Public Interest Advocacy Centre

Preliminary Submission to NSW Law Reform Commission Review of Anti-Discrimination Act 1977

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Public Interest Advocacy Centre
ABN 77 002 773 524
www.piac.asn.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone +61 2 8898 6500
Fax +61 2 8898 6555

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.

Contact

Alastair Lawrie
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

Website: www.piac.asn.au

Public Interest Advocacy Centre

@PIACnews

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

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Introduction

PIAC welcomes the opportunity to provide this preliminary submission to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) ('ADA').

The review is a long-overdue opportunity to remedy the lack of comprehensive and effective protection against discrimination in NSW law. PIAC has been advocating for such an overhaul for several years, including through our 2021 publication 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act.'[1]

In preparing this preliminary submission, we draw on our long history of involvement in anti-discrimination law and law reform, both federally and in NSW. This includes assisting people affected by discrimination to make complaints and litigate to defend their rights, especially in the area of disability discrimination.

In recent years, we have engaged in a number of important consultations on anti-discrimination issues. This has included playing a leading role in public debate surrounding the previous Commonwealth Government's Religious Discrimination Bill(s).[2] We have also consistently advocated for reforms to the *Sex Discrimination Act 1984* (Cth) to protect LGBTQ students and teachers at religious schools against discrimination,[3] most recently through our submission to the Australian Law Reform Commission inquiry into religious exceptions.[4] As well as working alongside disability community organisations to call for reforms to the *Disability Discrimination Act 1992* (Cth) to address problems arising from the Federal Court's decision in *Sklavos*.[5]

In NSW, we have contributed to debates and inquiries surrounding several Bills seeking to amend the Act, including:

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1 PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', 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/

2 PIAC, *Religious Freedom Bills Submission on Exposure Drafts*, 1 October 2019, available at: https://piac.asn.au/2019/10/01/religious-freedom-bills-submission-on-exposure-drafts/; PIAC, *Submission on the 2nd Exposure Draft of the Religious Freedom Bills*, 31 January 2020, available at: https://piac.asn.au/2020/01/31/submission-on-the-2nd-exposure-draft-of-the-religious-discriminaton-bill/; PIAC, *Submission on the Religious Discrimination Bills 2021 to the Joint Committee on Human Rights*, 17 December 2021, available at: https://piac.asn.au/2021/12/17/submission-on-the-religious-discrimination-bill-2021-to-the-joint-committee-on-human-rights/; Alastair Lawrie, 'Religious Discrimination Bill still discriminates against many, despite removal of Folau clause', *Sydney Morning Herald*, 17 November 2021.

3 PIAC, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into Anti-Discrimination Exceptions for Religious Schools*, 26 November 2018, available at: https://piac.asn.au/2018/11/26/submission-to-senate-legal-and-constitutional-affairs-references-committee-inquiry-into-anti-discrimination-exceptions-for-religious-schools/; PIAC, *Submission to the Senate Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, 21 January 2019, available at: https://piac.asn.au/2019/01/21/submission-to-the-senate-inquiry-into-the-sex-discrimination-amendment-removing-discrimination-against-students-bill-2018/

4 PIAC, *Submission to Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws*, 10 March 2023, available at: https://piac.asn.au/2023/03/10/submission-to-alrc-inquiry-into-religious-educational-institutions-and-anti-discrimination-laws/

5 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; as discussed in our Submission to Senate Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 23 November 2022, available at: https://piac.asn.au/2022/11/23/submission-to-senate-inquiry-into-the-fair-work-legislation-amendment-secure-jobs-better-pay-bill-2022/

- the Anti-Discrimination Amendment (Complaint Handling) Bill 2020[6]
- the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020,[7] and
- most recently, the *Anti-Discrimination Amendment (Religious Vilification) Act 2023*.[8]

Based on this experience and expertise, we submit:

The *Anti-Discrimination Act 1977* (NSW) is not fit for purpose and must be repealed and replaced with a new, modern Act. The ADA is no longer able to adequately protect people against discrimination as they go about their day-to-day lives – nor is it capable of being 'fixed' through piecemeal amendments.

This review is the perfect opportunity to draw from community and expert input, as well as the legislative approaches in other jurisdictions both domestically and overseas to deliver an anti-discrimination framework that is best practice and meets the needs of the people of NSW.

Recommendation – a new NSW Anti-Discrimination Act

That the NSW Law Reform Commission recommends the repeal of the Anti-Discrimination Act 1977 (NSW), and the drafting of a new anti-discrimination law, based on best practice from other jurisdictions and drawing on community and expert input.

