Embracing Equality

Submission to the NSW Attorney General on the Consolidation of Commonwealth anti-discrimination laws

14 March 2012

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Department of Trade and Investment for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's expertise in discrimination law

PIAC welcomes the opportunity to provide comment on the NSW Government's Discussion Paper on the Commonwealth Consolidation of Anti-Discrimination Laws (**discussion paper**).

PIAC has long played a leadership role in developing and using anti-discrimination law and in promoting equality in Australia. It has represented litigants in a number of significant discrimination cases in Australia.[1] PIAC has also been involved in a broad range of public policy

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[1] For general discrimination cases, see, eg, involving indirect discrimination in employment against women: *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165: involving the imposition of a standard in the mining industry that disproportionately affected women *Human Rights and Equal Opportunity Commission v Mt Isa Mines Limited* & *Ors* [1993] FCA 535 (9 November 1993); alleging unlawful sex discrimination in regulation of sport *Ferneley v The Boxing Authority of New South Wales* [2001] FCA 1740 (10 December 2001). For disability access cases, see, eg, *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658 (18 May 2000); involving discrimination in education: *Maguire v Sydney Organising Committee for the Olympic Games* [2000] FCA 1112 (3 August 2000); involving discrimination in the provision of

development and review processes in relation to anti-discrimination law,[2] the promotion of equality and human rights[3].

PIAC's comments in relation to the discussion paper do not address every question, but rather focus on areas relevant to PIAC's expertise and experience. We make recommendations in relation to the Commonwealth consolidation and also comment on the operation of the NSW *Anti-Discrimination Act 1977* (**NSW Act**).

In relation to the consolidation more generally, PIAC refers to its detailed submission to the Commonwealth Attorney-General's Department dated 1 February 2012, which is available on PIAC's website (www.piac.asn.au).

1. Impact of proposal

PIAC notes that many different options were canvassed in the Commonwealth consolidation discussion paper. As such, it is difficult to make a *precise* prediction of the likely impacts, including costs, ahead of the finalisation of such proposals and the release of exposure draft legislation, which the Commonwealth has indicated will be made available in mid-2012.

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information and services: *Grosvenor v Eldridge* [2000] FCA 1574 (19 October 2000); involving disability discrimination in access to retail premises: *Travers v New South Wales* [2000] FCA 1565 (3 November 2000); in relation to independent travel criteria: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008). Involving alleged failure to comply with the *Disability Standards for Accessible Public Transport 2002* (Cth) in relation to the provision of bus stop infrastructure: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007); in relation to wheelchair accessible taxis: *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27; in relation to non-wheelchair accessible buses and coaches: *Haraksin v Murrays Australia Ltd* [2011] FCA 1133 (final decision by Federal Court pending); in relation to audio announcements on trains: *Innes v Rail Corporation NSW* (currently before the Federal Magistrates Court); involving discrimination by a religious organisation against a homosexual couple relating to foster care services: *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).

[2] See, eg, Alexis Goodstone and Dr Patricia Ranald, *'Discrimination ... have you got all day?' Indigenous women, discrimination and complaints processes in NSW* (2001); Public Interest Advocacy Centre, *Submission on the Australian Human Rights Commission Legislation Bill 2003: Submission to the Senate Legal and Constitutional Committee on the Australian Human Rights Commission Legislation Bill* (2003); Robin Banks, *Implementing the Productivity* Commission *Review of the Disability Discrimination Act; submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill* (2009), Gemma Namey, *The other side of the story: extending the provisions of the Sex Discrimination Act 1984 (Cth): Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Sex and Age Discrimination Legislation Amendment Bill 2010* (2010), Lizzie Simpson and Robin Banks, *Taxis for All: Submission to the NSW Legislative Council's Select Committee on the NSW Taxi Industry* (2010). These and most PIAC publications, including submissions, are available on the Centre's website: <http:///www.piac.asn.au/publications/pubs/dateindex.html>.

