Public Interest Advocacy Centre

Equality Bill Consultation

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- 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 First Nations people
- Access to sustainable and 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)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Recommendation 2 – Replace transgender with gender identity as a protected attribute

The existing protected attribute of transgender should be replaced with a new protected attribute of gender identity, to ensure that people with non-binary, genderfluid and other diverse gender identities are covered. The definition of gender identity should be informed by the new definition of gender identity in the Equal Opportunity Act 2010 (Vic). The definition of 'recognised transgender person' in section 4 should also be repealed.

Recommendation 3 – Add sex characteristics as a new protected attribute

A new protected attribute of sex characteristics should be added to ensure that people born with innate variations of sex characteristics (intersex people) are covered. The definition of sex characteristics should be informed by the new definition of sex characteristics in the Equal Opportunity Act 2010 (Vic).

Recommendation 4 – Civil vilification provisions should cover sexual orientation, gender identity and sex characteristics

The civil prohibitions on homosexual and transgender vilification in the Anti-Discrimination Act should be replaced with sexual orientation and gender identity vilification provisions respectively. A new civil prohibition on vilification on the basis of sex characteristics should also be added.

Recommendation 5 – Ensure consistency between Anti-Discrimination Act and Crimes Act

If the protected attributes of sexual orientation, gender identity and sex characteristics are added to the Anti-Discrimination Act, including in relation to civil prohibitions on vilification, similar amendments should be made to section 93Z of the Crimes Act to ensure consistency between these two laws.

Recommendation 6 – Private educational authority exceptions should be repealed

The provisions of the Anti-Discrimination Act which allow private educational authorities to discriminate against LGBT students, teachers and other staff – sections 38K(3), 38C(3)(c), 49ZO(3) and 49ZH(3)(c) – should be repealed.

Recommendation 7 – Religious schools to discriminate on basis of religious belief only, and against students only at enrolment

Religious schools should be permitted to discriminate on the basis of religious belief only, and not in relation to other attributes such as sexual orientation, gender identity or sex characteristics. In relation to teachers and other staff, this discrimination should only be permitted in relation to roles

that are sufficiently connected with the 'religious and moral education' of children. In relation to students, this discrimination should only be permitted at the point of enrolment.

Recommendation 8 – Limit the application of the general religious exception in section 56(c) and (d) to prevent discrimination by religious schools

A qualifying provision should be inserted in section 56 of the Anti-Discrimination Act to ensure that the general religious exception in section 56(c) and (d) does not permit religious educational institutions to continue to discriminate against LGBT students, teachers and other staff.

Recommendation 9 – Reform the general religious exception in section 56(c) and (d) to only permit discrimination on the basis of religious belief

The general religious exception in section 56(c) and (d) of the Act should only permit discrimination on the basis of religious belief, and not on other protected attributes like sexual orientation, gender identity or sex characteristics, based on the approach in the Anti-Discrimination Act 1998 (Tas).

Recommendation 10 – Repeal the specific exception for adoption services

Section 59A of the Act, which specifically permits faith-based adoption services to discriminate against rainbow families, should be repealed.

Recommendation 11 – Repeal the specific exception for transgender people in superannuation

Section 38Q of the Act, which allows superannuation providers to deny the gender identity of transgender people, should be repealed.

Recommendation 12 – Replace the sporting 'blanket ban' with narrower restrictions

Section 38P of the Act, which permits a blanket ban of transgender participation in both community and elite sport, at all ages, should be replaced with far narrower restrictions, drafted in consultation with transgender and intersex community organisations and other experts as considered relevant. Children under the age of 12 should also be protected against discrimination on these attributes.

Recommendation 13 – Improved access to birth certificates

Trans and gender diverse people should have access to identity documentation, including birth certificates, based on self-declaration, without requiring surgery, physical treatment, or medical approval. The Births, Deaths and Marriages Registration Act 1995 (NSW) should be amended to remove existing requirements that transgender people have genital surgery in order to update their details, with consideration given to adopting the approach of the Births, Deaths and Marriages Registration Act 1999 (Tas). The details of these reforms should be finalised in consultation with trans and gender diverse community members, and organisations representing them.

Recommendation 14 – Ending medical interventions on intersex children

Unnecessary, non-consenting and/or deferrable surgeries and other medical interventions on children born with innate variations in sex characteristics should be prohibited. This should draw on the ACT draft Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2022, with any necessary changes made in consultation with Intersex Human Rights Australia.

Recommendation 15 – Prohibiting sexual orientation and gender identity conversion practices

Sexual orientation and gender identity conversion practices should be prohibited, drawing on existing schemes in Victoria and the ACT. This should include both civil and criminal prohibitions, with consent not permitted as a defence, and applying across a broad range of settings, including health and religious settings. The details of this framework should be finalised in consultation with individual survivors of conversion practices, and organisations representing them.

1. Introduction

PIAC welcomes the opportunity to provide this submission to the Member for Sydney, Alex Greenwich MP's, consultation on what reforms should be included in a NSW Equality Bill.

This consultation is much-needed, with a number of legislative changes to protect the rights of lesbian, gay, bisexual, transgender, intersex, queer and asexual (LGBTIQA+) people in NSW now long-overdue.

Indeed, while NSW led the way on important law reforms in this area in the 1980s and 1990s – being the first jurisdiction in Australia to prohibit homosexual discrimination, and later vilification, as well as an early adopter of transgender discrimination and vilification protections – NSW now has some of the worst LGBTIQA+ laws in the country.