We recognise the work of the NSW Law Reform Commission in its previous review of the *Anti-Discrimination Act*.[9]

It remains disappointing so few of that review's 161 recommendations were ever implemented. However, anti-discrimination law has evolved considerably since the turn of the century. So, while the previous review provides context for the current inquiry, we encourage the Commission to look at more recent reviews in other states and territories to help inform its current review. These include (but are not limited to):

- The Gardner review of the Victorian *Equal Opportunity Act 1995*,[10]
- The WA Law Reform Commission of their *Equal Opportunity Act 1984*,[11] and
- The Queensland Human Rights and Anti-Discrimination Commission's review of their *Anti-Discrimination Act 1991*.[12]

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6 PIAC, *Submission re Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, 28 April 2020, available at: https://piac.asn.au/2020/04/28/submission-re-anti-discrimination-amendment-complaint-handling-bill-2020/

7 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/

8 PIAC, Media Release: NSW religious vilification reforms 'too broad and need further amendment', 28 June 2023, available at: https://piac.asn.au/2023/06/28/nsw-religious-vilification-reforms-too-broad-and-need-further-amendment/

9 NSW Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW), Report 92, 1999.

10 Julian Gardner, An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report, June 2008, available at: http://www.daru.org.au/wp/wp-content/uploads/2013/03/An-Equality-Act-for-a-Fairer-Victoria_20082.pdf

11 WA Law Reform Commission, Review of the Equal Opportunity Act 1984 (WA), Project 111 Final Report, May 2022, available at: https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report_0.pdf

12 Queensland Human Rights Commission, Building belonging: Review of Queensland's Anti-Discrimination Act 1991, 29 July 2022, available at: https://www.qhrc.qld.gov.au/about-us/reviews/ada

Recent processes which resulted in the *Discrimination Amendment Act 2022* (ACT),[13] and the significant update of the NT *Anti-Discrimination Act 1992* (through the *Anti-Discrimination Amendment Act 2022*),[14] also warrant consideration.

In this preliminary submission, we draw attention to key issues which we believe should be addressed under each of the review's 12 terms of reference. In doing so, we will be drawing on the content of our *Leader to Laggard* report, as well as the work of partner organisations, including the Australian Discrimination Law Experts Group (ADLEG).

We look forward to providing further detail as part of this review process, and would of course be happy to meet with the Commission to discuss this submission and our perspective on how to achieve a best practice new NSW Anti-Discrimination Act.

1. Modernisation and simplification

Term of Reference 1: whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards.

A new modernised and simplified Act is necessary to ensure the protections offered by anti-discrimination law are accessible and easily understood by the people of NSW. Currently, the opposite is true – the *Anti-Discrimination Act* has a convoluted structure and uses out-dated language. As a result, it is difficult to interpret and apply even for lawyers, let alone members of the public who want to understand their rights (and responsibilities) and whether mistreatment they may have experienced is unlawful. Key problems include language, structure and numbering.

1.1 Language

It is perhaps not surprising that much of the language used in the ADA is now out of date. The Act is 46 years old and most of its key provisions were adopted last century (with few major substantive changes in the past two decades). However, this creates real problems, including through lack of coverage – for example, inclusion of the out-dated terms 'homosexuality' and 'transgender' as protected attributes leads to the exclusion of other groups from protection (see discussion at 2.1, below).

1.2 Structure

The Act has grown in an ad hoc manner since it was first introduced, with each new attribute added included in a separate Part, with its own definitions, areas of public life covered and exceptions. This has allowed inconsistencies within the Act to flourish, ranging from slight differences in wording (with the potential to have larger legal consequences) through to different exceptions depending on the attribute in question.

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13 Background to these amendments can be found on the ACT Government: Your Say website: https://yoursayconversations.act.gov.au/discrimination-law-reform (accessed 12 October 2023); and text of the Discrimination Amendment Act 2023 (ACT), which has yet to commence, can be found here: https://www.legislation.act.gov.au/View/a/2023-7/current/html/2023-7.html

14 Anti-Discrimination Amendment Bill 2022 (NT), https://legislation.nt.gov.au/en/LegislationPortal/Bills/~/link.aspx?_id=3AB10A2FEC654E6194E48E52366DAEE4&_z=z

The structure of the Act now falls well short of best practice in other jurisdictions, which instead adopt a single list of protected attributes, before setting out all of the areas of public life covered for all of these attributes, and then moving on to exceptions (usually across all attributes). This structure has multiple benefits, both in terms of ease of understanding, and in highlighting and therefore ensuring scrutiny of exceptions which apply only to some protected attributes.

1.3 Numbering

While a relatively simple technical issue, the Act's numbering serves to highlight its inaccessibility to the members of the community it is meant to serve: consider provisions numbered s49ZO(3) (allowing private educational authorities to discriminate against lesbian and gay students) or s49ZXB (covering HIV/AIDS vilification).

A new Anti-Discrimination Act should be modernised and simplified, including in relation to language, structure and numbering, so that members of the NSW community can navigate its provisions, to understand its protections and obligations.

2. Protecting more of our community

Term of Reference 2: whether the range of attributes protected against discrimination requires reform.

The range of protected attributes in the *Anti-Discrimination Act* is too narrow, with the consequence that far too many people in NSW are not protected against discrimination. Attributes under the Act should be expanded in at least four key ways.

2.1 Protecting the LGBTIQ+ community

NSW was the first jurisdiction in Australia to protect lesbians and gay men against discrimination (1982), and was also one of the first to protect transgender people (1996). However, the lack of progress since then means provisions relating to LGBTIQ+ people are out-dated and provide incomplete protection against discrimination, lagging behind all other states and territories. LGBTIQ+ attributes under the Act need to be updated in at least three key ways.

