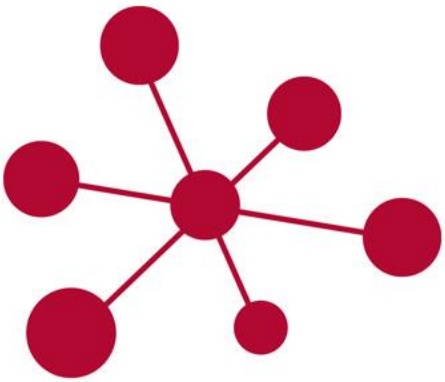

public interest
ADVOCACY CENTRE

Modernisation of the Northern Territory Anti-Discrimination Act: Discussion Paper

31 January 2018

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles difficult issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through legal assistance and litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

1.2 PIAC's work on discrimination

PIAC has a long history of involvement in discrimination law reform and litigation. This includes submissions on major policy consultations in this area, such as about the 2012 Commonwealth Exposure Draft Human Rights and Anti-Discrimination Bill,[1] and the Australian Law Reform Commission inquiry into Equality, Capacity and Disability in Commonwealth Laws.[2]

PIAC has also taken particular interest in the issue of vilification law, at both state and Commonwealth level, including submissions in response to proposed reforms to section 18C of the *Racial Discrimination Act 1975*,[3] and to the Inquiry into Racial Vilification Law in NSW.[4]

Finally, as a community legal centre focusing on strategic litigation, PIAC has been involved in a number of significant cases raising issues of discrimination law, including public transport access for people who are blind or have low vision,[5] as well as relating to the interaction between anti-

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1 PIAC, *Aligning the Pieces: Consolidating a framework for equality and human rights*, 21 December 2012, available at: https://www.piac.asn.au/wp-content/uploads/12.12.21_aligning_the_pieces_-_submission_to_the_senate_legal_and_constitutional_affairs_committee_-_human_rights_and_anti-discrimination_bill_2012_0.pdf accessed on 19 January 2018.

2 PIAC, *Equality before the law for people with disability*, 20 January 2014, available at: https://www.piac.asn.au/wp-content/uploads/14.01.20_equality_before_the_law_for_people_with_disability_-_submission_to_alrc_issues_paper.pdf accessed on 19 January 2018.

3 PIAC, *Reasonable limits on the right to freedom of expression*, 21 December 2016, available at: https://www.piac.asn.au/wp-content/uploads/2017/01/16.12.20-RDA_Free-speech-Final-submission.pdf accessed on 19 January 2018.

4 PIAC, *Regulating Racial Vilification in NSW*, 8 March 2013, available at: https://www.piac.asn.au/wp-content/uploads/13.03.08_regulating_racial_vilification_in_nsw_-_submission_to_the_legislative_council_standing_committee_on_law_and_justice.pdf accessed on 19 January 2018.

5 See *Innes v Rail Corporation of NSW (No 2) [2013] FMCA 36 (1 February 2013)*.

discrimination protections based on sexual orientation and exceptions provided to religious organisations.[6]

2. Need for modernisation

PIAC welcomes the opportunity to provide a submission in response to the *Modernisation of the Anti-Discrimination Act: Discussion Paper*.

We commend the Northern Territory Department of the Attorney-General and Justice for reviewing the *Anti-Discrimination Act*, which has been in operation for almost a quarter of a century, and – as the title of the Discussion Paper suggestions – is in significant need of modernisation, including in terms of expanding who is offered protection against discrimination and by introducing prohibitions on vilification.

This process presents the opportunity for the Northern Territory to adopt best practice models, including from other jurisdictions. We note that, as a general rule, there are significant benefits to greater consistency across jurisdictions, including building strong national community standards around the enjoyment of human rights and allowing for the development of a body of jurisprudence that will assist in the application and promote the understanding of anti-discrimination laws.

In this submission, we will respond to the majority of questions outlined in the paper, under the five headings used.

2.1 Modernisation Reforms

Question 1. Is updating the term sexuality to sexual orientation without labels appropriate? Are there any alternative suggestions?

PIAC supports updating the terminology used in the Act in this area.

The current definition in section 4 ('sexuality means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality') is inconsistent with the terminology used in other Australian jurisdictions. As noted in the Discussion Paper, it also inappropriately conflates issues of sexual orientation (heterosexuality, homosexuality and bisexuality) and gender identity (transsexuality).

The current definition is also limited because it specifically names those sexual orientations that are protected, thereby potentially excluding other forms of sexual orientation (such as pansexuality[7]).