This includes anti-discrimination laws that fail to properly protect LGBTIQA+ people from discrimination, and birth certificate laws that do not protect the human rights of trans and gender diverse people. There has been no progress in NSW on laws to protect children born with innate variations in sex characteristics against non-consenting medical interventions, or to prohibit sexual orientation and gender identity conversion practices, while other jurisdictions move ahead in these areas.

Reflecting PIAC's expertise, we provide detailed recommendations for reforms to the *Anti-Discrimination Act 1977* (NSW), with a focus on expanding protected attributes, narrowing exceptions (including religious exceptions) and harmonising vilification protections.

We will also provide shorter comments on the issues of improved access to birth certificates, ending medical interventions on intersex children, and prohibiting conversion practices, while deferring to the expertise of relevant communities, and community organisations, about the details of these reforms.

Finally, we note the call for submissions[1] expresses hope that the process for developing the Equality Bill will be 'multi-partisan'. We endorse this approach, and call on all parties in the NSW Parliament to take urgent action to ensure the rights of LGBTIQA+ people are properly protected.

2. Reforms to the *Anti-Discrimination Act 1977* (NSW)

In August 2021, PIAC released its report 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act'.[2]

The report analyses the short-comings of the *Anti-Discrimination Act* across a wide range of areas that have an adverse impact on a large number of different community groups in NSW. This includes LGBTIQA+ people, as well as women, people with disability, and people of faith.

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1 Alex Greenwich, 'A New Equality Bill', via website: https://www.alexgreenwich.com/equality_bill (accessed 22 June 2022).

2 PIAC, *'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act'*, 6 August 2021, available at: https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/

As articulated in Leader to Laggard:[3]

> The *Anti-Discrimination Act 1977* (NSW) needs comprehensive reform, so that it effectively protects people against discrimination on the basis of who they are, and promotes equality of opportunity and participation in our society for all people.

In this submission however we primarily focus on issues relating to the LGBTIQA+ community, and draws on the following sections of the report:

- Protecting more of the community
- Harmonising and modernising vilification protections
- Modernising exceptions for private schools, and
- Clarifying religious exceptions.

We will focus on these topics in turn, as well as a section addressing other exceptions in the Act.

2.1 Protecting more of our community

The *Anti-Discrimination Act 1977* (NSW) is one of the narrowest anti-discrimination laws in Australia, providing protection to the most limited range of personal attributes. In practical terms, this leaves many people and groups within the NSW community exposed to discrimination.

Nowhere is this more apparent than in relation to the LGBTIQA+ community, where the existing protected attributes reflect out-dated terminology, and exclude significant cohorts from protection.

These attributes should be replaced with the new attributes of sexual orientation, gender identity and sex characteristics, described in more detail below.

Sexual orientation

Currently, Part 4C of the *Anti-Discrimination Act* prohibits discrimination on the ground of 'homosexuality' which is defined in section 4: 'homosexual means male or female homosexual.'

Prima facie, this definition only covers people whose sexual orientation is exclusively towards people of the same gender, thereby excluding people who are bisexual, bi+ and/or pansexual.

NSW is the only jurisdiction in Australia which does not explicitly protect bisexual people against discrimination, with the Commonwealth and other states and territories all adopting terminology based on either 'sexuality' or 'sexual orientation', and inclusive of bisexuals.

In PIAC's view, the minimum standard in this area is provided by the *Sex Discrimination Act 1984* (Cth), which prohibits discrimination on the basis of 'sexual orientation', defined in section 4 as:

> 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.

[3] PIAC, *'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act'*, 6 August 2021, p15.

Such a definition would be likely to adequately protect bisexual people against discrimination.

However, we also note the above definition is now nine years old, and in discrimination law in this area, terminology is continually updated and refined. The most recently-revised definition for 'sexual orientation' is found in the *Equal Opportunity Act 2010* (Vic), which added the following to section 4(1) via amendments last year:

> sexual orientation means a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender.

Therefore, we suggest that in replacing the protected attribute of 'homosexuality' with 'sexual orientation' consideration be given to adopting the definition from the Victorian *Equal Opportunity Act 2010*.

Recommendation 1 – Replace homosexuality with sexual orientation as a protected attribute

The existing protected attribute of homosexuality should be replaced with a new protected attribute of sexual orientation, to ensure that bisexual, bi+ and/or pansexual people are covered. The definition of sexual orientation should be informed by the new definition of sexual orientation in the Equal Opportunity Act 2010 (Vic).

Gender identity

The treatment of transgender people by the *Anti-Discrimination Act* is out-dated, inadequate and requires amendment.

Section 38A provides that:

> A reference in this Part to a person being transgender or a transgender person is a reference to a person, whether or not the person is a recognised transgender person-
>
> (a) who identifies as a member of the opposite sex by living, or seeking to live as a member of the opposite sex, or
>
> (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
>
> (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,
>
> and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

The use of the out-dated terminology of 'opposite sex' only explicitly protects people with binary gender identities (that is, people who were assigned male at birth and whose gender identity is female, or vice versa).

This may leave a large number of other trans and gender diverse people, whose gender identity is non-binary, genderfluid, or other gender identities which do not neatly fit within the narrow wording of s38A, without adequate protection against mistreatment.