Replacing 'homosexual' with 'sexual orientation'

By including a protected attribute of 'homosexual', defined in s4(1) as 'means a male or female homosexual', the Act fails to protect bisexual and pansexual people against discrimination, the only place in Australia not to do so. This should be rectified by replacing the protected attribute of homosexual with sexual orientation, with a definition drawing on those existing in other jurisdictions (such as the *Sex Discrimination Act 1984* (Cth),[15] or the more recent definition added to the *Anti-Discrimination Act 1992* (NT)[16]).

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15 S4(1) provides: '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.'

16 S4(1) provides: 'sexual orientation means each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of the same gender identity, a different gender identity or more than one gender identity.'

Replacing 'transgender' with 'gender identity and expression'

The Act currently only protects some trans and gender diverse people against discrimination. This is a consequence of the interpretive provision at s 38A, which means the Act only protects a transgender person who 'identifies as a member of the opposite [sic] sex by living, or seeking to live, as a member of the opposite sex, or… who has identified as a member of the opposite sex by living as a member of the opposite sex…' In effect, the Act only protects trans people with 'binary' gender identities (who were assigned female at birth, but identify as male, and vice versa), while excluding non-binary, gender fluid and other transgender people without 'binary' gender identities.

This should be rectified by repealing the (already largely irrelevant) definition of 'recognised transgender person' (in s4), and replacing the protected attribute of transgender with a protected attribute of gender identity and expression. This could draw on the definitions of 'gender identity'[17] and 'gender expression'[18] in the *Anti-Discrimination Act 1998* (Tas), or the expansive definition of gender identity recently added to the *Anti-Discrimination Act 1991* (Qld).[19]

Adding a new protected attribute of 'sex characteristics'

The Act currently fails to protect people with innate variations of sex characteristics, commonly described as intersex, against discrimination. Western Australia is the only other jurisdiction with a similar exclusion. However, while some anti-discrimination laws, including the *Sex Discrimination Act 1984* (Cth), have a protected attribute of 'intersex status', this is no longer regarded as best practice, including by peak intersex organisation Intersex Human Rights Australia. Instead, they call for a protected attribute of 'sex characteristics', to ensure all people born with variations of sex characteristics are protected. This could draw on the definition recently added to the *Anti-Discrimination Act 1991* (Qld).[20]

2.2 Adding religious belief

PIAC has long supported adding religious belief as a protected attribute under both Commonwealth and NSW law, to provide protection against discrimination to people of faith, or

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17 S3 provides that: 'gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and may include being transgender or transsexual.'

18 S3 provides that: 'gender expression means any personal 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.'

19 Added by the Births, Deaths and Marriages Registration Amendment Bill 2022, passed by Queensland Parliament but yet to commences:
'gender identity, or a person-
(a) is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and
(b) without limiting paragraph (a), includes-
(i) the person's personal sense of the body; and
(ii) if freely chosen-modification of the person's bodily appearance or functions by medical, surgical or other means; and
(iii) other expressions of the person's gender, including name, dress, speech and behaviour.'

20 'Sex characteristics, or a person, means the person's physical features and development related to the person's sex, and includes-
(a) genitalia, gonads and other sexual and reproductive parts of the person's anatomy; and
(b) the person's chromosomes, genes and hormones that are related to the person's sex; and
(c) the person's secondary physical features emerging as a result of puberty.'

no faith. However, these protections should be provided on an equivalent basis to other existing attributes, and must not undermine the rights of other groups in the community, including women, LGBTQ people, people with disability and people of minority faiths, to live their own lives free from discrimination.

Unfortunately, recent legislative attempts to introduce religious belief as a protected attribute at both the Commonwealth and State level have offended these principles, by instead seeking to prioritise 'religious freedom' and the ability of religious individuals and organisations to discriminate against others.

We instead urge the current review to recommend religious belief be added as a protected attribute in a conventional way, consistent with provisions in the majority of states and territories. This should not include special privileges to discriminate against others.

Finally, we submit that 'religious belief' should be defined, to provide clarity about what is and is not sought to be protected, rather than left undefined as in the recently-passed *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW).

2.3 Modernising other existing attributes

There are a range of other existing attributes where the language, and/or scope, should be amended to reflect contemporary standards. This includes:

- Modernising the definition of disability in s 4(1), to avoid pejorative terminology such as 'malfunction, malformation or disfigurement', in consultation with people with disability;
- Updating the interpretive provision relating to sex (s24), including to separate out the protected attributes of pregnancy[21] and breast/chest-feeding,[22] noting that trans men and non-binary people may also become pregnant and breast/chest-feed;
- Updating the protected attribute of 'marital or domestic status' to relationship status; and
- Replacing the language surrounding the protected attribute of HIV/AIDS (which currently applies only in relation to vilification), from 'HIV/AIDS infected' (in s49ZXA) to 'persons living with HIV/AIDS' to remove stigmatising and harmful language.

