
# Submission to the Australian Law Reform Commission Inquiry *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (IP 46)*

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# 1. Introduction

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. Throughout its history, PIAC has sought to protect and promote human rights and freedoms across Australia – by providing legal assistance to disadvantaged people, and by communicating its experience regarding human rights. Accordingly, PIAC welcomes the opportunity to respond to the Australian Law Reform Commission (**ALRC**) inquiry into 'traditional rights and freedoms'.

The ALRC's Terms of Reference (**ToR**) for this inquiry focus on a particular conception of 'traditional' rights and freedoms; there has never been a generally-accepted strict demarcation between so-called common law rights and the human rights protected by the major international human rights instruments. On the contrary, experts from common law jurisdictions, whose professional experience was largely confined to the recognition of human rights in the British tradition of the common law, were among the most influential contributors to the drafting of those foundational international human rights instruments – especially the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (**ICCPR)** and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

In this submission, PIAC draws, in part, on international human rights law standards in order to identify criteria by which to determine whether infringement of a particular right or freedom can be justified. Similarly, the Hon James Spigelman acknowledged extra-curially the influence of international human rights instruments on his rebuttable presumptions forming the 'common law bill of rights', both in the 'degree of emphasis' to be given to them and on the articulation of 'new presumptions'.[1]

This is not to eschew the significance of the ALRC's inquiry in that it will, as the Commission's President has noted, likely lead to 'a "charter" of some kind'.[2] However, it should be borne in mind that any such 'charter' will not provide a complete picture of how rights and freedoms are infringed, nor indeed protected, under Australian law. The ToR exclude a number of fundamental rights, such as the right to privacy, which are becoming increasingly important to everyday Australians.

In this submission, PIAC comments on a select number of the rights and freedoms articulated in the ToR where it can base its discussion on its legal and broader experience. Further, PIAC has chosen to focus on the individually listed rights and freedoms that form the focus of the discussion paper, as opposed to the final catchall chapter of 'other rights and freedoms'.

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1 The Hon J Spigelman AC, Chief Justice of New South Wales (as he then was) 'The Common Law Bill of Rights, First lecture in the 2008 McPherson Lectures, Statutory Interpretation and Human Rights' (Lecture delivered at the University of Queensland, Brisbane, 10 March 2008) available at http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2008.pdf. Later published in Spigelman, J (2008) *Mcpherson Lecture Series Volume 3: On Statutory Interpretation and Human Rights* (University of Queensland Press)

2 Professor Rosalind Croucher, President, Australian Law Reform Commission, 'ALRC Inquiry into Freedoms' *Free Speech 2014 Symposium Papers* (Australian Human Rights Commission, 2014), at page 9. Available at https://www.humanrights.gov.au/sites/default/files/document/publication/free-speech-report2014.pdf.

PIAC acknowledges that it would be beyond the ToR for this inquiry to consider Australia's human rights protection framework, the gaps in that framework and how those gaps should be fixed. Nevertheless, in considering the issues that do fall within the scope of the current ToR, it is abundantly clear that those larger questions do need to be asked and addressed in an appropriate law reform process. The manifestly weak, fragmentary and inconsistent framework to protect rights and freedoms in Australia, cobbled together as it is from a combination of legislation and common law principles, means that some human rights can be infringed without adequate redress, and there is insufficient guidance to the executive, legislature and judiciary on how competing rights and interests ought properly to be accommodated.

## 1.1 The Public Interest Advocacy Centre

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia.

Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's work relevant to this review

PIAC has experience in a number of areas relevant to this submission, including in relation to:

**Human rights protection**

PIAC has responded to the various inquiries into human rights protection conducted in recent years.[3] It made a substantial contribution to the National Human Rights Consultation,[4] based on a comprehensive program of community consultations conducted with a broad range of marginalised groups (including people who were experiencing homelessness, those with mental illness, Indigenous people, older Australians, people with disability and migrant women).[5]

**Freedom of speech**

PIAC has provided legal advice, assistance and representation to clients in a number of matters relevant to vilification and defamation law in Australia.[6] PIAC has also contributed its experience to a number of law reform processes in the area, most recently regarding the proposed repeal of

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3 See, for example, Farthing, S and Santow, E *Rights and Responsibilities: Submission to the Australian Human Rights Commission Discussion Paper*, Public Interest Advocacy Centre, 31 October 2014, available at http://www.piac.asn.au/publication/2014/12/rights-and-responsibilities-2014; Santow, E and Bailey, B *Human Rights Charter Review – respecting Victorians,* Public Interest Advocacy Centre, 24 June 2011, available at http://www.piac.asn.au/publication/2011/06/human-rights-charter-review-respecting-victorians; Hartley, C et al *National Human Rights Action Plan Exposure Draft*, Public Interest Advocacy Centre, 5 March 2012, available at http://www.piac.asn.au/publication/2012/03/national-human-rights-action-plan-exposure-draft.

4 Banks, R et al *Realising rights: Submission to the National Human Rights Consultation,* Public Interest Advocacy Centre, 15 June 2009, available at http://www.piac.asn.au/publication/2009/06/090615-piac-human-rights-sub.

5 For detail of PIAC's past project, *Protecting Human Rights in Australia*, see PIAC's submission to the National Human Rights Consultation, above note 4, at section 1.3.

6 For example, *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 in relation to homosexual vilification; and *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 in relation to defamation.

s 18C of the *Racial Discrimination Act 1975*[7] and the inquiry of the NSW Legislative Council Standing Committee on Law and Justice into racial vilification law.[8]

PIAC has also considered this freedom in the context of its work as an advocate for the protection of privacy rights. PIAC has provided legal advice, assistance and representation to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Privacy Act 1988* (Cth). PIAC has also provided a number of responses to the various privacy inquiries at state and federal levels in recent years, including most recently the ALRC inquiry into *Serious Invasions of Privacy in the Digital Era*.[9]

**Freedom of association**

PIAC has worked to safeguard the right to freedom of association. For example, based on our experience of the operation of the NSW criminal justice system, PIAC recently made a comprehensive submission to the NSW Ombudsman's review of anti-consorting offences.[10]

**Judicial review**

In its legal practice, PIAC has extensive experience in administrative law generally, and in judicial review more specifically. This experience spans the NSW and Commonwealth jurisdictions and includes areas such as freedom of information,[11] review of migration decisions[12] and electoral issues.[13] PIAC has also made a number of policy submissions to consultations considering changes to judicial review, both at the Commonwealth[14] and State[15] levels.

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7 Roth, J and Santow, E *Protecting people from racism AND ensuring freedom of speech: Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s 18C) Bill 2014*, Public Interest Advocacy Centre, 30 April 2014, available at http://www.piac.asn.au/publication/2014/05/protecting-people-racism-and-ensuring-freedom-speech.

8 Pandolfini, C and Santow, E *Regulating racial vilification in NSW – Submission to the Legislative Council Standing Committee on Law and Justice Inquiry into Racial Vilification Law in NSW,* Public Interest Advocacy Centre, March 2013, available at http://www.piac.asn.au/publication/2013/03/regulating-racial-vilification-nsw.

9 See Roth, J and Santow, E *Serious Invasion of Privacy in the Digital Era: Submission to the Australian Law Reform Discussion Paper*, Public Interest Advocacy Centre, 12 May 2014, available at http://www.piac.asn.au/publication/2014/06/serious-invasions-privacy-digital-era. See also PIAC's submission to the Department of Prime Minister and Cabinet consultation on a Commonwealth statutory cause of action for serious invasion of privacy: Simpson, E *It's time: Submission in response to the Department of Prime Minister and Cabinet's Issues Paper – A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* Public Interest Advocacy Centre, 17 November 2011, available at http://www.piac.asn.au/publication/2011/11/its-time-submission; Mainsbridge, A and Banks, R *Resurrecting the Right to Privacy: Response to the Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law*, Public Interest Advocacy Centre, 21 December 2007, available at http://www.piac.asn.au/publication/2008/02/071221-piac-sub-dp72.

10 See Leibowitz, J *Targeting criminality: Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, Public Interest Advocacy Centre, 27 February 2014, available at http://www.piac.asn.au/publication/2014/04/targeting-criminality.

11 See, for example, *Waterford v Commonwealth* (1987) 163 CLR 54; *Re Hounslow and the Secretary, Department of Immigration and Ethnic Affairs* (1985) 7 ALN N362.

12 See, for example, *Untan v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1448.

13 See, for example, *Save Our Suburbs (SOS) NSW Inc v Electoral Commissioner of NSW* [2002] NSWSC 785; *Robert v Jeffery & 4 Ors* [2003] NSWSC 162; *Borsak v Cheung* [2006] NSWADT 5.

14 Goodstone, A et al, *Statutory judicial review – keep it, expand it: Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia, April 2011*, Public Interest Advocacy Centre, 2011, available at http://www.piac.asn.au/publication/2011/07/statutory-judicial-review-keep-it-expand-it.

15 Santow, E, *Reform of judicial review in NSW: response to Discussion Paper*, *NSW Department of Justice and Attorney General, Public* Interest Advocacy Centre, 2011, available at http://www.piac.asn.au/publication/2011/06/reform-judicial-review-nsw.

# 2. General principles

A recurring theme throughout this submission is the difficulty of protecting and evaluating limits on rights and freedoms without an enforceable human rights framework. This is particularly problematic regarding those rights without specific legislative protection, such as the right to freedom of religion. Currently, overarching promotion of human rights is left to the scrutiny of proposed legislation undertaken by the Parliamentary Joint Committee on Human Rights,[16] statements of compatibility accompanying Bills introduced to Parliament[17] and the 2010 Human Rights Framework (which has not been updated since its publication).[18]

Without seeking to revisit, in this forum, the National Human Rights Consultation proposal to introduce a Federal Human Rights Act,[19] there is a clear need for an authoritative statement of the human rights that apply to Australia's polity, and the principles that guide the way in which those human rights may be restricted. This statement need not be legislated, nor do we propose that it be given binding, legal force. In effect, a process of collating the rights applicable in Australian law is what the ALRC has been asked to do, only in relation to a sub-set of human rights and freedoms and disregarding a significant number of other rights which merit protection.