As with sexual orientation, we see the *Sex Discrimination Act 1984* (Cth) as providing the minimum standard in this area. It adopts the terminology of 'gender identity' rather than 'transgender', defined in section 4 as:

> 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.

This definition would ensure that people with non-binary, genderfluid and other diverse gender identities are covered under the Act.

However, as with sexual orientation, the most inclusive and therefore best practice definition may be found in the most recently-revised legislation, the *Equal Opportunity Act 2010* (Vic). It explicitly captures gender expression within its definition in section 4(1):[4]

> gender identity means a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.

This definition should therefore inform the wording of a new protected attribute of 'gender identity' in the NSW Act.

In as far as s 38A(c) attempts to provide protection for people of 'indeterminate sex', this is considered next.

Recommendation 2 – Replace transgender with gender identity as a protected attribute

The existing protected attribute of transgender should be replaced with a new protected attribute of gender identity, to ensure that people with non-binary, genderfluid and other diverse gender identities are covered. The definition of gender identity should be informed by the new definition of gender identity in the Equal Opportunity Act 2010 (Vic). The definition of 'recognised transgender person' in section 4 should also be repealed.

Sex characteristics

'Intersex people have innate sex characteristics that do not fit medical norms for female or male bodies.'[5] As a group within the LGBTIQA+ community, intersex people are currently not adequately protected under the *Anti-Discrimination Act*, if at all.

The only potential reference to intersex people is in para (c) of section 38A, described under gender identity above, which reads 'who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex.'

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4 Tasmania adopts an alternative approach which may also be worthy of consideration, with gender expression defined separately as 'gender expression means any physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity', section 3, *Anti-Discrimination Act 1998* (Tas).

5 Intersex Human Rights Australia, 'Intersex for allies', accessed 22 June 2022, available at: https://ihra.org.au/allies/

However, this provision has minimal, if any, practical effect in protecting intersex people against discrimination. As noted by Intersex Human Rights Australia:[6]

> A casual read might suggest that these provisions would protect intersex people but, in fact they require people to identify as either men or women, and do not protect those whose innate biological sex is intersex.

Even if a cohort of intersex people may be protected within s38A, it is inappropriate to conflate the very different attributes of gender identity and sex characteristics in the one provision. Therefore, a stand-alone protected attribute should be added to the Act to ensure intersex people are covered and their distinct characteristics respected.

In contrast to sexual orientation and gender identity, the *Sex Discrimination Act 1984* (Cth) does *not* provide a minimum standard in this area. That is because it uses the now-superseded protected attribute of 'intersex status'.[7]

Intersex status is not supported as a protected attribute by intersex community organisations, including Intersex Human Rights Australia. They, and other prominent intersex individuals and groups, called for the prohibition of discrimination on the basis of sex characteristics in the historic March 2017 Darlington Statement:[8]

> Article 9. We call for **effective legislative protection** from discrimination and harmful practices on the grounds of **sex characteristics** [emphasis in original].

Sex characteristics is also the relevant terminology used in the international human rights instrument *Yogyakarta Principles Plus 10*,[9] which were released in the same year, and defined as:

> 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.

As with sexual orientation and gender identity, the most recent state or territory law to define sex characteristics is the Victorian *Equal Opportunity Act*, which provides in section 4(1) that:

> sex characteristics means a person's physical features relating to sex, including-
> (a) genitalia and other sexual and reproductive parts of the person's anatomy; and

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6 Intersex Human Rights Australia, 'Intersex legislative issues 2012 – a brief summary', accessed 22 June 2022, available at: https://ihra.org.au/21053/intersex-legislative-issues/

7 See section 4: '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.'

8 Darlington Statement, accessed 22 June 2022, available at: https://darlington.org.au/statement/

9 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, 10 November 2017, access 22 June 2022, available at: https://yogyakartaprinciples.org/principles-en/yp10/

(b) the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty.

This definition should therefore form the basis of the new protected attribute in NSW.

Recommendation 3 – Add sex characteristics as a new protected attribute

A new protected attribute of sex characteristics should be added to ensure that people born with innate variations of sex characteristics (intersex people) are covered. The definition of sex characteristics should be informed by the new definition of sex characteristics in the Equal Opportunity Act 2010 (Vic).

Other possible attributes

PIAC is aware that a number of organisations to this consultation process will be recommending the inclusion of a new protected attribute of sex work, including because of the high representation of LGBTQ people among sex workers.

We support-in-principle adding 'sex work' to the *Anti-Discrimination Act*, and defer to sex worker-led organisations, including Scarlet Alliance, on the proposed definition for this attribute.

We also note previous calls from Intersex Human Rights Australia (IHRA) for the prohibition of discrimination on the basis of genetic characteristics.[10] Again, we support-in-principle this addition, and defer to IHRA on the proposed definition and coverage for this attribute.

2.2 Harmonising and modernising vilification protections

Currently, the *Anti-Discrimination Act* includes civil prohibitions on vilification on a range of protected attributes. Of particular relevance to this consultation, this includes:

- Transgender vilification, in sections 38R and 38S, and
- Homosexual vilification, in sections 49ZS and 49ZT.

If the above recommendations are accepted to modernise the Act's provisions relating to discrimination on the grounds of gender identity, sexual orientation and sex characteristics, these vilification provisions should be updated at the same time with new terminology and specific protection against vilification on the ground of sex characteristics.