2.4 Consider further attributes

There are a wide range of other potential protected attributes which could be added to the *Anti-Discrimination Act*, and which should therefore be considered in depth by this inquiry. These include:

- Sex work
- Accommodation status (eg homelessness)
- Genetic information (which may reinforce other protected attributes, including sex characteristics)

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21 Currently incorporated within sex discrimination by s24(1B), which provides: 'For the purposes of this section, but without limiting the generality of this section, the fact that a woman is or many become pregnant is a characteristic that appertains generally to women.'

22 Currently incorporated within sex discrimination by s24(1C), which provides: 'For the purposes of this section, but without limiting the generality of this section, the fact that a woman is breastfeeding or may breastfeed is a characteristic that appertains generally to women. For the purposes of this Act, breastfeeding includes the act of expressing breast milk.'

- Subjection to domestic or family violence
- Irrelevant criminal record
- Employment activity or status
- Immigration status
- Political conviction/opinion
- Socio-economic status
- Industrial activity/trade union activity
- Profession, trade or occupation
- Lawful sexual activity
- Physical features
- Medical record
- Expunged historical homosexual convictions

3. Improved coverage of public life

Term of Reference 3: whether the areas of public life in which discrimination is unlawful should be reformed.

The Act currently only prohibits discrimination in specified areas of public life. One of the weaknesses of this approach is that it results in patchy coverage.

We identified some of these gaps in our 'Leader to Laggard' report,[23] including:

- The exercise of government functions
- Access to premises and facilities, and
- Requests for information.

in PIAC's view, all areas of public life should be covered unless a clear and compelling public policy reason exists for excluding a given area.

We therefore recommend the Commission considers discrimination provisions of general application in public life, as exist under the *Racial Discrimination Act 1975* (Cth) for discrimination (see s 9) and racial vilification (see s 18C). Such reform would ensure the ADA more fully reflects the areas of public life in which discrimination may occur. [24]

At a minimum, the current review should seek to identify and address gaps in coverage such as those noted above.

4. Modernising the test for discrimination

[23] PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, p7, available at: https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/

[24] Ibid.

Term of Reference 4: whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination.

The tests for discrimination in the Act are not clear, not inclusive of all forms of discrimination and no longer reflect modern understandings of discrimination. There are a range of ways in which they could be improved, and we urge the Commission to consider the following issues during this review.

4.1 Removing arbitrary distinctions between direct and indirect discrimination

The *Anti-Discrimination Act* adopts rigid, and in some cases arbitrary, distinctions between the concepts of direct and indirect discrimination. This may cause issues where a complainant alleges one type of discrimination where the other may in fact be more relevant. The Commission should consider whether the two types of discrimination should be combined into one definition. Alternatively, and at a minimum, a similar approach to the *Discrimination Act 1991* (ACT) could be introduced, which removes the arbitrary distinction by providing that: '[f]or this Act, discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else' (s8(1)).

4.2 Removing the comparator test

Another way in which the Act is out-dated is that it includes a 'comparator test' as a key component of the test for discrimination. This hypothetical exercise can create significant practical difficulties, especially where it is unclear which comparator should be chosen or indeed if the wrong comparator is selected. It is also unnecessary – again, as the *Discrimination Act 1991* (ACT) demonstrates, it is possible to adopt an amended approach which simply assesses where 'the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes' (s8(2)).

4.3 Simplifying the test for indirect discrimination

The test for discrimination under the Act could also be modernised by updating its approach to indirect discrimination. Currently, the Act adopts the following test (for example, in relation to transgender discrimination (s38B(1)(b)):

> A person (the perpetrator) discriminates against another person (the aggrieved person) on transgender grounds if the perpetrator… requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons, or who do not have a relative or associate who is a transgender person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

Once again, the *Discrimination Act 1991* (ACT) provides a simpler alternative, under which:

> A person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes. (s8(3)

4.4 Recognising intersectional discrimination

Yet another weakness of the current Act is that it adopts rigid, and arbitrary distinctions, between discrimination on the basis of different attributes when in reality discrimination may be on the basis of multiple attributes at the same time (such as race and sex) or because of a particular intersection between attributes (for example, because the person was a woman of colour). This can create problems both where a complainant may select the 'wrong' attribute in making a complaint, but also where they are unable to make out discrimination on a particular attribute (including because of the operation of the comparator test).

The current review should ensure that whatever test for discrimination is ultimately adopted better recognises complaints based on multiple attributes, including the specific intersection of different attributes. This should include consideration of the existing approach in the ACT, which, as we have seen above, defines discrimination as treating another person 'unfavourably because the other person has 1 or more protected attributes' (s8(2)).

4.5 Other issues

Other issues with the test for discrimination which should be considered include:

- Ensuring that 'intended future conduct' is captured within the definition of discrimination (currently excluded under the Act), and
- Providing that a failure to make reasonable adjustments for people with disability itself constitutes discrimination (discussed in more detail at 7, below).

5. Harmonising vilification protections

Term of Reference 5: the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law.

As we noted in our 'Leader to Laggard' report:[25]

> Reviewing the ADA's civil vilification provisions might also consider whether the current test – 'incite hatred towards, serious contempt for, or severe ridicule of' – remains appropriate. This is a higher standard than the equivalent test for racial vilification in the *Racial Discrimination Act 1975* (Cth), with section 18C prohibiting 'an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate.'

