

# PIAC Annual Report 2003-2004

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**C**ENTRE

**Public Interest Advocacy Centre**

**ABN 77 002 773 524**

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# About PIAC

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The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal and policy centre. PIAC seeks to promote a just and democratic society and to empower individuals and groups, particularly those who are disadvantaged and marginalised. Using legal, policy, communication and training initiatives, PIAC makes strategic interventions in public interest matters.

PIAC was established in July 1982 as an initiative of the Law Foundation of New South Wales with the support of the NSW Legal Aid Commission. Since that time it has grown from a staff of four to paid staff at the end of the 2003-04 Financial year of twenty, of whom six work on a part-time basis. In addition to core staff, PIAC has a College of Law student on placement, a solicitor seconded to the Public Interest Law Clearing House (PILCH), a student from the University of Sydney one day a week and, from time to time, additional secondees, consultants and volunteers.

Whenever possible, to achieve its aims PIAC works co-operatively with other public interest groups, community and consumer organisations, community legal centres, private law firms, professional associations, academics, experts, industry and unions. PIAC provides its services free or at minimal cost.

## What PIAC does

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PIAC aims to:

- expose unjust or unsafe practices, deficient laws and policies;
- seek redress in public interest matters for those who are marginalised or unrepresented;
- promote accountable, transparent and responsive governance;
- facilitate, influence and inform public debate on public interest matters;
- promote the development of case and statutory law that better reflects the public interest;
- enhance the capacity of community organisations to pursue the interests of the communities they represent;
- promote and develop the protection of human rights; and
- maintain a national profile and impact.

## PIAC Criteria

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As demand for services often exceeds capacity and resources, PIAC must be selective in targeting the issues it will work on and matters or projects to be undertaken. PIAC gives priority to issues affecting identified groups within the general community where there is significant harm or adverse impacts being experienced by or likely to affect disadvantaged sectors of the community

The key questions asked by PIAC when selecting issues are:

- Is the issue consistent with PIAC's Charter and Strategic Plan?
- Can PIAC make a significant impact in the short to medium-term?
- Does PIAC have the capacity and resources to act effectively?
- Would PIAC be duplicating the efforts of others or can PIAC work in alliance with others?
- Can legal, policy, communication and training strategies be integrated?



# PIAC People

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## PIAC's Board

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The Hon Elizabeth Evatt AC	Chair
Philip Bates	Barrister, Sir Owen Dixon Chambers
Alan Cameron AM	Management Consultant
Bill Grant	Chief Executive Officer, Legal Aid Commission of NSW
Shauna Jarrett	Solicitor, Agostini Jarrett (Law Society of NSW nominee)
Joanna Kalowski	Management / Training Consultant
Rodney Lewis	Partner, Dormers Legal
Gary Moore	Director, Council of Social Service NSW (NCOSS)
Annette O'Neill	Consultant – Law & Justice Foundation Nominee
Merrilyn Walton	Faculty of Medicine, University of Sydney

## PIAC's Staff

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Robin Banks	Director (commenced 15 June 2004)
Madeleine Bennison	Financial Manager
Elissa Freeman	Policy Officer (UCAP) (commenced 5 April 2004)
Alexis Goodstone	Senior Solicitor
Marion Grammer	Bookkeeper
Carolyn Grenville	Training Co-ordinator
Jane King	Centre Co-ordinator
Anne Mainsbridge	Solicitor (commenced 16 July 2003)
Sarah Mitchell	Administrative Officer (Policy and Training)
Jason Mumbulla	Computer Systems Administrator (commenced 16 December 2003)
Simon Moran	Principal Solicitor
Annie Pettitt	Policy Officer (commenced 24 March 2003)
Melissa Pinzuti	Legal Secretary
Patricia Ranald	Principal Policy Officer
Shahzad Rind	Solicitor, Indigenous Justice Project
Fabiola Rofael	Receptionist
Cathy Sharpe	Casual Trainer
Katharine Slattery	Administrative Officer, Policy and Training (commenced 3 May 2004)
Louise Southalan	Policy Officer (Fair Trade)
Jim Wellsmore	Senior Policy Officer (UCAP)
Trish Benson	Senior Policy Officer (UCAP) (passed away January 2004)
Andrea Durbach	Director (resigned 11 June 2004)
Bassina Farbenblum	Solicitor (resigned 22 July 2003)

## PILCH Staff

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Robin Banks	Director (commenced 15 June 2004)
Madeleine Bennison	Financial Manager
Catherine Duff	PILCH Project Development Officer (appointed 13 October 2003)
Melissa Pinzuti	Legal Secretary
Sandra Stevenson	Solicitor
Andrea Durbach	Co-ordinator (resigned 11 June 2004)

**Trish Benson**

Trish Benson, Senior Policy Officer with PIAC's Utility Consumers' Advocacy Program passed away on 8 January 2004 after suffering a brain aneurysm in late December.

The loss of our loved and treasured colleague and friend, Trish, left every one at PIAC—staff and Directors—filled with deep, deep sadness and inconceivable shock. Trish joined PIAC five years ago to head the newly established Utility Consumers' Advocacy Program (UCAP). She turned UCAP into an extraordinarily successful and highly respected powerhouse, brokering relationships between government, utility providers and communities to magnificent effect.

As a colleague, Trish's skills, commitment and passion travelled into boundless areas and touched many people across different lives and worlds. Her energy and capacity to take life on was striking. Never content just to do what her significant UCAP role demanded, Trish leapt into other areas of PIAC's work. As PIAC Director, Joanna Kalowski said: "Trish will leave a very large space for so slight a woman".

**Andrea Durbach**

In June 2004, Andrea Durbach, PIAC's Director and PILCH's Co-ordinator, resigned from PIAC after almost 13 years of service. Andrea initially came to PIAC as Assistant Director. She then took on the demanding role of head of PIAC's legal practice, and for the last seven years has been the Director of PIAC and the Co-ordinator of PILCH.

Andrea has left PIAC to join the School of Law at the University of New South Wales as an Associate Professor and Director of the Australian Human Rights Centre. She will start her appointment at UNSW in late July 2004 and PIAC and PILCH Board and staff wish Andrea well in her new endeavour.

**Consultants**

Tilda Communications  
Glenys Clarke

Computer consultants until November 2003  
Library consultant until April 2004

**College of Law placements**

Ryan Verzosa (commenced May 2004)  
Victoria Lee (February to May 2004)  
Vanessa Liu (October 2003 to February 2004)  
Farhana Islam (July to August 2003)  
Cathy Stirling (January to July 2003)

**Student Placements & Volunteers**

Daniela Gavshon University of Sydney Placement (March to June 2004)  
Melissa Bromley University of Sydney Placement (August to October 2003)  
Azadeh Dastyari University of Sydney Placement (March to August 2003)  
Linda Steele Volunteer (February to May 2004)

**PILCH Secondees**

Marcel Savary  
Shyarma Chatterjee  
Graeme Edgerton  
Jennifer Cripps  
Catherine Capelin

Minter Ellison  
Allens Arthur Robinson  
Gilbert + Tobin  
Freehills  
Minter Ellison

**Minter Ellison Secondees to Homelessness Project**

Judith Levitan  
Michelle Rabsch

Kristen Howden  
Lindsay Prehn



# PIAC's Projects

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## Accountable government

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### Overview

PIAC's activities in the area of accountable government in the last year have centred on ensuring that governments comply with legislative and procedural requirements when making decisions.

### Legislative and procedural compliance

PIAC has given oral and written advice to both individuals and organisations seeking to challenge government decisions, and briefed counsel for advice on their behalf.

In *Minister of Tourism and Resources v Mobil Oil*, the Full Federal Court granted PIAC leave to intervene as *amicus curiae*. This matter related to a question of whether the Court was bound to accept a civil penalty agreed to by a Federal regulator and Mobil Oil. At issue was the ability of a government department's decisions to limit the power of a court to come to its own decision. In its submissions, PIAC stressed that the Court is not constrained by a joint submission on penalty and must itself be satisfied of the appropriate penalty.

In its decision, the Court stated that the appropriate answer to the question posed was, as PIAC had argued, 'no', and stressed that the Court has responsibility for exercising its own judgment as to whether a proposed penalty is within the appropriate range for the relevant contravention. The Court highlighted a number of key points: that a court should be satisfied that it is being given accurate, reliable and complete information on critical questions and if it is not satisfied that it has sufficient information to support an 'agreed' approach advocated by the parties, it can require the parties to provide additional evidence or information. If such information or evidence is not provided, the Court may impose a different sentence or penalty from that proposed by the prosecution or regulator (as the case may be). Geoff Lindsay SC and Tony Payne acted as counsel.

In the Inquest into the Death of Jessica Gallacher, PIAC acted with counsel, James Hmelnitsky, for Jessica's family. Jessica was killed by her mother's partner, Mr William McGarrity. Mr McGarrity had a long history of mental illness and was living with Jessica and her mother at the time of Jessica's death. Two days before Jessica's death, workers from the Department of Community Services and the Central Coast Area Health Service, accompanied by police, attended Jessica's home with the intention of scheduling Mr McGarrity. Inexplicably Mr McGarrity was not scheduled. Two days later he killed Jessica. Jessica was four years old when she died.