Recommendation 4 – Civil vilification provisions should cover sexual orientation, gender identity and sex characteristics

The civil prohibitions on homosexual and transgender vilification in the Anti-Discrimination Act should be replaced with sexual orientation and gender identity vilification provisions respectively. A new civil prohibition on vilification on the basis of sex characteristics should also be added.

[10] Intersex Human Rights Australia, 'Discrimination',4 January 2019, available at: https://ihra.org.au/discrimination/ (accessed 1 July 2022).

Consistency with the *Crimes Act*

In 2018, criminal prohibitions on vilification (referred to as serious unlawful vilification), were repealed from the *Anti-Discrimination Act*, and added to the *Crimes Act 1900* (NSW) in section 93Z:

> (1) A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence-
> …
> (c) the sexual orientation of the other person or one or more of the members of the group,
> (d) the gender identity of the other person or one or more of the members of the group,
> (e) that the other person is, or one or more of the members of the group are, of intersex status…

Section 93Z(5) then defined sexual orientation, gender identity and intersex status based on the definitions in the *Sex Discrimination Act 1984* (Cth).

This introduced a discrepancy between the two NSW laws, whereby all LGBT people were covered by the offence of publicly threatening or inciting violence, with modernised definitions, while civil prohibitions applied to only lesbian, gay and some transgender people, through the ADA's antiquated definitions. And while intersex status was at least explicitly included in the *Crimes Act* amendment, it was done so on a basis (discussed above) that falls short of the best practice protected attribute of 'sex characteristics'.

In the event that amendments are made to the *Anti-Discrimination Act*, section 93Z of the *Crimes Act* should be updated at the same time, to ensure consistency. Ideally, this will be based on the best practice definitions of sexual orientation, gender identity and sex characteristics in the *Equal Opportunity Act 2010* (Vic).

Recommendation 5 – Ensure consistency between Anti-Discrimination Act and Crimes Act

If the protected attributes of sexual orientation, gender identity and sex characteristics are added to the Anti-Discrimination Act, including in relation to civil prohibitions on vilification, similar amendments should be made to section 93Z of the Crimes Act to ensure consistency between these two laws.

2.3 Modernising exceptions for private schools

The *Anti-Discrimination Act* is the only anti-discrimination law in Australia which allows all private educational authorities, religious and non-religious alike, to discriminate against LGBT students, teachers and other staff (while also allowing discrimination on other attributes like sex and disability).

For example, section 49ZO prohibits discrimination against students on the basis of homosexuality in the area of education, with s49ZO(3) providing that 'Nothing in this section applies to or in respect of a private educational authority.'[11]

[11] Section 38K(3) provides the equivalent blanket exception in relation to trans students.

Section 49ZH prohibits discrimination against applicants and employees on the basis of homosexuality in the area of employment, with s49ZH(3)(c) similarly providing that this does not apply to employment 'by a private educational authority.'[12]

The *Anti-Discrimination Act* is also the only anti-discrimination law in the country which does not apply any purposive test or other limitation on the exercise of this special privilege to discriminate – it is *absolute*, and does not require any demonstration of a legitimate purpose, measure of reasonableness or good faith.

PIAC sees no justification for the current approach towards private educational authorities in the NSW *Anti-Discrimination Act*, and we recommend these provisions be repealed.

Recommendation 6 – Private educational authority exceptions should be repealed

The provisions of the Anti-Discrimination Act which allow private educational authorities to discriminate against LGBT students, teachers and other staff – sections 38K(3), 38C(3)(c), 49ZO(3) and 49ZH(3)(c) – should be repealed.

Religious schools

In the event that exceptions for all private educational authorities are repealed, the question arises whether any specific exceptions are required for religious schools, including to recognise the human right of parents to educate their children in their faith.

Our views on this subject have been consistent throughout multiple consultations on this subject at federal level over the past five years, including in our submission to the Religious Freedom Review,[13] namely that:

> PIAC acknowledges that the right to freedom of religion under Article 18 of the ICCPR requires State Parties to 'have respect for the liberty of parents and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
>
> In PIAC's view, this may allow for a religious school to discriminate against potential teachers and employees on the grounds of religious belief, in relation to roles that are sufficiently connected with the 'religious and moral education' of children. It may also support discrimination on the basis of religious belief against prospective students to support the religious ethos of the institution.
>
> However, in PIAC's view, religious schools should not be able to discriminate on other grounds, including sex, marital or relationship status, pregnancy, sexual orientation, gender identity or intersex status. Discriminating in this way is not a necessary or proportionate measure for the protection of religious freedom and is accordingly an unjustifiable infringement on the right to non-discrimination [in Article 25].

Allowing only discrimination on the basis of religious belief against students at the point of enrolment, and not beyond, is particularly important. It protects both the religious freedom of

12 Section 38C(3)(c) provides the equivalent blanket exception in relation to trans teachers and other staff.

13 PIAC, *Submission to the Religious Freedom Review*, 14 February 2018, available at: https://piac.asn.au/wp-content/uploads/2018/02/18.02.14-PIAC-Submission-re-Religious-Freedom-Review-FINAL.pdf

children and young people to question and explore their own faith as they learn and grow, and prevents indirect forms discrimination against LGBT students under the guise of religious views.