We anticipate that the relevant test for civil vilification will be considered by the current review, and will make comments on this issue in response to subsequent consultation papers. In this preliminary submission we focus on 'who' is protected against vilification, including addressing inconsistencies between the Act and the *Crimes Act 1900* (NSW) s93Z (which creates the 'offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status.').

[25] PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, p8, available at: https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/

We submit that all sections of the LGBTIQ community must be protected against civil vilification. This should be achieved by:

- Replacing the Act's protected attribute of homosexuality with sexual orientation;
- Replacing the protected attribute of transgender with gender identity; and
- Ensuring the new protected attribute of sex characteristics is covered by both discrimination and vilification provisions.

Section 93Z should also be amended to be consistent with these attributes (including updating the definitions of sexual orientation and gender identity if necessary, and replacing intersex status with sex characteristics).

PIAC also supports, in principle, the inclusion of religious belief in civil vilification provisions under the Act. However, this should include a clear definition of what constitutes religious belief. The inclusion of the vague and undefined attribute(s) of 'religious belief or affiliation' and 'religious activity' in the recently-passed *Anti-Discrimination Amendment (Religious Vilification) Act 2023* was a major reason why we opposed that reform.

The current review is an opportunity to remedy this situation. This could include amending the religious belief civil vilification provisions of the *Anti-Discrimination Act* to instead be consistent with the existing protected attribute in s93Z of the *Crimes Act*, namely: 'religious belief or affiliation' explicitly defined as 'means holding or not holding a religious belief or view.' In our view, this would address many of the problems created by the recent Bill.

PIAC also supports the protection of people with disability against both civil vilification under the ADA, and publicly threatening or inciting violence under the *Crimes Act*. We note that doing so would be broadly in line with the recommendations of the Disability Royal Commission, including:

- Recommendation 4.29 Offensive behaviour (covering an act that 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people'), and
- Recommendation 4.30 Vilification because of disability (covering an act that 'involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people' and 'the act is reasonably likely, in all the circumstances, to incite hatred towards another person of a group of people.')

Finally, we submit that the Commission should consider whether civil vilification protections under the Act should be extended to all protected attributes, including sex, age and any of the new attributes added as a consequence of this review.

6. Bringing harassment laws into the 21st century

Term of Reference 6: the adequacy of protections against sexual harassment and whether the Act should cover harassment based on other protected attributes.

PIAC strongly supports the modernisation of the sexual harassment provisions of the Act. As we wrote in our 'Leader to Laggard' report:[26]

> Part 2A of the ADA, prohibiting sexual harassment, was added to the Act in 1997. Despite significant changes in Australian workplaces and society over the past [now 26] years, none of the provisions in this Part have been amended during this time. The consequence is that NSW's sexual harassment laws are no longer fit for purpose. They are lacking in at least three key ways:
>
> First, the definition of sexual harassment adopted in the ADA, which focuses on conduct 'of a sexual nature', may not adequately capture different types of 'sex-based harassment' and may not ensure all workplaces are safe, especially for women…
>
> Second, as with the ADA's discrimination protections, sexual harassment is not prohibited in all areas of public life…
>
> Third, prevention of sexual harassment, and change to cultures which tolerate and enable it, requires more than just reactive measures. Pro-active approaches are essential.

We anticipate the current review will consider both the Australian Human Rights Commission's *Respect@Work* report,[27] and the multiple tranches of amendments to the *Sex Discrimination Act 1984* (Cth) which followed, for remedies to each of these problems. This should include the creation of an enforceable positive duty on employers and other duty holders to take reasonable and proportionate measures to eliminate forms of sex discrimination, including harassment.

The review should also consider broadening harassment protections to cover other protected attributes, including disability, noting the following recommendation of the Disability Royal Commission:

> Recommendation 4.27 Positive duty to eliminate disability discrimination
> The *Disability Discrimination Act 1992* (Cth) should be amended to introduce a positive duty on all duty-holders under the Act to eliminate disability discrimination, harassment and victimisation, based on the December 2022 amendments to the *Sex Discrimination Act 1984* (Cth)…

7. A positive obligation to make adjustments

Term of Reference 7: whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life.

PIAC supports, in principle, the introduction of positive obligations to prevent harassment, discrimination and vilification across the full range of attributes protected under the Act. This

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26 PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, p9, available at: https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/

27 Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report*, 2020, available at: https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020

would have a number of benefits, including removing the burden on individuals who experience discrimination by instead prioritising preventing discrimination before it takes place. We therefore support greater consideration of this issue through this review.

In this preliminary submission, we highlight one priority issue: the failure of the Act to impose an obligation to make adjustments for people with disability. As we noted in the 'Leader to Laggard' report:[28]

> Unlike some other jurisdictions, the ADA does not impose a positive obligation on employers, educators, providers of goods and services and others to 'make reasonable adjustments', to support the full and equal participation of people with disability in all areas of public life.
>
> Instead, the Act contains standard definitions of direct and indirect disability discrimination, while providing for a defence of 'unjustifiable hardship' to a claim of discrimination… This approach fails to properly address the structural barriers (including physical, environmental and attitudinal) that the cause of much discrimination against people with disability.