[3] See, for example, Chris Hartley et al, *National Human Rights Baseline Study: submission by the Public Interest Advocacy Centre* (2011), Chris Hartley and Edward Santow, *ACT Government consultation on the inclusion of economic, social and cultural rights in the Human Rights Act 2004* (2011), Edward Santow and Brenda Bailey, *Human Rights Charter Review-respecting Victorians* (2011).

Generally, PIAC notes that acts of discrimination, vilification and harassment impose significant costs on the community. These relate to lost productivity, absences from work and indirect costs, such as health-related impacts because of stress. A discrimination law regime, which is consistent, readily accessible to ordinary people and easy to understand for individuals and organisations, can actually *reduce* the cost burden on the community.

For example, where anti-discrimination laws are easy to understand and accompanied by appropriate awareness raising, they can have an important educative effect within the community. As the Australian Human Rights Commission (**Commission**) noted in its submission on the consolidation, '*information, education, and compliance promotion activities should be expected to be substantially more efficient and effective if based on legislation which is clear and more consistent'*.[4] Also, improving legislative clarity increases overall compliance with the widely-accepted objectives of these laws, and has the effect of reducing the number of complaints.

Moreover, the current Commonwealth reform process is considering ways to improve the compliance framework and ensure a simple, cost-effective mechanism to resolve complaints. This too would reduce costs for complainants and respondents by reducing protracted complaints and the need for legal advice and representation. In short, PIAC believes that there is very little, if any, evidence to suggest that the proposed reforms to federal anti-discrimination law will result in a net increase in costs for the community.

2. Onus of proof

PIAC supports changes to the burden of proof so that the party most able to adduce the evidence bears the burden. The operation of the current burden of proof for discrimination matters in NSW and federally falls almost entirely upon the complainant. The onus is only on the respondent to prove the mere existence of a defence or an exception or exemption; or for indirect discrimination, the respondent must prove only that a condition, requirement or practice is reasonable. This causes a number of difficulties for complainants as usually all evidence of the reason for the action lies with the respondent.

Often it is necessary for a complainant to prove matters relating to the state of mind of the respondent. For example, a complainant who claims they were not employed because of their family responsibilities has to prove that they did not get the job *because of* their family responsibilities. Evidence about subjective motivation is not easily available to a complainant. Therefore, many cases fail because the court is not satisfied that the action was taken *because of* the protected attribute.

PIAC submits that there should be a 'rebuttable presumption' of discrimination on the basis of that attribute once the complainant establishes a prima facie case. This means that a presumption will then arise that an action was taken for the reason alleged by the complainant

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[4] Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination law: Australian Human Rights Commission Submission to the Attorney-General's Department,* 8 December 2011, <http://www.hreoc.gov.au/legal/submissions/2011/20111206_consolidation.html> at [157].

and the onus falls on the respondent to rebut that presumption. This is consistent with the common law principle that evidence is to be '*weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict*.'[5]

This proposed position also reflects the approach taken in relation to discrimination under the *Fair Work Act 2009* (Cth) (**Fair Work Act**). Under the Fair Work Act, once the complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.[6] This is because almost invariably the respondent will be in a better position than complainants to produce evidence in relation to their conduct. Harmonisation of Federal discrimination laws with the Fair Work Act will make it easier for business to meet its obligations. It will also mean that the case law can develop together. PIAC's proposal in relation to onus of proof was also a recommendation of the Senate Inquiry into the Sex Discrimination Act.[7]

A similar onus of proof exists in the UK, European Union and Canada; the burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination. This does not seem to have caused any problems in these jurisdictions. The England and Wales Court of Appeal in *Ingen Ltd v Wong*[8] noted that the burden of proof made '*good sense given that a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treate.*'[9]

3. Creation of a 'no-cost' jurisdiction

There are currently inconsistencies in relation to the operation of costs jurisdictions for discrimination matters. At the Commonwealth level, employment discrimination matters under the Fair Work Act, which proceed to the Federal Court or Federal Magistrates Court, are in a no-costs jurisdiction. By contrast, discrimination matters under the Commonwealth discrimination statutes, which proceed to the same courts (ie, the Federal Court or Federal Magistrates Court), operate in a costs jurisdiction. There is also an inconsistency in that discrimination matters in NSW before the Administrative Decisions Tribunal (**ADT**) operate in a largely no-costs setting compared to discrimination matters at the Commonwealth level. Similarly, other State and Territory tribunals are no-costs jurisdictions.

