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ADVOCACY CENTRE

# Submission to AHRC Free & Equal Anti-Discrimination Law Reform Discussion Paper

**8 November 2019**

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## About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

# Recommendations

***Recommendation 1: Legislative amendment to the Disability Discrimination Act***
*The DDA should be amended to specify that it is unlawful to not make, or propose to not make, reasonable adjustments for a person who, because of their disability, requires adjustments.*

***Recommendation 2: Implementation of a reporting framework to monitor compliance with the s46 of Disability Discrimination Act and related AHRC Guidelines***
*Insurance companies should be required to report annually to the AHRC and publicly the number of times they have declined to provide insurance or offered insurance on different terms on the ground of disability*

***Recommendation 3: Investigation of potential breaches of s46 of the Disability Discrimination Act***
*The AHRC Act should be amended to empower the AHRC to investigate potential systemic breaches of the DDA, including the ability to audit an insurer's actuarial and statistical data where it seeks to reply on section 46 of the DDA. The power to obtain documents currently provided at section 21 of the AHRC Act should be extended to also apply to a power to commence investigations concerning systemic breaches of the DDA.*

***Recommendation 4: Introducing a reporting and monitoring framework for the Transport Standards***
*Structural reforms should be implemented to strengthen the reporting and monitoring framework for the Transport Standards and improve industry compliance.*

***Recommendation 5: Sex Characteristics as a Protected Attribute***
*The protected attribute of intersex status in the Sex Discrimination Act 1984 should be replaced with 'sex characteristics' based on the definition in the Yogyakarta Principles plus 10.*

***Recommendation 6: Inclusion of gender identity, sex characteristics and marital or relationships status in the Fair Work Act***
*Gender identity and sex characteristics should be included as protected attributes for the purposes of adverse action and unlawful termination provisions of the Fair Work Act 2009 (Cth). Marital status should also be updated to 'marital or relationship status' based on the SDA.*

***Recommendation 7: Repeal section 13 of the Sex Discrimination Act***
*Section 13 of the Sex Discrimination Act 1984 (Cth), which means that prohibitions on discrimination do not apply to employees of state instrumentalities, should be repealed.*

***Recommendation 8: State and Territory anti-discrimination laws to ensure coverage of BTI members of the community***
*All state and territory governments should ensure that bisexual, transgender, gender diverse and intersex people are fully protected under their respective anti-discrimination laws.*

***Recommendation 9: Repeal general religious exceptions in the Sex Discrimination Act***
*Section 38, and subsection 37(1)(d), of the Sex Discrimination Act 1984 should be repealed as they permit unjustifiable discrimination against others, including LGBT students and teachers in religious schools.*

***Recommendation 10: Religious exceptions and protection of religious belief***
*When religious belief is protected in Commonwealth anti-discrimination law, it should allow religious schools to discriminate on the basis of religious belief against employees (where it is an*

*inherent requirement of the role), and against students at the time of enrolment. This exception should not allow discrimination against students post-enrolment, and should not permit discrimination against anyone on the basis of other attributes, including sexual orientation and gender identity.*

***Recommendation 11: State and Territory religious exceptions***
*States and territories should adopt the approach of the Anti-Discrimination Act 1998 (Tas) to the issue of religious exceptions.*

***Recommendation 12: Consistency in protected attributes across anti-discrimination legislation***
*The categories of protected attributes in discrimination legislation should be harmonised to protect the grounds that exist under the AHRC Act, ILO and the Fair Work Act (which include political opinion, industrial activity, irrelevant criminal record, medical record, national extraction or social origin and family or carer's responsibilities).*

***Recommendation 13: Expand protected attributes in anti-discrimination legislation***
*Federal anti-discrimination laws should also be amended to include social/housing status, and victims or survivors of family or domestic violence as protected attributes.*

***Recommendation 14: Include religious belief as a protected attribute***
*Religious belief should be included as a protected attribute in Commonwealth anti-discrimination legislation, and in the Anti-Discrimination Act 1977 (NSW). However, these protections should not include provisions which undermine the right of others to be protected against discrimination, including women, LGBTI people, single parents, people in de facto relationships, divorced people and people with disability.*

***Recommendation 15: Expand vilification protections***
*Commonwealth vilification protections, which already cover race, should be expanded to cover sex, disability, sexual orientation, gender identity and sex characteristics (intersex status), with consideration given to covering religious belief.*

***Recommendation 16: Organisations to have standing to bring complaints***
*The rules for standing should be extended to organisations so that they can bring complaints on behalf of individuals and in their own right to the AHRC and the Federal courts.*

***Recommendation 17: Creation of a no-costs jurisdiction***
*The Federal Court and Federal Circuit Court should be a no-costs jurisdiction for discrimination complaints.*

***Recommendation 18: Restore 12-month time frame for lodging complaints***
*The previous 12-month time frame for lodging complaints to the AHRC should be restored.*

# Priorities for Anti-Discrimination Law Reform

PIAC welcomes the opportunity to provide feedback in response to the Australian Human Rights Commission's (AHRC) *Free & Equal Discussion Paper: Priorities for federal discrimination law reform*.