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6 See *OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293 (10 December 2010)*

7 For example, pansexual is defined as 'Not limited in sexual choice with regard to biological sex, gender or gender identity' in the *Online Oxford Dictionary*: https://en.oxforddictionaries.com/definition/pansexual) and as referring 'to a person whose emotional, romantic and/or sexual attraction towards others is not limited by biological sex, gender or gender identity' by UK LGBT advocacy organisation Stonewall in their online Glossary of Terms: http://www.stonewall.org.uk/help-advice/glossary-terms accessed on 30 January 2018.

PIAC supports the inclusion of 'sexual orientation' as a protected attribute. The definition of sexual orientation adopted by the Commonwealth *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* is a useful starting point:

> Sexual orientation means a person's sexual orientation towards:
> (a) persons of the same sex; or
> (b) persons of a different sex; or
> (c) persons of the same sex and persons of a different sex.

However, it should be noted that this definition also potentially excludes sexual orientations, such as pansexuality, that are related to gender identities, instead of or in addition to, biological sexes. Therefore, PIAC submits that an updated definition should be considered:

> Sexual orientation means a person's sexual orientation towards:
> (a) persons of the same sex or gender identity; or
> (b) persons of a different sex or gender identity; or
> (c) persons of the same sex or gender identity and persons of a different sex or sexes or a different gender identity or identities.

PIAC is aware of alternative suggestions to define sexual orientation according to the 2006 Yogyakarta Principles, as meaning:[8]

> each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

However, adopting such a definition would represent a significant departure from the current approach towards sexual orientation in other Australian jurisdictions and, at this stage, PIAC is unconvinced that it should be adopted in preference to the definition proposed above.

Question 2. Should the attribute of 'gender identity' be included in the Act?

Yes. PIAC strongly supports including a protected attribute of gender identity in the Act.

This would recognise the separate nature of gender identity from sexual orientation, thereby splitting 'transsexuality' from the other sexualities in the current definition (discussed under question 1, above). Using gender identity rather than 'transsexuality' or 'transgender' would also ensure that more people would be protected against discrimination, including people who are gender diverse and especially people who have non-binary gender identities.

As with sexual orientation, PIAC believes the definition adopted in the Commonwealth *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* offers a useful starting point:

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8 *Yogyakarta Principles*, 2006, available at: https://yogyakartaprinciples.org/preambule/ accessed on 29 January 2018.

> gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

However, PIAC is aware of criticisms that inclusion of the phrase 'whether by way of medical intervention or not') is both unnecessary, and inappropriately medicalises gender identity.

Instead, PIAC supports the position of Rainbow Territory that the definition contained in the ACT *Discrimination Act 1991* would be preferable:

> 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth' accompanied by a note that 'gender identity includes the gender identity that the person has or has had in the past, or is thought to have or have had in the past'.

Question 3. Should intersex status be included as an attribute under the Act?

PIAC supports inclusion of an attribute which protects people with intersex variations against discrimination.

As noted in the Discussion paper, intersex status was first included as part of the landmark 2013 reforms to the Commonwealth *Sex Discrimination Act 1984*, making Australia the first country to do so, with the following definition:[9]

> intersex status means the status of having physical, hormonal or genetic features that are:
> (a) neither wholly female nor wholly male; or
> (b) a combination of female and male; or
> (c) neither female nor male.

Since then, intersex or intersex status has since been protected in Tasmania,[10] the Australian Capital Territory,[11] and South Australia.[12]

However, in the intervening years, intersex advocates have expressed growing concerns about the use of intersex status as a protected attribute. As noted in OII Australia's submission as part of the current consultation process:[13]

> Recognition of the diversity of intersex people was and remains important, however, the meaning of 'intersex status' is often imputed to mean a fact about legal sex classifications or gender identity that is not supported by either the legal definition of the ground, or the diverse lived reality of intersex lives.

These criticisms were reflected by OII Australia and other intersex advocates and organisations from across Australia and Aotearoa/New Zealand in the March 2017 Darlington Statement, which

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9 Section 4, *Sex Discrimination Act 1984* (Cth).
10 Sections 3, 16, *Anti-Discrimination Act 1998* (Tas).
11 Dictionary, *Discrimination Act 1991* (ACT).
12 Subsection 29(4), *Equal Opportunity Act 1984* (SA).
13 OII Australia, *Submission on anti-discrimination law in NT*, p8, available at: https://oii.org.au/31847/submission-nt-2017/ accessed on 29 January 2018.

called for 'effective legislative protection from discrimination and harmful practices on grounds of sex characteristics.'[14]

The terminology of sex characteristics has since been used in the Yogyakarta Plus 10 Principles, defining sex characteristics as:[15]

> each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

The inclusion of sex characteristics, rather than intersex status, has been recommended in both the submission by OII Australia,[16] and by Rainbow Territory.