The central issue in the Inquest was whether the Department of Community Services and the Central Coast Area Health Service had acted appropriately by not scheduling Mr McGarrity. Coroner Milovanovich found that they had not. Further, the Coroner found that the Area Health Service failed to adequately implement policies that would ensure that a similar event did not occur in future. In contrast, the Coroner found that DOCS had investigated their actions, implemented policy changes and reviewed the changes to assess their effectiveness.

Coroner Milovanovich made the recommendations proposed by the family and expressed his concern that 'the system had failed Jessica and the system had failed McGarrity'. He said that he and the other state coroners regularly held inquests into deaths that related to people with mental illness. Accordingly, he indicated that the coroners would review these inquests and make submissions to the State Government regarding the need for a review of the provision of services to people with mental illness.

# Human Rights

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## Overview

A significant new area of work for the Centre over the last twelve months has been the development of a long-term project focusing on existing human rights protection in Australia and the potential for a comprehensive bill or charter of rights.

Work has continued on the impact of Federal Government national security and anti-terrorism laws on human rights, particularly civil and political rights.

PIAC continues to maintain an active interest in the issue of education rights, having provided advice on the right to education, and in privacy rights.

Another major focus of PIAC's human rights is the right to equality and the effectiveness of anti-discrimination laws in promoting and protecting that right.

## Protecting Human Rights in Australia: A Community Education Project

The history of Australia's protection of internationally recognised human rights has been fragmented and *ad hoc*. There are few rights that are afforded protection in the Australian Constitution and state and federal laws provide, at best, limited, scattered and inadequate protection of those rights.

Recent legislation that has reduced human rights protection in Australia has highlighted the fragility of that protection in the Australian legal system. Australia remains the only OECD country without a charter or bill of rights.

While discussions about bills of rights have attracted the attention of lawyers, academics and politicians, they have often failed to engage the broader community. As human rights principles are increasingly compromised, PIAC believes that it is timely to re-invigorate the debate and build momentum towards developing a comprehensive mechanism for the legal protection of human rights in Australia.

A number of attempts in the past to introduce bills or charters of rights, both at state/territory and federal levels, have failed. However, public opinion may be changing. In 2004, after extensive community consultation and clear support from its Chief Minister, the Hon John Stanhope, the Australian Capital Territory adopted legislation to protect human rights, the *Human Rights Act 2004*. This shows that both political leadership and support from the community are essential if Australia is to improve its protection of human rights.

PIAC has a long history of working toward improving the protection of human rights in Australia. In 2003, PIAC embarked on a three-stage project—Protecting Human Rights in Australia: A Community Education Project—to promote the improvement of human right protection in Australia. The Project aims to re-invigorate community debate about an Australian charter or bill of rights.

The three stages of the Project are:

- Stage 1: preparation of an education kit to raise community awareness of human rights and options for their formal protection in Australia.
- Stage 2: co-ordination of 'train the trainer' workshop for representatives from community groups in each state and territory.
- Stage 3: policy and law reform advocacy for a charter or bill of rights.

In 2003-04, with a grant from The Myer Foundation, PIAC focused on and completed Stage One. To assist with the Project, PIAC established a Reference Group made up of people with expertise in human rights, and representatives from community organisations, unions, faith and advocacy groups.

*Protecting Human Rights in Australia: A Community Education Kit* was launched in Sydney by Professor Hilary Charlesworth on 4 June 2004 and consists of 15 fact sheets addressing the protection, or lack of protection, of human rights in Australia in the following areas: age discrimination, civil and political rights, disability, education, environment, health, housing, Indigenous rights, race and religious

discrimination, sexuality, social security, women's rights and worker's rights. Each fact sheet includes a description of Australia's international commitments and the rights that are protected and those that are not. They also include case studies and cartoons to ensure the fact sheets are relevant, readable and clear. In addition, the Kit provides a discussion on different models for improving the protection of human rights including constitutional and legislative bills or charters of rights.

The community response to the Kit has been excellent. In the month following the launch approximately 3,000 Kits were distributed to a wide range of organisations across Australia including, all Community Legal Centres, unions, churches and faith-based organisations, regional councils of the NSW Community Relations Commission, and—in partnership with the NSW Legal Information Access Centre—to all public libraries in NSW. PIAC has also received over 200 independent requests for copies of the Kit. PIAC has had numerous emails and phone calls indicating support and enthusiasm for the Project.

Hard copies of the Kit are still available from PIAC and can be found on PIAC's website.

PIAC Policy Officer, Annie Pettit, presented a workshop on the project at the National Association of Community Legal Centre's National Conference in Hobart. This was an opportunity to promote the training opportunities provided through the project and encourage workers in community legal centres across Australia to use the Kit in their own community legal education and policy work.

## **National security legislation**

The Federal Government has continued to put forward new and amending Bills in the area of national security.

During the year, the Federal Government introduced numerous pieces of legislation to increase the powers of the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police, and other authorities. Many of the proposed amendments impinge on people's civil and political rights. Several of the Bills were referred to the Senate Legal and Constitutional Legislation Committee for review and PIAC made written and oral submissions to the Committee's Inquiries.

In December 2003, the *ASIO Legislation Amendment Act 2003* was passed through the Senate with the support of the Opposition to double the maximum time for interrogating detainees from non-English speaking backgrounds from 24 hours to 48 hours. The Government argued that the additional time is required for interpreting delays. The new powers also make it an offence for detainees and their lawyers to disclose any operational information about the interrogation for two years. This provision severely limits public scrutiny and discussion of the implementation of the legislation.

In June 2004, the Federal Government introduced further anti-terrorism legislation: Anti-Terrorism Bill (No 2) 2004 and Anti-Terrorism Bill (No 3) 2004. These Bills followed closely on the heels of the Anti-Terrorism Bill (No 1) 2004, passed by Federal Parliament in the same month. PIAC made submissions to the Senate Legal and Constitutional Legislation Committee's Inquiries in relation to Anti-Terrorism Bills 1 and 2.

In these submissions, PIAC raised concerns about the rights of alleged suspects of terrorism offences, including the extension of interrogation time before charges are laid from a maximum period of 12 hours to 24 hours, with additional periods during which questioning may be suspended or delayed—'dead-time'—to include time-zone differences.

PIAC also raised concerns regarding the definition of 'association' in the amendments. One of the Government's proposals was to create a new offence of 'associating with terrorist organisations' in the *Criminal Code Act 1995*. The definition failed to exclude some close family members, such as those related by marriage, aunts, uncles and cousins. PIAC also identified concerns about the effect of these provisions when considered in light of the presumption against bail and minimum non-parole periods in relation to terrorism offences that were added to Anti-Terrorism Bill (No 1) 2004 after the Senate Committee reported on that Bill.

In relation to Anti-terrorism Bill (No 2), PIAC opposed the amendment to the *Passport Act 1938* to grant certain authorities powers to demand and confiscate foreign travel documents where they believe that the person has committed particular offences either in Australia or overseas. PIAC argued that seizure of travel documents before an arrest warrant has been issued effectively presumes the person is guilty and imposes a penalty prior to arrest. PIAC recommended that, if passed, the Bill require judicial scrutiny prior to the seizure of travel documents.

PIAC strongly opposed amendments to the *Australian Security Intelligence Organisation Act 1979* to give authorities power to prevent people leaving Australia merely on request for the issue of an ASIO warrant.

## **International human rights protection and compliance**

During the year, PIAC was involved, through the National Working Group on the Women's Report Card Project, in the preparation of the Shadow and Community Reports on Australia's compliance with its obligations under the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). PIAC Policy Officer, Annie Pettit, co-convened the National Working Group and conducted training for women from across Australia on the consultation process and also on CEDAW and the UN treaty monitoring process at the NSW *Our Rights, Our Voices* forum organised by the NSW Council of Social Services and the NSW Working Group.

PIAC is also represented on the National Association of Community Legal Centre's Youth Network Reference Group that is undertaking consultations and preparation of the Shadow Report on Australia's compliance with its obligations under the Convention on the Rights of the Child.

## **Right to Education Advice**

In April 2004, PIAC provided written advice to the Dusseldorp Skills Forum (DSF), an independent non-government organisation that advocates for measures that improve the learning work transition of young Australians.

DSF sought advice from PIAC on the nature of obligations on Australian governments arising from legislative extensions to the period of compulsory education. PIAC gave advice to DSF on the elements of the right to education at international law, in Australian statutes and in the common law. In particular, the advice focused on the obligations that states and territories may have to provide education that is relevant, of good quality, and reflective of the individual student needs.

In summarising the obligations, PIAC also suggested a number of possible legislative amendments that may assist DSF in their advocacy. Simon Moran, PIAC's Principal Solicitor, presented the advice at DSF's Learning Choices Expo, a two-day event that showcases innovative learning options for young people whose needs are not being met in the traditional classroom setting.

A copy of the advice is on PIAC's website.

## **The right to privacy**

A matter that highlights the types of cases in which PIAC has acted in relation to privacy is a matter in which PIAC represented a client whose confidential medical records were inadvertently disclosed on the internet by a medical service provider. PIAC's client alleged that this conduct breached a number of Information Protection Principles under the *Privacy and Personal Information Protection Act, 1998* (NSW) (the PPIP Act). PIAC wrote to the service provider on the client's behalf and asked that it carry out an internal review of the alleged breaches pursuant to section 53 of the PPIP Act. A review was undertaken, but was considered unsatisfactory by the client in a number of respects. An application for review was then filed in the Administrative Decisions Tribunal of NSW (ADT). Following negotiations between the parties, the matter was settled on a confidential basis.