Over the past five years, PIAC has worked in partnership with People with Disability Australia to seek to rectify a related problem in the *Disability Discrimination Act 1992* (Cth), which has arisen as a result of the decision of the Federal Court in *Sklavos*.[29] Through this process, we have advocated for a replacement of the 'reasonable adjustments' provisions for the DDA, drawing on existing sections in the *Equal Opportunity Act 2010* (Vic), to ensure a standalone duty to make adjustments exists.

More recently this issue has been addressed by the Disability Royal Commission:

> *Recommendation 4.25 Adjustments*
>
> *The Disability Discrimination Act 1992 (Cth) should be amended by replacing all references to 'reasonable adjustments' with 'adjustments'.*
>
> *Recommendation 4.26 Standalone duty to make adjustments*
>
> *The Disability Discrimination Act 1992 (Cth) should be amended to include the following provision:*
>
> *Duty to make adjustments*
>
> *It is unlawful for a person to fail or refuse to make an adjustment for:*
> *(a) a person with a disability; or*
> *(b) a group of persons with disability*
> *unless making the adjustment would impose an unjustifiable hardship on the person.*

We encourage the Commission to consult with people with disability organisations, including People with Disability Australia, on how similar reforms can be incorporated into the new NSW

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28 PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, p6, available at: https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/

29 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

Anti-Discrimination Act and we welcome the opportunity to make further submissions on this issue, including in relation to drafting of any provision.

8. Exceptions, special measures and exemption processes

Term of Reference 8: exceptions, special measures and exemption processes.

PIAC supports, in principle, the retention of both special measures provisions, and exemptions processes, in the Act. These are necessary to ensure that actions can be taken to undo the effects of past discrimination, including/especially in relation to the ongoing impacts of discrimination against First Nations people. However, in this section we will concentrate on the exceptions in the Act, and the need to significantly narrow them, including in the following ways:

8.1 Modernising exceptions for private schools

The NSW Act currently has the broadest exceptions for 'private educational authorities' of any anti-discrimination law in Australia. This is because these exceptions:

- Apply to all private schools and colleges;
- Do not impose any test to determine whether they apply in certain circumstances, but are instead blanket exceptions. For example, s49ZO(3) simply states 'Nothing in this section applies to or in respect of a private educational authority', thereby allowing discrimination against lesbian and gay students without having to provide any apparent justification for this discrimination; and
- Apply across a broad range of attributes, including sex,[30] transgender status,[31] marital or domestic status,[32] disability[33] and homosexuality.[34]

In our view, these exceptions are clearly excessive, unjustified and should be repealed, including to protect LGBTQ students and teachers who remain particularly exposed to mistreatment.

PIAC recognises the role for a specific and targeted exception to allow religious schools to discriminate on the basis of religious belief (but not other attributes) at the point of enrolment, in recognition of the right of communities of faith to form schools to educate their children. But, just as importantly, this should not allow for discrimination against students on the basis of their religious belief, or lack of belief, beyond enrolment – this is essential to protect the rights of children to an education, their mental and physical health and their own rights to question, develop and express religious beliefs as they grow older.

We will deal with the issue of teachers in religious schools further under 8.2, below.

30 Ss 25(3)(c) and 31A(3)(a).
31 Ss 38(3)(c) and 38K(3).
32 Ss 40(3)(c) and 46A(3).
33 Ss 49D(3)(c) and 49K(3)(a).
34 Ss 49ZH(3)(c) and 49ZO(3).

8.2 Clarifying, and narrowing, religious exceptions

In addition to the specific 'private educational authorities' exceptions, the Act provides very broad exceptions to religious organisations under s 56. While sub-sections (a) and (b) are closely tied to the exercise of religious freedom (excluding the appointment and training of ministers of religion), sub-section (c) provides an excessively broad exception in relation to employment (excluding 'the appointment of any other person in any capacity by a body established to propagate religion'), while sub-section (d) excludes:

> 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.

These broad-based exceptions fall short of contemporary community standards, in allowing discrimination on the basis of all protected attributes under the Act (including race, sex, disability, homosexuality, transgender and marital or domestic status).

We therefore submit the general exception in section 56 should be narrowed significantly, such that is allows only for discrimination:

- In relation to the appointment of ministers of religion, and
- Where it is directly related to religious observance (eg through participation in a religious service).

Beyond this, we do not support an exception in relation to people accessing services, other than to allow discrimination by religious schools against students on the basis of religious belief at enrolment (see 8.1 above).

In employment, including at religious schools and faith-based service providers across health, housing, disability and other community and welfare services, we submit that the Commission should consider models according to the following criteria:

- Discrimination should be allowed only on the basis of religious belief not for any other attributes (including sex, sexual orientation, gender identity and relationship status);
- The discrimination must be directly connected to an inherent requirement of the role; and
- The discrimination is reasonable and proportionate in the circumstances.