Despite potential inconsistency with other Australian jurisdictions, PIAC supports the protected attribute of sex characteristics, based on the Yogyakarta Plus 10 definition, being included in the Northern Territory *Anti-Discrimination Act* as best practice, and hope it will serve as a model to be followed by other jurisdictions, including those that have already legislated to protect intersex or intersex status.

Question 4. Should vilification provisions be included in the Act? Should vilification be prohibited for attributes other than on the basis of race, such as disability, sexual orientation, religious belief, gender identity or intersex status?

Yes, PIAC supports the inclusion of prohibitions on vilification as part of the *Anti-Discrimination Act*.

We note the Northern Territory is currently the only jurisdiction in Australia in which racial vilification is not specifically outlawed.[17] This should be remedied as a matter of priority.

The right to free speech is not absolute. It is already regulated in civil (e.g. defamation) and criminal (e.g. offensive language, promotion of terrorism) contexts.

The overwhelming evidence is that racist speech warrants regulation. It is harmful to individuals and our society.[18] People experiencing racism face poorer social and health outcomes, including

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14 OII Australia et al, *Darlington Statement*, March 2017, available at: https://oii.org.au/darlington-statement/ accessed on 29 January 2018.

15 *Yogyakarta Plus 10 Principles*, available at: http://yogyakartaprinciples.org/principles-en/yp10/ accessed on 29 January 2018.

16 OII Australia, *Submission on anti-discrimination law in NT*, pp9-10, available at: https://oii.org.au/31847/submission-nt-2017/ accessed on 29 January 2018.

17 Although, as noted in the Discussion Paper, the Commonwealth *Racial Discrimination Act 1975* prohibitions on racial vilification do apply in the NT.

18 See Katharine Gelber and Luke McNamara, 'Evidencing the harms of hate speech', (2016) 22(3) *Social Identities*, 324-341.

higher suicide risk in young people.[19] Racist speech also silences its victims and impacts upon their ability to enjoy basic freedoms.[20]

Writing in the American context, Mari Matsuda observes:

> As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear for all human beings. However irrational racist speech may be, it rights right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance.[21]

The right to live free of racial discrimination and vilification is also a fundamental human right. Australia has committed to take steps to address racial vilification under both International Covenant on Civil and Political Rights (ICCPR, article 20), and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD).

In PIAC's view, the prohibition on vilification should not be limited to race. The harms of hate speech are not limited to racial hatred. In PIAC's view, the prohibition should extend to all protected attributes, particularly those that have historically been a source of discrimination and marginalisation, such as disability, sex, sexual orientation, gender identity, sex characteristics (intersex status), religious belief or activity and lawful sex work.

There is, however, a clear need to ensure that freedom of expression remains appropriately protected. It is an essential part of a healthy democracy and itself a fundamental human right.

PIAC suggests that the 'pubic interest' defence contained in section 55 of the Tasmanian *Anti-Discrimination Act 1998* is an appropriate model:[22]

> The provisions [prohibiting vilification] do not apply if the person's conduct is –
> (a) a fair report of a pubic act; or
> (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
> (c) a public act done in good faith for –

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19 See Niyi Awefeso, 'Racism: A major impediment to optimal Indigenous health and health care in Australia', (2011) 11(3) *Australian Indigenous Health Bulletin* available at https://pdfs.semanticscholar.org/06ef/72366b4af348b35891219b1dd39cf3af7d74.pdf (accessed 25 November 2016); Naomi C Priest, Yin C Paradies, Wendy Gunthorpe, Sheree J Cairney, Sue M Sayers, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth', (2011) 194(10) *Medical Journal of Australia* at 546, available at https://www.mja.com.au/system/files/issues/194_10_160511/pri10947_fm.pdf (accessed 25 November 2016); Ann Larson, Marisa Gillies, Peter J. Howard, Juli Coffin, 'It's enough to make you sick: the impact of racism on the health of Aboriginal Australians', (2007) 31(4) *Australia and New Zealand Journal of Public Health* 322 – 329, available at http://onlinelibrary.wiley.com/doi/10.1111/j.1753-6405.2007.00079.x/full (accessed 25 November 2016).

20 See, for example, Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320 – 2381, 2337.

21 Ibid.

22 A similar approach is adopted in the ACT, which exempts acts done 'reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter': s 67A(C) *Discrimination Act 1991* (ACT).

(i) academic, artistic scientific or research purposes; or
(ii) any purpose in the public interest.