PIAC's experience of advising and acting for clients in relation to the right to privacy has enabled us to articulate the reasons why privacy rights should be maintained when they have been threatened during the last year. For example, in 2003 the NSW Government introduced to the NSW Parliament the Privacy and Personal Information Amendment Bill 2003. PIAC had a number of concerns about the potential impact the provisions of this Bill would have on the protection of the privacy of personal information in NSW.

PIAC's concerns included:

- the abolition of the specialist advocate for privacy being the Office of the Privacy Commissioner and the transfer of many functions of the Commissioner to the NSW Ombudsman;
- giving to the Premier or a relevant Minister the power to exempt public sector agencies from compliance with privacy principles and codes: this would create the potential for significant conflicts of interest;

- the absence of a guarantee that the important policy development and educational activities of the Office of the Privacy Commissioner will be preserved once the bulk of the functions of the Office are transferred;
- the postponement of review of the current *Privacy and Personal Information Protection Act 1998*, which was to commence on 30 November 2003, until after the changes introduced by the Bill have been implemented.

PIAC made a written submission to the Joint Legislation Review Committee of the Parliament. The Committee's report to Parliament noted a concern for the 'public interest' if a Minister were to have the power to grant a public sector agency an exemption from privacy obligations. PIAC discussed its concerns with the NSW Opposition, which subsequently determined to oppose the Bill. Subsequently the Bill was not passed.

## **The right to equality and anti-discrimination law**

Despite the fact that anti-discrimination legislation has now been in place in Australia for several decades many people continue to experience unlawful discrimination and harassment in their employment, education or when attempting to access transport or goods and services. Frequently, discrimination tends to be insidious and systemic in nature and may be entrenched through legislation, policies, procedures, organisational structures or workplace cultures.

Throughout 2003-2004, PIAC has challenged discriminatory practices by seeking positive outcomes for its clients, while also seeking to address the broader, more systemic patterns of discrimination that frequently underlie individual acts of discrimination.

### **Access to premises for people with disabilities**

*Andrews v Inverell Shire Council* focussed on the rights of people with disabilities to access premises and services. Mr Andrews, who is blind, claimed that as a consequence of his disability and the absence of appropriate road crossings, he was unable to independently access the centre of his local town, Inverell. He made a complaint to the Human Rights & Equal Opportunity Commission (HREOC) that Inverell Shire Council had breached the *Disability Discrimination Act 1992* (Cth) (DDA). The complaint was not conciliated and Mr Andrews lodged an application to the Federal Magistrate's Court in which he sought the construction of appropriate street crossings. After intensive negotiations a settlement was agreed between the parties, which resulted in the construction of two crossings in the Inverell central business district (CBD). Shortly after the settlement of this matter another Shire Council in rural New South Wales announced that it would also construct a number of crossings in its CBD to facilitate access to all the areas of the CBD.

### **Homosexual vilification**

PIAC is currently awaiting judgment in a high-profile case concerning alleged homosexual vilification in the media: *Burns v Radio 2UE, Laws and Price*. Mr Burns, a gay man, lodged a complaint of homosexual vilification against Radio 2UE, John Laws and Steve Price, following comments made on Radio 2UE by Laws and Price in relation to the appearance of a gay couple on the Channel 9 television program, *The Block*. Mr Burns alleged the comments incited hatred towards, serious contempt for, and severe ridicule of homosexuals on the grounds of their homosexuality, in contravention of the *Anti-Discrimination Act 1977* (NSW) (ADA). Chris Ronalds SC appeared for Mr Burns at the hearing before the NSW Administrative Decisions Tribunal (ADT) in March and May 2004.

### **Defamation and racial vilification**

PIAC assisted in a matter where it was alleged that a T-shirt bearing an anti-Arab slogan breached the racial vilification provisions of the ADA.

PIAC is also assisting a client who alleges he was defamed by *The Australian* in an article that reported on the proscribed terrorist organisation, Jemaah Islamia.

### **Provision of insurance to people with disabilities**

This year, PIAC has provided representation and advice to a number of clients who have been denied insurance or offered insurance on limited terms on the basis of existing or previous disabilities. In one case, PIAC represented a client who was denied a component of a loan repayment insurance policy on the basis that he has diabetes. Evidence obtained by PIAC under summons suggested that the company had

based its assessment of his application on stereotypical assumptions and inaccurate information about the nature of diabetes and the impact that this condition might have on his ability to meet his loan repayments. Following a mediation conference in the ADT, PIAC's client received an apology, financial compensation and a commitment from the company to review its policies and procedures in the future.

In another case, *Maier v Westpac Life*, PIAC has commenced proceedings in the Federal Court on behalf of a client who was offered insurance that excluded incapacity caused by cancer, rather than the full life insurance cover for which she had applied. Although PIAC's client had been diagnosed with cancer as a child, she was considered to have made a full recovery, and has been symptom-free since 1993. In its defence, Westpac Life is relying on an exemption in the DDA, which provides that discrimination in the provision of insurance services will not be unlawful where discriminatory conduct is based on 'actuarial or statistical data on which it is reasonable to rely'. There is little judicial authority on the application of this exemption, so the case is likely to set important precedent on the obligations of insurance providers when assessing risk. Chris Ronalds SC is representing Ms Maier in the proceedings.

## **The rights of carers in employment**

Discriminatory treatment of workers with carer responsibilities is central to the case of *Spencer v Greater Murray Area Health Service*, to be heard by the ADT in November 2004. For some years, PIAC's client has had significant responsibilities in caring for her elderly parents—who are in poor health—and her sister, who had a stroke in 1999. Initially, the employer accommodated these responsibilities, allowing Ms Spencer to work her hours over four days. However, following a restructure the employer required her to revert to a five-day week. PIAC's client alleges that this requirement is unreasonable, and that it was imposed on her without adequate consideration of the nature of her carer responsibilities.

The case is expected to be significant in relation to the provisions of the ADA concerning indirect discrimination on the ground of carer responsibilities, and the proper interpretation of 'reasonableness' in those provisions. The case is also significant in that it deals with responsibilities for elder care, an issue of increasing importance in the light of Australia's ageing population.

## **Review of the *Disability Discrimination Act***

In July 2003, PIAC's Principal Solicitor, Simon Moran, gave evidence before the Productivity Commission's Inquiry into the *Disability Discrimination Act*. Of particular interest to Commissioners Helen Owens and Cate McKenzie were PIAC's submissions on the defence of adverse costs awards, the implications of giving HREOC a power to initiate complaints and the difficulties that 'unjustifiable hardship' creates for people with disabilities who have made complaints of unlawful discrimination.

## **Reductions in protection of equality rights**

The fragility of the protection offered by anti-discrimination laws has been highlighted by two disturbing events during the year.

Firstly, the NSW Anti-Discrimination Board (ADB) sustained drastic reductions in its funding, resulting in the abolition of its legal and policy branch. PIAC, on behalf of a number of concerned community organisations and practitioners, wrote to the Premier and the NSW Attorney General, expressing concern about the potential impact of the cuts on clients, many of whom were already experiencing considerable delays in the resolution of their complaints. The Attorney General subsequently met with a delegation of stakeholders to discuss the budgetary cuts. Although this meeting resulted in the Attorney expressing a commitment to consult with PIAC and other stakeholders in the legal profession and community organisations about the on-going administration of the ADB, PIAC remains concerned about the effect of the cuts on the capacity of the ADB to carry out legal and policy work and its ability to function as a watchdog for human rights in NSW.

Second, in December 2003, the Disability Discrimination Amendment Bill 2003 was introduced into the House of Representatives by the (then) Federal Attorney-General, the Hon Phillip Ruddock MP. The Bill sought to permit discrimination against people who are addicted to prohibited drugs unless they are receiving treatment for their addiction. The amendments proposed that such discrimination would be lawful in a wide range of areas of public life, including employment, education, provision of goods and services and accommodation. PIAC was one of 118 concerned organisations and individuals to lodge a written submission with the Senate Legal and Constitutional Committee Inquiry that was established to inquire into and report on the Bill. PIAC has direct experience in this area through its representation of a client with a complaint to the Human Rights and Equal Opportunity Commission of discrimination in employment on the basis of his participation in a methadone treatment program.

PIAC's submission strongly opposed the Bill, highlighting its potential to contravene Australia's international human rights obligations and to further marginalise already vulnerable social groups, including the homeless. In addition, PIAC's submission pointed to the practical difficulties faced by many drug dependent people in accessing treatment, particularly if they have other disabilities, or if they live in rural or remote areas. PIAC Solicitor, Anne Mainsbridge, was one of 26 witnesses who appeared at public hearings held by the Senate Committee in March 2004.

The Committee's Report, which was tabled on 15 April 2004, recommended that the Bill would benefit from wider consultation and that it be referred to the Ministerial Council of Drugs Strategy for consideration. It also recommended that if the legislation proceeds, its application should be limited to employment only.

### **Liaison and publications**

In order to maintain awareness of the work of other organisations and government in this area, PIAC has participated in the Department of Foreign Affairs and Trade's Human Rights Non-Government Organisation (NGO) Forum, and the Federal Attorney-General's Human Rights NGO Forum, and met with the Human Rights Unit of the NSW Legal Aid Commission, the Environmental Defender's Office. PIAC is also active in the National Association of Community Legal Centre's Human Rights Network.