This approach – only allowing religious schools to discriminate on the basis of religious belief and not other attributes in relation to employment, and only on the basis of religious belief against students at the point of enrolment – has been adopted, successfully, under the *Anti-Discrimination Act 1998* (Tas) for more than two decades.[14]

In 2018, the ACT Government amended the *Discrimination Act 1991* (ACT) consistent with this approach. And both the *Anti-Discrimination Act 1991* (Qld) and *Anti-Discrimination Act 1992* (NT) protect LGBT students against discrimination and only permit discrimination on the basis of religious belief against students at the point of enrolment. We support a similar approach in NSW.

We note, however, that the absence of religious belief as a stand-alone protected attribute in the NSW *Anti-Discrimination Act*[15] would give such provisions limited effect until such a protected attribute is finally introduced (which PIAC also supports).[16]

Recommendation 7 – Religious schools to discriminate on basis of religious belief only, and against students only at enrolment

Religious schools should be permitted to discriminate on the basis of religious belief only, and not in relation to other attributes such as sexual orientation, gender identity or sex characteristics. In relation to teachers and other staff, this discrimination should only be permitted in relation to roles that are sufficiently connected with the 'religious and moral education' of children. In relation to students, this discrimination should only be permitted at the point of enrolment.

To give effect to this approach for religious schools, an amendment is also required to the general religious exception found in section 56, including 56(c) and especially 56(d) of the Act (discussed in more detail below). This is to ensure that general religious exceptions do not continue to apply to schools, notwithstanding the intention to limit the ability of schools to discriminate.

This can be achieved by adding a qualifying provision to section 56, to clarify that 'Nothing in section 56(c) or (d) applies in relation to religious educational institutions'.[17] When religious belief is added as a protected attribute to the Act, specific exceptions in line with Recommendation 7, above, would then be added.

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14 Section 51(2) applies in relation to employment by religious schools and provides: '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 religious schools may discriminate on the ground of religious belief or affiliation or religious activity in relation to admission as a student under section 51A, *Anti-Discrimination Act 1998* (Tas).

15 Noting that some religious groups, including Jewish people and Sikh people, may be partially protected because the definition of race in section 4 includes 'ethno-religious… origin', although importantly this does not extend to Muslim people, Hindu people and people of other religious minorities.

16 PIAC, *Submission to NSW Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, 25 September 2020, available at: https://piac.asn.au/2020/09/25/submission-to-nsw-inquiry-into-the-anti-discrimination-amendment-religious-freedoms-and-equality-bill-2020/

17 See for example, section 109(2) of the *Anti-Discrimination Act 1992* (Qld), which provides that 'An exemption under sub-section 1(d) [which is similar to s56(d) in NSW] does not apply in the work or work-related area or in the education area.'

Recommendation 8 – Limit the application of the general religious exception in section 56(c) and (d) to prevent discrimination by religious schools

A qualifying provision should be inserted in section 56 of the Anti-Discrimination Act to ensure that the general religious exception in section 56(c) and (d) does not permit religious educational institutions to continue to discriminate against LGBT students, teachers and other staff.

2.4 Clarifying religious exceptions

The primary religious exception in the Act is found in section 56, providing that:

> Nothing in this Act affects-
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
> (c) the appointment of any other person in any capacity by a body established to propagate religion, or
> (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Sections 56(a) and (b) are closely tied to the appointment, training and education of religious office-holders, such as priests and ministers of religion. PIAC accepts that allowing religious bodies to discriminate in who fills these positions is reasonably necessary to support the expression of religious freedom.

The same does not apply to s 56(c), which allows discrimination by religious organisations in employment, including potentially by bodies involved in the delivery of government-funded public services in health, housing and community welfare. It also does not apply to 56(d), the very broad terms of which allows a wide range of discrimination by religious organisations, including against the people accessing services in those areas.

The breadth of section 56(d) was confirmed in the case of OV & OW, involving a male couple who applied to become foster carers with Wesley Mission, but were rejected because of their homosexuality. Through a case which traversed from the Anti-Discrimination Tribunal[18] to the NSW Court of Appeal[19] and back again,[20] it was confirmed that there are very few practical limits on the ability of religious organisations to discriminate on any of the protected attributes covered by the Act.

This approach is far from best practice to these issues in Australian anti-discrimination laws. Exceptions to laws designed to protect human rights need to be carefully and closely limited to ensure they are necessary and proportionate. The broad NSW approach fails to do this.

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18 *OV & anor v QZ & anor (No. 2) [2008] NSWADT 115*; *Members of the Board of the Wesley Mission Council v OW and OV [2009] NSWADTAP* (27 January 2009); *Members of the Board of the Wesley Mission Council v OV & OW (No. 2) [2009] NSWADTAP 57* (1 October 2009).

19 *OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155* (6 July 2010).

20 *OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADY 293* (10 December 2010).

The NSW position can be contrasted with that under the Tasmanian *Anti-Discrimination Act 1998*, which – in addition to the exceptions in relation to teachers and other staff members, and the admission of students, described above – provides the following specific religious exceptions:

- Employment by religious organisations (other than educational institutions) in section 51(1): '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', and
- Participation in religious observance (in section 52) which also only permits discrimination 'on the ground of religious belief or affiliation or religious activity'.[21]

This approach has operated successfully for decades without harming the enjoyment of religious freedom. We therefore recommend a similar approach in NSW, permitting discrimination by religious bodies on the basis of religious belief only, in employment where it is a genuine occupational requirement and in the participation in religious observance.