Litigation costs are a significant barrier to accessing justice in discrimination complaints. The current Commonwealth costs regime represents a major impediment to pursuing discrimination complaints. For many of PIAC's clients, the risk of an adverse costs order is sufficient to dissuade them from pursing a discrimination complaint in the Federal courts, even when they have a strong claim.

PIAC submits that the Federal courts should be made a no-costs jurisdiction for discrimination complaints. This will ensure consistency with General Protection claims under the Fair Work Act

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5 *Qantas Airways Limited v Gama* [2008] FCAFC 69, citing *Medtel Pty Ltd v Courtney* [2003] FCAFC151; (2003) 130 FCR 182 per Branson J at [76].

6 *Fair Work Act* (Cth) s 361.

7 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality* (2008).

8 [2005] EWCA Civ 142.

9 *Ingen Ltd v Wong* [2005] EWCA Civ 142 at [31].

and State and Territory anti-discrimination laws. It will improve access to justice for individuals who have been victims of discrimination. PIAC notes that the Productivity Commission has previously made a similar recommendation.[10]

In NSW, there is a presumption that each party bears their own costs in discrimination matters that proceed to the ADT.[11] However, this presumption was diluted by amendments in 2008,[12] which allow the ADT to award costs if it is 'fair to do so'.[13] While PIAC acknowledges that in some circumstances it may be appropriate to make a costs order, in our view, the ADT provisions go too far.

PIAC supports the following provisions to make a costs order if the Federal courts are made no-costs for discrimination matters. First, if a party has conducted the matter in such a way as to add unnecessary delay, the court should have the discretion to make a costs order. This is consistent with the existing powers in the court rules. Secondly, if a matter is not dismissed at an early stage as frivolous or vexatious, and proceeds to hearing, it may be appropriate to make a costs order. Thirdly, PIAC submits that where a discrimination matter is a public interest matter and the complainant is successful, the court should to able to make a public interest costs order, to allow the complainant to recover its costs.

4. Standing of organisations to bring complaints

PIAC supports extending the rules for standing at the Commonwealth level so organisations can bring complaints on behalf of individuals and in their own right to the Commission and the Federal courts. PIAC submits that in many cases organisations are better placed than individuals to make complaints regarding discrimination, particularly in the case of systemic discrimination. For example, in relation to inaccessible public transport, a disability organisation should have standing to bring a complaint, in their own right as an organisation that advocates for the rights of people with disability, and on behalf of an individual who has been personally affected.

The rules on standing for discrimination matters differ at the Commonwealth and NSW levels in relation to representative organisations. It has been suggested that the NSW provisions on standing[14] permit *any* person to lodge a discrimination complaint, whether personally affected or not, and is an open standing provision.[15] In relation to the standing of organisations to bring a complaint in NSW, two types of complaints can be made by an organisation: a representative complaint made on behalf of a class of people,[16] and a complaint lodged by a representative body[17].

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10 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004), Recommendation 13.4.

11 *Administrative Decisions Tribunal Act 1997* (NSW) s 88(1).

12 *Administrative Decisions Tribunal Amendment Act 2008* (NSW).

13 *Administrative Decisions Tribunal Act 1997* (NSW) s 88(1A).

14 *Anti-Discrimination Act 1977* (NSW) s 87A(1).

15 See *Western Aboriginal Legal Service Limited v Jones* [2000] NSWADT 102 at [44].

16 *Anti-Discrimination Act 1977* (NSW) s 87A(1)(a)(ii).

17 *Anti-Discrimination Act 1977* (NSW) ss 87A(1)(c), 87C.