PIAC proposes that the Australian Government undertake a process to establish a comprehensive but non-binding document that sets out which human rights apply in Australia, how those rights should be protected in Australian domestic law and how those rights can justifiably be limited. This document would serve to guide the current policy and legislative actions of government.

***Recommendation 1***

*PIAC recommends that a process be undertaken by the Australian Government to establish a comprehensive but non-binding document setting out which human rights apply in Australia, how these rights should be protected in Australian law and how those rights can be justifiably limited.*

# 3. Freedom of speech

Free speech is a cornerstone of Australian democracy. It is protected by international human rights instruments in full, and in a limited context by the *Australian Constitution*. As recent debate in relation to limitations imposed by s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) shows, free speech must be balanced against a number of other public interests. Exactly where that balance lies is the challenge.

16 Established by Part 2 *Human Rights (Parliamentary Scrutiny) Act 2011*.

17 Part 3 *Human Rights (Parliamentary Scrutiny) Act 2011*.

18 Commonwealth of Australia, *Australia's Human Rights Framework*, April 2010, available at http://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf.

19 Recommendation 18. Commonwealth of Australia, *National Human Rights Consultation Report* (2009), available at http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx.

## 3.1 Question 2-1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

The limited interpretation of the 'right' or 'freedom' of speech in Australian common law recognises it is not absolute; legislation which interferes with the right will be invalid to the extent it affects the operation of representative government provided for in the *Constitution*.[20] The common law 'right' or 'freedom' of free speech is not, and never has been considered, to be absolute.[21] Similarly, the implied right to freedom of political communication, derived from the text of the Constitution, particularly sections 7 and 24 which provide that the Senate and the House of Representatives shall be 'directly chosen by the people', is also not absolute.[22] In relation to the implied right, McHugh J has said:

> The freedom protected by the Constitution is not, however, a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian Community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution.[23]

The ICCPR acknowledges that, because of the ramifications of its exercise, freedom of speech carries with it 'special duties and responsibilities' that may necessitate certain restrictions.[24] The *Charter of Rights and Responsibilities Act 2006* (Vic) (**the Victorian Charter**) provides for lawful restrictions of the right to free speech where reasonably necessary to: (a) respect the rights and reputations of others; or (b) for the protection of national security, public order, public health or public morality.[25] Under the *Human Rights Act 1998* (UK), free speech can be limited in accordance with the law, where it is necessary and proportionate and where it is in pursuit of a legitimate aim.

This accords with the proportionality-type test adopted by the High Court in its consideration of the implied right to political communication. The High Court has determined that, to merit constitutional protection, the speech in question must not just be shown to be political speech, it must also be shown that any incursion on that political speech is disproportionate to the pursuit of an alternative legitimate end.[26]

PIAC considers the broad categories of necessity, proportionality and legitimacy are the appropriate criteria by which to measure whether interference with free speech is justified. The particular protection of free speech as an aid to Australian democracy should also be borne in mind. That there are different types of speech, 'some of which are more deserving of protection in

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20 See, *Unions NSW v State of New South Wales* (2013) 88 ALJR 227 at [18]-[19]; *Coleman v Power* [2004] 220 CLR 1, per Gummow and Hayne JJ at [185], Kirby J at [225], [250], [253]; *R v Secretary of State for the Home Department; Ex parte Simms* 1999 WL 477443; [2000] 2 AC 115; [1999] 3 All ER 400 per Lord Steyn.

21 See, for example, *Coleman v Power* (2004) 209 ALR 182, per Gummow and Hayne JJ at [185], Kirby J at [225], [250], [253]; *R v Secretary of State for the Home Department; Ex parte Simms* 1999 WL 477443; [2000] 2 AC 115; [1999] 3 All ER 400 per Lord Steyn.

22 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, [51], [76]-[7], [94]-[5].

23 *Levy v Victoria* (1996-1997) 189 CLR 579; 622.

24 Article 19(3) *International Covenant on Civil and Political Rights*.

25 Section 15 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

26 *Coleman v Power* [2004] HCA 39; 220 CLR 1. Per Gummow and Hayne JJ at [196]; Kirby J at [211], [213], [228]; Callinan J at [299].

a democratic society than others', was acknowledged by Baroness Hale in the UK House of Lords decision in *Campbell v Mirror Group Newspapers*:[27]

> Top of this list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all.[28]

As noted by Professor Spencer Zifcak at the recent Australian Human Rights Commission (**AHRC**) *Free Speech 2014* conference, protection of free speech is essential in Australia for two reasons. First, it is 'essential for the maintenance of democracy, and for the [effective] participation of citizens in democracy' and

> Secondly…freedom of speech is crucial to the pursuit of the truth. Society will more accurately attain facts in an atmosphere of free and uninhibited discussion, criticism and debate.[29]

Accordingly, PIAC considers limitation on free speech to be justifiable, but only where it is lawful, necessary, for a legitimate purpose and proportionate. Any limitation on speech, which pursues a democratic aim or fulfils a particular democratic purpose, should be exceptional and should be no greater than is strictly necessary to achieve that other legitimate aim.

***Recommendation 2***

*Free speech may be limited where it is for a legitimate aim, in accordance with the law and where the measure is proportionate to that aim. Restrictions on free speech which have a democratic function or which support the functioning of Australian representative democracy should be exceptional and should be no greater than is strictly necessary to achieve a legitimate aim.*

An example of a justifiable limitation of free speech can be found in section 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

The need to protect against harmful speech is clearly contemplated in international law. Article 20 of the ICCPR states:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In addition, Article 4(a) of the Convention on the Elimination of Racial Discrimination (**CERD**) states that signatory states should declare an offence the dissemination of ideas based on racial superiority or hatred and declare an offence all other propaganda activities promoting and inciting racial discrimination. Article 4 is not fully implemented in Australian law given section 18C of the RDA does not create a *criminal* offence of racial incitement, rather it makes unlawful behaviour which offends, insults, humiliates or intimidates a person or group of people on the basis of race. Australia has entered a reservation in relation to Article 4(a) of CERD that states the Australian

27 [2002] EWHC 499 (QB) (2002).
28 Above, note 27, at [148].
29 See *Free Speech 2014, Symposium Papers*, above note 2, at section 4.

Government intends, when suitable, 'to seek from Parliament legislation specifically implementing the terms of article 4(a)'.[30]

As PIAC's work defending freedom of speech and protecting against harmful speech reflects, the critical task for our community involves finding how to reconcile these competing interests. In relation to racial vilification, the law must strike a balance between permitting the expression of views that might be disagreeable or worse, but draw a line to prohibit speech that causes unreasonable harm to others. One of the key motivations for PIAC's opposition to the proposed rollback of restrictions on racist speech last year was evidence of the wide-ranging impact of racially motivated hate speech on PIAC's clients.[31] Accordingly, PIAC welcomed the Australian Government's decision to abandon the Draft Freedom of Speech (Repeal of s 18C) Bill 2014, thereby preserving the fine balance struck in Australian society between enabling freedom of speech to flourish but not tolerating racial vilification and intimidation.

## 3.2 Question 2-2: Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

### 3.2.1 Impairing democratic participation

Blanket restrictions on the dissemination of information regarding government activity should generally be viewed with a critical eye. Australia's constitutionally-mandated system of democratic, responsible government requires transparency and openness and, as such, any such restrictions are only justifiable if they are tightly defined and closely tied to a legitimate purpose.

The ALRC's recent report on secrecy laws identified 506 secrecy provisions across 176 pieces of legislation, including 358 criminal offences.[32] While there are sensible arguments that certain information is rightly withheld from public view, there must be a strong justification for doing so. At the very least, there should be a balancing exercise undertaken where there is an identifiable public interest in disclosure. The ALRC recommended that ss 70 and 79(3) of the *Crimes Act 1914* (Cth), which broadly criminalise the disclosure of any information uncovered in the course of an individual's work as a Commonwealth officer, be repealed. Instead, the Commission recommended reform that would provide for 'whistleblower protection' by providing for offences that would prohibit only disclosure that is likely to or intended to cause harm to public interests.[33]

***Recommendation 3***

*PIAC recommends that ss 70 and 79(3) of the* Crimes Act 1914 *(Cth) be repealed and replaced with an offence that prohibits disclosure by Commonwealth officers, where that disclosure is intended to cause harm to identified public interests, as recently recommended by the ALRC.*

In addition, the Government's proposed changes to the *Freedom of Information Act 1982* (Cth), as set out in a bill currently before the Senate,[34] would radically change, and undermine, the

30 See Reservation made by Australia to the *Convention on the Elimination of Racial Discrimination*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec.

31 See the proposed changes to s 18C of the *Race Discrimination Act 1975* (Cth) as outlined in Roth, J and Santow, E *Protecting people from racism AND ensuring freedom of speech: Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s 18C) Bill 2014*, above note 7.

32 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia, Report 112* (March 2010), at page 2. Available at http://www.alrc.gov.au/publications/report-112.

33 Above, note 32, at page 9.

34 Freedom of Information Amendment (New Arrangements) Bill 2014.

Commonwealth freedom of information regime. PIAC considers the reform proposed in the Bill to be a retrograde step.[35] If passed, the Bill would see the loss of an independent advocate for open government by abolishing the Office of the Australian Commissioner (**OAIC**). The Bill would also make it much more difficult to review decisions to refuse access to a document by removing the ability of free appeal. The current legal and policy framework provided by the OAIC is a vital underpinning for the effective exercise of freedom of speech. An FOI regime is a central plank of open government, ensuring transparency and accountability for decisions made by those who have been elected to govern.