As noted above, the limited coverage in NSW for religion as a protected attribute ('ethno-religious') means that amended provisions would be relevant only in limited circumstances: for example, in relation to Jewish or Sikh religious people and groups. However, it would set the Act up to support the future inclusion of religion as fully protected attribute and is therefore the approach that PIAC recommends.

Recommendation 9 – Reform the general religious exception in section 56(c) and (d) to only permit discrimination on the basis of religious belief

The general religious exception in section 56(c) and (d) of the Act should only permit discrimination on the basis of religious belief, and not on other protected attributes like sexual orientation, gender identity or sex characteristics, based on the approach in the Anti-Discrimination Act 1998 (Tas).

2.5 Other exceptions

There are at least three other exceptions in the Act which allow discrimination that would otherwise be prohibited and which have particular relevance to the LGBTIQA+ community.

Exceptions in adoption services

In addition to the general religious exception, discussed at 2.4 above, there is a specific exception for adoption services provided by 'faith-based organisations' in section 59A of the Act:

[21] Full text: 'A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to-
(a) the ordination or appointment of a priest; or
(b) the training and education of any person seeking ordination or appointment as a priest; or
(c) the selection or appointment of a person to participate in any religious observance or practice; or
(d) any other act that-
(i) is carried out in accordance with the doctrine of a particular religion; and
(ii) is necessary to avoid offending the religious sensitivities of any person of that religion.'

(1) Nothing in Part 3A or 4C affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the *Adoption Act 2000* or anything done to give effect to any such policy or practice.

Note-

Section 8(1)(a) of the *Adoption Act 2000* requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration.

(2) Subsection (1) does not apply to discrimination against any child who is or may be adopted.

(3) In this section, faith-based organisation means an organisation that is established or controlled by a religious organisation and that is accredited under the *Adoption Act 2000* to provide adoption services.

As discussed earlier, Parts 3A and 4C prohibit transgender and homosexual discrimination respectively, meaning this provision specifically allows for discrimination against rainbow families seeking to adopt.

In PIAC's view, such an exception is unjustified. It is inconsistent with community standards and is excessively broad: amongst other things, it applies to service provision, rather than religious observance, and requires no connection to the doctrines or tenets of a religion.

We also note that the substance of this clause is in direct conflict with the drafting note under section 59(1): the 'best interests of the child' can only be met by placing a child with the most suitable parent(s) irrespective of the parent or parents' sexual orientation and/or gender identity. This provision should be repealed.

Recommendation 10 – Repeal the specific exception for adoption services

Section 59A of the Act, which specifically permits faith-based adoption services to discriminate against rainbow families, should be repealed.

Exceptions in superannuation

Another specific exception which should be repealed relates only to transgender people, and is found in section 38Q:

> A person does not discriminate against a transgender person (whether or not a recognised transgender person) on transgender grounds if, in the administration of a superannuation or provident fund or scheme, the other person treats the transgender person as being of the opposite sex to the sex with which the transgender person identifies.

Once again, there does not appear to be a justification to permit such discrimination in 2022. For comparison, while there are superannuation exceptions in the *Sex Discrimination Act 1984* (Cth), in sections 41A and 41B, neither allows discrimination on the basis of gender identity.

It is also inconsistent with the existing superannuation exception in the NSW *Anti-Discrimination Act* in relation to sex,[22] which imposes the following restrictions:

> (a) the terms or conditions-

[22] Section 36, *Anti-Discrimination Act 1977* (NSW).

(i) are based upon actuarial or statistical data on which it is reasonable to rely, and
(ii) are reasonable having regard to the data and any other relevant factors, or
(b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained – the terms or conditions are reasonable having regard to any other relevant factors...

Further, when section 38Q was introduced, as part of the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996*, the then-Attorney General the Hon Jeff Shaw described this section effectively as a placeholder:[23]

> Granting legal protection also has implications for the superannuation sector in terms of differential contributions and benefits. These implications have not yet been fully determined. The legislation therefore provides for an exemption to legal recognition in this area. Nevertheless, I wish to advise the House that the Government is currently examining this matter with a view to possible further amendments at a later date. It is my intention to consult with relevant groups regarding any future changes to the legislation and the regulations.

26 years later, we submit there should be no place for discrimination against transgender people in superannuation under the *Anti-Discrimination Act*.

Recommendation 11 – Repeal the specific exception for transgender people in superannuation

Section 38Q of the Act, which allows superannuation providers to deny the gender identity of transgender people, should be repealed.

Exceptions in sport

The third specific exception also relates only to transgender people, and is found in section 38P:

> (1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.
> (2) Subsection (1) does not apply-
> (a) to the coaching of persons engaged in any sporting activity, or
> (b) to the administration of any sporting activity, or
> (c) to any sporting activity prescribed by the regulations for the purposes of this section.[24]

This exception is extraordinarily – and, in PIAC's view unacceptably – broad, and applies to participation in all sporting activities, from elite level through to community sport, and for all ages, including adults, young people and children.

It compares unfavourably with the equivalent section in the *Sex Discrimination Act 1984* (Cth), which includes two major limitations not included in NSW. The Commonwealth exception applies only where the 'strength, stamina or physique of competitors is relevant', and only to people over the age of 12. Section 42 provides that:

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23 Attorney General the Hon Jeff Shaw, NSW Legislative Council Hansard, 30 May 1996, available at: https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-64715

24 Noting that no sporting activities appear to be prescribed in the *Anti-Discrimination Regulation 2019*, available at: https://legislation.nsw.gov.au/view/html/inforce/current/sl-2019-0381#sec.7

(1) Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.
(2) Subsection (1) does not apply in relation to the exclusion of persons from participation in:
(a) the coaching of persons engaged in any sporting activity;
(b) the umpiring or refereeing of any sporting activity;
(c) the administration of any sporting activity;
(d) any prescribed sporting activity; or
(e) sporting activities by children who have not yet attained the age of 12 years.