This submission builds on our previous submission in response to the broader *Free & Equal Issues Paper*, including its recommendation for consolidation of Commonwealth anti-discrimination laws.[1] It focuses on two main areas where we have particular expertise:

- Disability discrimination issues, and
- LGBTI discrimination issues.

We have played an ongoing role in disability discrimination law reform issues, including in collaboration with organisations such as People with Disability Australia.[2] We have also been actively involved in recent legal advocacy on LGBTI discrimination issues, including in relation to proposed amendments to the *Sex Discrimination Act 1984* (Cth) (SDA) to protect LGBT students and teachers in religious schools against discrimination.[3]

This submission also highlights recommendations about anti-discrimination law reform priorities across different protected attributes based on our general discrimination practice, as well as addressing some of the other high-level issues raised in the discussion paper.

Finally, we would welcome the opportunity to be involved in further consultations about anti-discrimination issues in the lead-up to the Commission finalising its Free & Equal project.

## 1. Disability Discrimination Law Reform Priorities

### 1.1 Legislative reform to clarify 'reasonable adjustments' under the *Disability Discrimination Act 1992* (Cth)

*Question 2 asks:*

*What are the key factors relevant to the need for federal discrimination law reform?*

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1 Previous submissions on the topic of anti-discrimination legislation consolidation include: *Embracing Equality: Submission to the NSW Attorney General on the Consolidation of Commonwealth anti-discrimination laws* (14 March 2012); *Aligning the pieces: consolidating a framework for equality and human rights: Submission to the Senate Legal and Constitutional Affair Committee on the exposure draft Human Rights and Anti-Discrimination Bill 2012* (21 December 2012).

2 Submissions in relation to disability issues include: *Get on Board! Submission to the 2012 Review of the Disability Standards for Accessible Public Transport* (31 May 2013); *Submission to the Senate Standing Committee on Economics: Inquiry into the Scrutiny of Financial Advice* (22 April 2016); *Mental Health and Insurance: Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (26 April 2018).

3 Submissions in relation to LGBT anti-discrimination and religious exceptions include: *Submission to Religious Freedom Review* (14 February 2018); *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into Anti-Discrimination Exceptions for Religious Schools* (26 November 2018); S*ubmission to Senate Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (21 January, 2019); *Religious Freedom Bills' Exposure Draft Submission* (1 October 2019).

PIAC is concerned that recent court decisions have undermined the proper operation of the *Disability Discrimination Act 1992* (DDA), and that there is an urgent need for amendments to address these problems.

In particular, PIAC is concerned the decision of the Full Federal Court in the matter of *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 (*Sklavos*) seriously undermines the effectiveness of the DDA as a means of advancing substantive equality. In PIAC's view, prompt action is required by way of legislative amendment to ensure the DDA operates as it was intended and provides adequate remedies and protection against discrimination.

In *Sklavos*, the Full Federal Court found section 5(2) of the DDA requires an aggrieved person to prove a causal connection between the impugned conduct and their disability.[4] The Court found it is not enough for a person to demonstrate a link between the effect of a respondent's conduct (the failure to make a reasonable adjustment) and their disability. Rather, the person's disability must be a reason for the failure to make a reasonable adjustment, in order for the conduct to be discriminatory.[5]

As a consequence of this decision, it is now more difficult for applicants to establish discrimination claims. For example, a blind person who requires software to assist them to undertake a task at work must show that the *failure to provide* that software is *because they are blind*. PIAC submits that while disability will be the reason a person needs a reasonable adjustment, it is not likely to be the reason for refusing to provide adjustments.

It is also important to recognise the practical hurdle that such an approach places in the way of an aggrieved person. Causation will be nearly impossible to prove unless a respondent makes a clear statement such as 'I refuse to make adjustments for you, because you are blind'. Because a reasonable adjustment will never be provided to people without a disability, it is not possible for an individual to point to the fact that the reasonable adjustment was provided to other (sighted) people that requested it but not to them.

PIAC is concerned that the *Sklavos* decision undermines the intention of the reasonable adjustment provisions in the DDA. The introduction of the reasonable adjustment provisions was intended to provide for a 'stand-alone duty' as a basis for advancing substantive (not merely formal) equality. This was the recommendation of the Productivity Commission in their *Review of the Disability Discrimination Act 1992* to which the 2009 amendments that introduced the reasonable adjustment provisions sought to give effect.[6]

PIAC submits that the most effective way to resolve the problem raised by the decision in *Sklavos* is to amend the DDA to clarify the stand-alone nature of the obligation to provide reasonable adjustments. As such, PIAC proposes that a new section (section 6A, as drafted below) be added to the DDA which would make it unlawful to not provide reasonable adjustments.

[4] *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, 30 – 53.
[5] *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, 43.
[6] Productivity Commission Inquiry Report, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) XL.

*SECTION 6A*

*Discrimination by failing to provide reasonable adjustments*

*For the purpose of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:*

(a) *because of the disability, the aggrieved person requires adjustments; and*

(b) *the discriminator does not make, or proposes not to make, reasonable adjustments for the person.*

*For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the disability of the aggrieved person.*

Should this amendment be introduced into the DDA, some consequential amendments will also be required to section 5 and 6 of the DDA.