PIAC notes that, despite significant controversy, vilification provisions in Australia have in fact proven to be an effective protection against the harms of hate speech, without limiting fair and robust debate. For example, the racial hatred provisions in Part IIA of the *Racial Discrimination Act 1975* (Cth) have been found *not* to have had a 'chilling effect' on free speech.[23] The law has protected the freedom of expression of comedians,[24] cartoonists,[25] playwrights,[26] politicians[27] and journalists[28] who have acted reasonably and in good faith.

Finally, PIAC submits that, in introducing prohibitions on vilification further consideration should be given to adopting (at least) a dual approach, which allows for individual and representative complaints to the Anti-Discrimination Commission, and criminal offences for serious acts of vilification.

This would mirror the NSW *Anti-Discrimination Act 1977*, which prohibits vilification on the basis of race,[29] homosexuality, transgender and HIV/AIDS status, and includes a separate offence of serious vilification for each of these attributes.[30]

While there have been some criticisms of this approach, as well as possible suggestions for improvement (such as removing the role of the Attorney General, and introducing civil penalty provisions in addition to or replacement of the criminal offences),[31] PIAC submits that including either a criminal (or civil penalty) provision for serious vilification recognises the seriousness of these acts and the social damage they inflict, and the need for appropriate sanctions of such behaviour.

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23 Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia, (2015) 49(3) *Law & Society Review* 631.

24 *Kelly-Country v Beers* (2004) 207 ALR 421.

25 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

26 *Bryl v Nowra* [1999] HREOCA 11.

27 *Walsh v Hanson* [2000] HREOCA 8.

28 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

29 Section 20C(1): It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person of group of persons on the ground of the race of the person or members of the group.

30 For example, section 20D(1):
A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of person on the ground of the race of the person or members of the group by means which include:
(a) threatening physical harm towards, or towards any property of, the person or group of persons, or
(b) inciting others to threaten physical harm towards, or towards any property of, the person or groups of persons.
Maximum penalty:
In the case of an individual – 50 penalty units or imprisonment for 6 months, or both.
In the case of a corporation – 100 penalty units.

31 NSW Parliament Standing Committee on Law and Justice, *Racial Vilification Law in NSW*, 3 December 2013, available at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5807/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf accessed on 30 January 2018.

Question 5. Should the Act create rights for people experiencing domestic violence in relation to public areas of life such as employment, education and accommodation?

Yes. PIAC supports achieving this end by including 'subjection to domestic or family violence' as a protected attribute under s 19 (or equivalent section if renumbered). This language is consistent with that used in the ACT: see *Discrimination Act 1991* (ACT) s 7(1)(x).

PIAC assists a number of individuals who have experienced family and domestic violence through our Homeless Persons' Legal Service (HPLS). The experiences of women seeking to access housing after leaving domestic violence are explored in our 2017 study 'Home in a Storm'.[32] In considering the experiences of 23 women, we found that difficulties with service providers, landlords and real estate agents compounded the distress they experienced and posed real barriers to exiting homelessness and overcoming the effects of domestic violence. In our experience providing legal services, those subject to domestic violence may also experience direct discrimination in several areas, including housing, employment, and in accessing transport services such as taxis and public transport.

> **Case study: T**
> T is a 22 year old Aboriginal woman who left the family home due to family violence. She is couch-surfing with friends and extended family while working and studying part time. On one occasion her brother had attended her workplace and threatened to cause damage if she didn't come home. Her employer expressed concern about the 'drama with her family' and subsequently reduced her shifts.

The Northern Territory has the highest rate of domestic violence in Australia,[33] and there is an urgent need to address this issue. It is well recognised that family and domestic violence is a violation of human rights, with serious repercussions for victims and communities. These issues may be compounded by discrimination,[34] and PIAC therefore recommends that the NT adopt 'subjection to domestic or family violence' as a protected attribute.

Question 6. Should the Act protect people against discrimination on the basis of their accommodation status?
Yes. PIAC supports including 'accommodation status' as a protected attribute under the Act.

There are currently no specific provisions in Australian law that provide direct protections for homeless people. Unless an individual can show discrimination has occurred on the basis of a protected attribute such as disability, discrimination on the basis of housing status is currently lawful in Australia. Unfortunately, such discrimination is widespread.

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32 PIAC, *Home in a storm*, 2017, available at https://www.piac.asn.au/2017/03/06/home-in-a-storm-the-legal-and-housing-needs-of-women-facing-homelessness/ accessed on 29 January 2018.