Although the Bill that would amend the *Freedom of Information Act 1982* (Cth) (**FOI Act**), has not yet even been debated by the Senate, much of the Bill has been given practical effect by the cessation of funding of the OAIC from 1 January 2015.[36] By withholding funds the Government has completely sidestepped the proper parliamentary process, in circumstances where it was likely the Bill was to be rejected by the Senate.[37] Dismantling an independent statutory body by executive fiat, where that body was responsible for ensuring and promoting open government, exemplifies the limitations in Australia's system for protecting rights and freedoms.

***Recommendation 4***

*PIAC recommends that the Freedom of Information (New Arrangements) Bill 2014 be deferred until comprehensive inquiry and consultation on the Bill's proposals can take place, taking into account the proposals to improve the OAIC made in the Hawke Review. In addition, until the Bill is passed, funding must be restored to the OAIC so that it can continue to fulfill its statutory functions and duties.*

There are also a number of features of the FOI Act, in its current form, as well as after the proposed amendments, which undermine free speech. If passed, for example, the Bill would impose a hefty fee of approximately $800 on applicants in order to review a decision by a government agency to refuse an FOI request. This fee would undoubtedly deter many disadvantaged people, as is PIAC's experience through its casework, who wish to have a refusal decision reviewed. As a counterbalance, PIAC recommends that all fees and charges be removed in respect of initial FOI applications. PIAC has made this recommendation in previous submissions on the basis that removing fees would better reflect the fundamental principle that FOI is designed to vindicate the right of individuals to access information; the right of access to public information should not be a user-pays system. In the alternative, charges should not be payable when applications for government-held documents are made in the public interest. This recommendation could be given effect by amending the FOI Act to provide for an automatic waiver of all fees and charges applicable to individuals, not-for-profit organisations and journalists where persons in each of these categories make FOI requests to further the public interest.

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35 See Farthing, S and Santow, E, *Freedom of Information (New Arrangements) Bill 2014. Submission to the Legal and Constitutional Affairs Committee*, Public Interest Advocacy Centre, 6 November 2014, available at http://www.piac.asn.au/publication/2014/12/freedom-information-amendment-new-arrangements-bill-2014.

36 Funding for the OAIC ceased on 31 December 2014. See Cowan, P 'OAIC Canberra office down to two staff' (11 December 2014) *itNews Online* available at http://www.itnews.com.au/News/398740,oaic-canberra-office-down-to-two-staff.aspx.

37 McKinnon, M 'Freedom of Information Act amendments set to be blocked in Senate, nation could lose appeal rights', *ABC News Online,* 3 October 2014, available at http://www.abc.net.au/news/2014-10-03/senate-to-block-crucial-changes-to-freedom-of-information-act/5788266.

Finally, PIAC has consistently noted its concerns about the broad categories of information that are exempt from the operation of the FOI Act. The right to access information under the FOI Act is an essential bulwark to Australia's constitutional system of responsible government, because without an accessible means of obtaining government-held information, subject to limited restrictions, electors are unable to inform themselves properly on important matters relating to the government and its operations. Excluding broad categories of information, without a process for assessing whether it is in the public interest to disclose particular documents that fall within these broad categories, undermines freedom of political expression and this, in turn, damages open and responsible government. PIAC believes a public interest test should be applied to all FOI refusals in order to determine, on a case-by-case basis, whether non-disclosure is justified.[38]

***Recommendation 5***

*PIAC recommends that a number of amendments be made to the FOI Act to better support the FOI Act's objectives to assure the right to public information that, in turn, will support free speech. These recommendations include:*

1. *No fees and charges should be levied in respect of applications made under the FOI Act; or, in the alternative, charges and fees should be waived for applications that are made to further the public interest.*
2. *At the first possible opportunity, the exemptions in the FOI Act should be reviewed to determine if they are in the public interest.*

### 3.2.2 Counter-terrorism offences

In the context of counter terrorism, the pursuit of national security is quintessentially a legitimate aim. However, a number of provisions risk burdening free speech in a disproportionate way. The chilling effect of disproportionate free speech offences should not be underestimated, nor should the normalising effect of gradually limiting free speech over successive pieces of legislation.

The new offence of 'advocating terrorism', for example, in section 80.2C of the *Criminal Code Act 1995* (Cth)[39] (the **Criminal Code**) criminalises speech that 'counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorist offence' where the speaker is reckless as to whether another person will engage in a terrorist act or commit a terrorist offence. Introduced in late 2014, the human rights impact statement accompanying the Foreign Fighters Bill concluded the restriction on freedom of expression was 'reasonable, necessary and proportionate … in order to protect the public from terrorist acts'.[40]

The necessity of this new offence is questionable. Section 80.2 of the Criminal Code already criminalises 'urging violence' against the Constitution or Government by force or violence. Section 11.4 of the Criminal Code provides for an offence of incitement that criminalises intentional and direct encouragement to a person to commit a terrorist act.[41] Also questionable is the assertion that the provision is proportionate. The new advocacy offence is far wider in scope than the targeted offence of incitement, requiring a person only to be reckless as to whether their

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38 See Cohen, M et al *Review of Freedom of Information Laws,* Public Interest Advocacy Centre, 7 December 2012, available at http://www.piac.asn.au/publication/2012/12/review-freedom-information-laws. See, also PIAC's *Submission to the Legal and Constitutional Affairs Committee,* above note 35.

39 New s 80.2C *Criminal Code Act 1995* (Cth), introduced by s 61 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

40 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, at para 138.

41 Section 11.4 *Criminal Code Act 1995* (Cth).

expression of a view 'counsels, promotes, encourages or urges' another to commit a terrorist act, rather than intending them to do so. As has been noted by the Gilbert + Tobin Centre of Public Law, the risk with such a wide provision is it would capture 'a wide range of grey areas and difficult moral questions'.[42]

The further expansion of s 80.2 appears to follow the same flawed approach of the Howard Government's controversial sedition laws introduced in 2005, of which the ALRC was highly critical.[43] In its report on sedition laws, the ALRC made a number of recommendations, most of which were implemented,

> aimed at ensuring there is a bright line between freedom of expression – even when exercised in a challenging or unpopular manner – and the reach of the criminal law, which should focus on exhortations to the unlawful use of force or violence.[44]

Similarly, new section 35P of the *Australian Security Intelligence Organisation 1979* (Cth)[45] criminalises disclosure of information that relates to a special intelligence operation. While individual Government ministers have suggested that the this provision is intended to have a limited operation,[46] the natural and ordinary meaning of the provision suggests a broad scope: it could apply, for example, to a journalist publishing information in circumstances where there may well be an overriding public interest to do so. The Australian Human Rights Commission considered the necessity to protect those operating in special intelligence operations and to ensure the integrity of the operation to be a legitimate ground for restricting free expression. It did not, however, consider that the Government had demonstrated a 'sufficient, direct and immediate connection between the limitation on expression and the threat'.[47]

In a heightened state of anxiety in the wake of terrorist attacks both here and overseas, the rush to legislate is perhaps understandable. The consequence, however, has been successive pieces of counter-terrorism legislation acts that greatly undermine our rights and freedoms. Against a background of proposed sweepingly broad and untargeted measures to retain a record of our telecommunications data,[48] warnings from the Prime Minister and others that the 'delicate balance between freedom and security' is shifting[49] and the Attorney-General's recent

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42 Hardy K, McGarrity N and Williams G *Submission to the Parliamentary Joint Committee on Intelligence and Security.* Gilbert and Tobin Centre of Public Law, 1 October 2014.

43 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia,* Report No. 104 (2006). Available at http://www.alrc.gov.au/inquiries/sedition,

44 Australian Law Reform Commission, above note 43, at page 10.

45 Introduced by clause 3, Schedule 3 *National Security Legislation Amendment Act (No. 1) 2014* (Cth).

46 See, for example, comments made by the Attorney General on the Bill: 'Q&A Transcript' *ABC Online* (3 November 2014) available at http://www.abc.net.au/tv/qanda/txt/s4096883.htm.

47 Australian Human Rights Commission *Submission to the Parliamentary Joint Committee on Intelligence and Security on the National Security Legislation Amendment Bill (No. 1) 2014*, August 2014, available at https://www.humanrights.gov.au/submissions/submission-inquiry-national-security-legislation-amendment-bill-no-1-2014.

48 As proposed in the Telecommunications (Intercept and Access) Amendment (Data Retention) Bill 2014, currently being considered by the Commonwealth Parliament.

49 See, for example, Commonwealth, *Parliamentary Debates,* House of Representatives, 22 September 2014, at page 9957, Prime Minister The Hon Tony Abbott MP.

announcement of a new 'combating terrorist propaganda online' program,[50] there are significant current threats to free speech.

***Recommendation 6***

*PIAC recommends that section 80.2C of the* Criminal Code Act 1995 *(Cth) and section 35P of the* Australian Security Intelligence Organisation 1979 *(Cth) be repealed.*

### 3.2.3 Capacity to speak freely

In a recent address outlining this current inquiry, the ALRC President indicated the Commission may take a broader view of free speech, encompassing 'laws more generally that affect people's *capacity* to speak freely, to live the sorts of lives that give some of us the freedom to speak'.[51] As an organisation that seeks to give voice to the marginalised, PIAC agrees that the obstacles to free speech cannot be overlooked if we are to protect this right comprehensively. This is particularly so when freedom of expression is not just viewed as the simple right to speak, but as inextricably linked to the right to participate in public affairs.

Article 25 of the ICCPR states that every citizen shall have the right and opportunity without unreasonable restriction to take part in the conduct of public affairs, directly or through freely chosen representatives. The United Nations Human Rights Committee (**UNHRC**) has asserted that the Article 25 right to participate in public affairs lies at the core of representative, democratic government,[52] which is of course also provided for, by the text, structure and implication of the *Australian Constitution*.

For those who are homeless and at risk of homelessness, for example, the ability to exercise their freedom of speech in order to fully participate in Australian democracy is severely restricted by their disadvantage. Being excluded from mass media opportunities and from policy-making processes means that the voices of this group can be silenced when it comes to developing policy that will have a significant impact on their lives.