***Recommendation 1: Legislative amendment to the Disability Discrimination Act***
*The DDA should be amended to specify that it is unlawful to not make, or propose to not make, reasonable adjustments for a person who, because of their disability, requires adjustments.*

### 1.2 Insurance exemption in the Disability Discrimination Act

*Question 7 asks:*

*Are there particular permanent exemptions that warrant particular scrutiny?*

*Question 8 asks:*

*How can existing compliance measures under federal law be improved?*

*Question 9 asks:*

*What additional compliance measures would assist in providing greater certainty and compliance with federal discrimination law?*

In 2012, PIAC was approached by Mental Health Australia and beyondblue in relation to their concerns about unfair and discriminatory practices in the insurance industry concerning mental health, and in particular, the provision of general insurance (particularly, travel) and life insurance products including income protection and total and permanent disability insurance. Since then, PIAC has provided advice and legal representation to individuals across Australia who believe general or life insurance providers have discriminated against them.

In the conduct of our work, PIAC has identified ongoing systemic problems in the way life insurers design, price and offer policies and assess claims for people with past or current mental health conditions. Life insurers appear to be unreasonably denying cover and applying broad mental health exclusions that are not supported by evidence and do not reflect the risk posed by the applicant to the insurer. For example, PIAC has acted for clients who have been diagnosed with a

mental illness and find themselves subject to a blanket refusal of insurance rather than being able to take up a policy that covers risks that are not related to their mental illness.

In PIAC's experience, many life insurers are also overestimating the risks involved in insuring people who can demonstrate a high level of functioning despite their mental illness. Clients who have been diagnosed with anxiety or depression, or post-natal depression, have had broad exclusion clauses applied for the life of their cover which relate not just to the condition they experienced but also to any other mental health condition or disorder.

Section 46 of the DDA provides an exception for superannuation and insurance providers by permitting them to lawfully discriminate against a person with a disability:

(a) where the discrimination in based on actuarial or statistical data that is reasonable for the insurance provider to rely on; and
(b) the discrimination is reasonable having regard to that data and all 'other relevant factors'.

If there is no statistical or actuarial data available or reasonably obtainable to assess the risk, an insurer may justify its discrimination by relying solely on all 'other relevant factors'.

The AHRC has issued 'Guidelines for providers of insurance and superannuation under the *Disability Discrimination Act 1992* (Cth)'[7] (**AHRC Guidelines**) with respect to:

(a) what type of actuarial or statistical data is reasonable for insurers to rely upon;
(b) what is meant by 'other relevant factors'; and
(c) when it will be 'reasonable' to discriminate.

PIAC considers that this exception should attract increased scrutiny and oversight by the AHRC in order to ensure higher rates of compliance. The current regulatory framework does not require insurers to disclose to the applicant the actuarial or statistical data that they have relied upon, or other relevant factors, to make a decision in response to an application for cover.

The case of *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 (***Ingram***) demonstrates the reluctance of insurers to provide the actual data they have used to make their decision, and which supports their underwriting guidelines.

In *Ingram*, QBE sought to rely on the section 47 of the *Equal Opportunity Act 2010* (Vic) (EOA) in relation to a blanket mental health exclusion placed on a travel insurance policy, where the customer had no pre-existing conditions. Section 47 of the EOA provides:

> *(1) An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if—*
>
> *(a) the discrimination is permitted under—*
>
> *(i) the Sex Discrimination Act 1984 of the Commonwealth; or*
>
> *(ii) the Disability Discrimination Act 1992 of the Commonwealth; or*
>
> *(iii) the Age Discrimination Act 2004 of the Commonwealth; or*
>
> *(b) the discrimination—*

[7] Australian Human Rights Commission, Guidelines for providers of insurance and superannuation under the *Disability Discrimination Act 1992* (Cth) (November 2016) <https://www.humanrights.gov.au/sites/default/files/AHRC_DDA_Guidelines_Insurance_Superannuation2016.pdf>

*(i) is based on actuarial or statistical data on which it is reasonable for the insurer to rely; and*

*(ii) is reasonable having regard to that data and any other relevant factors; or*

*(c) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.*

VCAT found QBE did not make out the exception. Some of the reports QBE relied on post-dated the acts of discrimination and its lay and expert evidence was found to be unreliable. VCAT found that QBE failed to prove:

a. that the statistical data it sought to rely upon existed at the time the policy was drafted or approved; and
b. that the mental health exclusion was reasonably based on actuarial or statistical data.

Following *Ingram*, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has conducted an investigation into mental health discrimination in travel insurance and released the report 'Fair-minded cover: Investigation into mental health discrimination in travel insurance' in June 2019.[8] The report found that insurers were unlawfully discriminating against people with a mental health condition by including blanket mental health exclusions in their travel insurance policies and failing to indemnify people under those policies. During the investigation and before the report was published, the participating insurers removed (or took active steps to remove) blanket mental health exclusions and agreed to address VEOHRC's recommendations. This demonstrates the impact a properly defined investigation can have in addressing systemic discrimination in the insurance industry.

