers have been used on young or elderly people or those with a disability;
- Tasers have been used on Aboriginal or Torres Strait Islander people;
- Complaints have been made about the use of Tasers;
- A person has died following the use of a Taser.

The only publicly-available data is piecemeal, and derived from proactive inquiries made under FOI laws, by the relevant Ombudsman, or by the coroner. Statistics regarding Taser use are not included in NSW Police Annual Reports. Without enquiries being undertaken by the Ombudsman and private parties under FOI law, statistics would not have been made publicly available.[37]

In Victoria, statistics regarding Taser use were previously researched by the Federation of Community Legal Centres, and published in a 2010 report, *Taser Trap: Is Victoria falling for it?*[38]

Increasing transparency and accountability in the operation of weapons such as Tasers, may lead to police receiving more appropriate and rigorous training in their use. The collation and release of such data nationally would also assist Australia to provide reliable statistics to relevant UN bodies. In relation to Taser use, this could be anticipated to occur following Australia's ratification of the *Optional Protocol on the Convention Against Torture* (OPCAT).

Recommendation 11

PIAC recommends that the Australian Government commit to ensuring that state-based police forces, the Australian Federal Police and any other relevant agencies be required to publish statistics regarding how many times Tasers have been used in the jurisdiction, in all relevant modes, including the age and gender of the person on which it was used.

PIAC recommends that such statistics should also be reported to the Australian Institute of Criminology, or for the Australian Government to determine an effective alternative for consistent reporting of Taser use.

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37 For example, in NSW, statistics regarding Taser use were revealed via: A November 2008 NSW Ombudsman report, *The use of Tasers by NSW Police Force, Special report to Parliament*, available at https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/the-use-of-taser-weapons-by-nsw-police-force (accessed 10 March 2016); an application under the *Government Information (Public Access) Act* 2009 (NSW)(GIPA) in Feb 2011 http://www.police.nsw.gov.au/__data/assets/pdf_file/0006/187782/disclosure_log201101_201111.pdf (accessed 10 March 2016); an October 2012 NSW Ombudsman report, *How are Taser weapons used by the NSW Police Force? A special report to Parliament under s31 of the Ombudsman Act 1974;* and a GIPA application in August 2015: NSW Police, Disclosure Log 2015, (#131443 and #132007) available at http://www.police.nsw.gov.au/services/information_access_unit_gipa/disclosure_logs/2015. Further information regarding Taser use was also evident in the NSW Coroner's Report into the death of Brazilian national Roberto Laudisio Curti: NSW State Coroner, *Roberto Laudisio Curti,* 2012/00086603 (14 November 2012), available at http://www.abc.net.au/cm/lb/4371034/data/coroner27s-report-into-the-death-of-roberto-laudisio-curti-data.pdf (accessed 16 March 2016).

38 Federation of Community Legal Centres Victoria, 'Reducing the risk of misuse, injury and death from Tasers' available at http://www.fclc.org.au/cb_pages/clr_tasers.php (accessed 10 March 2016).

Incidents of self-harm in detention facilities

While national statistics are compiled regarding deaths in custody, PIAC recommends that statistics should also be required to be released regarding self-harm incidents that occur in detention environments. Self-harm incidents are indicative of the risk of suicide in detention, and some deaths in custody have been preceded by numerous self-harm attempts.[39]

PIAC suggests that streamlining the state and federal process of reporting of self-harm incidents will also be of future assistance in the event that Australia ratifies OPCAT, which could require the reporting or monitoring of such data.

Recommendation 12

PIAC recommends that the Australian Government work with the states and territories to ensure consistent reporting regarding self-harm incidents that occur in police and corrective services custody.

Proactive disclosure of procedures and policies in criminal justice

Police, corrective services and justice health services use informal procedural guidance documents, as well as formal policy documents (which have a particular status and publication requirement in s 10 of the FOI Act), in decision-making. Such documents make those decision makers aware of their obligations to prisoners and persons in custody. However, the public availability of such informal procedures (as distinct from the formal policies) varies across jurisdictions in Australia.