PIAC believes that the right to participate in public affairs necessarily entails the provision of mechanisms by which this group, and other similarly marginalised groups, can participate meaningfully in policy design and implementation, thereby enabling their right to freedom of expression to be effectively realised.

There are precedents to ensuring the voices of those in poverty, which necessarily includes those who are homeless and at risk of homelessness, are heard and involved in the making of public policy. For example, in 2009 PIAC's Homeless Persons' Legal Service established its homeless consumer advisory committee, StreetCare, which is made up of people who have recent experience of homelessness. StreetCare provides a unique mechanism enabling an otherwise overlooked group to participate directly in policy-making processes. StreetCare's members have since been involved in government policy advisory committees, providing advice to the highest

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50 As reported, see Kehoe, J 'George Brandis seeks to shut down online "terrorist propaganda"', *Financial Review Online,* 20 February 2015, available at http://www.afr.com/p/technology/george_brandis_seeks_to_shut_down_JfJ0egCv5CeoJKuiuBvuHK

51 Above, note 2, at page 9.

52 *General Comment No. 25 (57), General Comments under article 40, para 4 of the International Covenant on Civil and Political Rights*, United Nations Human Rights Committee, adopted at its 1510th Meeting, UN Doc CCPR/C/21/Rev.1/Add.7 (1996), at para 1.

level of the NSW Government on issues such as reform of specialist homelessness services in NSW and the development and implementation of the revised Protocol for Homeless People in Public Places.

Accordingly, in determining the restrictions on the capacity of individuals to exercise their right to free speech, PIAC recommends that it be considered in this wider context, taking into account those who are prevented from fulfilling the right to freely express themselves and participate in our democracy due to being marginalised from mainstream society.

***Recommendation 7***

*PIAC recommends that the ALRC consider the barriers to free speech experienced by those who are marginalised, including those who have a disability, are Aboriginal or Torres Strait Islander, are mentally ill or who are experiencing homelessness or at risk of homelessness. The ALRC should propose mechanisms, similar to those that have been developed in New South Wales to promote the participation of people with experience of homelessness in the formulation of policy relevant to them.*

# 4. Freedom of religion

Article 18 of the ICCPR protects the right to freedom of thought, conscience or religious worship. Protection of religious freedom also finds form in section 116 of the *Australian Constitution*, albeit this protection has been construed very narrowly. This right serves an important function in Australian society, interlinked with many of the core rights and the underlying principle of the dignity of the individual inherent in the international human rights conventions.

It is also a right that frequently conflicts with the exercise of other rights. This is particularly so in the context of anti-discrimination measures.

## 4.1 Question 3-1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

That the freedom of religion may be limited is contemplated for in international human rights law. Article 18(3) of the ICCPR provides:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Similarly, the Victorian Charter provides for the freedom to be reasonably limited as can demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors, such as the nature of the right, the extent and nature of the limitation and the relationship between the limitation and its purpose.[53] Specifically, the Charter provides:

[53] Section 7 *Charter of Rights and Responsibilities Act 2006* (Vic).

A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.[54]

***Recommendation 8***

*PIAC recommends that the guiding principles adopted by the ALRC to determine whether an infringement of the freedom of religion is justified should provide that the freedom should only be reasonably limited*

- *where it is necessary to do so; and*
- *where it can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.*

Based on its work in defending the rights of marginalised groups in Australian society in the context of its discrimination work, PIAC endorses certain restrictions on the freedom of religion in the context of service provision. Religious organisations play a large and important role in public life in Australia; for example, in the provision of education, health, aged care and other services. Largely in recognition of this vital role, many of these religious organisations also receive significant public funding for the provision of these services.

The extent to which religious organisations are allowed to engage in what would otherwise constitute unlawful discrimination affects a significant number of people, including potential and existing employees and recipients of these services. Under section 37 of the *Sex Discrimination Act 1984* (Cth), religious bodies are permitted to act in a way that would otherwise constitute unlawful sex discrimination in the area of employment, in education and the provision of goods, services and facilities. Religious organisations are also able to discriminate on the basis of age in these areas under section 35 of the *Age Discrimination Act 2004* (Cth).

PIAC believes that where a religious organisation is providing services, particularly where in receipt of public funding or where performing a service on behalf of government, it should not be permitted to discriminate in a way that would otherwise be unlawful. A blanket exemption from the operation of anti-discrimination law for religious organisations also means that, in many cases, the right of individuals to equality is not properly considered vis-à-vis the right to freedom of religion.

PIAC recommends that if a religious body wishes to discriminate on certain grounds, it should be required to justify such discrimination in the specific circumstances of the proposed discrimination so that the right to religious belief can be properly balanced against competing interests and a decision be made carefully about how the relevant conflicting rights should be accommodated in the particular situation.[55]

***Recommendation 9***

*PIAC recommends that current blanket exemptions for religious organisations in the* Sex Discrimination Act 1984 *(Cth) and the* Age Discrimination Act 2004 *(Cth) be amended to require religious organisations to justify that discriminatory conduct in the specific circumstances of the*

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54 Section 14 *Charter of Rights and Responsibilities Act 2006* (Vic).

55 See Namey, G et al *Improving Access to Equality: Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* Public Interest Advocacy Centre, 1 December 2012, available at http://www.piac.asn.au/publication/2012/02/improving-access-equality.

*proposed discrimination. PIAC further recommends that an appropriate government body should be given the function to consider whether to accommodate each claim to be permitted to engage in discriminatory conduct and, if so, how that accommodation should be made in a manner that impinges to the minimum extent necessary on the right to equality so as to protect freedom of religion.*

## 4.2 Question 3-2: Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

The right to believe what one chooses and freely manifest one's religious beliefs alone and in the company of others lies at the core of the freedom of religion. PIAC believes the law should operate primarily as a 'shield' to protect the right of individuals to freely live by their religious values, rather than as a 'sword' to enforce those rights against the interests of others. PIAC accepts, for example, that a religious group may need to discriminate on occasions to ensure the ongoing manifestation of the core tenets of its faith; for example when making key religious appointments.

PIAC appreciates that religious organisations have for some time felt that their religious freedom is at risk of being unduly restricted. There are few provisions in state or federal legislation that expressly provide for the protection of freedom of religion. In the absence of a federal bill or charter of rights, religious organisations must rely on the narrowly construed section 116 of the *Constitution* (which does not apply to state legislation) and the common law doctrine that necessitates legislation be interpreted so as not to abrogate the fundamental rights and freedoms to which the executive has committed, in the absence of clear parliamentary intention to the contrary.[56]

Given this paucity of express legislative protection for religious freedom per se, PIAC recommends an approach that ensures appropriate protections for religious organisations in contentious contexts. This could take place by reference to the particular activity that is being regulated. Recent legislation, for example, introduced in the United Kingdom to allow for same-sex marriage clearly carved out exceptions for faith groups to eliminate any possible cause of action alleging discrimination against those faith groups who did not wish to perform same-sex marriage ceremonies.[57]

Another approach may be to formalise the common law doctrine mentioned above, to interpret legislation in line with Australia's international human rights law obligations unless there is clear legislative intent to the contrary. This could be achieved as an amendment to the *Acts Interpretation Act 1901* (Cth): for example, an interpretive provision could require other legislation to be interpreted in a non-discriminatory way unless the legislature states that it intends to be discriminatory.

***Recommendation 10***

*PIAC recommends legislative amendment, for example to the* Acts Interpretation Act 1901 *(Cth), which would provide general protection for religious beliefs by providing legislation to be interpreted in a non-discriminatory way unless it is clearly stated that the government intended for the legislative provision to be discriminatory.*

[56] See, for example, *Coco v The Queen* (1994) 179 CLR 427 at 437.
[57] *Marriage (Same Sex Couples) Act 2013* (UK).

# 5. Freedom of association

The right to freely associate with others and peacefully assemble without fear of legal or political repercussion are cornerstones of a well-functioning democracy. It is a right that many Australians would regard as part of our democratic landscape, but in reality it receives little legal protection. It has been said to be incidental to the constitutional implication that protects freedom of political communication. Without demarcating the bounds of a constitutional protection, if any, for freedom of association, Hayne J said recently:

> Because freedom of communication on matters of government and politics is an indispensable incident of that system of representative and responsible government which the Constitution creates and requires, that freedom cannot be curtailed by the exercise of legislative or executive power and the common law cannot be inconsistent with it.[58]

Freedom of association is protected in international human rights law treaties to which Australia is bound – especially Article 22 of the ICCPR, as well as through inextricable links to the exercise of many other civil, cultural, economic, political and social rights.

Despite the only very limited legal protection, the interlinked freedoms of association, assembly and speech are integral to Australian democracy. The ability of individuals to assemble peacefully to protest, for example, is a feature of our society that we should go to great length to protect. The significance of the exercise of these rights is evident from historic events in the development of modern Australia, from the 1972 Tent Embassy protest in support of Aboriginal land rights to the 2014 'March in March' protests expressing concern about the Federal Government's budget. Minimising any restriction on these rights is important for the health of Australia's democracy.

## 5.1 Question 4-1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

Under international law, the right to freely associate with others is not absolute. It is a right that must be balanced with others, such as the need for public safety, and indeed may be legitimately limited in those circumstances. The ICCPR provides for the right to be restricted where it is:

- prescribed by law, and
- necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Similarly, the Victorian Charter provides for the right to freely associate[59] to be reasonably limited where:

- it can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom; and

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58 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014), per Hayne J at [59].

59 Section 16 *Charter of Rights and Responsibilities Act 2006* (Vic)..

- all relevant factors are taken into account including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[60]

The criteria adopted by the Victorian Charter provide a proportionate and practical solution to assess whether a Commonwealth law unjustifiably interferes with freedom of association. PIAC considers applying these principles provides sufficient flexibility to assess whether encroachment on this right can be justified.