33 In the year ending 30 November 2017, the rate of domestic violence offences in the NT was 1688.3 per 100,000 population: Northern Territory Police, *Northern Territory Crime Statistics*, 2018, available at http://www.pfes.nt.gov.au/Police/Community-safety/Northern-Territory-crime-statistics.aspx accessed on 29 January 2018.

34 See, for example, the Australian Human Rights Commission in a submission relating to the Consolidation of Commonwealth Discrimination laws, available at http://www.humanrights.gov.au/consolidation-commonwealth-discrimination-law-domestic-and-family-violence#Heading107 accessed on 29 January 2018.

PIAC has experience assisting people experiencing homelessness status through the Homeless Persons' Legal Service (HPLS). This service provides free legal advice and representation to over 700 people each year. In our experience, individuals often experience discrimination on the basis of their accommodation status when attempting to access housing and a range of public and private services.

> **Case study: K**
> K is a 63 year old man who spent a number of years sleeping rough. On one occasion he needed to catch a taxi to an appointment. Although he had a voucher to pay for the taxi trip, he was carrying a swag and was in an area known for rough sleeping. He was unable to flag down a taxi and was eventually able to find transport at a taxi rank. On his way to the appointment he discussed this with the driver, who said 'most taxis don't want to pick up someone who looks homeless because they might cause a mess or refuse to pay'.

These issues are likely to be particularly acute in the Northern Territory, which has the highest rate of homelessness in Australia. According to the most recent available census data, in 2011 the rate of homelessness in the NT was 730.7 per 10,000 population, compared with a rate of 50 per 10,000 in the jurisdiction with the next highest rate (the ACT).[35] Given the extent of this issue, PIAC believes that it would be appropriate to adopt 'accommodation status' as a protected attribute under NT law.

Question 7. Should 'lawful sex work' be included as an attribute under the Act?

Yes. PIAC supports including 'lawful sexual activity' as a protected attribute under the Act. This approach has been taken in Victoria,[36] Queensland[37] and Tasmania.[38]

In the Northern Territory, the inclusion of 'lawful sexual activity' would extend protection to those engaged in lawful sex work, including independent sex workers and those employed at licenced escort agencies. As the Scarlet Alliance notes, discrimination against sex workers 'comes from private, public and government spheres'.[39] It is appropriate that sex work, and other legal forms of sexual behaviour, be protected under the law.

Question 8. Should 'socioeconomic status' be included as a protected attribute?

PIAC does not express a view for or against this amendment.

We note that, as the Discussion Paper states (on page 15):

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35 Australia Bureau of Statistics, *Census of Population and Housing: Estimating homelessness*, 2011, Summary of Findings, available at http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/2049.0Main%20Features22011 accessed on 29 January 2018.

36 *Equal Opportunity Act 2010* (Vic) s 6(g). We note that the Victorian law includes an exception for accommodation intended to be used for (commercially-based) lawful sexual activity: s 61.

37 *Anti-Discrimination Act 1991* (Qld) s 7(l).

38 *Anti-Discrimination Act 1998* (Tas) s 16(d).

39 Stardust, Zahra, *Protecting sex worker human rights in Australia*, International Bar Association Human Rights Law Working Group Newsletter, page 31, September 2014, available at http://www.scarletalliance.org.au/library/stardust_2014 accessed on 29 January 2018.

> Society could benefit from an increased focus on the foundation of socioeconomic inequities. Introducing socioeconomic status as a protected attribute could reduce the barriers for people resulting from their socioeconomic status.

However, PIAC also notes there may be definitional and other drafting challenges to be resolved in order to ensure such a protected attribute operates effectively.

Question 9. Should the Act be broadened to include specifically trained assistance animals such as therapeutic and psychiatric seizure alert animals?

Yes. PIAC supports broadening s 21 to include appropriately trained assistance animals, and that this include animals certified under the laws of all states and territories.

A person with disability who obtains assistance from an appropriately trained animal should be afforded the same protection as a person with a guide dog.

The definition of 'assistance animal' should be consistent with the definition set out in section 9 of the *Disability Discrimination Act 1992* (Cth).[40]

2.2 New Reforms

Question 10. Should a representative complaint model process be introduced into the Act? Should there be any variations to the process of the complaint model as described above?

Yes. A representative complaint process should be introduced into the Act to allow complaints to be brought on behalf of a group of people against the same person or organisation where those complaints arise from same or similar circumstances. Such a process would allow greater opportunity for complaints to be made on behalf of vulnerable groups, including where individuals may be unable to do so themselves for a variety of reasons, and to address systemic issues affecting those groups.