The proactive disclosure by government agencies of relevant informal procedural and formal policy documents facilitates and encourages open and transparent government, and government decision-making.

In NSW, the *Government Information (Public Access) Act 2009* (NSW) (GIPA) governs the release of information. GIPA encourages the proactive disclosure of information by government agencies. In NSW, as a consequence, government agencies disclose relevant formal policies and informal procedures on their websites.

However, there is inconsistency in the availability of certain documents relevant to criminal justice, both within states and across Australia.

For example, the NSW Corrective Services, *Offender Classification Case Management Policy and Procedures Manual* is available online.[40] The *Corrective Services Operations Procedures*

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39 For example, see State Coroner's Court of New South Wales, *Inquest into the death of Michael David John Nolan,* (14 March 2016), available at http://www.coroners.justice.nsw.gov.au/Documents/Nolan%20Findings%20final.pdf (accessed 23 March 2016). The inquest focused on whether correctional authorities and Justice Health practitioners adequately managed the risk of Mr Nolan's self-harming and appropriately treated his mental illness.

40 NSW Government, Department of Justice, 'Offender Classification and Case Management Policy and Procedures Manual', available at http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/related-links/publications-and-policies/policies-defined-gipa-act/csnsw-policy-documents/csnsw-policy-documents.aspx (accessed 21 March 2016).

Manual is also available online, however, PIAC is aware that some sections of this manual are not available online. Those sections that are not online, such as 'Segregating Inmates with a mental illness', are said to be exempt on the basis of s 14 Table 2(h) of GIPA.

PIAC considers that these exemptions have been applied in an overly broad manner by the relevant agency, as it is not clear that the whole of this section of the manual, if disclosed, would prejudice the good order, security or discipline of any correctional facility (s14 Table 2(h)).

Similarly, relevant NSW Police policies are available online, such as the *NSW Police Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*.[41] PIAC believes, however, that additional documents such as some Standard Operating Procedures should also be publicly available.

The policies and procedures that are publicly available vary across Australian jurisdictions.

PIAC suggests that there should be an overriding presumption in favour of disclosure of relevant documents regarding police operations and the operation of prisons. This would assist members of the public in knowing their rights; when decisions have been not in keeping with procedures and policies; and increase the accountability and transparency of police and corrective services in Australia.

PIAC notes that the Western Australian Economic Regulation Authority (ERA) inquired into the efficiency and performance of WA's prison system. The ERA considered that, with the current level of disclosure in Western Australia, 'it is not possible for interested parties to understand how the Department operates, nor how well it operates, [which] further hinders the Department in establishing effective service delivery relationships with communities and businesses'.[42]

The ERA recommended that that the Department of Corrective Services should:

- Identify individual datasets that are of acceptable quality and commence publishing these as soon as feasible.
- Adopt a policy of publishing its operational and financial data by default, wherever there is no compelling confidentiality reason not to do so.
- Improve publication and disclosure practices as necessary to meet the standards detailed under Western Australia's *Whole of Government Open Data Policy.*[43]

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41 NSW Police Force, 'Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence', available at http://www.police.nsw.gov.au/about_us/policies__and__procedures/legislation_list/code_of_practice_for_crime (accessed 23 March 2016).

42 Economic Regulation Authority (WA), *Inquiry into the Efficency and Performance of Western Australian Prisons – Final Report,* (November 2015), at 229 – 230. Available at https://www.erawa.com.au/cproot/13942/2/Final%20Report%20-%20Inquiry%20into%20the%20Efficiency%20and%20Performance%20of%20Western%20Australian%20Prisons.PDF (accessed 22 March 2016).

43 Economic Regulation Authority (WA), *Inquiry into the Efficiency and Performance of Western Australian Prisons – Final Report,* (November 2015), at 230, available at https://www.erawa.com.au/cproot/13942/2/Final%20Report%20-%20Inquiry%20into%20the%20Efficiency%20and%20Performance%20of%20Western%20Australian%20Prisons.PDF (accessed 22 March 2016).