***Recommendation 11***

*PIAC recommends that the guiding principles adopted by the ALRC to determine whether an infringement on the freedom to associate is justified should provide that the freedom can only be reasonably limited where:*

- *necessary and proportionate; and*
- *it can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.*

## 5.2 Question 4-2: Which Commonwealth laws unjustifiably interfere with freedom of association and why are these laws unjustified?

The recent proliferation of sweeping anti-consorting criminal offences across most Australian states and territories provides several examples of interferences with the freedom of association that PIAC considers to be unjustified. It is noted that there is corresponding Commonwealth anti-consorting legislation. However, anti-consorting laws are quickly becoming of interest to every Australian jurisdiction, with almost all States and Territories having anti-consorting laws in place.[61]

Additionally, anti-consorting offences by their very nature go beyond state and territory boundaries, not least because the acts constituting consorting will frequently involve interstate activities and actors. In the recent High Court challenge to a number of Queensland 'anti-bikie laws', the Commonwealth, NSW, the Northern Territory, South Australia, Victoria and Western Australia were all interveners in the case arguing that the laws are valid.[62] Immediately following the High Court's decision, South Australia, Western Australia and the Northern Territory indicated they would enact similar legislation. Further, the Federal Justice Minister Michael Keenan has set

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60 Section 7 *Charter of Rights and Responsibilities Act 2006* (Vic)..

61 All jurisdictions apart from the ACT currently have anti-consorting legislation; a bill to enact anti-consorting provisions is, at the time of writing being considered by the ACT parliament. For other states and territories see, for example, *Serious and Organised Crime (Control) Act 2008* (SA), *Criminal Organisation Act 2009* (Qld), *Criminal Organisations Control Act 2012* (WA), *Criminal Organisations Control Act 2012* (Vic), *Serious Crime Control Act 2009* (NT), *Police Offences Act 1935* (NT) and *Police Offences Act 1935* (Tas). For an overview of the applicable state and territory laws see NSW Parliamentary Research Service, *Issues Backgrounder: Anti-Gang Laws in Australia*, Number 5 of 2013, available at http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/AntiganglawsinAustralia/$File/Anti+gang+laws+in+Australia.pdf

62 *Kuczborski v Queensland* (2014) 314 ALR 528. In the event, the main challenges failed due to the finding that the applicant lacked standing. The validity of the Queensland laws argued to unduly impact on freedom of association, primarily the *Vicious Lawless Association Disestablishment Act 2013* (Qld), failed due to the applicant's lack of standing; as noted by French CJ this question *'must await consideration on another day'*: [16]. The case accordingly does not impact on the analysis of *Tajjour* articulated here.

up a National Anti-Gangs Squad in partnership with the Victorian Government[63] and in January 2015 stated that a nationally co-ordinated legislative approach to 'bikie laws' across the country is under consideration.[64]

Fundamentally, any consorting law, by its very nature, impinges on a person's right to freedom of association and it would be difficult to draft such legislation so as to comply with international human rights law. The anti-consorting provisions in NSW legislation were recently considered by the High Court in *Tajjour & Ors v New South Wales*.[65] Section 93X in Division 7, Part 3A of the *Crimes Act 1900* (NSW) makes it an offence for a person to habitually consort with two or more convicted offenders after receiving a warning from a police officer that they are convicted offenders and that consorting with them is an offence.

While it has been established that there is no freestanding implied right to freedom of association in the *Australian Constitution*,[66] the High Court in *Tajjour* concluded that the consorting provisions in the NSW *Crimes Act* did present a burden on the implied freedom of political communication.[67] Nevertheless, the majority of the High Court held that the impugned provision did not violate the second, 'proportionality' limb of the test. That is, the legislation did not violate the requirement that it be reasonably appropriate and adapted to serve a legitimate end, and accordingly the High Court did not find that the NSW consorting provisions were constitutionally invalid.[68]

In his dissenting judgment, French CJ accepted that the objective of s 93X was legitimate, and noted that as the 'net cast by s 93X is wide enough to pick up a large range of entirely innocent activity' its operation 'evidently relies upon the exercise of police discretion or an appropriately narrow focus in its actual application'.[69] The Chief Justice concluded that the offence is invalid by reason of the imposition of a burden on the implied freedom, stating that the section fails to 'discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not'.[70] Accordingly, the offence, given the

> breadth of its application to entirely innocent habitual consorting, is not appropriate and adapted reasonably, or otherwise, to serve the purpose of the section.[71]

PIAC agrees with French CJ that s 93X represents an unjustified interference with freedom of association. In its response to the recent review of the provisions by the NSW Ombudsman, PIAC voiced concern about the practical operation of s 93X and its unintended consequences. PIAC's central recommendation to the Ombudsman was to repeal the laws on the basis that the provisions fundamentally breach international human rights law.[72] The recent decision in *Tajjour*

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63 Minister for Justice, The Hon Michael Keenan MP and the Premier of Victoria, The Hon Denis Napthine MP *Joint Press Release: Victorian strike team cuts down on bikies,* 30 October 2013, available at http://www.ministerjustice.gov.au/Mediareleases/Pages/2013/Fourth%20Quarter/30October2013-Victorianstriketeamcracksdownonbikies.aspx

64 As reported, "Victorian premier says national bikie laws needed", *Sky News Online*, 18 January 2015, available at http://www.skynews.com.au/news/national/2015/01/18/vic-premier-says-national-bikie-laws-needed.html

65 [2014] HCA 35 (8 October 2014).

66 See French CJ in *Tajjour* at [46]; citing *Wainohu v New South Wales* (2011) 243 CLR 181; Gageler J in *Tajjour* at [143]; Keane J in *Tajjour* at [242].

67 Per Crennan, Kiefel and Bell JJ at [112]; French CJ at [40]; Hayne J at [71]; Gageler J at [159].

68 Per Crennan, Kiefel and Bell JJ at [133]; Hayne J at [91]; Gageler J at [167]; Keane J at [241].

69 *Tajjour*, ibid, at [41]-[42].

70 At [45].

71 At [45].

72 See Leibowitz, J *Targeting criminality*, above note 10.

indicates that it is solely within the purview of the executive and legislative branches of government to consider whether to amend or repeal this legislation. However, the concern remains, as pointed out by French CJ, that the breadth of the provisions means that in practice they are criminalising a population of community members far beyond the 'criminal milieu' the offence was intended to capture. Indeed, this was the evidence gathered by PIAC from its clients and from extensive consultation with experts in the field, including the criminal bar, Legal Aid NSW, the Aboriginal Legal Service in Western NSW and a number of Local Area Commands across the Sydney region.[73]

Despite the High Court's ruling on the question of constitutional validity, the unnecessary criminalisation of often vulnerable individuals means that there should still be amendments to mitigate as much as possible the most damaging aspects of the operation of the laws. In its submission to the Ombudsman, PIAC made a number of detailed recommendations on how the legislation could be amended, accompanied by updates to the NSW Police Force's Consorting Standard Operating Procedures, which would go some way to impose more appropriate limitations to justify what is otherwise a damaging incursion on the right to freely associated. Should any national anti-consorting crime be under consideration, similar limitations should apply in order to justify burdening the right to freely associate, for example:

- ensuring that the application of the consorting provisions be limited to a targeted group of persons involved in serious criminal activity;
- specifying a time frame for the period (a) between the commission of an indictable offence and the issuance of a consorting warning, (b) for which warnings remain valid and (c) during which 'habitual' consorting must occur;
- providing protections under the law to address the specific needs of vulnerable persons;
- clarifying the procedural requirements for the issuance of warnings against consorting under the act; expand the defences available to a person warned or charged with the offence of consorting;
- introducing an internal and external review mechanism for a person to challenge the issuance of a warming; and
- minimising privacy concerns that arise in the context of the offence of consorting.[74]

In the likely enactment of federal anti-consorting legislation, the provisions must be tightly drafted to protect freedom of association and avoid capturing those whose behavior is beyond the scope of what was intended.

***Recommendation 12***

*PIAC recommends that any federal anti-consorting legislation adopted should be proportionate to the legitimate aim of public safety by inserting sufficient safeguards, such as ensuring the laws can be limited to a targeted group of persons involved in serious criminal activity.*

# 6. Delegating legislative power

Given the breadth and depth of areas now regulated by government, the ability to flesh out primary legislation in subordinate legislation is a necessary and expedient tool of government.

[73] As set out in detail in Leibowitz, J *Targeting criminality,* above note 10.
[74] See Leibowtiz, J, *Targeting Criminality*, above note10.

Delegated legislation can, however, have a great impact on individuals and often requires far more scrutiny than it receives. As noted by Hamer, delegated legislation

> is of great importance, for uncontrolled delegated legislation offers a fertile field for government despotism and bossy interference by bureaucrats. Delegated laws sometimes have much more impact on the lives of ordinary citizens than do most acts of parliament.[75]

This is particularly problematic given delegated legislation undergoes minimal parliamentary scrutiny and, practically speaking, is much more difficult for parliamentarians to challenge.

The *Legislative Instruments Act 2003* (Cth) (**LIA**) requires legislative instruments to be registered in the Federal Register of Parliamentary Instruments.[76] Within six sitting days of registration, Parliamentary Counsel must table the legislative instrument in Parliament; in practice this may mean that the instrument is not registered for weeks or months, given there are often considerable gaps in the Parliamentary sitting calendar.[77] Within 15 sitting days of tabling, a motion of disallowance can be laid in either the Senate or House of Representatives;[78] if the disallowance motion is passed, the legislative instrument shall cease to exist.[79] An infrequently used alternative is to specify in the primary legislation that any subordinate legislation be subject to the affirmative resolution procedure, requiring approval by both Houses of Parliament before it can come into force.