While some aspects of discrimination in the travel insurance industry have now been addressed as a consequence of the decision in *Ingram* and VEOHRC's investigation, the discrimination PIAC has observed in the life insurance industry is ongoing. As claims of unlawful discrimination against travel and life insurers will often settle on a confidential basis, it is difficult to achieve systemic change through litigation. It is therefore critical that the AHRC is provided with an investigation function to allow the AHRC to commence an investigation of its own initiative in relation potential systemic breaches of the DDA, including the ability to audit an insurer's actuarial and statistical data where it seeks to reply on section 46 of the DDA. Section 11(f)(i) of the *Australian Human Rights Commission Act 1986* (**AHRC Act**) currently provides the AHRC with the ability to inquire into any act or practice that may be inconsistent with or contrary to any human right, however this provision does not sufficiently empower the AHRC to conduct investigations into systemic breaches of the DDA, and does not provide the AHRC with the power to compel documents to assist with those inquiries.

The power to obtain documents currently provided at section 21 of the AHRC Act, which applies to Division 3 of the AHRC Act only, should be extended to also apply to a power to commence investigations concerning systemic breaches of the DDA, to ensure the AHRC is sufficiently empowered to compel relevant material to effectively conduct such investigations. The AHRC should also be well resourced to perform that function, given the significant role independent investigations and oversight can have in reducing discrimination.

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8 Victorian Equal Opportunity and Human Rights Commission, Fair-minded cover: Investigation into mental health discrimination in travel insurance (June 2019)

PIAC urges the AHRC and the insurance industry to implement a reporting framework to monitor compliance with section 46 of the DDA and the AHRC Guidelines. Insurance companies should be required to report annually to the AHRC and publicly (e.g. in an annual report) the number of times they have declined to provide insurance or offered insurance on different terms on the ground of disability. Furthermore, the AHRC or another statutory agency should be empowered to investigate breaches of the DDA, including the power to audit an insurer's actuarial and statistical data where it seeks to rely on s 46 of the DDA.

***Recommendation 2: Implementation of a reporting framework to monitor compliance with the s46 of Disability Discrimination Act and related AHRC Guidelines***
*Insurance companies should be required to report annually to the AHRC and publicly the number of times they have declined to provide insurance or offered insurance on different terms on the ground of disability*

***Recommendation 3: Investigation of potential breaches of s46 of the Disability Discrimination Act***
*The AHRC Act should be amended to empower the AHRC to investigate potential systemic breaches of the DDA, including the ability to audit an insurer's actuarial and statistical data where it seeks to reply on section 46 of the DDA. The power to obtain documents currently provided at section 21 of the AHRC Act should be extended to also apply to a power to commence investigations concerning systemic breaches of the DDA.*

### 1.3 Transport Standards

PIAC has a long history of advocating for improvements to access to public transport for people with disability and lodged a submission to the Third Review of the Disability Standards for Accessible Public Transport 2002 (Transport Standards) in December 2018.

The Transport Standards are formulated to provide guidance to public transport operators and providers as to the minimum accessibility requirements that apply to public transport services in order to enable 'operators and providers to remove discrimination from public transport services.'[9] However, shortcomings in the drafting of the Transport Standards, including the lack of enforcement mechanisms for breaches of the Transport Standards, have led to low levels of industry compliance.

Despite the Transport Standards setting compliance targets, there has been inadequate monitoring of public transport operators and providers to ensure that they are meeting their obligations. Since the introduction of the Transport Standards in 2002, legal action by individuals has been the only mechanism to enforce compliance. For this reason, PIAC recommends that the Federal Government resources an independent monitoring body to oversee the implementation and enforcement of the Transport Standards.

In the discussion paper, the AHRC suggests that there is a need for industry support to promote compliance with disability standards. PIAC agrees. However, we consider more structural reforms need to be implemented in order to strengthen the reporting and monitoring framework for the Transport Standards and improve industry compliance. As articulated in our submissions to previous reviews of the Disability Standards[10], these structural reforms should include:

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9 *Disability Standards for Accessible Public Transport 2002*, 1.2(2)

10 Public Interest Advocacy Centre, *Get on Board! Submission to the 2012 Review of the Disability Standards for Accessible Public Transport* (31 May 2013); Public Interest Advocacy Centre, *Third Review of the Disability Standards for Accessible Public Transport 2002* (12 December 2018).

1. a national reporting framework to require public transport operators and providers to make data publicly available to demonstrate the extent to which they are complying with the Transport Standards;
2. funding an external body, such as the AHRC, to provide independent oversight and monitoring of the information provided by transport operators and providers;
3. amending the Transport Standards to expressly confirm that a breach of the Transport Standards is unlawful and introducing a stand-alone complaint process for individuals and organisations to allege breaches of the Transport Standards in the AHRC and federal courts, without requiring complaints to constitute unlawful disability discrimination under the DDA;
4. extending the rules of standing to allow organisations to bring a complaint in relation to the Transport Standards on behalf of a person and in their own right to the AHRC and the federal courts.