PIAC presented papers on human rights law and issues to a range of forums including an Amnesty International Australia Seminar on the practice of human rights law, the Australian Social Policy Conference on REFIT, to the Public Health Association on Advocacy and Human Rights, the Conference of the National Committee on Human Rights Education, to the NSW Equal Opportunity Practitioner's Association on Genetic Discrimination in the Workplace, and at the Beijing + 10 Conference on CEDAW.

# Indigenous Justice Project

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## Introduction

PIAC's Indigenous Justice Project (IJP) funded by Allens Arthur Robinson (AAR) since its inception in November 2002 has continued to grow. The IJP is in a position to:

- represent a large number of Indigenous clients, particularly in the area of race discrimination and civil liberties;
- enhance PIAC's profile as a provider of legal services to Indigenous clients in relation to public interest matters. This is reflected in the increasing numbers of indigenous clients approaching PIAC;
- facilitate the development and incorporation of Indigenous programs within the legal profession; and
- integrate Indigenous justice issues within PIAC's training programs and policy projects.

The IJP has developed over the last two and half years to the point where PIAC is now in the position where it has to refer matters on because of the level of demand. This has also meant that PIAC has been developing key areas of focus for the Project. The number of Indigenous clients has increased and during the life of the IJP it is evident that Indigenous people throughout NSW continue to face discrimination in everyday life as well as harassment from members of the NSW Police.

The Project's information and advice work has generated several important public interest matters. The following cases are examples of the casework in which PIAC has been involved.

## Casework

*Rights in CDEP:* PIAC's client lodged a complaint of sex discrimination against an Aboriginal Community Development Employment Program (CDEP), which refused her request for maternity leave. Legal aid was granted and the matter was listed for hearing in the Federal Magistrates Court in June 2004. The matter was successfully settled with the client recovering compensation and achieving a change to the Program's policy.

*Duty of Care in Correctional Facilities:* PIAC has commenced an action for damages against the Department of Corrective Services on behalf of its client in relation to the death of her son whilst in custody. The matter is likely to go to hearing in late 2004. The public interest in this matter arises because of the 'duty of care' owed to people in detention and prisons and to their family members. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC), made numerous recommendations for Correctional facilities and the treatment and care of Indigenous prisoners. Particular attention was drawn to inmates at risk of suicide and self-harm. PIAC is concerned that the systemic problems within Correctional facilities continue to exist in relation to design and adequate treatment of Indigenous prisoners at risk.

*Police chases:* PIAC is a young Indigenous boy who alleges that he was chased by police. While being chased, he climbed a gate and the police vehicle smashed the gate, causing him to fall, suffering injuries to his shoulder and to blood vessels in his brain. PIAC's client complained to the Ombudsman and police investigated that complaint, finding no misconduct by the police. PIAC is concerned to achieve improvements in policing practices as they relate to Indigenous people, particular young people.

*Race Discrimination in provision of goods and services:* PIAC acts for an elderly Indigenous women who complains that she, when accompanied by her child and grandchild and child, were accused of shop lifting in a major retail outlet, PIAC's client complained that the language used and words said to her could constitute racial discrimination. No evidence of stolen items was found on our client by attending police. The client was understandably very upset by this experience.

*Race discrimination in employment:* PIAC is acting for an Indigenous employee who is alleging racial discrimination in the work place. The client was shown a photograph and words that are racially offensive towards Aboriginal people. PIAC, through its work in race discrimination complaints of this sort, aims to promote awareness of the rights of Indigenous people to fair and harassment-free treatment in daily life.



## **Aboriginal Trust Funds (Stolen Wages and Child Endowment)**

Between 1930 and 1969, trust funds were established for apprentices (mostly domestic and farm workers), recipients of child or other endowments, pensioners, eg, people receiving the Widow's Pension, and beneficiaries of other payments. These monies were held on trust by the Aborigines Welfare Board (AWB).

After receiving an enquiry from an Indigenous woman who claimed she was owed endowment payments held for her on trust by the NSW Government, PIAC applied to the Department of Community Services under the *Freedom of Information Act 1989* (NSW) (FOI) for documents to support this claim. After uncovering some vital documentation in relation to outstanding monies, PIAC's Indigenous Solicitor, Shahzad Rind, travelled to Maclean and Grafton to take instructions from other potential claimants who are seeking wages and entitlements owed to them by the NSW Government.

PIAC has been contacted by over 80 people who are potential claimants. Late in the year, PIAC decided to adjust its strategy on this issue after the NSW government established the Aboriginal Trust Fund Reparation Scheme Panel to advise it on the development of a scheme to returning the monies. PIAC met with the Panel members and outlined the concerns held by PIAC and its clients, as well as legal issues that are likely to impact on the scheme. PIAC has provided information to Indigenous communities about the panel's work as well as PIAC's views about this issue. PIAC is preparing a submission to the Panel setting out principles to guide the Scheme and a proposed model. The Panel is to provide its report to the NSW government by October 2004.

## **Our Strong Women Project**

During 2002-2003, PIAC worked with the National Network of Indigenous Women's Legal Services (NNIWLS) on their *Our Strong Women* project, which delivered leadership and advocacy training to 200 Indigenous women in 13 locations all around Australia.

During 2003-2004, PIAC again partnered with NNIWLS to take the next step in Indigenous women becoming self-sufficient in running leadership and advocacy training. NNIWLS has successfully applied for funding to the Office of the Status of Women to develop training materials that are tailored and relevant for Indigenous women, and trial them in five regional workshops. PIAC is looking forward to working closely with NNIWLS during the coming year.

## **Indigenous Water Project**

Over the last year, PIAC began investigating the possibility of a project that brings together its expertise in utilities—particularly water services—and Indigenous rights. The project will examine access to clean water in rural and remote Indigenous communities in NSW. This issue has been considered at a national level by the Human Rights and Equal Opportunity Commission, but little has been done to examine in detail the range of factors that impact on access in NSW.

Outside the major metropolitan areas, water services are provided through a patchwork of mechanisms. In most towns, the local Shire Authority is responsible for water supply. In some Indigenous communities, it is the responsibility of the community governing body. For others, there is no managed supply. This impacts on the quality and reliability of water supply, both of which can have serious health impacts in Indigenous communities.

## **Liaison and publications**

Throughout the year, Shaz has visited a range of Indigenous and other organisations, and communities to promote the availability of civil law assistance from PIAC for Indigenous clients. These include: the NSW Coalition of Aboriginal Legal Services, Tranby College, Walgett Aboriginal Legal Service, Warawara at Macquarie University, the Indigenous Law Centre, ANTaR, the Arts Law Centre, the Indigenous community in Maclean, Walgett.

The project was also profiled in an article in the *Indigenous Law Bulletin* in July 2003, and to staff of Allens Arthur Robinson through a lunchtime seminar. And during Law Week, Shaz delivered a lecture to students at the University of Technology Sydney and Tranby College and chaired a session on indigenous lawyers and the Bar. In late 2003, PIAC's Indigenous Solicitor, Shaz Rind, joined the Board of the *Indigenous Law Bulletin*.

## Promoting Access to Justice

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On an ongoing basis, PIAC undertakes two key activities in the promotion of access to justice: advocacy training and promotion of and assistance to the community in accessing *pro bono* legal services. In the last year, another major area of activity has been the development, through PILCH, of the Homeless Persons' Legal Service.

PIAC's training program is an extension of its advocacy work on behalf of disadvantaged individuals and communities. PIAC training aims to provide individuals, organisations and communities with the knowledge and skills to be effective advocates, whatever their cause or issue. This reflects PIAC's aim of enhancing the responsiveness and representativeness of our democracy.

### PIAC's accredited training

PIAC has been a Registered Training Organisation under the Australian Quality Training Framework since 1999. In 2002, this registration was extended until 2007.

Since 1999, PIAC has been delivering an accredited advocacy course, *Work the System: an introduction to advocacy*. With the accreditation of the *Work the System* course due to expire in early 2004, PIAC decided to align its training to the national Community Services Training Package. The NSW Vocational Education And Training Accreditation Board (VETAB) has now registered PIAC to deliver training, conduct assessment and issue the training qualification *Undertake Systems Advocacy – CHCAD3A* from that training package.

This has benefits for PIAC's training participants who can gain formal recognition of their skills by completing an assessment. The *Undertake Systems Advocacy* unit of competence is nationally recognised and can provide opportunities to complete Certificate IV and Diploma level qualifications. But for participants who may not be studying for a qualification in this field, this new arrangement still provides formal recognition of their skills in the area of systems advocacy.

### Who has PIAC trained?

#### Public courses

During 2003-2004, a total of 55 people attended *Work the System: an introduction to advocacy*, and 69 people attended PIAC's other public course, *Effective Advocacy Skills & Strategies*. Public courses were held in the Sydney CBD, the Hunter Valley, and the Northern Beaches.