The position at the Commonwealth level is different. PIAC has identified two problems with the existing Commonwealth rules regarding standing. First, there is an inconsistency regarding the rules of standing to bring a complaint to the Commission and a complaint to the Federal courts. Currently, complaints to the Commission can be made by or on behalf of a 'person aggrieved' pursuant to s 46P(2) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). However, only an 'affected person' (s 46PO(1)) can bring proceedings in the courts if the complaint does not resolve at conciliation. This means that an organisation, such as a disability advocacy organisation, can bring a complaint on behalf of an individual to the Commission, but if the matter does not settle then only the individual with the disability can bring the complaint to court, as only the individual is an 'affected person'.

PIAC has experience of the problems these inconsistencies create. PIAC advised a disability organisation that had brought complaints on behalf of a number of individuals around Australia regarding access to a particular service. PIAC advised that, given the inconsistencies between ss 46P(2) and 46PO(1), it would be difficult for the organisation to continue acting on behalf of the individuals in the Federal Court. As the individual complaints related to the same service, it would have made sense for the complaints to be heard together and brought by the organisation on behalf of the individuals.

Given the difficulties in pursuing a discrimination complaint in the courts, including the financial, time and emotional resources required, it is important that organisations be able to bring such complaints to court on behalf of individuals, who are often vulnerable or marginalised. The inconsistencies between ss 46P(2) and 46PO(1) should be amended to ensure that organisations can bring complaints on behalf of an individual before the courts as well as before the Commission.

A second problem with the Commonwealth law of standing for discrimination matters relates to the standing of organisations to bring complaints, in their own right, as opposed to on behalf of individual members. PIAC represented Access for All Alliance (Hervey Bay) Inc (**AAA**) in a disability discrimination action against Hervey Bay City Council regarding a breach of the Disability Transport Standards, relating to inaccessible bus stop infrastructure.[18] AAA, an incorporated association, was established to ensure equitable and dignified access to premises and facilities for all members of the community. The complaint was dismissed by Collier J on the basis that AAA was not a 'person aggrieved' within the terms of s 46P and therefore did not have sufficient standing to bring the complaint. Although the applicant was an organisation that represented people with disability, the Court found that the applicant itself was not affected by inaccessible public transport infrastructure to an extent greater than an ordinary member of the public. The Court found that the applicant needed to establish that it was a '*person aggrieved in its own right*'.[19]

This decision appears to have inhibited other organisations making complaints about systemic discrimination.[20] The test outlined in *Access for All* that applies to the standing of an organisation

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18 *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (**Access for All**).

19 Ibid at [58].

20 See for eg, NSW Disability Discrimination Law Centre Inc, *Submission: Response to a Strategic Framework for Access to Justice in the Civil Justice System*, (2009) < http://www.piac.asn.au/publication/2009/12/091130-piac-sub-a2j> at 11 May 2011. http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Submission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf/$file/Submission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf> at 12 June 2011, 8.

to bring a discrimination complaint is very limited and hampers the ability of organisations to bring action to address systemic discrimination.

PIAC submits that ideally there should be a liberal approach to the question of standing. PIAC supports open standing for discrimination complaints, in similar terms to s 123 of the *Environmental Planning and Assessment Act 1979* (NSW). PIAC notes that the Commission in its submission to the Consolidation also refers to environmental law rules of standing as one of the options for simplifying the standing requirements in discrimination law.[21] As outlined above this would make the Commonwealth laws consistent with the NSW (and Western Australian legislation[22]), which arguably provide open standing.

Open standing provisions would make it easier for organisations to bring proceedings to address systemic discrimination, taking the pressure off individuals in bringing such claims. Courts already have the power to dismiss an action that is frivolous or has no reasonable prospects of success. In PIAC's view, this power would be sufficient to address any concerns that open standing would result in a flood of discrimination complaints being brought before the courts.

In PIAC's experience, open standing provisions would be particularly useful to bring actions in the area of disability discrimination relating to access. PIAC has represented a number of individuals, who at great personal cost – in terms of time, stress and financial risk – have brought proceedings in the Federal Court against public transport operators in relation to inaccessible transport.[23] In each case, the problems identified about access not only affected the individuals involved, but also equally affected other people with disability; they were cases of genuine public interest. Open standing provisions would have allowed a disability organisation, or an organisation such as PIAC, to bring the proceedings, rather than the individuals.