***Recommendation 4: Introducing a reporting and monitoring framework for the Transport Standards***
*Structural reforms should be implemented to strengthen the reporting and monitoring framework for the Transport Standards and improve industry compliance.*

# 2. LGBTI Discrimination Law Reform Priorities

## 2.1 Sex Characteristics as a Protected Attribute

*Question 4 asks:*

*What, if any, changes to existing protected attributes are required?*

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* was historic, not just because it protected lesbian, gay, bisexual and transgender people in federal anti-discrimination law for the first time, but also because Australia was the first country to introduce stand-alone, nation-wide discrimination protections for intersex people.

Specifically, it included the protected attribute of 'intersex status' defined in section 4 of the SDA as:

> 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.

However, in the six years since passage of those reforms, intersex advocates have raised concerns about how effective this definition is in ensuring coverage for intersex people. As explained by Intersex Human Rights Australia:[11]

> Firstly, it is based on a model of deficit: it makes statements about what intersex people lack in relation to typical females and males. Secondly, it has been imputed to mean something about the identity of intersex people, even though the legal attribute refers to physical features. Thirdly, the definition

[11] Intersex Human Rights Australia, *Discrimination* (4 January 2019): https://ihra.org.au/discrimination/ , accessed 4 November 2019.

> needed to be imprecise to protect people who are perceived to have an intersex variation; for this reason, it is not limited to people born with particular characteristics.

For these reasons, in March 2017 intersex advocates from across Australia and Aotearoa/New Zealand called for protection against discrimination to be based on 'sex characteristics' rather than intersex status:[12]

> Article 9: We call for effective legislative protection from discrimination and harmful practices on grounds of sex characteristics.

Another development in 2017 – the release of the *Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles*[13] – included a new definition of sex characteristics for international human rights law:

> Understanding 'sex characteristics' as 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.

PIAC supports calls by organisations such as Intersex Human Rights Australia for the protected attribute of intersex status to be replaced by sex characteristics in the *Sex Discrimination Act 1984* (Cth).

***Recommendation 5: Sex Characteristics as a Protected Attribute***
*The protected attribute of intersex status in the Sex Discrimination Act 1984 should be replaced with 'sex characteristics' based on the definition in the Yogyakarta Principles plus 10.*

### 2.2 Employment Protections

The *Sex Discrimination Act 1984* includes some employment protections for lesbian, gay, bisexual, transgender and intersex Australians.

However, the primary workplace protections against adverse action, and unlawful termination, are found in the *Fair Work Act 2009* (Cth). Unfortunately, that legislation only covers sexual orientation, while excluding both gender identity and intersex status/sex characteristics. For example, sub-section 351(1) provides that:

> An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Subsection 772(1)(f) further provides that:

> An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons … race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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12 Darlington Statement, https://darlington.org.au/statement/ , accessed 4 November 2019.

13 As adopted on 10 November 2017, Geneva, https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf , accessed on 4 November 2019.

The net effect of these provisions means that, unlike most other employees subject to discriminatory treatment, trans, gender diverse and intersex people cannot make a complaint to the Fair Work Ombudsman, and cannot take advantage of a choice of jurisdiction to hear employment-related discrimination complaints (for reasons such as limits on damages, or risks of costs).

There is an additional complication arising from the SDA itself. As highlighted in the Free & Equal discussion paper (p 12), section 13 of the SDA limits the operation of employment protections so that they do not protect employees of state government instrumentalities:

> **Extent to which Act applies to State instrumentalities**
> (1) Section 14 does not apply in relation to employment by an instrumentality of a State.
> (2) Section 28B does not apply in relation to an act done by an employee of a State or of an instrumentality of a State.

Such an exception does not apply in the other three Commonwealth anti-discrimination laws (covering Race, Disability and Age). In practice, how much of a problem this creates depends on the coverage provided under state anti-discrimination laws.

Given only Tasmania, the ACT and South Australia include coverage for intersex people, intersex employees of state government instrumentalities elsewhere are unprotected from discrimination: under the *Fair Work Act*, *Sex Discrimination Act* or state equivalent.

There are also issues with definitions of gender identity in different jurisdictions, with some states excluding non-binary and gender diverse people from protection, meaning those employees may also be without protection. And in NSW, given only homosexuality is protected under the *Anti-Discrimination Act 1977*, bisexual employees of state government instrumentalities would only be protected against unlawful termination, but not against adverse action within the workplace.[14]

This situation requires urgent reform to ensure both clarity and appropriate protection for intersex and gender diverse people. This must include at least the following three changes:

- Include gender identity and sex characteristics in adverse action and unlawful termination provisions of the *Fair Work Act*,
- Remove section 13 of the *Sex Discrimination Act*, and
- State and territory governments should ensure their respective anti-discrimination laws fully protect bisexual, transgender, gender diverse and intersex people against discrimination.

Finally, if the *Fair Work Act* is updated, the protected attribute of marital status should also be updated to 'marital or relationship status' consistent with the SDA.

***Recommendation 6: Inclusion of gender identity, sex characteristics and marital or relationships status in the Fair Work Act***
*Gender identity and sex characteristics should be included as protected attributes for the purposes of adverse action and unlawful termination provisions of the Fair Work Act 2009 (Cth). Marital status should also be updated to 'marital or relationship status' based on the SDA.*

[14] Because subsection 351(2)(a) of the *Fair Work Act 2009* (Cth) provides that: 'subsection (1) does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken', while the unlawful termination provisions in section 772 contain no such limitation.