In the ordinary course, the only scrutiny is that undertaken by the Senate Standing Committee on Regulations and Ordinances, which reviews subordinate legislation for a number of purposes, including whether it: is in accordance with the statute; unduly infringes personal rights and liberties; makes rights and freedoms of citizens contingent on unreviewable administrative decision-making; or includes a matter more appropriate for primary legislation.[80] Importantly, however, the Committee does not consider the *policy* underpinning the regulation. In most cases where the Committee raises an objection and tables a motion of disallowance, it is withdrawn upon receiving assurances from the Minister.[81]

Accordingly, in most cases, whether delegated legislation is scrutinised will depend on the individual will of parliamentarians to make themselves aware of the potential impact of tabled delegated legislation, ensure there is debate by tabling a motion of disallowance and then hopefully convincing a sufficient number of his or her colleagues to vote in favour of the motion. In a tightly packed parliamentary agenda this will inevitably be rare. As noted in the *House of Representatives Practice*,

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75 Hamer, D, *Can responsible government survive in Australia?* The Department of the Senate, Revised, 2001, at p 148. Accessed 15 February 2015 at http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/hamer/chap09.

76 Part 4 *Legislative Instruments Act 2003* (Cth).

77 Section 38 *Legislative Instruments Act 2003* (Cth).

78 Section 42 *Legislative Instruments Act 2003* (Cth).

79 Section 42(2) *Legislative Instruments Act 2003* (Cth).

80 Department of Prime Minister and Cabinet *Legislation Handbook*, incorporating update No. 1 of May 2000, at page 3. Available at www.dpmc.gov.au/sites/default/files/publications/legislation_handbook.pdf

81 Evans, H (Ed) *Odgers' Australian Senate Practice*, 12th Ed, Department of the Senate, 2008, at page 340.

> Of the hundreds of pieces of delegated legislation presented each year very few are ever formally considered, let alone disallowed, by the House. Almost invariably, notices of disallowance are given by private Members…[82]

Accordingly, given the minimal parliamentary scrutiny afforded to delegated legislation, there is a need for clear articulation of what should be delegated and what powers should remain in primary legislation.

## 6.1 Question 15-1: What general principles or criteria should be applied to help determine whether a law that delegates legislative power to the executive is justified?

There is no statutory or common law authority defining what should be included in delegated legislation and what powers should be retained in the primary act. Judicial review of delegated legislation will determine whether a decision permitted by delegated legislation goes beyond the power of what was authorised in the primary statute.

In addition, judicial review of Commonwealth subordinate legislation cannot occur under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). This leaves a person seeking to challenge subordinate legislation via judicial review to do so only via the far more constrained process that exists at common law. The result is that most of the grounds of judicial review that would be available in respect of judicial review of administrative decision making are unavailable in respect of judicial review of subordinate legislation.

***Recommendation 13***

*PIAC recommends that the ADJR Act be amended to allow legislative instruments to be judicially reviewed under the ADJR Act, by amending the definition of 'decision to which this Act applies' in s 3.*

Beyond black and white issues of *ultra vires* lies the grey area of what should, in the interests of the fair functioning of our democracy, reside in delegated legislation and what is more appropriately set out in the primary statute. The Department of the Prime Minister and Cabinet's Legislation Handbook makes recommendations as to the kinds of matters that should only be implemented by primary legislation. Of the non-exhaustive list of matters, PIAC considers a number to be crucial for the proper functioning of democracy, including:

- significant questions of policy including significant new policy or fundamental changes to existing policy;
- rules which have a significant impact on individual rights and liberties;
- procedural matters that go to the essence of the legislative scheme;
- provisions imposing obligations on citizens or organisations to undertake or desist from certain activities; and
- provisions imposing significant criminal or administrative penalties.[83]

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82 Harris, IC (Ed) *House of Representatives Practice (5th Ed)*, 2005, Chapter 15, available at http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/practice/Chapter10.

83 Above, note 80, at page 4.

Given the potential impact of what is frequently included in delegated legislation, PIAC believes there should be greater safeguards in place to ensure that this category of powers is not delegated without strong justification.

First, PIAC considers that there should be statutory guidance in the LIA setting out matters which should be reserved for primary legislation, unless there is a public interest in those matters being set out in delegated legislation. For example, the exercise of powers that impact on individual rights and liberties should only be dealt with by way of primary legislation. Alternatively, where proposed delegated legislation will impact on individual rights and freedoms, it should, at a minimum, be subject to the affirmative resolution procedure.

Secondly, so-called 'Henry VIII clauses', which allow for primary legislation to be amended by delegated legislation, should not be permitted or, in the alternative, should be required to be exceptional, time limited and always subject to the affirmative resolution procedure. PIAC recommends that the ALRC, or another body, undertake a review of all Commonwealth, state and territory legislation to identify where Henry III clauses continue to operate in Australian law.

Thirdly, there should be a safeguard inserted to ensure that the gaps in the Parliamentary calendar do not mean that a legislative instrument is in operation for a significant length of time before the opportunity to table a motion of disallowance arises. Legislative instruments currently commence upon registration. As disallowance does not take effect *ab initio*, any decisions made under the instrument while it is in force remain valid. This means an adverse decision may have a significant, irreversible impact on an individual in circumstances where the legislative instrument providing for the exercise of power is ultimately rejected by Parliament.[84] Shortening the time period a legislative instrument is in force before the opportunity arises for it to be considered by Parliament will provide an appropriate safeguard.

Fourth, parliamentary oversight in the form of the Senate Standing Committee on Regulation and Ordinances should be strengthened. The Committee must be properly resourced, and be able to consider the policy implications of legislative instruments where the Committee considers it necessary or where the statement of compatibility for the instrument, required by the *Human Rights (Parliamentary Scrutiny) Act 2011*, identifies that it raises human rights concerns.

***Recommendation 14***

*PIAC recommends:*

- *amendments be made to the LIA to set out a non-exhaustive list of powers (including Henry VIII clauses) and matters which should not be delegated unless there be a public interest in doing so;*
- *where delegated legislation affects human rights and freedoms, the affirmative resolution procedure should be adopted;*
- *there be a limitation inserted into sections 38 and 42 of the LIA so that a legislative instrument can only be in operation for a maximum of 45 calendar days before it must be tabled in Parliament;*

[84] As was the case, for example, in *Plaintiff M150/2003 v Minister for Immigration and Border Protection* [2014] HCA 25 (20 June 2014) and *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24 (20 June 2014): discussed below at 6.2.

- *parliamentary procedure be strengthened by providing for a strengthened role for the Senate Standing Committee on Regulation and Ordinances; and*
- *that there be a comprehensive review of all Commonwealth, state and territory legislation to identify where Henry VIII clauses continue to operate in Australian law.*

### 6.2 Question 15-2: Which Commonwealth laws unjustifiably delegate legislative power to the executive, and why are these laws unjustified?

History shows that, where the party forming government in the House of Representative has had difficulty obtaining approval for its bills in the Senate, it has tended to rely more heavily on delegated legislation, with the attendant deficit in democratic oversight that this entails. For example, in 2013 the Government attempted to bypass a Senate blockage regarding the number of Temporary Protection Visas that could be issued by creating a cap by way of regulation.[85] The regulation was ultimately disallowed; however, given disallowance does not void the regulation *ab initio*, a number of asylum seekers were adversely affected by the regulation. Two such affected asylum seekers challenged the regulation. Applying a contextual analysis, the High Court declared the exercise of delegated power to be invalid as it went beyond the substantive scope of what was considered in section 85 of the *Migration Act 1958* (Cth).[86]

In the context of migration law, there are a number of unjustified and inappropriate delegations of power to the Minister for Immigration, some of which impact on Australia's obligations under the Refugee Convention. For example, section 5AA(3)(c) of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2012* (Cth) allows for the Minister to prescribe by regulation further categories of people to be 'unauthorised maritime arrivals'. This unilaterally expands the number of individuals who will be excluded from the ordinary statutory process to claim refugee status applying to asylum seekers who reach Australian shores by other means.

PIAC has also raised concerns regarding the inappropriate delegation of power to the Minister under the Freedom of Information (New Arrangements) Bill 2014 currently before the Senate. If passed, the Attorney-General will be able to determine, by legislative instrument, information he or she believes would be 'unreasonable' to publish under the Public Information Scheme[87] or under general access provisions.[88] This will create an unresolvable conflict should the Attorney-General determine that certain information be withheld from public access in circumstances where the Attorney-General may well have a vested interest in non-disclosure. Given the Attorney-General will also gain the function of issuing guidelines regarding a number of areas of operation under the FOI Act, PIAC is concerned that the Attorney-General will gain significant determinative power over what will and what will not enter the public domain.

## 7. Judicial review

The importance of judicial review to keep an active check on the Executive is well established. Finding protection in the *Constitution*, it has been recognised that judicial review helps preserve

85 See the *Migration Amendment (Temporary Protection Visas) Regulation* (Cth).
86 See *Plantiff M150/2003 v Minister for Immigration and Border Protection* [2014] HCA 25 (20 June 2014) and *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24 (20 June 2014).
87 Item 10, Schedule 1 New Arrangements Bill, amending s 8(2)(g)(iii) *Freedom of Information Act 1982* (Cth).
88 Items 18 and 19, Schedule 1 New Arrangements Bill, amending s 11C *Freedom of Information Act 1982* (Cth).

the rule of law and acts as a bulwark against injustice and unfairness. As the joint majority judgment of the High Court observed in *Plaintiff S157 v the Commonwealth,*[89] judicial review

> is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.[90]

The ICCPR also provides a foundation for a right to judicial review. Article 2 requires each State party to ensure that anyone claiming a violation of their rights under the Covenant 'shall have an effective remedy' with such claims to be 'determined by competent, judicial, administrative or legislative authorities'.

For PIAC's vulnerable clients, the ability to challenge decisions made by government officers in relation to multiple aspects of their life is vital. It is a need that has intensified over the 30-odd years of PIAC's existence with the proliferation of government regulation and delegation of powers, which both underlies the importance of judicial review as a tool of democratic accountability, and complicates its operation. Indeed, as noted by NSW Chief Justice Bathurst extra-curially:

> Over the past 50 years the law has evolved from a system where most activities were governed by common law with relatively modest government interference, to a situation where a wide range of activities are regulated by statute and subordinate legislation, with a corresponding upsurge in regulatory bodies.[91]

Accordingly, PIAC supports judicial review that is accessible and affordable, provides meaningful remedies and is not unduly limited by either statutory or practical obstacles.