#### In-house courses

PIAC customises training to meet the learning needs of particular organisation, and delivers training at times and locations that are convenient. During 2003-2004, PIAC delivered 24 in-house training courses, over a total of 24.5 days to the following organisations:

- Multicultural Development Association of Queensland
- Schizophrenia Fellowship
- Illawarra Area Health Service consumer representatives
- Tenants' Union
- Hunter Health Councils
- Cancer Council of NSW consumer advocates
- Mental Health Coordinating Council
- ChangeXChange
- Southern Cross University
- STARTTS
- People With Disability (PWD)
- Wollondilly and Campbelltown Interagencies
- Far West Area Health Services consumer representatives
- Airs resident group
- Benevolent Society

## **Training partnerships**

The year also saw PIAC continue some exciting partnerships to deliver training. PIAC worked with the Cancer Council NSW to train its consumer advocates to encourage them to become active and effective advocates for improved health policies and systems. This involved PIAC presenting three two-day training courses in Sydney, Orange and Tamworth.

The New South Wales Council of Social Services (NCOSS) runs a training project for Emergency Relief Workers and has partnered with PIAC to deliver training on advocacy and lobbying. During 2003-2004, PIAC delivered two further training courses for people who provide emergency relief services for people in financial crisis in Newcastle and the Central Coast.

## **Practising in the Public Interest**

During the year, PIAC worked in partnership with the Public Interest Law Clearing House (PILCH), and the law faculties of the University of Western Sydney, Macquarie University, University of Sydney and University of Wollongong to conduct *Practising in the Public Interest* summer and winter schools. A total of 30 students from these four universities completed the one-week course.

## **Access and equity**

PIAC has a commitment to ensuring equal access to our training. To this end we use only wheelchair accessible venues for our training courses. During 2003-2004 we also ran one training course using Auslan interpreters.

## **The Public Interest Law Clearing House**

This year has been a busy and exciting one for PILCH. Of particular note has been the work done by the organisation to implement some of the key recommendations arising from the external review undertaken in early 2003, including the Homelessness Project culminating in the establishment of the Homeless Persons' Legal Service.

In October 2003, PILCH welcomed its first corporate law department member, MLC Ltd. In the same month, MLC General Counsel, Damian Murphy, hosted a PILCH breakfast for corporate counsel, who were addressed by Esther Lardent, President of the Pro Bono Institute, Washington DC.

Another major undertaking during the year was PILCH's involvement in the Second National Pro Bono Conference, *Transforming Access to Justice*, which was held in Sydney on 21 and 22 October 2003.

As in past years, PILCH continued to facilitate the provision of *pro bono* legal assistance by its members to individuals, communities and non-profit organisations through its assessment and referral scheme. It also co-ordinated a response to the Commonwealth Attorney-General's Federal Civil Justice System Strategy Paper.

In addition to undertaking work arising from referrals, the support that members continue to provide through payment of annual membership fees, the provision of secondees solicitors, and the hosting of PILCH events, is vital to the success of PILCH's operations.

Since its creation as a project of PIAC in 1992, PILCH has received substantial support from PIAC through the provision of management services and in-kind support. The provision of management services by PIAC to PILCH and the opportunities that arise to work together on projects greatly assists both organisations to meet their objectives, develop a meaningful connection with the communities they seek to serve and, importantly, build PILCH's credibility and effectiveness as a key provider of *pro bono* legal services in NSW.

As at 30 June 2004, PILCH membership comprised 29 law firms, two associate members, 11 barristers, eight chambers of barristers, one corporate member, the Law Society of NSW, the NSW Bar Association and PIAC.

On 22 August 2003, at a Special General Meeting, PILCH members approved expanding the categories of membership to include the legal departments of corporations. Two months later, on 22 October 2003, MLC Ltd joined PILCH as a founding corporate member. PILCH Board and staff have been working with MLC, the NSW Law Society and Law Cover to address the professional indemnity insurance issues for corporations engaging in the work of PILCH.

During the year PILCH welcomed the following new members in addition to MLC Ltd: Clayton Utz and Watts McCray.

### **Homeless Project and Homeless Persons' Legal Service (HPLS)**

The major project for PILCH during the year was the Homelessness Project and the establishment of HPLS, a joint initiative of PIAC and PILCH aimed at providing free legal services to people in NSW who are homeless or at risk of homelessness.

The project follows the establishment in Melbourne by PILCH (Victoria) and in Brisbane by QPILCH of the Homeless Persons' Legal Clinics that have been operating with great success.

In NSW, the project has been undertaken in two phases. Phase One involved conducting a detailed legal needs analysis and feasibility study and the development of a model of service. Phase Two involved the launch and implementation of the HPLS.

Both phases of the project have been guided by a Steering Committee made up of representatives from PILCH member law firms, community legal centres, peak homelessness organisations, the welfare sector, PIAC and PILCH. A Reference Group with similar representation will be involved in overseeing the work of HPLS.

PIAC and PILCH were greatly assisted in developing and implementing HPLS by the provision by Minter Ellison of four solicitors on secondment over a twelve-month period.

HPLS was launched on 20 May 2004 by the Hon Bob Debus MP, NSW Attorney General. Over 100 supporters and colleagues attending the launch at the NSW State Library were welcomed by PILCH Co-ordinator Andrea Durbach and addressed by Clover Moore, MP, Lord Mayor of Sydney.

From late May 2004, HPLS has been operating through five clinics in Sydney and Parramatta. The clinics are based in five host welfare agencies that provide a range of services and support to people who are homeless: The Station, Matthew Talbot Hostel, Vincentian Village, Edward Eager Lodge and Parramatta Mission. Six PILCH member law firms provide lawyers to staff those clinics: Allens Arthur Robinson, Clayton Utz, Ebsworth & Ebsworth, Gilbert + Tobin, Henry Davis York and Minter Ellison.

Other PILCH members have also provided invaluable assistance in the development and establishment of HPLS: Freehills, which developed the HPLS logo and printing various materials; Mallesons Stephen Jaques, which provided *pro bono* legal assistance to PIAC in relation to the HPLS funding negotiations; and Blake Dawson Waldron, Clayton Utz and PricewaterhouseCoopers which all hosted training sessions for participating lawyers from member firms and for producing training resources.

Before starting work at the clinics, approximately 80 lawyers participated in a mandatory intensive training program that dealt with legal and social issues confronting homeless people. HPLS will be providing further training on identified issues, and, in addition, lawyers participating at the clinics will have access to information and resource packages developed by PIAC.

Legal information, advice and representation is being provided in the following areas of law:

- housing, tenancy and eviction;
- fines;
- victims' compensation;
- debt and consumer credit;
- social security;
- mental health, community health orders;
- guardianship and administration;
- questions of identity;
- wills and estates;
- discrimination; and
- employment law.

Assistance by way of information only is provided in criminal, family and immigration law matters. Advice on these matters is provided through various specialist law firms, the Legal Aid Commission of

NSW, community legal centres and PILCH barristers. Where necessary assisted referrals are made to appropriate services.

The HPLS model has been developed to overcome some of the barriers traditionally faced by homeless people in accessing legal services by providing face-to-face legal services with a continuity of legal personnel at locations that are familiar to and easily accessible by people who are homeless or at risk of homelessness. Lawyers have been provided with training on working with clients with disabilities and those experiencing extreme disadvantage, and the legal services are provided in combination with complementary services required by homeless people, such as social welfare support, counselling and accommodation services. The welfare agencies facilitate the provision of the legal services by hosting client consultations with lawyers, providing assistance through support workers, and acting as the point of contact for clients.

HPLS aims not only to address legal issues on a case-by-case basis by securing appropriate and effective outcomes for individual clients, but also to identify and address systemic issues facing people who are homeless or at risk of homelessness by monitoring the casework and convening regular consultations with key stakeholders, with a view to engaging in education, law reform and policy initiatives.

Funding has been secured for the first year of operations of HPLS from the Commonwealth Department of Family and Community Services under the National Homelessness Strategy and from the Public Purpose Fund through the support of the Hon Bob Debus, NSW Attorney General. With this support a full-time Co-ordinator, a part-time Administrator and a part-time Policy Officer will be able to be appointed to HPLS.

The funding also provides for an evaluation of HPLS in early 2005. The evaluation will consider the impact and effectiveness of HPLS against its key objectives, including resolution of the legal problems of individual clients, and identification and increased awareness of systemic issues. The evaluation will inform the future development of HPLS to enable it to respond to the complex challenge of effectively meeting the legal needs of people in NSW who are homeless or at risk of homelessness.

## **Senate Inquiry into Legal Aid**

PIAC provided a submission to the Senate Legal and Constitutional Committee's Inquiry into Legal Aid. PIAC Director, Andrea Durbach, and Principal Solicitor, Simon Moran, then gave evidence at the Committee's hearings.

## **Liaison and publications**

PIAC's Principal Solicitor, Simon Moran, represents the NSW Combined Community Legal Centre's Group as a Commissioner on the Legal Aid Commission as well as being a member of the Board of the Group. He is also on the Board of the National Children's and Youth Law Centre.

PIAC has been involved on the Steering Committee of the NSW Legal Aid Commission's Co-operative Service Delivery Model, on the Board of LawAccess NSW as well as its Operations Committee, and is involved in the Law and Justice Foundation Legal Referral Forum. PIAC's Director, Andrea Durbach, continued as Chair of the National Pro Bono Resource Centre's Board until her resignation from PIAC in June 2004.