In the event that open standing is not adopted in a consolidated Commonwealth Act, PIAC submits that the new Commonwealth Act at least should include a test for standing for organisations or groups, in particular incorporated organisations, to bring discrimination proceedings according to the following criteria:

- the membership of the organisation or group; or
- if the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.

The first criterion finds some support in obiter comments in decisions regarding the standing of bodies corporate to bring complaints where all (or some) of its members have been affected by the alleged discriminatory conduct.[24] The second criterion derives from s 27(2) of the

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[21] Australian Human Rights Commission, above n 4, at [299].

[22] *Equal Opportunity Act 1984* (WA) s 83(1).

[23] See *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27; *Haraksin v Murrays Australia Ltd* [2011] FCA 1133; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

[24] See *Access for All* above n 18 above at [60] where Collier J left open the prospect of an incorporated association having standing if all of its members were aggrieved by the conduct; *IW v City of Perth* (1997) 191 CLR 1, where Toohey J (at 30) and Kirby J (at 77) found that the appellant was a person aggrieved and had standing; and in *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537, 548-549, where the applicant was held to be a person aggrieved as its members were affected by the discriminatory conduct.

Administrative Appeals Tribunal Act 1975 (Cth), an uncontroversial provision of long-standing operation, which PIAC submits should be extended to this context. We submit that these criteria should be included in the legislation to provide guidance on standing for groups and organisations.

5. Exemptions generally

The terminology in relation to exemptions and exceptions varies between the Commonwealth acts and NSW Act. The NSW Act uses the term 'exemptions' to refer to exemptions that can be granted on a temporary basis by the Minister; 'exceptions' are permanent and refer to areas that are excluded from the operation of the NSW Act. The current terminology used in the Commonwealth legislation is inconsistent and confusing and refers to exceptions and exemptions interchangeably.

The NSW Act has a broad range of exceptions. There are a number of specific exceptions for each of the attributes, including, for example sport, superannuation and genuine occupational qualification.[25] Part 6 of the NSW Act also sets out general exceptions to the Act, including for religious bodies. In addition, there is provision to apply to the Minister for a temporary exemption for a period up to 10 years.[26] Similar exemptions and exceptions exist in the Commonwealth discrimination legislation.

The exceptions and exemptions contained in the current Australian anti-discrimination legislation have sometimes been criticised as inflexible, unreasonable and overly broad.[27] It has also been suggested that permanent exceptions contained in anti-discrimination laws have reinforced discrimination against marginalised groups of Australian society.[28]

PIAC does not support the current regime of permanent exceptions and exemptions in the NSW Act and in the Commonwealth legislation. PIAC contends that all of the exceptions and permanent exemptions contained in current Commonwealth anti-discrimination legislation should be replaced with a single justification provision, which provides that the discriminatory behaviour will not be unlawful discrimination if the respondent can show that '*the action was a proportionate*

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25 *Anti-Discrimination Act 1977* (NSW), for race: ss 14, 15, 16, 21 and 22; for sex: ss 31, 35-38; for transgender: ss 38 P, 38Q, for marital or domestic status: s 49; for disability ss 49P, 49PA, 49Q, 49R, for compulsory retirement s 49ZX; and for age: ss 49ZYJ, 49ZYK, 49ZYQ-ZYX.

26 *Anti-Discrimination Act 1977* (NSW) s 126.

27 See, Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality,* September 2008, Australian Human Rights Commission, <http://www.hreoc.gov.au/legal/submissions/2008/20080901_SDA.html>, 162.

28 See, eg, Human Rights Law Centre & Public Interest Law Clearing House, *Eliminating Discrimination and Ensuring Substantive Equality, Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995(Vic),* 2009 < http://www.hrlrc.org.au/files/eo-review-pilch-hrlrc-submission-to-sarc.pdf> at 8 December 2011, 2.

means of achieving a legitimate aim'.[29] All other defences such as unjustifiable hardship should be subsumed within this provision. On a symbolic level, including a single defence provision, which balances the interests of duty holders against the rights of individuals, sends a powerful message about the importance of equality in Australian society. On a practical level, a single justification provision is simpler for individuals and businesses to understand. It is also more flexible, as it allows decisions about discrimination to change over time in line with changing community expectations. Moreover, this approach is more consistent with Australia's international human rights obligations.