***Recommendation 7: Repeal section 13 of the Sex Discrimination Act***
*Section 13 of the Sex Discrimination Act 1984 (Cth), which means that prohibitions on discrimination do not apply to employees of state instrumentalities, should be repealed.*

***Recommendation 8: State and Territory anti-discrimination laws to ensure coverage of BTI members of the community***
*All state and territory governments should ensure that bisexual, transgender, gender diverse and intersex people are fully protected under their respective anti-discrimination laws.*

### 2.3 Reforming Religious Exceptions

The broad exceptions that exist for religious organisations, allowing them to discriminate on the basis of sexual orientation and gender identity (alongside other attributes like sex, and marital or relationship status), have received significant attention in recent years.

Attention has particularly focused on religious schools and whether, and if so how, they should be allowed to discriminate against LGBT students, teachers and other staff.

These issues have been considered as part of the Commonwealth Government's Religious Freedom Review, as well as multiple Senate inquiries in late 2018 and early 2019, including examining the Opposition's Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018. They will likely be considered again next year as part of the Australian Law Reform Commission's reference to examine exceptions under Commonwealth, state and territory anti-discrimination law.

However, while the issue has been controversial, PIAC does not believe that the solution needs to be complicated. Indeed, as we have consistently argued, one Australian jurisdiction has already demonstrated a simple, best practice approach which can, and should, be replicated elsewhere: Tasmania.

Under the Tasmanian *Anti-Discrimination Act 1998*, religious organisations are allowed to discriminate in relation to participation in religious observance[15], thus respecting their religious freedom. However, the exceptions in relation to employment, and religious schools, are much more limited than elsewhere.

Subsection 51(1) covers general employment:

> 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 teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

Subsection 51(2) covers employment in religious schools:

> A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

While section 51A applies to enrolment of students in religious schools:

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15 Section 52, *Anti-Discrimination Act 1998* (Tas).

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.
(2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.
(3) Subsection (1) does not permit discrimination on any grounds referred to in section 16[16] other than those specified in that subsection.

The most important features of this approach are as follows:

- While it allows religious organisations to discriminate on the basis of religious belief, it does not allow them to discriminate on the basis of other protected attributes, including sexual orientation and gender identity;
- In terms of employment, discrimination must be justified by the inherent requirements of the position or, in the case of religious schools, must be linked to enabling the school to operate according to its beliefs; and
- In terms of students, discrimination on the basis of religious belief is limited to enrolment only.

PIAC believes this approach achieves a careful balance between the rights and interests at issue. It allows religious organisations to preference employing people who share their faith where it can be justified by reference to the position involved. At the same time, it protects others against discrimination on the basis of irrelevant attributes.

It also respects the rights of religious communities to come together to establish faith schools, allowing for the instruction of their children in their respective faith. But it acknowledges the right of children to education and ultimately determine matters of faith for themselves.

We note that this approach has been working effectively for more than two decades in Tasmania and has been so successful that, at least in respect of religious schools, it was replicated by the Australian Capital Territory in late 2018[17] (coming into effect in April 2019).

This approach should be adopted federally, and in those jurisdictions which currently have more expansive religious exceptions to their anti-discrimination laws.

In terms of the *Sex Discrimination Act 1984* (Cth), this would mean abolishing section 38 (which allows religious schools to discriminate against employees, contractors and students). It would also involve repealing subsection 37(1)(d) (which exempts 'any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion').

At the same time, it means that if and when 'religious belief' is introduced as a protected attribute in federal anti-discrimination law, it should include an exception allowing religious schools to discriminate in terms of employment where it is an inherent requirement of the role, and only in relation to religious belief and not other protected attributes. Religious schools should also be allowed to discriminate in terms of the enrolment of students, but again only on the basis of religious belief, not other attributes, and not after the point of enrolment.

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16 Which includes sexual orientation (c), gender identity (ea), intersex variations of sex characteristics (eb), marital status (f) and relationship status (fa).

17 *Discrimination Amendment Act 2018* (ACT).

***Recommendation 9: Repeal general religious exceptions in the Sex Discrimination Act***
*Section 38, and subsection 37(1)(d), of the Sex Discrimination Act 1984 should be repealed as they permit unjustifiable discrimination against others, including LGBT students and teachers in religious schools.*

***Recommendation 10: Religious exceptions and protection of religious belief***
*When religious belief is protected in Commonwealth anti-discrimination law, it should allow religious schools to discriminate on the basis of religious belief against employees (where it is an inherent requirement of the role), and against students at the time of enrolment. This exception should not allow discrimination against students post-enrolment, and should not permit discrimination against anyone on the basis of other attributes, including sexual orientation and gender identity.*

***Recommendation 11: State and Territory religious exceptions***
*States and territories should adopt the approach of the Anti-Discrimination Act 1998 (Tas) to the issue of religious exceptions.*

# 3. General Discrimination Law Reform Priorities

### 3.1 Expanding the categories of protected attributes

*Question 4 asks:*

*What, if any, changes to existing protected attributes are required?*

*Question 5 asks:*

*What, if any, new protected attributes should be prioritised?*

In addition to the above recommendation re sex characteristics, PIAC submits that the Commonwealth Government should expand other categories of protected attributes in anti-discrimination legislation to meet emerging social values, community expectations and international standards.