PIAC also presented papers on access to justice and related issues, including *pro bono* practice, to a range of forums including to law students at the University of NSW on using judicial review mechanisms, and on public interest law, at the Australasian Law Teachers Conference on *Conscientious participation: working the law back to its bones*, to Redfern Legal Centre on Freedom of Information legislation, at several sessions of the 2<sup>nd</sup> National Pro Bono Conference, to students at Sydney University Law School on PILCH and *pro bono* work, and on *amicus curiae* interventions, and to the National Conference of Community Legal Centres on *Running a Test Case* and *The Rights of Asylum Seekers in Detention*, to the Australian Health Promotion Association and to the Local Community Services Association Annual Conference.

## Refugees and detention

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### Unlawful detention

In 2002, PIAC was approached by an asylum seeker in Perth Detention Centre who was awaiting removal from Australia to Iraq, following an unsuccessful protection visa application. PIAC subsequently represented the asylum seeker in a challenge to the power of the Federal Government to detain him indefinitely, ie, while his removal was not able to be effected. The application was for an order in the nature of *habeas corpus*, claiming that the relevant sections of the *Migration Act 1958* (Cth) (the Migration Act) purporting to give the Federal Government the power to detain him, and others like him, were beyond the ‘aliens’ power, or alternatively, that the Migration Act should be read down so as to only allow detention for so long as removal is reasonably practicable.

While the matter was being prepared for hearing, Justice Merkel of the Federal Court handed down a decision in a similar case, *Al Masri*<sup>1</sup>, finding that the Federal Government does not have the power to detain a person where there is no real likelihood of them being removed from Australia in the reasonably foreseeable future. In PIAC’s case, Justice French distinguished Justice Merkel’s decision on the basis that PIAC’s client had not consented to return to Iraq, and was therefore partly responsible for the Government being unable to remove him.<sup>2</sup>

During 2003 and 2004, PIAC acted in ten further *habeas corpus* applications. Of these, seven were successful, resulting in the interim release of the applicants. In the case of *NAGA*<sup>3</sup>, six applications were heard together. Some of the six asylum seekers had been in detention since 1999, awaiting removal from Australia for periods of up to three years following the exhaustion of domestic legal processes related to their refugee applications. They were released into the community on interim orders in April 2003. Lucy McCallum and Geoffrey Kennett acted as counsel in the *NAGA* matter on a *pro bono* basis.

In the case of *Ng*, Mr Ng had arrived in Australia 10 years earlier, committed a crime and been charged and sentenced to eight years imprisonment. Following the completion of his sentence, he was transferred to immigration detention to await removal. However, he could not be removed as his country of former permanent residence would not renew his residency rights, despite his wife and children currently residing there. In addition, his country of birth did not recognise him as a citizen. Mr Ng spent two years awaiting removal before PIAC brought an application for *habeas corpus* and the Federal Court ordered his release. Kate Eastman acted as counsel in the matter on a *pro bono* basis.

In August 2004, the High Court considered a similar matter and found, by a majority of 4:3, that it is constitutional and lawful under the Migration Act to keep a person in detention indefinitely, even where there is no real likelihood of that person being removed from Australia in the reasonably foreseeable future.<sup>4</sup> PIAC’s seven clients faced re-detention, however one had since been removed (Mr Ng) and two had since been granted Temporary Protection Visas. The remaining four were granted bridging visas, allowing them to remain out of detention while awaiting removal. They cannot work and have no access to social security benefits.

PIAC currently represents two asylum seekers in detention who cannot be removed, for whom PIAC was preparing *habeas corpus* applications when the High Court’s decision came down.

Peter Qasim has just begun his seventh year in detention in Australia. The Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone, will not grant him a bridging visa as she is of the view that he is not co-operating in his removal. From the evidence, however, it appears that despite the wealth of information provided by PIAC’s client about his background and identity, India has not been able or is not interested in confirming his nationality and identity, and will not issue him with a passport.

The second client is a man has mental health problems and faces indefinite detention as he is not fit to co-operate in his removal.

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<sup>1</sup> *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009.

<sup>2</sup> *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625.

<sup>3</sup> *NAGA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 460.

<sup>4</sup> *Al-Kateb v Godwin* [2004] HCA 37.

Following the High Court's decision, PIAC plans to lobby the Government for changes to the law to ensure that detainees who cannot be removed are not detained indefinitely and that, upon their release, they have financial support and the capacity to work.

PIAC's expertise in *habeas corpus* applications led other lawyers to seek advice and assistance from PIAC in relation to a number of other *habeas corpus* applications. PIAC also posted example Federal Court Applications, Statements of Claim and Affidavits in *habeas corpus* matters on its website.

### **Section 501 cancellations: the character test**

PIAC obtained advice for a client of the Multicultural Disability Advocacy Association whose visa was cancelled by the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone, under section 501(2) of the Migration Act. The brief concerned whether the Minister has the power to revoke an earlier decision to cancel a visa under section 501(2). A Federal Court case, *Burgess v MIMA* [2000] FCA 926 had earlier found no power to revoke. Amendments to the Migration Act following the decision in *Burgess* raised the question as to whether a fundamental rationale for the decision in *Burgess* has been removed, and whether the Minister now does have the power to reconsider section 501(2) decisions. John Basten QC provided the advice on a *pro bono* basis. The advice was to the effect that where a decision is subject to jurisdictional error, the Minister will have power to make a fresh decision.

### **Bridging visas**

PIAC successfully represented a client seeking a Bridging Visa E, which are provided to non-citizens including those who, owing to a medical condition, cannot be cared for in detention. A prerequisite to obtaining the Bridging Visa E is that 'medical specialist appointed by the Department of Immigration and Multicultural and Indigenous Affairs has certified that the non-citizen cannot properly be cared for in a detention environment'. In the case of PIAC's client, the Minister would not authorise the assessment. PIAC lodged an application in the Federal Court seeking to compel the Minister to authorise the medical assessment. The Minister initially opposed the application, but settled at the first directions hearing. The assessment was subsequently carried out and our client was granted a Bridging Visa E. Justice Sackville awarded costs against the Minister.<sup>5</sup>

PIAC also lodged proceedings for a client seeking a Bridging Visa E on the basis that he was married to an Australian citizen. In this case, the client had satisfied all of the requirements for the grant of the Bridging Visa, however the Minister was delaying issuing one. After the commencement of proceedings, a Bridging Visa was granted.

### **Separated minors**

PIAC has represented two separated minors, one a Chinese girl in a Federal Court review of the Refugee Review Tribunal's (RRT) decision<sup>6</sup>, the other an African boy in a High Court review of a Full Federal Court decision<sup>7</sup>, both in relation to their Protection Visa applications. In these cases, PIAC argued that the Minister, as the legal guardian of separated children, should have had an independent guardian appointed to assist them with their visa applications, and owed them other special duties that were not fulfilled.

In the Chinese girl's case, PIAC also argued that the RRT should not have made a decision adverse to the minor without establishing for itself that she had effective legal assistance and understood that failing to attend the hearing (she alleged her migration agent elected for her not to attend without her knowledge) was effectively abandoning her application. In this case, prior to hearing, the Minister agreed to grant her the opportunity to make a fresh Protection Visa application, thus making the proceedings moot. John Basten QC and Robert Lindsay acted as counsel on a *pro bono* basis.

In the case of the African boy, proceedings were on foot in the High Court when the client withdrew and elected to end his lengthy detention by returning to Africa. John Basten QC again acted as counsel with Shane Prince, both on a *pro bono* basis.

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<sup>5</sup> *NAVJ v Minister for Immigration, Multicultural and Indigenous Affairs* [2003] FCA 1341 (13 November 2003).

<sup>6</sup> *NAXC v Minister for Immigration, Multicultural and Indigenous Affairs*.

<sup>7</sup> *Applicant P76/2002 v Minister for Immigration, Multicultural and Indigenous Affairs*.

PIAC is also a partner with the University of Sydney in a research project, *Seeking Asylum Alone: The Treatment of Separated and Trafficked Children in Need of Refugee Protection*, which is part of a larger international project on separated children. The project will examine the effectiveness of the legal process for claiming asylum in Australia for child asylum seekers separated from their families.

### **The powers of the Family Court in relation to children in detention**

PIAC acted for Amnesty International as *amicus curiae* in a matter in the High Court about the rights of children in detention and the jurisdiction of the Family Court. The applicant claimed that the Family Court, in the exercise of its welfare jurisdiction and injunctive powers, had power to make orders to release children from immigration detention and/or other orders for the protection of children. The *amicus* submissions to the Court focussed on Australia's ratification of the United Nations Convention on the Rights of the Child (CROC). CROC prescribes that the detention of children, except in very limited circumstances, is a violation of international human rights obligations. Felicity Hampel SC and Kate Eastman acted as counsel on a *pro bono* basis.

The High Court found that the provisions of the Migration Act were clear and unambiguous, providing for the mandatory detention of both adult and children unlawful non-citizens and that the jurisdiction of the Family Court could not override its provisions.<sup>8</sup>

### **Information and advice**

PIAC has provided information, advice and/or referrals to people, generally by telephone, in the following areas:

- *habeas corpus* applications for release from immigration detention;
- standards/conditions of detention;
- health issues in detention;
- injuries in detention; and
- visa applications, or appeals relating to visa applications.

PIAC provided a written advice to a community organisation in relation to whether the release of detainees into the community with no means of support and no right to work is a breach of the common law or of international human rights law.