PIAC recommends that transitional provisions should be made at the Commonwealth level to make all the existing exceptions, permanent exemptions and defences subject to a three-year sunset clause.

PIAC suggests that the single justification provision should include a list of the following factors that may be taken into account when determining whether discriminatory actions are justified:

- the objects of the Act;
- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the disadvantage or condition, requirement, provision, criterion, or practice;
- the feasibility of overcoming or mitigating the disadvantage;
- the financial circumstances of the person imposing the condition, requirement, provision, criterion or practice;
- the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage; and
- in relation to discrimination at work, the inherent requirements of the job.

PIAC supports the continued availability of temporary exemptions up to five years, on an application basis and with public consultation.

5.1. Religious freedom and a firmer basis for protection against discrimination

As outlined above, PIAC's primary position is that there should be no permanent exemptions for religious bodies in respect of any protected attribute. Instead, PIAC submits that religious bodies, if they wish to discriminate on certain grounds, must justify such discrimination. As outlined above, such discrimination must conform to the general limitations clause – that is, it must be a proportionate means of achieving a legitimate aim.

In PIAC's view, the operation of such a limitation clause would be assisted by the creation of protection from discrimination on the ground of religious belief. South Australia and NSW are alone among States and Territories to have no legislation prohibiting discrimination on the ground of religious belief. Although NSW does prohibit discrimination on the basis of 'ethno-religious origin' as part of the definition of race,[30] the meaning of that term remains uncertain and therefore

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29 See for eg *Equality Act 2010* (UK) s 13(2) which provide '*If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim*'. See also *Equality Act 2010* (UK) ss 15(1)(b) and 19(2)(d).

30 *Anti-Discrimination Act 1977* (NSW) s 4.

the protection is limited. At the Commonwealth level, only religious discrimination in employment is prohibited, under the Fair Work Act and to some extent the AHRC Act. Freedom of religion and belief is a fundamental human right[31] and should be given appropriate protection under Australian (and NSW) discrimination law.

Providing protection against discrimination on the ground of religious belief would enable the Australian Government to re-shape the religious exemptions under the consolidated Act so that they are more suitable to their purpose. By more effectively combating religious intolerance in anti-discrimination legislation, the Government would be able to provide a more effective, more principled response to the need for religious freedom than the overly-broad exemptions granted to religious organisations.

Religious organisations play a large and important role in public life in Australia; for example, in the provision of education, aged care and other services. The extent to which they are allowed to discriminate affects a significant number of people, including potential employees and recipients of services. Therefore, PIAC believes the exemptions for religious organisations should be no broader than is justifiable and necessary.

PIAC believes that the current exception for religious bodies as contained in s 56 of the NSW Act is unnecessarily broad. Section 56 is a general exception and states:

> Noting in this Act affects:
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> (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.

PIAC acknowledges that religious bodies sometimes need permission to discriminate when making key religious appointments. PIAC endorses the view of the Uniting Church in Australia in limiting the core functions to leadership and teaching positions. The Uniting Church supports:

> [f]ederal legislation prohibiting religious discrimination, including a specific provision which allowed for discrimination on the basis of religion by faith communities in the area of employment in leadership and teaching positions, where it is reasonably necessary for maintaining the integrity of the religious organisation...[32]

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31 *Universal Declaration of Human Rights* article 18; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993) article 18.

32 Uniting Church in Australia National Assembly, *Submission to the Australian Human Rights Commission – Freedom of Religion and Belief in the 21st Century*, March 2009, 14.

The current exception in NSW goes beyond this and is unnecessarily broad. For example, the exception is not limited to discrimination on the basis of sex in relation to the ordination or appointment of religious members. The exception applies to employment, education, provision of goods and services, accommodation and registered clubs. Moreover, it is not limited to sex but encompasses discrimination on the grounds of breastfeeding and pregnancy.[33] The position is similar for all other protected attributes in that the exception applies to all areas of public life.