## 7.1 Question 18-1: What general principles or criteria should be applied to help determine whether a law that restricts access to judicial review is justified?

PIAC supports a federal judicial review scheme that is clear, accessible and promotes the accountability and transparency of government. Because of the importance PIAC places on judicial review, it encourages a broad and non-technical approach to the jurisdiction and scope of the scheme, as well as to the grounds of review, right to seek review, obligation to provide reasons and availability of remedies. PIAC does, however, accept the need to circumscribe the availability of judicial review in certain circumstances. Any such limitations should be

- strictly limited and exceptional;
- closely tied to legitimate purpose; and
- justifiable on public interest grounds.

PIAC supports, for example, carefully-calibrated mechanisms that have been developed to deal with unmeritorious claims, including the power to strike out matters that are frivolous, vexatious or an abuse of process as well as powers to order a plaintiff to provide security for costs. PIAC also

89 (2003) 211 CLR 476.

90 Per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at para 104.

91 The Hon T F Bathurst, Chief Justice of New South Wales, 'Book Launch: Key Issues in Judicial Review' (Speech delivered in Sydney, Monday 7 April 2014) at para 4. Available at http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m670001l771019/bathurst_20140407.pdf.

considers the time limits currently contained in the ADJR Act can, where reasonable in scope, provide an acceptable means to achieve efficiency and certainty in administrative decision making.

More broadly, PIAC also supports the three-decades old codification of common law principles of judicial review in the ADJR Act. While recognising its limitations, PIAC strongly supports a statutory judicial review mechanism as greatly preferable to relying solely on the combination of the *Constitution* and the common law. Judicial review pursuant to section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and ss 75(iii) or 75(v) of the *Constitution* is complex and technical. The ADJR Act, on the other hand, removes some, but not all, of this complexity and therefore promotes access to justice. The advantages of maintaining a statutory judicial review scheme alongside constitutional review are that the statutory scheme:

- sets out clearly the applicable law in relation to jurisdiction, grounds of review and standing for judicial review applications;
- broadens the availability of, and provides clarity in relation to, remedies for judicial review; and
- incorporates a right to reasons which does not exist at common law.

Its wider influence has also been noted by the Australian Information Commissioner:

> Beyond the courtroom, the ADJR principles and grounds have a wider value of elucidating the principle of legality and instilling administrative law values in government administration. There is wide recognition throughout the public service of core ADJR grounds such as natural justice, relevant and irrelevant considerations, unauthorized purpose, inflexible application of policy, good faith, unreasonableness, evidence based decision making, and reasons for [the] decision.[92]

***Recommendation 15***

*PIAC recommends that limitations on judicial review should be strictly limited and exceptional, proportionate to a legitimate purpose and justifiable on public interest grounds.*

## 7.2 Question 18-2: Which Commonwealth laws unjustifiably restrict access to judicial review, and why are these laws unjustified?

PIAC's concerns in relation to the limitations imposed on judicial review relate to:

- legislative provisions that unduly narrow or appear to exclude the availability of judicial review; and
- the barriers for individuals seeking to bring a claim for judicial review.

### 7.2.1 Exempting decisions and ousting judicial review

Given the importance of judicial review as a pillar of Australian democracy, as a general rule legislation that seeks to narrow the grounds of judicial review or exempt review of executive and administrative decision-making cannot be justified. As outlined above, PIAC considers that limitations on judicial review will only be acceptable where strictly limited and exceptional, for a

[92] Professor John McMillan, Australian Information Commissioner 'Restoring the ADJR Act in federal judicial review' (Presentation to the Australian Institute of Administrative Law seminar, Canberra, 4 December 2012), available at http://www.oaic.gov.au/news-and-events/speeches/restoring-the-adjr-act-in-federal-judicial-review.

legitimate purpose and in the public interest. Most attempts to insulate executive and administrative action from judicial review undermine the rule of law and therefore fail on all three grounds.

PIAC considers the ability of the Minister to identify, by way of regulation, a class of decisions that will not subject to be judicial review under the ADJR Act to be an impermissible limitation on the right to judicial review which the ADJR Act creates.[93] The ADJR Act promotes access to judicial review and provides certainty around outcomes. It enables the court, at the instigation of an individual, to closely scrutinise acts of government. The power of a Minister to exempt certain administrative decisions from the scope of the ADJR Act by way of regulation undermines the operation of the rule of law. This is particularly so given the low level of scrutiny of delegated legislation provided by Parliament, as outlined above. In particular, PIAC can see no principled justification for administrative decisions made under the *Migration Act 1958* (Cth) to be subject to a different judicial review regime, and indeed one that is more complex, technical and restrictive than that provided for via the ADJR Act.

***Recommendation 16***

*PIAC recommends that current exemptions under the ADJR Act be reviewed and section 19 of the ADJR Act be amended to require any proposed exemption by way of Ministerial regulation to be approved by both Houses of Parliament in an affirmative resolution procedure.*

Privative, or ouster, clauses, purporting to exclude judicial review should be viewed with caution as generally being contrary to the rule of law and an unjustifiable encroachment on the constitutional function of judicial review. The oft-cited section 474 of the *Migration Act 1958* (Cth) (**Migration Act**) is a clear example of a limitation that cannot be justified. Section 474 was inserted into the Migration Act in an apparent attempt to ensure that certain decisions made under the Act could not be challenged in any way via judicial review.

The High Court has consistently read down attempts such as this to oust the jurisdiction of the High Court itself, and state Supreme Courts, to review administrative and Executive decision-making. While the High Court considered section 474 to be a valid exercise of the power in *Plaintiff S157 v The Commonwealth*,[94] it diminished its potential impact almost completely by stating that the privative clause does not apply to any decision infected by jurisdictional error. What will be considered to be 'jurisdictional error' was outlined by the High Court *Re Refugee Tribunal, Ex parte Aala* (2000) 204 CLR 82:

> There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.[95]

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93 Section 19 and Schedule 1 *Administrative Decisions (Judicial Review) Act 1977* (Cth).

94 (2003) 211 CLR 476.

95 At [163]. Cited by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, at [66].

The joint majority judgment of the High Court in *Plaintiff S157* asserted that s 75(v) of the *Constitution* provides for 'an entrenched minimum provision of judicial review',[96] which also places 'significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action'.[97] The majority of the High Court considered:

> The centrality, and protective purpose, of the jurisdiction of this court … places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action.[98]

Similarly, in *Kirk v Industrial Court of New South Wales*,[99] the High Court referred to the constitutionally-entrenched supervisory role of the State Supreme Court. A majority held that any privative clause that

> purports to strip the Supreme Court of the state of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the state legislature. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the state.[100]

The net result of these cases indicates that the constitutional validity of privative clauses is questionable and the High Court's restrictive interpretive approach to them renders them largely ineffective, as well as complicating statutory interpretation. For reasons of principle and practice then, PIAC considers ouster or privative clauses to be an unjustified incursion on judicial review.

### 7.2.2 Private companies, public functions

There is undoubtedly an increasing trend to contract out the functions of government to private entities. Privatising public service provision has occurred for a range of traditional state functions, from running detention centres to care homes, and is likely to increase.[101] The ADJR Act provides for review of decisions of 'administrative character' made, proposed to be made or required to be made, under Commonwealth legislation by a Commonwealth authority or an officer of the Commonwealth.[102] The ADJR Act accordingly focuses on the source rather than the nature of the power, and the courts have interpreted this jurisdiction-granting provision so as generally to exclude decisions made by private bodies even where making a decision under an enactment at the behest of government. PIAC considers that this approach means that accountability will be lost by virtue of governments contracting out decision making to a private body.

The decision in *NEAT Domestic Trading v AWBI Ltd*[103] indicates that constitutional judicial review generally does not cover private bodies making decisions under an enactment.[104] In a

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96 Per Gummow, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157,* above, note 94, at [103].
97 Above, note 94 at [104].
98 Per Gummow, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157,* above note 94, at [103]-[104].
99 (2010) 239 CLR 531.
100 Per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [55].
101 As noted in *NEAT Domestic Trading Pty Ltd v AWB Ltd and Anor* (2003) 198 ALR 179, at [49].
102 Section 3 *Administrative Decisions (Judicial Review) Act 1977* (Cth).
103 (2003) 216 CLR 277.
104 Note that, despite the outcome of this case, arguably the question remains open. In *NEAT* McHugh, Hayne and Callinan JJ considered the question whether the decisions made by AWB as a private corporation within a scheme of public regulation lead to the question of whether public law remedies can be granted against private bodies, and answered in the negative. They added, *'That answer depends in important respects upon the*

contextualised decision, the High Court considered that 'it is not possible to impose public law obligations on [the non-government entity whose decision was the subject of an application for judicial review] while at the same time accommodating pursuit of its private interests'.[105] In dissent, Gleeson CJ and Kirby J (in separate judgments) decided this question differently, finding that the entity in question was performing functions of an administrative nature under an enactment and the ADJR Act consequently applied.[106] Kirby J considered the case an opportunity to affirm the principle he and Callinan J articulated in *Gerlach v Clifton Bricks Pty Ltd* that Parliament cannot confer absolute power on anyone

> in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is 'outsourced' to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.
>
> Given the changes in the delivery of governmental services in recent times, performed earlier and elsewhere by ministries and public agencies, this question could scarcely be more important for the future of administrative law. It is a question upon which this court should not take a wrong turning.[107]

Kirby J considered that in order to determine what is a 'decision' for the purposes of s 5(1) of the ADJR Act, the focus should not be on the particular character of the decision maker, which is relevant but not determinative, but rather the nature of the power exercised:

> In a particular case, a statutory scheme may have entrusted decisions of a public, governmental or regulatory character to a private corporation, involving that body, to that extent in the exercise of public power.[108]

As a matter of public policy, the approach taken by Kirby J seems preferable. To overcome the *NEAT* decision and ensure that government cannot by accident or design avoid accountability by procuring the services of a private company to carry out public interest functions, PIAC supports the articulation of a public function test in establishing whether an application may be brought under the ADJR Act. This could most easily take the form of an amendment to the ADJR Act to make it clear that the test for judicial review will include decisions made by private entities exercising public power.