PIAC also briefed counsel and obtained oral advice in relation to whether and in what circumstances the detention of detainees in isolation or segregation detention within a detention centre was unlawful.

### **Policy and advocacy work**

PIAC conducted research, undertook lobbying and provided a briefing paper to stakeholders on the Migration Legislation Amendment (Duration of Detention) Bill 2003. The Bill sought to remove the power of courts to order, in appropriate cases, that a person be released from detention on an interlocutory (interim) basis pending a final decision. PIAC spoke to the Greens, Democrats and the ALP to oppose the Bill, arguing that taking away the power of courts to make interim orders for a person's release violates Australia's international human rights obligations and goes against fundamental principles of common law. PIAC's explanation of the Bill was distributed throughout refugee networks. The Bill was passed, however with major amendments, so that now, interim release is not available to detainees whose visa was cancelled under section 501 or who are awaiting deportation under section 200 (both resulting from criminal convictions).

PIAC made a Submission to the Senate Inquiry into the Migration Legislation Amendment (Identification and Authentication) Bill 2003 and gave evidence at a public hearing on 8 September 2003. PIAC submitted that the Bill did not appropriately balance the need to accurately identify persons entering Australia with the need to protect individual rights, that the measures introduced in the Bill were in breach of Australia's international obligation to protect the right to privacy, that there was inappropriate use of delegated legislation and an absence of provisions relating to destruction and supervision of the information collected.

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<sup>8</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20.



## **Liaison**

In working in this area, PIAC has regular liaison with a number of other groups active on the issue, including the Jesuit Refugee Service, the United Nations High Commission for Refugees, the Refugee Advocacy Service of South Australia, Spare Lawyers for Refugees, the Greens, the American Civil Liberties Union's Immigrant's Rights Project (NY), the Refugee Council and the Refugee Advice and Casework Service (RACS). PIAC is represented on the Board of Australians for a Just Refugee Program.

## Trade Justice and Competition Policy

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Trade negotiations are conducted behind closed doors, and they can result in changes to social policies without public debate or parliamentary scrutiny. PIAC's work on fair trade and human rights aims to make the Australian trade policy process more open and accountable, and to ensure that the content of trade agreements is consistent with UN human rights principles.

PIAC hosts and supports—through involvement of key PIAC staff—the Australian Fair Trade and Investment Network (AFTINET), a national network that has tripled its membership to 90 community organisations over the past four years. AFTINET funds PIAC to employ Louise Southalan, a part-time policy officer, to work on Fair Trade projects. PIAC Principal Policy Officer, Dr Pat Ranald, is the Convenor of AFTINET. AFTINET's website receives an average of 60,000 hits per month.

AFTINET has conducted two major community education and lobbying campaigns over the past year, on the USA-Australia Free Trade Agreement (USFTA) and the General Agreement on Trade In Services (GATS), an agreement of the World Trade Organisation (WTO), in addition to submissions on the Thai-Australia Free trade Agreement and the proposed Australia-China Free Trade Agreement.

### The USFTA

PIAC and other community organisations were concerned about both the process and content of the proposed USFTA. There was also debate amongst trade economists about whether such an agreement would deliver economic benefits to Australia. The Government of the USA, which has a more open process for trade negotiations, published its negotiating objectives, which showed that it regarded important Australian health, cultural and social policies as barriers to trade, and sought to change them through trade negotiations.

The community campaign included production and distribution of over 80,000 copies of two plain-language publications, public meetings, conferences and rallies in most states, and in urban and rural areas, and articles in community publications. Political lobbying included meetings with negotiators, detailed submissions and evidence to two Federal Parliamentary Inquiries, and meeting with members of Federal Parliament.

Media work included regular local, state and national print, radio and TV media coverage, opinion pieces and letters to the editor, and media conferences. Opposition to the USFTA spread beyond our networks and came from health experts, film and television stars, economists and journalists and was more prominent in the media than in any previous trade debate.

The campaign influenced the ALP, Democrats and Greens to adopt policies critical of the USFTA, to support a Senate Inquiry and to pledge to oppose the implementing legislation and thus defeat the proposed USFTA if it was not in the national interest. While the Greens and Democrats kept this pledge, the ALP was divided on factional lines, and opponents of the USFTA were defeated.

The ALP amendments to the implementing legislation were also a response to the campaign. They sought to penalise abuse of patents by drug companies and to protect current media content rules. The fact that the Government of the USA may yet object to these amendments demonstrates the limits on democracy that the USFTA entails.

The campaign had some impact on the content of the USFTA, notably the exclusion of an investor-state complaints process and some protection of quarantine and environmental regulation.

However, the USFTA does limit the right of governments to regulate in the public interest.

It gives drug companies based in the USA the right to seek reviews of decisions by Australia's Pharmaceutical Benefits Advisory Committee and establishes a Joint Medicines Working Party that gives priority to protecting the intellectual property rights of drug companies over the principle of access to affordable medicines. Patent law has also been amended in line with these principles.

The USFTA restricts Australian voices in new media by limiting Australian content rules for new forms of media, and allows the Government of the USA to challenge these rules as a barrier to trade.

The USFTA adopts USA-style copyright law, meaning higher costs for libraries and schools, and negative impacts for small IT software firms, including the Australian local Open Source software industry.

The Agreement 'binds' or freezes state and local government regulation of essential services at existing levels, unless they are listed as exceptions. This limits the ability of future governments to regulate in many areas. Water, electricity, public transport and aged care have not been listed as exceptions.

The Agreement has a disputes process that allows the Government of the USA to challenge many Australian laws and policies before a trade tribunal based on trade law without considering impacts on health, culture or the public interest.

### **The WTO and the General Agreement on Trade in Services (GATS)**

Australia is currently engaged in negotiations in the World Trade Organisation, including negotiations on trade in services. PIAC, through AFTINET, has expressed concerns about the expansion of the GATS in ways that could limit the ability of governments to regulate and provide essential services in the public interest. This campaign also included publications, meetings, media work and lobbying of parliamentarians and a Senate Inquiry into GATS.

The campaign influenced the Australian Government to make public its initial offer in the GATS negotiations and to announce that it would not include further offers on health, education, water media or postal services. The Senate Inquiry adopted AFTINET's recommendations on protection of public services, government rights to regulate services, and increasing democratic accountability, public debate and parliamentary scrutiny of trade negotiations.

### **WTO Agreement on Investment, Competition Policy and Government Procurement**

AFTINET and PIAC also joined similar groups in other countries and many developing country governments to lobby against WTO agreements on Investment, Competition Policy and Government Procurement. These agreements would have reduced the rights of governments to regulate investment and to have local industry development policies. This campaign succeeded in July 2004 when these issues were dropped from the WTO agenda for the current round of negotiations.

### **Thailand and China Free Trade Agreements**

The Thai-Australia Free Trade Agreement was signed in July 2004. PIAC, through AFTINET, made submissions to the Joint Standing Committee on Treaties, which has not yet reported on the Agreement. The main concerns of Thai civil society groups relate to the impacts of increased agricultural impacts on small farmers. In Australia, the main impacts will be on regional areas that rely on manufacturing and textile industries.

A feasibility study for a possible Free Trade Agreement with China began this year. AFTINET has made a submission raising concerns about human rights, labour rights and environmental protections in China, and the social impacts of a Free trade Agreement in both countries.

### **Training**

PIAC was involved in curriculum development on globalisation and human rights as well as developing and delivery several training courses on fair trade for AFTINET.

### **Productivity Commission Review of National Competition Policy**

The Productivity Commission is conducting a review after ten years of National Competition Policy. The main impact of the policy has been to apply market principles and trade practices law to public utilities including energy, water and public transport. The review explores whether the policy should be extended to other areas like human services and the labour market.

PIAC made a submission to the review in which it argued that essential services are not the same as other commodities and that equitable access to essential services requires active government intervention into markets. Competition policy has delivered few benefits for consumers of utility services. Application of competition policy to human services would compound these difficulties.

United Nations and International Labor Organisation principles recognise that there is an inequality between employers and employees that requires a right to freedom of association and to collective bargaining. Human labour is not a commodity and the application of competition policy would therefore be inappropriate.

### **Liaison and publications**

As well as through its involvement with AFTINET, liaised with a number of other organisations on fair trade issues during the year including: the Department of Foreign Affairs and Trade negotiators, and Treasury officials.

PIAC also presented papers on fair trade issues to a range of forums including at AFTINET's public meeting on Fair Trade and Peace, at the Non-Government Seminar on Bilateral Trade Agreements in Cancun, at AID/Watch on the WTO, at a meeting of Eastern Suburbs Friends of the ABC on the USFTA, to Deakin University postgraduate class of military officers on the WTO and Civil Society, the Annual Conference of St Vincent's Health Executives on the USFTA, an ALP Seminar on the USFTA, and to a range of other public meetings and meetings of community organisations including Rotary International, and neighbourhood centres.

## Utilities and consumers

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PIAC's Utility Consumers' Advocacy Program (UCAP) now is in its seventh year and it remains unique as a model for consumer advocacy in Australia, both for its brief in covering three essential services—electricity, gas and water—and its role as a dedicated advocate for the views of community groups and low-income consumers in NSW.