An alternative approach can be found in the *Anti-Discrimination Act 1998* (Tas), which provides in section 29 that: 'A person may discriminate against another person in a competitive sporting activity by restricting participation to persons of one gender of 12 years of age or more' (which, interestingly, does not appear to allow discrimination on the basis of gender identity).

The ACT Government's Exposure Draft Discrimination Amendment Bill 2022, currently open for consultation, provides in clause 33B that:

(1) It is not unlawful for a person to discriminate against another person by excluding the other person from participating in organised sport on the ground of the other person's sex, disability or age if-
(a) the discrimination is necessary for fair, safe and effective competition; and
(b) the outcome of the discrimination is reasonable, justifiable and proportionate.
(2) Subsection (1) does not apply to discrimination against a child under 12 years old on the ground of sex or disability.

PIAC is not an expert in this area, especially in relation to elite sport, and therefore do not express a preference for either of these approaches (Tasmania or ACT), or a different option.

However, in our view the starting point must be inclusion, and any exclusion of transgender and intersex athletes (who would also likely be affected by any restrictions) must be based on clear and publicly-available evidence. In addition, there should be no discrimination against children under the age of 12 years.

In this context, the blanket ban in section 38P of the *Anti-Discrimination Act* is unjustified. It should be replaced with far narrower restrictions, with the exact wording developed in close consultation with transgender and intersex community organisations, and other experts as considered relevant.

Recommendation 12 – Replace the sporting 'blanket ban' with narrower restrictions

Section 38P of the Act, which permits a blanket ban of transgender participation in both community and elite sport, at all ages, should be replaced with far narrower restrictions, drafted in consultation with transgender and intersex community organisations and other experts as considered relevant. Children under the age of 12 should also be protected against discrimination on these attributes.

3. Improved Access to Birth Certificates

PIAC supports the ability of trans and gender diverse people to more easily access identity documentation, including birth certificates, which reflects their gender identity.

Currently, the barriers to accessing such documentation in NSW are far too high, with the provisions of the *Births, Deaths and Marriages Registration Act 1995* making NSW one of only two jurisdictions in Australia, alongside Queensland,[25] to require transgender people to undergo genital surgery in order to update their details.[26]

Instead, we support the ability of trans and gender diverse people to access new identity documentation on the basis of self-declaration, without the need for surgery or other forms of physical medical interventions (such as hormones), and also without medical approval (such as supporting documentation from medical practitioners and/or counsellors or psychologists).

We note that this approach – self-declaration – has already been successfully adopted in the Tasmanian *Births, Deaths and Marriages Registration Act 1999*, with section 28A(2)(b) requiring the applicant to make a 'gender declaration' in support of their application.[27]

PIAC are not experts in this area, and defer to the views of trans and gender diverse community members, and the organisations that represent them, about the specific details of what a new birth certificate framework in NSW should ultimately include.

However, we express our support for the following general principles:

- People aged 16 and over should be able to apply to update their own gender marker[28]
- If people aged under 16 are required to obtain approval from parents or guardians to apply, there must be provisions to allow for applications where there are two or more parents/guardians and they disagree on whether to approve the application
- Consideration should be given to allowing children aged under 16 to apply in the absence of approval from parents of guardians, where a court or tribunal considers it to be in the best interests of the child and also assesses the child to be capable of consenting to the application[29]
- Options to record gender should include male, female, non-binary and unspecified, as well as allowing for people to use other self-declared gender markers.

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25 *Births, Deaths and Marriages Registration Act 2003* (Qld).

26 With section 32B of the *Births, Deaths and Marriages Registration Act 1995* (NSW), requiring people to have 'undergone a sex affirmation procedure', which is defined in section 32A as:
'means a surgical procedure involving the alteration of a person's reproductive organs carried out-
(a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
(b) to correct or eliminate ambiguities relating to the sex of the person.'

27 The Victorian *Births, Deaths and Marriages Registration Act 1996* almost satisfies this standard, although sections 30A(3)-(4) also require an applicant to include a 'supporting statement' from another person with their application, with that person having 'known the applicant for at least 12 months', 'believes that the applicant makes the application to alter the record of the sex of the applicant in good faith', and 'supports the application.'

28 As is currently permitted under the *Births, Deaths and Marriages Registration Act 1999* (Tas), and *Births, Deaths and Marriages Registration Act 1997* (ACT).

29 See for example section 29J, *Births, Deaths and Marriages Registration Act 1996* (SA).

Recommendation 13 – Improved access to birth certificates

Trans and gender diverse people should have access to identity documentation, including birth certificates, based on self-declaration, without requiring surgery, physical treatment, or medical approval. The Births, Deaths and Marriages Registration Act 1995 (NSW) should be amended to remove existing requirements that transgender people have genital surgery in order to update their details, with consideration given to adopting the approach of the Births, Deaths and Marriages Registration Act 1999 (Tas). The details of these reforms should be finalised in consultation with trans and gender diverse community members, and organisations representing them.