PIAC therefore supports the adoption of a 'public function' test such as that contained in section 4 of the Victorian Charter. That provision makes clear that, while the Charter is in principle limited to government action, it extends to non-government entities to the extent that they exercise functions 'of a public nature … on behalf of the State or public authority'. This extends the reach

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*particular structure of the legislation in question. It is not to be understood as an answer to the more general question we identified'.* See above, note 103, at [49]-[50].

105 Per McHugh, Hayne and Callinan JJ in *NEAT,* above note 94, at [51].

106 Kirby J at [133]. Gleeson CJ ultimately considered that he need not determine the question definitively, but stated that his preference was that AWBI's action did fall under the ADJR Act as being one of administrative character made under an enactment, at [27].

107 Per Kirby J in *NEAT,* above note 103, at [67]-[68].

108 Per Kirby J in *NEAT* above note 103, at 99].

of the Charter in an appropriately modest way: the Charter does not apply to any private entity that happens to have a contract with the state, but it does apply to private entities that (pursuant to a contract or otherwise) are exercising power on behalf of the state. PIAC believes that a similar test should be included in the ADJR Act.

***Recommendation 17***

*PIAC recommends that the ADJR Act be amended to include a 'public function' test to ensure that decisions made by a private company undertaking a public function be made subject to judicial review.*

### 7.2.3 Standing

In recent years, PIAC has advocated for the narrow test for standing under the ADJR Act and at common law to be broadened so that organisations can bring proceedings on behalf of aggrieved persons or groups of people.[109] Currently, judicial review under the ADJR Act may be sought only by a person 'who is aggrieved by' a decision, conduct or failure to make a decision.[110] The 'special interest' test at common law is very similar and certainly no less restrictive.[111]

The Administrative Review Council (**ARC**) in its 2012 report on Judicial Review recommended that the ADJR Act 'be amended to align the test for standing for representative organisations with that in subsection 27(2) of the Administrative Appeals Tribunal Act 1975 (Cth)'.[112] Subsection 27(2) enables an organisation to bring proceedings provided that the decision being challenged relates to a matter included in the objects of the organisation.

While supporting the recommendation made by the ARC, given the importance of public interest litigation, PIAC would go further still, recommending a liberal open standing provision be inserted into the ADJR Act. This accords with the ALRC's recommendation in its 1996 report, *Beyond the Door Keeper, Standing to Sue for Public Remedies*,[113] to remove the special interest requirement and replace it with an open standing provision that would allow any person to 'commence public law proceedings unless any relevant legislation provides otherwise or the litigation would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it as he or she wishes'.[114]

Ideally, PIAC recommends the adoption of a provision along the lines of section 123 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).[115] This provision provides

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109 See Goodstone, A et al *Justice – not just a matter of charity: submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice,* Public Interest Advocacy Centre 20 May 2009, available at http://www.piac.asn.au/sites/default/files/publications/extras/PIAC_Access_to_Justice_Submission.pdf; and Goodstone, A et al *Statutory judicial review – keep it, expand it: Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia,* Public Interest Advocacy Centre, 14 July 2011 available at http://www.piac.asn.au/publication/2011/07/statutory-judicial-review-keep-it-expand-it.

110 Sections 5 to 7 *Administrative Decisions (Judicial Review) Act 1977* (Cth).

111 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

112 Administrative Review Council *Report 50: Federal Judicial Review in Australia,* 2012, available at http://www.arc.ag.gov.au/Publications/Reports/Documents/ARCReport50-FederalJudicialReviewinAustralia-2012.PDF. See, in particular, Chapter 8 'Right to Seek Review'.

113 Australian Law Reform Commission *Beyond the Door Keeper. Standing to Sue for Public Remedies*, Report 78, 1996, available at http://www.alrc.gov.au/report-78.

114 Above, note 113, at [1.15].

115 Section 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW) provides 'Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach'. Section 123(2) provides that

for open standing. While such an approach was originally considered radical and liable to open the floodgates to frivolous or vexatious litigation, this has not proven to be the case in practice.[116] One reason for this may be that anyone who does bring an action under the provision will be liable to pay a costs order made against them.[117] Moreover, to safeguard against misuse of the provision, the ADJR Act could expressly provide the court with discretion to refuse standing where the application for judicial review is apparently frivolous or has no basis for establishing a prima facie case.

Limiting access to judicial review through narrow standing provisions cannot be justified. Test case litigation has the capacity to create systemic change for large groups of people without the need for each person to bring a separate legal claim. This promotes access to justice and reduces the costs borne by the justice system. In Australia, test cases that promote the public interest by creating, enforcing or clarifying legal rights must generally be brought by individuals prepared to expend significant financial resources, time and emotional energy on the proceedings. Litigation pursued by individuals may have broad-reaching effects and benefit users.

However, test case litigants are often almost crushed in the process. As a public interest legal practice seeking to promote access to justice, enhanced democracy, consumer protection and human rights, PIAC has also witnessed the unfortunate situation where no individual is prepared to take on the enormous burden and risk of bringing a legal claim, despite significant numbers of people suffering harm.

The case of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*[118] is instructive. PIAC acted for Access for All Alliance (**AAA**), an incorporated association that was established to ensure equitable and dignified access to premises and facilities for all members of the community. In 2005, AAA brought proceedings against the Hervey Bay City Council alleging that a number of bus stops, which had been built or significantly upgraded since the commencement of the *Disability Standards for Accessible Public Transport 2002* (Cth), did not comply with those standards. However, the Federal Court dismissed the proceedings on the basis that AAA did not have standing to commence the proceedings. This decision appears to have inhibited other organisations making complaints about systemic discrimination.[119] Although the AAA case was brought in the context of discrimination law, the same issues arise in the context of the ADJR Act.

***Recommendation 18***

*PIAC recommends that an open standing test be adopted in the ADJR Act to ensure that a broader range of organisations and interested parties be able to apply for judicial review of an administrative decision. In the alternative, PIAC recommends that the Australian Government implement the Administrative Review Council's 2012 recommendation that the ADJR Act 'be*

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proceedings 'may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated)…having like or common interests in those proceedings'.

116 See, for example, Environmental Defender's Office, *Submission on NSW Government Discussion Paper: Reform of Judicial Review in NSW* (2011), www.edo.org.au/edonsw/site/pdf/subs/110420judicial_review.pdf, at 10-11.

117 Section 123(3) *Environmental Planning and Assessment Act 1979* (NSW)

118 [2007] FCA 974.

119 See, for example, NSW Disability Discrimination Law Centre Inc, (2009) *Submission: Response to a Strategic Framework for Access to Justice in the Civil Justice System.*

*amended to align the test for standing for representative organisations with that in subsection 27(2) of the* Administrative Appeals Tribunal Act 1975 *(Cth)'.*

### 7.2.4 Costs

As PIAC has noted in previous submissions related to judicial review,[120] the threat of an adverse costs order is a practical limitation to seeking judicial review and inhibits especially impecunious people from accessing justice. This is of course not an issue that is limited to judicial review; costs are a barrier to all public interest litigation. In PIAC's experience, even where pro bono legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse costs order.[121] This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.

PIAC supports the creation of a public interest costs rule that would protect litigants bringing action in the public interest from an adverse costs order. An amendment could simply be made to the legislation that governs the Chapter III Courts that would specifically allow those courts to make orders that protect litigants bringing action in the public interest from an adverse costs order. A public interest costs rule was recommended by the ALRC in 1995.[122] PIAC supports such a provision because it would remove a further barrier that inhibits impecunious people, and organisations bringing public interest proceedings, from litigating.[123]

Another way of alleviating the negative impact of adverse costs orders on public interest litigation, including proceedings seeking judicial review, would be to strengthen the application of Order 62A Rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis. A costs order made pursuant to Order 62A has the potential to remove uncertainty about the level of risk of an adverse costs order from the applicant, thereby allowing the applicant to proceed in cases where they otherwise would not be able to.

The problem with the Order is only its infrequent use, due to lack of awareness by practitioners and judges, and in cases where the applications have been made, the reticence of judges to make orders limiting costs. In June 2008, in proceedings against Virgin Blue Airlines, PIAC, acting on behalf of two people with disability, succeeded in obtaining 'cost cap' orders in the two sets of proceedings being heard together in the Federal Court.[124]

Amendments to Order 62A should be made so that there is a presumption in favour of limiting costs in 'public interest' matters, where 'public interest is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.

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120 See, for example, Goodstone, A et al *Statutory judicial review – keep it, expand it: Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia,* see above note 120109

121 See also, for example, submission of the Environmental Defender's Office, above note 116, at page 9.

122 Australian Law Reform Commission, *Cost shifting – who pays for litigation*, Report No 75, 1995, available at http://www.alrc.gov.au/report-75.

123 For further explanation of this proposal, see PIAC's submission to the NSW Law Reform Commission: Goodstone, A, *PIAC Submission: A public interest approach to costs*, NSW Law Reform Commission Inquiry, Public Interest Advocacy Centre, 2011, available at http://www.piac.asn.au/publication/2011/08/public-interest-approach-costs.

124 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

***Recommendation 19***

*PIAC recommends the deterrent effect of the risk of an adverse costs order being made should be addressed by amending the constituent legislation to enable the High Court, Federal Court, Federal Circuit Court and Family Court to make a protective costs order; or Order 62A of the* Federal Court Rules *(Cth), to provide for a presumption in favour of limiting costs in 'public interest' matters.*