Recommendation 13

PIAC recommends that the Australian Government work with state and territory governments and relevant agencies to apply the recommendations of the ERA (or similar measures) on a national basis across the corrections system.

Promote monitoring of places in detention in Australia

The delivery of public services could be improved specifically in detention environments in Australia by increasing the formal monitoring of prisons and detention environments.

The core mechanism by which transparency and accountability would be facilitated in Australia in detention environments, is via Australia ratifying OPCAT. This would assist in promoting transparency of Australian prison environments, including the adequacy of conditions for inmates, via the introduction of National Preventative Mechanisms who would be enabled to monitor prison environments. PIAC previously submitted in 2012 to the Joint Standing Committee on Treaties (JSCOT) that the ratification of OPCAT should take place as soon as practicable.[44] JSCOT, in its 2012 report, believed 'that it now appropriate for Australia to ratify OPCAT'[45] and recommended that binding treaty action be undertaken.

In its 2015 submission to Australia's Second Universal Periodic Review, the Australian Human Rights Commission noted:

> Six years have passed since Australia signed OPCAT, with limited progress towards ratification and establishment of a National Preventative Mechanism. Since 2011, ratification has been endorsed through parliamentary processes…
>
> The Commission recommends that Government expedite the ratification of OPCAT and establishment of a National Preventative Mechanism for places of detention.[46]

Recommendation 14

PIAC endorses the recommendation of the Australian Human Rights Commission that the Australian Government should expedite the ratification of OPCAT.

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44 PIAC, 'OPCAT – preventative, proactive and non-punitive,' Submission to the Joint Standing Committee on Treaties National Interest Analysis, (30 March 2012), available at http://www.piac.asn.au/sites/default/files/publications/extras/12.03.30_opcat_preventative_proactive_and_non-punitive_submission.pdf (accessed 24 March 2016).

45 Parliament of Australia, Joint Standing Committee on Treaties, *Report 125 – Treaties Tabled on 7 and 28 February 2012, Chapter 6: Optional Protocol to the Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment done at New York on 18 December 2002* (21 June 2012) at 51 – 51 [6.48] and Recommendation 6, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/report.htm (accessed 30 March 2016).

46 Australian Human Rights Commission, *'Australia's Second Universal Periodic Review, Submission by the Australian Human Rights Commission to the Universal Periodic Review Process'* (2015) at 4 [2.2], available at https://www.humanrights.gov.au/sites/default/files/document/publication/WEB_Australias_Second_UPR_Review_2015.pdf (accessed 17 March 2016).

7. Balancing the public interest

PIAC is concerned that in weighing the public interest factors for and against disclosure, overly heavy weight is sometimes given to considerations of national security and law enforcement. This results in more information access being denied than is necessary.

7.1 PIAC's work regarding military detention

In 2005, PIAC applied under the FOI Act to the Department of Defence seeking further information pertaining to Australian Defence Force operations outside Australia. PIAC sought to examine the way in which individuals who were suspected of being terrorists were apprehended, detained and transferred to other military or civil authorities outside Australia.[47]

While the Department of Defence identified 222 documents that were deemed to be relevant to the request, from 3000 that had been reviewed, PIAC initially was given access to only 21 of the 222 documents. The Department of Defence decided that 199 of the documents were fully exempt from disclosure as they affected national security, defence or international relations.[48]

In 2009, PIAC sought a review of the decision made by the Department of Defence, which took place in the Administrative Appeals Tribunal (AAT). The Department of Defence acknowledged that a number of documents had been 'inadvertently overlooked' when the original decision was made. PIAC succeeded in gaining access to a significant number of documents (approximately 160) that had been previously withheld. Many of the documents that the Department of Defence originally claimed were exempt from release were subsequently released to PIAC.

However, these documents would not have been released without review to the AAT.