UCAP maintained its strong focus on the interests of low-income and disadvantaged people as consumers of energy and water and the impact on households of continued changes to these industries. While the majority of the community identify energy and water as essential services both industry and the NSW Government continued to pursue changes for a wide range of reasons. These included a desire to drive higher levels of competition; a continued emphasis on better commercial performance by the industries; and pressing environmental concerns.

Seen in this light, the continued financial support of the NSW Government through its funding of the program was welcomed by PIAC and other community organisations who work with UCAP.

### National energy advocacy

UCAP gave increasing attention to the development of a new round of reforms of the regulation of the electricity and gas industries across Australia. This came about through a Ministerial Council on Energy (MCE) agreement in 2003 to pursue the recommendations of the Commonwealth's 2002 *Parer Report*.

The emphasis of the reforms is increased market activity in the energy industries and it is expected these could have a number of impacts on residential consumers. As with earlier competition reform in utilities the proponents for change view efficient markets and increased competition as positive outcomes. With its mandate to promote the interests of households and low-income consumers in these markets, UCAP has been active in identifying the weaknesses in the proposed reforms as they are brought forward.

UCAP participated in a series of briefings on the initial round of reforms. It made a formal response to one major discussion paper released by the MCE and collaborated with a number of other community organisations on a national submission on the need for a national consumer advocacy body funded by the energy industries. PIAC believes that UCAP provides a useful model for such an advocacy body.

In mid-2004, the various government officials responsible for the process belatedly opted to initiate a broader process of negotiation with all sectors of the energy industries, including small-volume customers. Unfortunately, by this time some fundamental issues already had been decided, including the meaning of the "consumer benefits" that are supposed to flow from the new arrangements. The result is that some of the important ground rules for future consultation and participation have been decided in the absence of residential users who form the largest and most vulnerable group in the energy markets.

UCAP has been active in the debates and consultation processes around the new national regulatory arrangements.

### Licence enforcement

Making utility businesses accountable for the way they operate remains the responsibility of each state and territory government. In most cases, the businesses have a range of obligations imposed on them through operating licences. The concern for UCAP and a number of community organisations is that some of the utility businesses may be in technical breach of their licences with resulting negative impacts on consumers. In some cases, the businesses may be contravening the spirit rather than the letter of their obligations.

The NSW Independent Pricing and Regulatory Tribunal (IPART) is the body responsible for enforcing compliance with operating licence conditions. IPART was due to release a protocol for its compliance activities in the second half of 2004. PIAC intends to take up with IPART a range of licence compliance issues. One position being advocated by PIAC is that better communication with the utility businesses may be just as crucial to improved performance as more assertive enforcement.

## **Social impact in utilities**

A major area of activity for UCAP was a significantly enlarged program of research into strategic issues affecting residential consumers. This increased effort was made possible by the NSW Government including in its funding grant for UCAP an amount of 'supplementary funding' for new research projects. These additional monies had been recommended in a 2002 independent evaluation of UCAP undertaken for PIAC and the NSW Government.

The initial research project was a large review of the impact on households of disconnection from energy and water supply due to financial hardship. A research steering group was established and UrbisJHD were commissioned to undertake a literature review. Following this, the steering group commissioned UrbisJHD to survey a large number of households about their experience with recent disconnection or restriction of energy and water supply due to non-payment of bills. UCAP achieved participation by almost all NSW energy and water retailers in the research project. This has meant that the research is able to include consumers living in a wide range of situations. The project is to be completed late in 2004.

## **Affordability of essential services**

NSW residential consumers faced a series of price rises in energy and water. While understanding some of the reasons advanced for the price increases, UCAP nonetheless argued with industry and the regulator, IPART, over both the justification and the level of proposed increases.

In one case, IPART accepted the claim of the major gas retailer that price trends in the wholesale market were responsible for their request for a price change. UCAP was unable to fully test this claim due the confidential nature of wholesale gas contracts. However, UCAP made clear its view that the 10% rise eventually approved by IPART was a poor return for the effort invested in recent competition reforms to this industry.

In electricity, the industry argued for significant price increases to fund capital investment to meet rising consumption. UCAP joined a number of other groups in arguing for more cost-effective investment options to be taken up by the industry. This view was informed by concerns for the impact on low-income households of large price increases. UCAP also took the view that the electricity distribution businesses in NSW should make a greater effort in programs of 'demand management'. These reduce per capita consumption and hence the need for higher prices. When targeted to low-income households, such programs offset modest price increases by delivering lower bills. UCAP believes the evidence shows that such programs are as cost-effective as traditional 'network' approaches.

IPART's determination will see household electricity prices rise by some 25% over the next five years. In some cases, consumers will experience a 10% rise in 2004 alone.

UCAP also actively engaged with the electricity industry over several proposals to change tariff structures. A key proposal was for 'inclining block tariffs', which penalise higher consumption. Again, the concern of UCAP was the impact this change would have on low-income households and especially those with large families.

Rising demand for water has also led to proposal for price increases for this essential service. Here, too, inclining block tariffs have received support from industry and the NSW Government. UCAP agreed with other stakeholders that the environmental impact of Sydney's growing demand for water is a public interest issue. Once more, UCAP argued for more innovative solutions such as programs to 'retrofit' energy- and water-saving devices into Sydney homes, again targeted to low-income consumers.

## **Indigenous Water Project**

UCAP has also joined with PIAC Indigenous Justice Project to work on issues of access to water in rural and remote Indigenous communities. This project is reported more fully under Indigenous Justice at page 12.

## **Reference Group**

UCAP is greatly assisted in its policy development and advocacy by the members of its Reference Group. In the last year, the Department of Energy, Utilities and Sustainability (DEUS) provided additional funding to enable UCAP to ensure representation from rural and, in particular, Indigenous communities on the Reference Group.

The Reference Group also includes:

Gary Moore, NSW Council of Social Service;  
Australian Consumers Association;  
Patty Morris, Bourke Family Support Service;  
Council on the Ageing (NSW);  
Rural Women's Network;  
Park and Village Service;  
Combined Pensioners and Superannuants; and  
Institute for Sustainable Futures.

### **Liaison and publications**

PIAC is represented by Senior Policy Officer, Jim Wellsmore, on the Ministry of Energy and Utilities Working Party on Electricity Demand Management Code, and the Council of the Energy and Water Ombudsman of NSW.

In its series of Occasional Papers on utilities, PIAC this year published a paper on electricity co-operatives. PIAC also continued to produce its specialist newsletter on utilities issues, *Well Connected*.

PIAC presented papers on utilities issues to a range of forums including IPART's public forums on electricity distribution pricing, energy pricing and water licencing, the Australian Social Policy Conference on REFIT, and to the Business Council for Sustainable Energy National Conference on Energy Efficiency.

PIAC continues to support the work of consumers on industry advisory bodies. This year, it provided training to Integral Energy's Customer Council on industry issues.

## PIAC Membership of Organisations

Australian Fair Trade and Investment Network - Working Group	Pat Ranald
Australians for a Just Refugee Program - Board of Management	Alexis Goodstone
Attorney General's Human Rights NGO Forum - PIAC representative	Pat Ranald
Australian Competition and Consumer Commission - Consumer Consultative Committee -	Jim Wellmore
Community Trainers and Assessors Group	Carolyn Grenville
Community Services and Health Industry Training - Advisory Board.	Carolyn Grenville
Department of Infrastructure, Planning and Natural Resources - Demand Management Planning Stakeholder Reference Group	Jim Wellmore
Department of Energy Utilities and Sustainability - Energy Accounts Payment Assistance (EAPA) Working Group -	Jim Wellmore
Department of Foreign Affairs and Trade - Human Rights Consultation Forum on International Human Rights Issues	Pat Ranald
Energy Water Ombudsman NSW (EWON) - Council member appointed by the Minister - Finance Committee	Jim Wellmore Jim Wellmore
Federation of Ethnic Communities Councils of Australia - Women's Policy Committee	Annie Pettitt
Independent Pricing and Regulatory Tribunal - Energy Industry Consultative Group - Utilities Licence Audit Advisory Committee	Jim Wellmore Vacant
Indigenous Law Centre UNSW - Management Committee	Shaz Rind
LawAccess NSW - Board (resigned June 2004) - Operations Committee	Andrea Durbach Sandra Stevenson
Legal Aid Commission of NSW - Board - Civil Law Sub-Committee - Community Funding Sub-Committee	Simon Moran Simon Moran Simon Moran
National Association of Community Legal Centres: - National Human Rights Network	Annie Pettitt
National Pro Bono Centre - Principal solicitor - Board of Management	Simon Moran Andrea Durbach



National Children's and Youth Law Centre - Board of Management	Simon Moran
NSW Combined Community Legal Centres' Group - Board of Management - Employment and Discrimination Sub-Group - Legal Aid Commission Sub-Committee	Simon Moran Anne Mainsbridge Simon Moran
Public Interest Law Clearing House - Board of Directors	Shauna Jarrett Kate Harrison
The Women's Rights Action Network Australia	Annie Pettitt
Women's Report Card (Convention on the Elimination of all forms of Discrimination Against Women) Project	Annie Pettitt
Legal Aid Commission - Cooperative Legal Service Delivery Model Steering Committee - PILCH representative -	Sandra Stevenson
TPV Legal Working Group - PILCH representative	Sandra Stevenson
NSW Legal Referral Forum (convened by the NSW Law and Justice Foundation) - PILCH representative	Sandra Stevenson