An example of drafting which achieves the above can be found in s82A of the *Equal Opportunity Act 2010* (Vic):

> Religious bodies – employment
> (1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a religious body if-
> (a) conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position; and
> (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
> (c) the discrimination is reasonable and proportionate in the circumstances.

(2) The nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (1)(a).
(3) This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).

We would be happy to meet with the Commission to discuss the issue of much-needed reform to religious exceptions in more detail.

8.3 Removing and reforming other exceptions

There are a range of other exceptions in the Act that should be narrowed, or removed altogether. These include:

- *Repealing the specific exception for religious adoption services*. As with the broader reforms to religious exceptions outlined above, we do not support the exceptions in s59A of the Act which allow faith-based adoption agencies to discriminate against prospective parents solely on the basis of attributes like sexual orientation or gender identity.

- *Repealing the specific exception for transgender people in relation to superannuation*. PIAC supports repeal of the exception in s38Q of the Act which allows superannuation providers to treat a 'transgender person as being of the opposite [sic] sex to the sex with which the transgender person identifies.'

- *Reforming the specific exception in relation to transgender people and sport*. The current exception, in s38P, is much broader than equivalent laws in other jurisdictions and should be narrowed in several ways, including: removing the ability to discriminate against children under 12; limiting the exception to competitive sporting activities rather than all sport; removing the ability to discriminate against umpires or referees; and adding a test to ensure that any discrimination against trans athletes is reasonable and proportionate in all the circumstances of the case.

- *Repealing the employment exceptions in relation to small business*. Currently, the Act includes exceptions allowing small business employers to discriminate on a range of attributes where they employ five or fewer people (see for example, s25(3)(b), which allows discrimination against applicants and employees on the basis of sex 'where the number of persons employed by the employer, disregarding any persons employed with the employer's private household, does not exceed 5.') This exception is not justified in the modern workplace and should be removed entirely.

8.4 A general limitations clause

PIAC is aware that some organisations may use the current review to advocate for the replacement of most or all exceptions within the Act with a 'general limitations clause'.

We have reservations about this approach. As we noted in our submission to the Australian Human Rights Commission's Free and Equal consultations, we have concerns that:[35]

> 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.

It may instead be preferrable to retain narrowly-drafted, and clear, exceptions. In considering broad-based reform to exceptions under the Act, we urge the Commission to consider closely the possible downsides to a general limitations clause in the context of an anti-discrimination law.

9. Complaints procedures and remedies

Term of Reference 9: the adequacy and accessibility of complaints procedures and remedies.

One of the weaknesses of many anti-discrimination laws, including the Act, is that they are complaint-driven, thereby placing the primary responsibility for addressing discrimination on the people who experience it. These people often have fewer resources compared to respondents (the alleged perpetrators of discrimination), thus placing them at even greater disadvantage. There are several ways in which this disadvantage might be ameliorated, including:

- *Amending the burden of proof*. As the ACT Law Reform Advisory Council recommended in 2015:[36]

  > [C]omplainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. This would address the current difficulty encountered by complainants in being required to demonstrate what was in the mind of the complainant at the time of the unfavourable treatment.

- *Simplifying and strengthening representative complaints processes*. Making it easier for a variety of different groups (including unions, and organisations representing different communities) to make complaints on behalf of their stakeholders would significantly reduce the burden on individuals affected by discrimination to make complaints themselves.

- *Ensuring complainants are protected against adverse costs orders*. A disincentive to lodging complaints is the prospect that, should the matter ultimately end up in the Supreme Court, the complainant may be ordered to pay the respondents legal costs. A similar issue exists in relation to Commonwealth anti-discrimination protections. As PIAC

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35 PIAC, *Submission to Free & Equal: Anti-Discrimination Law Reform*, 8 November 2019, p19, available at: https://piac.asn.au/wp-content/uploads/2019/11/19.11.08-PIAC-Submission-Free-and-Equal-Anti-Discrimination-Law-Reform-Final.pdf

36 ACT Law Reform Commission Advisory Council, *Review of the Discrimination Act 1991 (ACT): Final Report*, 2015, p143.

and the Grata Fund recommended in a recent submission to a review examining that issue:[37]

> We recommend that the 'equal access' asymmetrical costs model be adopted in all federal discrimination proceedings.
>
> The equal access model proposes to amend the *Australian Human Rights Commission Act 1986* (Cth) to remove the costs risk for applicants in discrimination and harassment matters so they can take meritorious cases to court with confidence that, even if they happen to lose, they will not be subject to an adverse cost order.
>
> Under this model:
>
> - Applicants will generally not be liable for adverse costs, except where vexatious claims are made, or an applicant's unreasonable conduct in the course of proceedings has caused the other party to incur costs
> - Where an applicant is successful and the court has found that a respondent has engaged in discriminatory conduct or sexual harassment, the respondent will be liable to pay the applicant's costs; and
> - Where an applicant is unsuccessful, each party will bear their own costs.

While the ability go to the NSW Civil and Administrative Tribunal (NCAT) prior to discrimination cases being heard by the Supreme Court means the situation in NSW is not directly equivalent, the principles outlined above should be considered for those cases which do ultimately proceed to court.