7.2 PIAC's work regarding NSW Police

The NSW Police uses the Suspect Target Management Plan (STMP) regime to target 'high-risk offenders'. Little information is publicly available regarding STMP practice; however, PIAC's casework highlights that placing an individual on an STMP can lead to over-policing and harassment of individuals, which is of particular concern in relation to young people seeking to rehabilitate. PIAC's casework also suggests that Indigenous young men may be over-represented on STMPs.

PIAC sought the release of documents relevant to STMPs, submitting that such release was in the public interest, in the NSW case of *Sarraf v Commissioner of Police, NSW Police Force* [2015] NSWCATAD 15.

The case explored balancing the public interest, with consideration of the broad presumption against disclosure of 'a document created by the State Crime Command of the NSW Police Force in the exercise of its functions concerning the collection, analysis or dissemination of intelligence'.[49]

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47 See PIAC, 'About the Defence project', available at http://military.piac.asn.au/about (accessed 23 March 2016).

48 Ibid.

49 *Government Information (Public Access) Act 2009* (NSW), Schedule 1, clause 7(c).

The NSW Police Force submitted that public interest considerations against disclosure included that 'disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions'[50] and 'disclosure of the information could reasonably be expected to prejudice the prevention, detention or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law'.[51]

In weighing the public interest, the Court held that the potential prejudicial impact of disclosure of the documents outweighed public interest considerations for disclosure.

In the absence of further information from the NSW Police, it is more difficult for advocates to effectively work towards solutions to reduce the contact of Indigenous young people with the criminal justice system.

This provides a case study illustrating the difficulty in obtaining information retained by police agencies, and the broad application of presumptions against disclosure.

Recommendation 15

PIAC recommends that the Australian Government should encourage a culture of disclosure, with a specific focus on departments engaging in national security or policing issues, at both a federal and state/territory level.

8. Consultation

Within both state and federal parliaments, there is scope for better consultation regarding legislative amendments and opportunities to provide submissions to parliamentary committee inquiries.

8.1 Rushed consultations for legislative reform

There have been many instances in which background papers have been released, Bills introduced or inquiries announced with inadequate time for interested stakeholders to assess the matter in question and provide comment before a parliamentary vote takes place.

It is of concern when Bills are passed by Parliament while a formal scrutiny or inquiry process is still underway. The Australian Law Reform Commission notes that at a federal level, since 2000, this has occurred in relation to 109 of the Bills considered in the Scrutiny of Bills Committee's reports. Since the commencement of the Joint Parliamentary Committee on Human Rights in 2012, over 50 bills have been passed before that Committee had completed its review.[52]

A number of organisations support the imposition of minimum timeframes for scrutiny committees to consider Bills.[53]

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50 *Sarraf v Commissioner of Police, NSW Police Force* [2015] NSWCATAD 15 at [66].

51 Ibid.

52 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)* (2 March 2016) at 71 [3.79], available at https://www.alrc.gov.au/publications/freedoms-alrc129 (accessed 29 March 2016).

53 Ibid, at 72 [3.81].

Recommendation 16

PIAC recommends that the Legislation Act 2003 *(Cth) include a minimum period for a Bill to be scrutinised by parliamentary committee processes, and that this minimum period should only be avoided in truly exceptional and urgent circumstances.*

9. Work collaboratively with Indigenous people

Through its Indigenous Justice Program, PIAC has extensive experience representing Aboriginal and Torres Strait Islander peoples in relation to criminal justice issues, as well as supporting claimants in NSW seeking repayment of 'stolen wages' and in respect of compensation for the Stolen Generations.

Indigenous affairs have historically not been marked by transparency, accountability and participation. It is widely acknowledged that injustices have been committed against Indigenous communities, which have perpetuated trauma, poverty and social disadvantage. Often these injustices have occurred in an environment in which Indigenous persons did not have the opportunity to participate in or be consulted regarding reforms affecting them and their communities.

PIAC notes that Australia has undertaken to improve public services as a core challenge of its National Action Plan, and that the commitments made must address at least one of the core principles of transparency, accountability, participation or technology and innovation.