In doing so, the Commonwealth Government should also address the inconsistency between the protected attributes that exist under the four key pieces of Commonwealth discrimination legislation (sex, race, age and disability), the *Fair Work Act 2009* (Cth) and the employment protections under the AHRC Act, by virtue of the International Labour Organization (**ILO**).

The categories of protected attributes in discrimination legislation should be harmonised to protect the grounds that exist under the AHRC Act, ILO and the *Fair Work Act* (which include political opinion, industrial activity, irrelevant criminal record, medical record, national extraction or social origin and family or carer's responsibilities).

PIAC submits that protection should also be extended to social/housing status, status as a victim or survivor of family or domestic violence and religious belief as a priority as these attributes are not adequately covered in federal anti-discrimination laws.

Social/housing status

Social status should be defined to mean a person's status as homeless, unemployed, or a recipient of social security payments. Alternatively, housing status should be defined to include people who are homeless, but also people who are at risk of homelessness, people who were previously homeless, and people who are in public housing.

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.

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'.

Victims or survivors of family or domestic violence

PIAC supports extending discrimination protection to victims or survivors of family or domestic violence. Family and domestic violence can have a major impact on a person's life particularly in the area of employment as has been recently acknowledged in the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* which introduced an entitlement to unpaid family and domestic violence leave as part of the National Employment Standards. 'Subjection to domestic or family violence' has also recently been added to the ACT *Discrimination Act 1991*.[18]

Religious belief

PIAC has consistently supported the inclusion of religious belief as a protected attribute in Commonwealth anti-discrimination law, and in the *Anti-Discrimination Act 1977* (NSW). This includes in-principle support for protecting people of faith, including people of no faith, in the form of a federal Religious Discrimination Bill.

However, the protection of religious belief must not come at the expense of the rights of other groups, including women, LGBTI people, single parents, people in de facto relationships, divorced people, people with disability and others, to live their lives free from discrimination on the basis of who they are.

[18] Subsection 7(1)(x) *Discrimination Act 1991* (ACT).

Unfortunately, the Exposure Draft Religious Discrimination Bill released by Commonwealth Attorney-General Christian Porter seeks to override existing protections against discrimination, as set out in our submission to the Government's consultation.[19]

In our submission, we made a number of recommendations for changes to the Religious Discrimination Bill to improve consistency between the proposed legislation and the standard structure of existing anti-discrimination laws. We note that there is also significant overlap in the recommendations made in our submission, and those in the submission by the AHRC.

***Recommendation 12: Consistency in protected attributes across anti-discrimination legislation***
*The categories of protected attributes in discrimination legislation should be harmonised to protect the grounds that exist under the AHRC Act, ILO and the Fair Work Act (which include political opinion, industrial activity, irrelevant criminal record, medical record, national extraction or social origin and family or carer's responsibilities).*

***Recommendation 13: Expand protected attributes in anti-discrimination legislation***
*Federal anti-discrimination laws should also be amended to include social/housing status, and victims or survivors of family or domestic violence as protected attributes.*

***Recommendation 14: Include religious belief as a protected attribute***
*Religious belief should be included as a protected attribute in Commonwealth anti-discrimination legislation, and in the Anti-Discrimination Act 1977 (NSW). However, these protections should not include provisions which undermine the right of others to be protected against discrimination, including women, LGBTI people, single parents, people in de facto relationships, divorced people and people with disability.*

### 3.2 Expanding vilification protections

*Question 13 asks:*

*Is there a need to expand protections relating to harassment and vilification on the basis of any protected attributes?*

We welcome the focus on this issue on page 17 of the Discussion Paper. In principle, PIAC supports the expansion of vilification protections in Commonwealth law, beyond the existing prohibition on racial vilification in section 18C of the *Racial Discrimination Act 1975*, to include, at a minimum, sex, disability, sexual orientation, gender identity and sex characteristics (intersex status). These are groups that are recognised to have been particularly subject to harm from vilification, including vilification caused by the same-sex marriage postal survey.

When religious belief is introduced as a protected attribute in Commonwealth anti-discrimination law, consideration should also be given to introducing vilification protections on that basis, provided that it is drafted in a way to avoid inadvertently reviving the offence of blasphemy.

19 Public Interest Advocacy Centre, *'Religious Freedom' Bills Submissions on Exposure Drafts* (30 September 2019)

***Recommendation 15: Expand vilification protections***
*Commonwealth vilification protections, which already cover race, should be expanded to cover sex, disability, sexual orientation, gender identity and intersex status/sex characteristics, with consideration given to covering religious belief.*

### 3.3 Standing of organisations to bring complaints

*Question 11 asks:*

*What, if any, reforms should be introduced to the complaint-handling process to ensure access to justice?*

*Question 12 asks:*

*What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?*

The issue of whether an organisation has standing to file proceedings in the Federal Court or the Federal Circuit Court turns on the interpretation of section 46P(2) and section 46PO(1) of the *Australian Human Rights Commission Act 1986* (**AHRC Act**).