PIAC generally supports the complaint model process set out in the Discussion Paper. However, a representative complaint should not be limited to representative bodies. Organisations and individuals should both be permitted to lodge a representative complaint. PIAC commends the conditions and additional rules for lodging a representative complaint set out in ss 46PB and 46PC of the *Australian Human Rights Commission Act 1986* (Cth) as a useful starting point.

PIAC is also generally supportive of a model which allows the ADC to investigate the complaint if conciliation is unsuccessful. Ideally, this should be one of two options available, the other being the referral of the complaint to the Northern Territory Civil and Administrative Tribunal.

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[40] For the purposes of this Act, an assistance animal is a dog or other animal:
(a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons with a disability to alleviate the effect of the disability; or
(b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
(c) trained:
(i) to assist a person with a disability to alleviate the effect of the disability; and
(ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Where the ADC does investigate a representative complaint, sufficient resources should be allocated to ensure the proper investigation of the complaint including, at a minimum, travel and interpreter costs. Report writers should also have appropriate expertise and training in anti-discrimination law, investigations, cultural awareness and report writing. Reports should be prepared carefully. Consideration should also be given to whether such a report would be admissible in future legal proceedings and to any resulting prejudice to a party arising from an investigation and/or report of a poor standard.

Question 11. Should the requirement for clubs to hold a liquor licence be removed?

Yes. PIAC agrees that there is no logical reason that clubs that do not hold a liquor licence should be outside the Act, permitting them to discriminate freely. This is a change that is consistent with community expectations about protection against discrimination in public life and would enhance the operation of the Act.

Question 12. Should the restriction of areas of activity on sexual harassment be removed?

Yes. PIAC supports a broad prohibition against sexual harassment in public life. This would set a clear community standard and provide increased protection against conduct that significantly interferes with the enjoyment of human rights, especially by women and girls.

Such an approach would be consistent with best practice model already operating in Queensland and reflect the approach that was proposed in the Commonwealth Human Rights and Anti-Discrimination Bill 2012 exposure draft legislation.

PIAC notes that the broad prohibition in Queensland has been in operation since 1992. Complaints of harassment brought under that provision have primarily related to employment, but cases have also involved other contexts, including education, correctional services, health service and naval reserve cadets. We are not aware of any evidence of problems arising from the broad scope of the provision.

Question 13. Should the definition of 'service' be amended to extend coverage to include the workers?

Yes. The definition of 'service' should be extended to ensure that workers are protected from discrimination and harassment by customers.

PIAC also supports amendments to the Act to ensure that the conduct of police *and other people undertaking government functions*, such as prison guards,[41] youth justice workers, child protection workers and council officers is explicitly covered.

[41] See *Rainsford v Victoria* for a case in which the definition of services in the context of the treatment of a prisoner was the subject of differing judicial views: *Rainsford v Victoria (No 2)* (2004) 184 FLR 110, [20]-[26], *Rainsford v Victoria* (2005) 144 FCR 279, 296 [54]-[55] (Kenny J), *Rainsford v Victoria* [2008] FCAFC 31, [9].

As Rees, Rice and Allen note, 'government functions cannot always be clearly or reliably described as the provision of a service, and maybe be outside the coverage of anti-discrimination laws unless there is express provision'.[42]

The community is right to expect that police and other government workers will serve the community without discrimination or harassment as well as being protected from discrimination and harassment in the course of their duties.

Examples of provisions that prohibit discrimination in the 'administration of laws and programs' can be found in anti-discrimination legislation in Queensland,[43] Tasmania,[44] and in NSW in the case of sexual harassment,[45] as well as under Commonwealth legislation which applies to the performance of any function, the exercise of any power and the fulfilment of any responsibility.[46]

2.3 Removing Content that Enshrines Discrimination

Question 14. Should any exemptions for religious or cultural bodies be removed?

PIAC submits that several of the 'religious exceptions' in the Northern Territory *Anti-Discrimination Act* should be repealed and/or limited to ensure that they more appropriately balance the right to freedom of religion with the right to freedom from discrimination.

PIAC acknowledges that the area of religious exemptions is a contested aspect of anti-discrimination laws in Australia, especially in terms of exceptions allowing discrimination on the basis of other attributes, such as sex, sexual orientation and gender identity.

This is because of the need to accommodate different rights and freedoms. The right to freedom of religion is an important, but not absolute, right. Article 18(3) of the International Covenant on Civil and Political Rights (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.

One such fundamental right is the right to freedom from discrimination, as set out in Article 26 of the ICCPR:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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42 Rees, Rice and Allen *Australian Anti-Discrimination Law*, 2nd ed (2014), 510 [7.4.6.1].
43 *Anti-Discrimination Act 1991* (Qld) s 101.
44 *Anti-Discrimination Act 1998* (Tas) s 22(f).
45 *Anti-Discrimination Act 1977* (NSW) s 22J.
46 *Sex Discrimination Act 1984* (Cth) s 26; *Disability Discrimination Act 1992* (Cth) s 29; *Age Discrimination Act 2004* (Cth) s 31.