PIAC suggests that an important component of improving public services is via increasing and improving participation and consultation with Indigenous people. PIAC notes that New Zealand has enshrined this approach within its own National Action Plan under the OGP.

9.1 New Zealand's Kia Tūtahi Relationship Accord and OGP

PIAC notes that one of the four key components of New Zealand's OGP National Plan relates to communities and government standing together and the Kia Tūtahi relationship accord.[54]

In New Zealand, the Kia Tūtahi Relationship Accord (the Accord) was signed in August 2011 by government and community members. The Accord set out principles and expectations to guide how communities of Aotearoa New Zealand and government, could work together for a fair, inclusive and flourishing society. The Accord notes that the following principles form the basis for committed actions:

- we will respect Te Tiriti o Waitangi;
- we have a collective responsibility to hear and respond to the voices of all;
- we will act in good faith; and
- our work together will be built on trust and mutual respect.[55]

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54 Open Government Partnership, 'New Zealand: Introduction', available at http://www.opengovpartnership.org/country/new-zealand (accessed 23 March 2016).

55 Government of New Zealand, Department of Internal Affairs, 'The Relationship Accord', available at http://www.dia.govt.nz/vwluResources/The%20Kia%20Tutahi%20Relationship%20Accord%20-%20Fact%20Sheet/$file/kia-tutahi-fact-sheet-27-may-2015-pdf.pdf (accessed 29 February 2016, last

A 2015 review of the Accord conducted by New Zealand's Department of Internal Affairs found that only 20% of communities surveyed knew about the Accord.[56]

In February 2016, the OGP's Independent Reporting Mechanism released its first report on New Zealand's progress towards fulfilling its international commitments, and noted that the OGP value relevance of the Kia Tūtahi Accord was 'clear' and that further steps had been and could be taken to strengthen the Accord.[57]

Recommendation 17

PIAC recommends that the Australian Government consider developing a Relationship Accord similar to New Zealand's Kia Tūtahi Relationship Accord, enshrining the importance of consultation with Aboriginal and Torres Strait Islander peoples.

9.2 Implement justice targets

Amnesty International reports that in 2015-2016, **'**Aboriginal and Torres Strait Islander people continued to be severely overrepresented in prison, making up over a quarter of all adults incarcerated. Indigenous children, less than 6 per cent of the population of 10-17 year-olds, are more than half of young Australians in detention.'[58] Indigenous young people are therefore 26 times more likely to be in detention than non-Indigenous young people.[59]

Change the Record, a coalition of leading Aboriginal and Torres Strait Islander, human rights, legal and community organisations, notes that in the past 10 years, there has been an 88 per cent increase in the number of Aboriginal and Torres Strait Islander people in prison, with Aboriginal and Torres Strait Islander people now 13 times more likely to be imprisoned than non-Indigenous people.[60]

Change the Record has recommended that justice targets be set.[61] PIAC supports this call and submits that Australia should implement 'justice targets' to provide measurable outcomes on progress to reduce the over-representation of Indigenous people in the criminal justice system.

In 2011, a federal parliamentary committee inquiry assessing Indigenous youth and the criminal justice system also recommended that the Australian Government endorse justice targets

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updated May 2015). Te Tiriti o Waitangi refers to the Treaty of Waitangi signed in 1840 between the British Crown and approximately 540 Maori chiefs. No such treaty has ever existed in Australia.

56 Government of New Zealand, Department of Internal Affairs, 'Kia Tūtahi Relationship Accord', available at http://www.dia.govt.nz/KiaTutahi (accessed 29 February 2016).

57 Open Government Partnership, above n 6, at 4 and 13.

58 Amnesty International, 'Amnesty Annual Report 2015/16: Australia can do better', available at http://www.amnesty.org.au/news/comments/41350/ (accessed 25 February 2016)

59 Amnesty International, *A Brighter Tomorrow* (July 2015) at 5, available at http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf (accessed 31 March 2016).