Also, the NSW exception appears to have little operation to some protected attributes. For example, the exception applies to the protected grounds of disability, race and pregnancy. PIAC does not believe that the exception in relation to all grounds is necessary. It is important to note that neither the *Disability Discrimination Act 1992* (Cth) **(DDA)** nor the *Racial Discrimination Act 1975* (Cth) contain exemptions for religious organisations. In PIAC's view there is no justifiable need for religious bodies to be authorised to discriminate on the grounds of race or disability.

Paragraph 56(d) allows any act or practice of a body established to propagate religion that '*is necessary to avoid injury to the religious susceptibilities of adherents of that religion*.'[34] This phrasing is too broad as it may permit discrimination on the basis that an act will injure the religious susceptibilities of *some* adherents of a religion.

The Commonwealth consolidation discussion paper sought feedback on how a religious exemption might apply to the new grounds of sexual orientation and gender identity. PIAC's consistent position is that there should be no such exemptions, other than a general limitation provision- whether the discrimination is a 'proportionate means of achieving a legitimate end or purpose'.

Case Study: operation of religious exemption in NSW

PIAC has experience of the operation of the NSW religious bodies exception in the area of discrimination on the ground of sexuality. PIAC represented a homosexual male couple, OV and OW, in their case against Wesley Mission. [35] In 2002, OV and OW sought to apply to a foster care agency that was mostly funded by the Department of Community Services but operated by Wesley Mission to become foster carers. The agency refused to provide them with an application form, giving as its reason the sexuality of OV and OW. OV and OW lodged a complaint against the Wesley Mission, alleging it had unlawfully discriminated against them by refusing to provide them with a service because of their sexuality. Wesley Mission relied on section 56 of the NSW Act, particularly paragraphs (c) and (d), to claim that its conduct was lawful.

At first instance, the ADT found that Wesley Mission had unlawfully discriminated against OV and OW because neither ss 56(c) nor (d) applied. Section 56(c) did not apply because foster carers are 'approved' pursuant to the child protection scheme set out in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Section 56(d) did not apply because Wesley Mission

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33 By virtue of ss 24(1B), 24(1C) the *Anti-Discrimination Act 1977* (NSW).

34 *Sex Discrimination Act 1984* (Cth) s 37.

35 *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293; *OV & OW v Wesley Mission* [2010] NSWCA 155 (6 July 2010); *OV v QZ (No. 2)* [2008] NSWADT 115 (1 April 2008); *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5 (27 January 2009); *Members of the Board of the Wesley Mission Council v OW and OV (No 2)* [2009] NSWADTAP 57.

failed to prove that '*monogamous heterosexual partnership in marriage as the norm and ideal'* of the family was a doctrine of the Christian religion or of the Uniting Church.

Wesley Mission appealed to the ADT Appeal Panel to have the questions arising on the appeal referred to the Supreme Court. The NSW Attorney General intervened in support of the appeal and the application to refer the matter to the Supreme Court.

The Appeal Panel did not refer the proceedings to the Supreme Court and dismissed Wesley Mission's appeal in relation to section 56(c). However, the Appeal Panel found that the religion of Wesley Mission was Christianity and that 'religion' in s 56 should be determined by reference to the 'belief system' from which relevant doctrines are derived. The Appeal Panel sent the question of s 56(d) back to the ADT for rehearing.

PIAC's clients appealed from the decision of the Appeal Panel to the Court of Appeal. Wesley Mission cross-appealed on s 56(c). The Court of Appeal dismissed the cross-appeal in relation to s 56(c). The Court also found that s 56 '*encompassed any body established to propagate a system of beliefs, qualifying as a religion'.* That appeal was successful and the matter was remitted to the ADT for further determination in July 2010.

Ultimately, the ADT found in favour of Wesley Mission. However, the ADT said that it was not its task to decide whether it was appropriate for Wesley Mission to accept public funds for providing a service that it provided in a discriminatory fashion. They said the test was '*singularly undemanding'* in that it merely required the ADT to '*find that the discriminatory act was "in conformity" with the doctrine not affirmatively that it breached it. This may be a matter which calls for the attention of Parliament*.'