Over the past four decades, since the passage of the Commonwealth *Racial Discrimination Act 1975*, the principle of non-discrimination has been progressively implemented across all Australian jurisdictions. It now forms a fundamental pillar in protecting the human rights of all Australians. Exemptions that allow discrimination should be closely scrutinised and reviewed to ensure that historical concessions remain appropriate and represent a proper balancing of rights.

An important part of the context is the significant role played by public funding of a range of bodies and services, including religious schools and organisations that provide health, education and other community services.

In PIAC's view, where funding is provided by government for an activity, any exception that would allow discrimination against people seeking to access those services must be particularly closely examined. Such an approach is already reflected in the 'carve out' for people accessing Commonwealth-funded aged care services operated by religious organisations, found in sub-section 37(2) of the *Sex Discrimination Act 1984*).[47]

Section 30(2)

As noted in the Discussion Paper, section 30(2) permits discrimination in religious schools and colleges: 'An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion'.

Given the substantial role of public funding in this area, there is a strong argument to remove the ability of religious educational bodies that receive public funding to discriminate in the admission of students on any grounds, including religious belief – consistent with the position for aged care under *Sex Discrimination Act*, described above.

If, however, an exception is to be retained, PIAC submits it should be more carefully confined in a similar way to sub-section 51A(3) of the Tasmanian *Anti-Discrimination Act 1998*, which clarifies that this exception cannot be used to discriminate on the basis of any other protected attributes (including sexual orientation, gender identity and sex characteristics).[48]

Section 37A

This section currently allows discrimination against employees or potential employees of religious schools and colleges on the basis of both religious belief or activity or sexuality.

In PIAC's view, any such exception should be limited to positions that are directly involved in religious instruction or observance within a religious school, or where it is a genuine occupational requirement. It is unclear why the employment of, for example, a groundskeeper who is not of a particular religion would interfere with the religious purposes of a school or the enjoyment of religious freedom.

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47 Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
(a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
(b) the act or practice is not connected with the employment of persons to provide that aged care.

48 Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection (namely religious belief or affiliation or activity).

The exception could be based on sub-section 51(1) of the Tasmanian *Anti-Discrimination Act 1991*:

> A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

The current exception allowing discrimination against teachers and other staff on the basis of their sexual orientation, gender identity or sex characteristics should be repealed.

PIAC also submits that any exception in relation to employment should be limited consistently with the recommendation above in relation to section 30(2). In other words, this exception cannot be used to discriminate on the basis of any other protected attributes (including sexual orientation, gender identity and sex characteristics).

Section 40(2A) and 40(3)

If religious educational authorities are to be permitted to discriminate on the basis of religious belief in the provision of accommodation as outlined in existing section 40(2A) of the *Anti-Discrimination* Act, the exception should be narrowed consistently with the recommendation above in relation to section 30(2). In other words, this exception cannot be used to discriminate on the basis of any other protected attributes (including sexual orientation, gender identity and sex characteristics).

In PIAC's view, the much more broadly-framed exception in section 40(3) of the current Act should be repealed. PIAC does not accept that freedom of religion requires or justifies an accommodation provider refusing access to accommodation to people not of that religion.

If such a provision is to be retained it should be narrowed to only allow discrimination on the basis of religious belief or activity (and explicitly exclude discrimination on the basis of other attributes, including sexual orientation, gender identity and sex characteristics).

Section 43

PIAC recognises that limiting access to sites of cultural or religious significance (under s 43) may have a role to play in protecting the right to freedom of religion.

This may be particularly important for Indigenous groups in limiting access to sacred sites. However, the Discussion Paper notes that 'protection of Aboriginal sacred sites is available through existing provisions in the *Northern Territory Aboriginal Sacred Sites Act*'. If that is the case, PIAC submits that the scope of this exception should be narrowed so that religious organisations can limit access to sites of religious significance (such as places of religious observance, including churches, mosques etc) on the basis of religious belief or activity, but not on the basis of other protected attributes (such as sex, age and race).

Section 51

Section 51 contains the general 'religious exception' in the Northern Territory *Anti-Discrimination Act*, comparable to similar exceptions in other states and territories.