60 Change the Record Coalition Steering Committee, *Blueprint for Change,* (November 2015), at 4, available at https://changetherecord.org.au/blueprint-for-change (accessed 1 March 2016).

61 *Ibid.* See also National Congress for Australia's First Peoples, 'Justice target adds strength to closing the gap', 12 August 2013, available at http://nationalcongress.com.au/justice-target-adds-strength-to-closing-the-gap/ (accessed 29 February 2016); ANTaR, 'Justice', available at https://antar.org.au/campaigns/justice (accessed 29 February 2016).

developed by the Standing Committee of Attorneys-General for inclusion in the Council of Australian Governments (COAG) Closing the Gap Strategy, and that these targets should then be monitored and reported against.[62]

Recommendation 18

PIAC recommends that the Australian government commit to setting justice targets through the COAG framework for Closing the Gap in Indigenous disadvantage, implementing a justice reinvestment approach, as recommended by the Change the Record. [63]

9.3 Formalise the importance of consultation with and participation of Indigenous peoples

There is strong international momentum towards increasing Indigenous peoples' participation and consultation in a global vision, which PIAC considers intersects neatly with the OGP's principles.

9.3.1 Lack of enforceable mechanisms to secure Indigenous right of participation

The 2007 *Declaration of the Rights of Indigenous Peoples,* which was formally endorsed by Australia in 2009, sets out rights of democratic participation for Indigenous peoples. Articles 18 and 19 emphasise the right of Indigenous peoples to participate in decision-making, and the obligation of states to consult and cooperate in good faith with Indigenous people in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. However, the Declaration has not been incorporated into Australian law and is not legally enforceable.

In August 2009, General Recommendation No. 32 was passed by the Committee on the Elimination of Racial Discrimination, outlining the meaning and scope of 'special measures' in the *International Convention on the Elimination of Racial Discrimination.* General Recommendation No. 32 noted that 'states parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities'.[64]

However, neither of these sources has legal enforceability in Australia; and in *Maloney v The Queen* [2013] HCA 28, these sources were held not to constitute extrinsic materials of the kind contemplated by Article 31(3) of the *Vienna Convention on the Law of Treaties*. However, a majority of the Court also accepted that consultation may be a relevant consideration in relation to whether a measure can be characterised as a 'special measure' for the purposes of section 8 of the *Racial Discrimination Act* 1975 (Cth) (RDA). Chief Justice French accepted the appellant's

62 Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time, Time for Doing: Indigenous youth in the criminal justice system,* (June 2011) at xix, available at https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf (accessed 2 March 2016).

63 Change the Record Coalition Steering Committee, *Blueprint for Change,* (November 2015), at 5, available at https://changetherecord.org.au/blueprint-for-change (accessed 1 March 2016).

64 Committee on the Elimination of Racial Discrimination, *General Recommendation 32,* Seventy-fifth session, August 2009, at [18].

submission that in the absence of genuine consultation with those to be affected by a special measure, it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve.[65]

In the absence of appropriate legislative amendment to the RDA, Australia continues to wrestle with engaging Indigenous consent and has failed to adopt best practice in promoting and effectively engaging Indigenous participation.

Recommendation 19

PIAC recommends that Australia should amend section 3 of the Australian Human Rights Commission Act 1986 *(Cth) to include the Declaration of the Rights of Indigenous Peoples in the list of Declarations.*

Australia should amend section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 *(Cth) to include the* Declaration of the Rights of Indigenous Peoples *in the list of rights and freedoms recognised or declared by international instruments. This would enable Bills to be more appropriately scrutinised on the basis of Indigenous rights.*

Australia should amend the Racial Discrimination Act 1975 *(Cth) so that section 3 provides the definition of 'special measures' as meaning 'measures of a kind described in General Recommendation No. 32, issued by the UN Committee Against Racial Discrimination in August 2009'.*

9.3.2 Recent issues in Australia

In 2011, Australia attracted critique from Indigenous elders, communities and legal groups in relation to the implementation of the *Stronger Futures in the Northern Territory* legislation. In March 2012, Jumbunna Indigenous House of Learning released a report, *Listening but not hearing: A response to the NTER Stronger Futures Consultations June to August 2011*,[66] which explored how consultation with Indigenous communities prior to the legislation had been grossly inadequate.