As the Commission would be aware, complaints can be made by or on behalf of a 'person aggrieved' (section 46P(2) of the AHRC Act). However, only an 'affected person' (section 46PO(1)) can bring proceedings in the courts if the complaint does not resolve at conciliation. This inconsistency presents difficulties for organisations, who may be able to make a complaint on behalf of an individual at the AHRC but are not be able to pursue that complaint on behalf of the individual in court.

PIAC submits that the AHRC Act should be amended to provide open standing to allow organisations to bring complaints on behalf of individuals and in their own right to the AHRC and the federal courts to enforce a breach of anti-discrimination laws or the disability standards. In many cases, organisations are better placed than individuals to make complaints regarding discrimination, particularly in the case of systemic discrimination. Organisations may also be better resourced to absorb the costs risks that are associated with pursuing discrimination complaints in court. This is particularly the case when the discriminator is a large corporation, and there is a significant difference between the resources of the complainant and alleged discriminator.

Extending the rules of standing would assist to place greater focus on systemic discrimination issues and limit the risks and burden that litigation, and in particular discrimination litigation, places on individuals. Addressing the inconsistency in the rules of standing would help to streamline the complaint-handling process and improve access to justice by enabling organisations that make complaints on behalf of individuals to the AHRC to then pursue those complaints in court.

***Recommendation 16: Organisations to have standing to bring complaints***
*The rules for standing should be extended to organisations so that they can bring complaints on behalf of individuals and in their own right to the AHRC and the Federal courts.*

### 3.4 Introducing a 'no cost' jurisdiction

The cost of litigation is a significant barrier to complainants pursuing discrimination complaints. In particular, the risk of an adverse costs order dissuades individual litigants from pursuing discrimination complaints in court.

Both the Federal Court and the Federal Circuit Court may make orders specifying the maximum costs that may be recovered by a successful party on a party and party basis. However, applicants are required to divulge private financial and other sensitive personal information in evidence which deters applicants from seeking such orders. There is also a lack of clarity concerning the criteria on which a maximum costs order will be made and, in particular, how the public interest in a case should be judged in applications for maximum costs orders.

A set scale of costs regime also operates in the Federal Circuit Court to fix the amount of costs recoverable by a successful party for particular stages of work. However, costs can considerably increase during the course of civil proceedings and applicants often require more certainty about their potential costs exposure prior to commencing proceedings. In addition, the amount of costs which may be awarded under the Federal Circuit Court Scale mean that the risk of an adverse cost order, no matter how strong a legal claim is, will result in litigation being prohibitive to many individuals.

No set scale of costs regime currently applies in the Federal Court and this can act as a determining factor in applicants preferring to pursue complaints in the Federal Circuit Court even though the complaint may be legally and factually complex and involve questions of general importance.

In PIAC's view, the Federal Court and the Federal Circuit Court should be a no-costs jurisdiction for discrimination complaints. This would reflect the fact that by their nature, discrimination proceedings generally involve human rights and systemic issues that are of significant public interest. A federal no-costs jurisdiction would also align with the no-costs jurisdiction that applies in employment discrimination matters which proceed to the federal courts and the no-costs jurisdictions that generally operate in State and Territory tribunals. This would significantly improve access to justice outcomes for complainants at the court stage of the complaints process.

***Recommendation 17: Creation of a no-costs jurisdiction***
*The Federal Court and Federal Circuit Court should be a no-costs jurisdiction for discrimination complaints.*

### 3.5 Restoring the time frame for lodging complaints

PIAC notes the following on page 16 of the Discussion Paper:

> There is no specific time frame in which a complaint must be lodged with the Commission. However, the President can terminate a complaint if the complaint is lodged more than 6 months after the alleged act, omission or practice takes place. There has been concern expressed that 6 months is too short for complex disputes and creates a disincentive for people who have experienced sexual harassment and persons with a disability to raise concern or make complaints.

We share these concerns. We also express our belief that the previous limit – of 12 months – was a more appropriate time frame for lodging complaints, allowing opportunities to people from marginalised communities to obtain legal advice in the intervening period.

***Recommendation 18: Restore 12-month time frame for lodging complaints***
*The previous 12-month time frame for lodging complaints to the AHRC should be restored.*

### 3.6 General limitations clause

*Question 6 asks:*

*What are you views about the Commission's proposed process for reviewing all permanent exemptions under federal discrimination law?*

PIAC supports the review of all permanent exemptions to ensure they remain necessary and proportionate to achieve a legitimate purpose. This is particularly pressing in light of the overly-broad exceptions provided to religious schools, discussed at 2.3 above.

We recognise the value of a 'general limitations' provision, in place of specific exceptions. In principle, we support that approach. However, in our view, such a change should only be contemplated as part of a complete overhaul of our discrimination laws (including the machinery for rights protection that focuses on individual complaints) and should not be considered as a stand-alone reform to existing legislation. PIAC would otherwise be concerned that such a change may have unintended negative consequences. This includes a lack of certainty that will impact most heavily on those seeking protection of their rights. It may, in turn, entrench a power imbalance between complainants and respondents, with respondents able to seek general justification for their actions, requiring complainants to take significant risks in pursuing a claim in court.