While PIAC recognises that an exemption closely connected with religious ceremonies or observances may be necessary to provide for the right to freedom of religion, the exception should be clarified in at least two ways, by:

i) specifying that religious observances or practices means religious ceremonies and related practices, rather than broader-based rules or doctrines, and

ii) providing that, for the purposes of this section, a body established for religious purposes does not include a religious educational body because those bodies already attract exceptions elsewhere.

Question 15. Should the exclusion of assisted reproductive treatment from services be removed?

Yes. PIAC supports the removal of this exclusion. PIAC can see no legitimate public policy justification for allowing assisted reproductive services to discriminate on the basis of sex, sexual orientation, gender identity or marital or relationship status.

As noted by the Australian Institute of Family Studies:[49]

> Most studies to date indicate that children raised in same-sex parented families do as well emotionally, socially and educationally as their peers in comparable kinds of heterosexual families… These include benefits in the quality of parenting children receive when raised from birth by lesbian couples, greater gender flexibility, particularly for sons, and their greater acceptance of family diversity.

Removing discrimination in this area will also help bring the Northern Territory into line with other jurisdictions, including South Australia (with the Discussion Paper noting that the organisation providing ART services in the Northern Territory is based there) as well as under the Commonwealth *Sex Discrimination Act 1984*.

[49] Australian Institute of Family Studies, *Factsheet: Same-sex parented families in Australia*, 2015, available at: https://aifs.gov.au/cfca/publications/same-sex-parented-families-australia/export accessed on 30 January 2018.

2.4 Clarifying and Miscellaneous Reforms

Question 16. What are your views on expanding the definition of 'work'?

PIAC supports expanding the definition of 'work' to explicitly include volunteers, people sharing workplaces and engaged in activities akin to a work arrangement. A broader definition is particularly important given frequent changes to work arrangements and the need to ensure that volunteers are entitled to the full protection of their rights.

Question 17. Should section 24 be amended to clarify that it imposes a positive obligation?

PIAC supports amending s 24 of the Act to clarify and simplify the obligation to accommodate a special need. This could be done by incorporating a failure to make reasonable adjustments into the definition of discrimination in s 20, for example as follows:

> (1) For the purposes of this Act, discrimination includes:
> …
> (c) failing or refusing to make reasonable adjustments to accommodate a special need that another person has because of an attribute.
> …
> (1A) For the purposes of subsection (1)(c):
> (a) A failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need.
> (b) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:
> (i) the nature of the special need;
> (ii) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
> (iii) the financial circumstances of the person;
> (iv) the disruption that accommodating the special need may cause; and
> (v) the nature of any benefit or detriment to all persons concerned.

Question 18. Is the name 'Equal Opportunity Commissioner' preferred to the name 'Anti-Discrimination Commissioner'? Would the benefits of a new name outweigh the financial cost that comes with re-naming an office?

PIAC does not express a view on the naming of the Commissioner.

Question 19. Is increasing the term of appointment of the ACD to five years appropriate? Should the term of appointment be for another period, if so what?

PIAC supports increasing the term of appointment to five years to provide greater certainty to the office-holder and allow for long-term planning as well as enhancing the independence of the position.

2.5 Modernising Language

Question 20. Should definitions of 'man' and 'woman' be repealed?

Yes. PIAC agrees with the rationale for repealing these definitions from the Commonwealth *Sex Discrimination Act 1984*, which the Discussion Paper describes (on page 27) as including 'ensure that 'man' and 'woman' were not interpreted so narrowly so as to exclude, for example, transgender women from accessing protections from discrimination on the basis of other attributes contained in the Act'.

Repealing these definitions would also ensure greater consistency between Commonwealth anti-discrimination laws and the Northern Territory *Anti-Discrimination Act*.

However, PIAC suggests that, if these definitions are repealed, the operation of the Act be reviewed by the Anti-Discrimination Commission after three or five years to ensure that this objective is realised in practice.

Question 21. Should the term 'parenthood' be replaced with 'carer responsibilities'?

Yes, PIAC supports this change.

Question 22. Should the term 'marital status' be replaced with 'relationship status'?

Yes. PIAC supports this change, and the inclusive nature of 'relationship status'.

The definition of this attribute could also be updated, based on the definition of 'marital or relationship status' adopted by the Commonwealth *Sex Discrimination Act*:

> Marital or relationship status means a person's status or being any of the following:
> (a) single;
> (b) married;
> (c) married, but living separately and apart from their[50] spouse;
> (d) divorced;
> (e) the de facto partner of another person;
> (f) the de facto partner of another person, but living separately and apart from that other person;
> (g) the former de facto partner of another person;
> (h) the surviving spouse or de facto partner of a person who has died.

[50] ''his or her' has been replaced by 'their' to reflect subsequent changes to the *Marriage Act*.