- *Increasing the cap on the amount of compensation that can be awarded*. Currently, s108(2)(a) limits the maximum award of damages at NCAT to $100,000. The review should consider whether this cap is set at the appropriate level.

- *Increasing the timeline for lodging complaints*. The review should also consider whether to extend the maximum timeline for lodging complaints to 24 months, to bring it into line with changes to the *Australian Human Rights Commission Act 1986* (Cth), and recognise it may take people who experience discrimination some time to prioritise making a complaint and to obtain appropriate advice allowing them to do so.

10. Anti-Discrimination Board of NSW

Term of Reference 10: the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination.

[37] PIAC and the Grata Fund, 'Joint submission to the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws', 14 April 2023, p4 available at: https://piac.asn.au/wp-content/uploads/2023/04/20230414-GrataPIAC-Joint-Submission-to-AGD-Costs-Consultation-encl-Report.pdf

PIAC supports the expansion of powers of Anti-Discrimination NSW, especially to allow it to take a greater role in preventing and/or responding to systemic discrimination. As noted in our 'Leader to Laggard' Report:[38]

> A review of the ADA should also consider modernising Anti-Discrimination NSW's ability to undertake inquiries and conduct research to identify and address systemic discrimination (rather than relying on individual complaints). While section 119 of the ADA provides some powers of this kind, it has evolved gradually and in an ad hoc manner, resulting in only some attributes being included in [section] 119(1)(a): existing grounds such as race, sex, physical disability, homosexuality and transgender are excluded.
>
> This power should be modernised, and brought into line with equivalent organisations, including the Victorian Equal Opportunity and Human Rights Commission and Australian Human Rights Commission.

In particular, the ability to conduct inquiries into systemic discrimination must be own motion (ie not relying on any reference from the Attorney General) and include the power to advocate to Government for legal and other responses to address such discrimination.

Just as important as expanding the powers and functions of Anti-Discrimination NSW is expanding their funding and resources to ensure they are in a position to undertake their responsibilities properly. Currently, Anti-Discrimination NSW receives comparatively lower funding than equivalent organisations in other states and territories, including the Victorian Equal Opportunity and Human Rights Commission and Queensland Human Rights Commission. This must be rectified for it to take on a greater role in preventing and/or responding to systemic discrimination in future.

11. Other anti-discrimination and human rights laws

Term of Reference 11: the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws.

PIAC defers to the expertise of our colleagues at the Australian Discrimination Law Experts Group (ADLEG) for comparative discrimination law analysis, especially when it comes to international anti-discrimination approaches. We understand that, in their submission, they will be highlighting the South African approach which establishes a non-exhaustive list of protected attributes and allows for judicial expansion of this list based on certain criteria. In our view, this approach warrants further consideration in the current review.

In terms of 'other human rights laws', PIAC is a member of a coalition of organisations advocating for a Human Rights Act for NSW. A Human Rights Act would be a complementary reform to comprehensive anti-discrimination reform. This is reflected in the institutional frameworks that

[38] PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, p13, available at: https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/

exist in the three Australia jurisdictions which already have human rights acts or charters, and where many functions related to those acts/charters are performed by the same organisation which oversees anti-discrimination functions, namely:

- the Victorian Equal Opportunity and Human Rights Commission
- the Queensland Human Rights Commission, and
- the ACT Human Rights Commission.

We highlight this here given the possibility for future expansion of the roles and responsibilities of Anti-Discrimination NSW should a Human Rights Act ultimately be adopted in NSW.

12. Interaction with Commonwealth anti-discrimination laws

Term of Reference 12: the interaction between the Act and Commonwealth anti-discrimination laws.

We consider here briefly the relationship between the NSW *Anti-Discrimination Act* and its Commonwealth counter-parts more broadly,[39] rather than any specific legal interaction between these laws.

We note criticisms of inconsistencies which exist between these laws (and with the anti-discrimination laws of other states and territories) and the potential confusion these inconsistencies may cause to people accessing anti-discrimination protections.

In our view these concerns do not negate one of the main strengths of having concurrent Commonwealth, and state and territory, anti-discrimination laws: the opportunity for different jurisdictions to move forward to protect vulnerable groups against discrimination to reflect contemporary values and challenges. This allows for the progressive realisation of rights and a process of improvement to achieve best practice anti-discrimination laws.

This can be seen through countless examples over the past half-century: from NSW protecting gay men and lesbians against discrimination more than 30 years before they were included in the *Sex Discrimination Act 1984* (Cth), through to several jurisdictions (including Tasmania, the ACT, Victoria and Northern Territory) adopting narrower religious exceptions than those which currently exist in Commonwealth law, thereby protecting more LGBTQ people against discrimination (as discussed at 8.2, above).

In conducting this Review, we encourage the NSW Law Reform Commission to identify and recommend best-practice protection against discrimination, harassment and vilification, setting a standard for other jurisdictions to emulate. This is an opportunity for NSW to again become a leader and we look forward to further engaging with the Commission throughout its process.

[39] Including the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004*, *Fair Work Act 2009*, and *Australian Human Rights Commission Act 1986*.