4. Ending Medical Interventions on Intersex Children

PIAC supports the right to bodily autonomy. This includes for children born with innate variations of sex characteristics (intersex children), who are current subjected to unnecessary, non-consenting and/or deferrable surgeries and other medical interventions.

These human rights violations are outlined in the Australian Human Rights Commission's 2021 report, *Ensuring Health and Bodily Integrity: Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions*.[30] Recommendation 4 of that Report provides that:

> Medical interventions modifying sex characteristics of children may be conducted without personal consent only in circumstances of medical necessity. Circumstances of medical necessity exist only where all of the following factors are present:
> (a) the medical intervention is required urgently to avoid serious harm
> (b) the risk of harm cannot be mitigated in another less intrusive way, and intervention cannot be further delayed
> (c) the risk of harm outweighs the significant limitation on human rights that is occasioned by medical intervention without personal consent.

While some international jurisdictions have already passed legislation to prohibit unnecessary, non-consenting and/or deferrable medical interventions on intersex children,[31] no Australian jurisdictions has done so to date.

However, the ACT Government recently released the draft Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2022 for public consultation.

This legislation has been developed with close consultation with intersex community representatives, including Intersex Human Rights Australia (IHRA). Executive Director of IHRA, Morgan Carpenter, responded to the draft legislation's release by commenting:[32]

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30 Australian Human Rights Commission, 'Ensuring Health and Bodily Integrity', October 2021, available at: https://humanrights.gov.au/intersex-report-2021

31 Including Malta, Portugal, Germany and Iceland. Kennedy, Aileen et al, 'The ACT releases Australian-first draft law to protect intersex children from irreversible medical harm', *The Conversation*, 17 June 2022, available at: https://ihra.org.au/39890/theconversation-act-draft-law/

32 Intersex Human Rights Australia, Media Release 'The ACT moves forward with protective legislation' 27 May 2022, available at: https://ihra.org.au/39871/act-moves-forward/

> This is a historic moment. For more than twenty years, the intersex movement in Australia has sought legal reforms to protect people with innate variations of sex characteristics in medical settings. The persistence of so-called 'normalising' interventions, intending to make the bodies of children with intersex variations fit gender stereotypes, has been our most intractable issue. Working with ourselves and other intersex advocates, the ACT government made a formal commitment to reform in 2019, and this thoughtful, carefully considered draft legislation is the product of years of productive engagement. To the maximum extent possible, it aims to ensure that all of us can make our own decisions about our own bodies. Alongside it, we anticipate increased resourcing for peer and family support… We hope that the legislation will be strengthened by this process of public consultation, and we call on all Australian jurisdictions to take the same steps forward.

PIAC are not experts in this area, but defer to the expertise, and lived experience, of intersex community advocates and organisations, and especially Intersex Human Rights Australia.

Based on the above position from Morgan Carpenter, we therefore express in-principle support for NSW legislation to adopt the provisions of the ACT's Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2022, together with any necessary amendments developed in consultation with IHRA.

Recommendation 14 – Ending medical interventions on intersex children

Unnecessary, non-consenting and/or deferrable surgeries and other medical interventions on children born with innate variations in sex characteristics should be prohibited. This should draw on the ACT draft Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2022, with any necessary changes made in consultation with Intersex Human Rights Australia.

5. Prohibiting Sexual Orientation and Gender Identity Conversion Practices

PIAC acknowledges the serious harms, both psychological and sometimes physical, caused to lesbian, gay, bisexual and transgender people by sexual orientation and gender identity (SOGI) conversion practices, as highlighted by the Human Rights Law Centre and La Trobe University in their *Preventing Harm, Promoting Justice* report.[33] We therefore support legislative efforts to prohibit SOGI conversion practices in NSW.

We note that three Australian jurisdictions have already introduced legal reforms in this area: Queensland,[34] Victoria[35] and the ACT.[36] However, we consider the Queensland legislation to be limited in that it only applies to health settings, and is therefore not supported for adoption in NSW, although both the Victorian and ACT schemes merit further detailed consideration.

PIAC are not experts in this area, and defer to the views of others, including individuals who are, and organisations representing, survivors of conversion practices, about the specific details of what a conversion practices prohibition framework in NSW should ultimately include.

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33 Jones et al (2018) *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia*, available at: https://www.latrobe.edu.au/news/articles/2018/release/report-on-lgbt-conversion-therapy-harms

34 *Public Health Act 2005* (Qld), Chapter 58.

35 *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

36 *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT).

However, we express our support for the following general principles:

- The framework should include a civil prohibition on conversion practices, with a range of possible consequences, including but not limited to professional misconduct disciplinary proceedings for regulated professionals.
- The framework should also include a criminal offence, applying to conversion practices which result in actual physical or psychological harm, as well as those involving minors or other vulnerable persons.
- Consent is not a defence, given conversion practices by their nature are psychologically coercive.
- The framework should apply in a broad range of settings beyond health, including conversion practices occurring in religious settings/undertaken by religious organisations, given this is where harm is often reported.

Recommendation 15 – Prohibiting sexual orientation and gender identity conversion practices

Sexual orientation and gender identity conversion practices should be prohibited, drawing on existing schemes in Victoria and the ACT. This should include both civil and criminal prohibitions, with consent not permitted as a defence, and applying across a broad range of settings, including health and religious settings. The details of this framework should be finalised in consultation with individual survivors of conversion practices, and organisations representing them.