The *Stronger Futures in the Northern Territory* legislative package also did not provide any means by which the special measures implemented within the package could be measured as having been achieved: a crucial component of special measures as cited by General Recommendation No. 32 issued by the UN Committee on the Elimination of Racial Discrimination.[67] A 2016 review conducted by the Parliamentary Joint Committee on Human Rights, found that core components of the legislation, such as alcohol restrictions, income

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65 *Maloney v The Queen* [2013] HCA 28 (19 June 2013) French CJ at [25].

66 Jumbunna Indigenous House of Learning, *Listening but not hearing: A response to the NTER Stronger Futures Consultations June to August 2011* (March 2012), available at http://www.uts.edu.au/sites/default/files/ListeningButNotHearing8March2012_0.pdf (accessed 24 February 2016)

67 UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination', https://www2.ohchr.org%2Fenglish%2Fbodies%2Fcerd%2Fdocs%2FGC32.doc&usg=AFQjCNEy7K1YEXLIlmXMm-R6gfF_JwwJRQ&sig2=oLFmwZjDQvgi-pVnI8ZBUg

management and school enrolment and attendance through welfare reform measures, were not compliant with human rights standards and required review.[68]

9.3.3 Recent international progress in advancing Indigenous participation

In September 2015, the United Nations General Assembly adopted 'Transforming Our World: the 2030 Agenda for Sustainable Development'. The new 2030 Agenda came into effect on 1 January 2016 and will carry through the next 15 years, with 17 sustainable development goals and 169 associated targets, described as integrated and indivisible.

The Permanent Forum on Indigenous Issues has called for Indigenous peoples' participation in the process towards the adoption of the Agenda, recommending the inclusion of in the goals and recommending that progress be measured for Indigenous peoples on relevant key indicators. This followed progress in the 2014 World Conference on Indigenous Peoples' Outcome Document, in which Member States made commitments to

> *'giving due consideration to all the rights of indigenous peoples in the elaboration of the post-2015 development agenda' (paragraph 37)* and in general, to
>
> '*working with indigenous peoples to disaggregate data, as appropriate, or conduct surveys and to utilizing holistic indicators of indigenous peoples' well-being to address the situation and needs of indigenous peoples and individuals, in particular older persons, women, youth, children and persons with disabilities (paragraph 10)'.*[69]

Given the international momentum which is driving the increased participation of Indigenous people in the 2030 Agenda, PIAC considers that it would be appropriate for Australia to pursue commitments in relation to Indigenous participation and consultation within its National Action Plan.

Recommendation 20

PIAC recommends that Australia should formalise the importance of consultation with and participation of Indigenous peoples and should address increasing Indigenous participation and consultation in its National Action Plan. It would be appropriate for Australia's commitment to reflect and enshrine the spirit of the Declaration of the Rights of Indigenous Peoples*, as well as the provisions of General Recommendation No. 32. PIAC recommends legislative amendment to enshrine similar provisions within the* Racial Discrimination Act 1988 *(Cth).*

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68 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures,* (16 March 2016) at ix – xi, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report (accessed 23 March 2016).

69 United Nations, Division for Social Policy and Development Indigenous Peoples, 'Indigenous Peoples and the 2030 Agenda', available at https://www.un.org/development/desa/indigenouspeoples/the-sustainable-development-goals-sdgs-and-indigenous.html (accessed 24 February 2016)

10. Conclusion

PIAC appreciates the opportunity to highlight our broad concerns regarding transparency and accountability in this submission.

PIAC applauds the commitment by the Australian government to the OGP and looks forward to participating in subsequent stages of the formation and review of the National Action Plan.