This case illustrates the broad nature of the current religious exemption in the NSW legislation. PIAC submits that a similar outcome should be avoided under a new Commonwealth Act. Even the Tribunal that ultimately found in favour of Wesley Mission suggested that the exemptions needed to be reformed. As a public policy matter, no public service provider or educational institution that receives public funding should be able to discriminate on any of the protected attributes without justifying the discrimination to the Commission.

In summary, PIAC proposes that any permanent religious exemption, in the existing NSW Act or in a new Commonwealth Act, should be limited to marital status, sex, age, sexuality and gender identity, and should be narrowed to two areas of public life:

- the ordination, appointment, training or education of priests, Ministers of religion or members of any religious orders; and
- educational institutions established for religious purposes in relation to the employment of staff in the provision of religious education and training.[36]

[36] The exemption in relation to age may not be necessary in relation to educational institutions.

6. Expanding the duty to make reasonable adjustments to other attributes

The duty to make reasonable adjustments was inserted into the DDA by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*, which came into force on 5 August 2009. The provisions in the DDA relating to reasonable adjustments are subsections in the definitions of direct and indirect discrimination (ss 5(2) and 6(2)). These provisions are yet to be judicially considered.

PIAC supports extending the duty to make reasonable adjustments to other attributes. Currently, claims of indirect discrimination arise where a person with a particular attribute is unable to comply with the requirement or condition, or the requirement or condition has a disproportionate impact on a group with the particular attribute. To defeat a claim of indirect discrimination, a respondent must prove that the requirement or condition is reasonable.

A separate positive duty to make reasonable adjustments would provide clarity to duty holders in assessing the impact of a neutral requirement or condition and its reasonableness. For example, an employer may impose a condition that an employee be able to lift 25kg, a requirement that is likely to have a disproportionate impact on women. An adjustment in that situation might be allowing another employee to assist with lifting of heavy objects. Whether such an adjustment is reasonable would depend on, for example, the number of employees, the frequency such lifting is required etc.

Another example of how such a duty would operate is that an employer could be required to make an adjustment to provide Occupational Health and Safety manuals in a language other than English. Assessing whether such an adjustment is reasonable, would involve consideration of the size of the employer, the number of employees who speak a different language, the number and size of the manuals. Similarly, premises such as a shopping centre may provide a special facility for women who are breastfeeding. Whether making such an adjustment is reasonable would depend on the size of the shopping centre.

6.1. Stand-alone provision

PIAC submits that the duty to make reasonable adjustments should be a stand-alone provision that applies to all attributes rather than incorporated into discrimination provisions more generally. It would be simpler for the reasonable adjustment duty to be a separate provision. The provision should also apply to all areas of public life that are protected from discrimination and not be limited to, for example, employment.

The *Equal Opportunity Act 2010* (Vic) contains a duty to make reasonable adjustments that is limited to the areas of employment, education, the provision of goods and services and access to premises. Given that the current provisions in the DDA apply across all areas of public life protected by the DDA, if a new standalone provision were limited to particular areas, as the Victorian Act is, then this would represent a reduction in existing protections.

7. Expanding the categories of protected attributes

PIAC supports extending the categories of protected attributes. There is currently an inconsistency between the protected attributes under the four key pieces of Commonwealth discrimination legislation (sex, race, age and disability), the Fair Work Act and the employment protections under the AHRC Act, by virtue of the International Labour Organization (**ILO**).

PIAC submits that the inconsistencies should be addressed by expanding the attributes in a new consolidated Commonwealth Act to protect the grounds under the ILO and Fair Work Act, namely:

- religion;
- political opinion;
- industrial activity;
- nationality;
- criminal record;
- medical record;
- sexual preference;
- carer's responsibilities;
- national extraction; and
- social origin.

These additional attributes are already covered in the employment context and it would harmonise employment with other contexts and enable the case law to develop together. As the Commission explains in its submission, the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *International Covenant on Economic Social and Cultural Rights* (**ICESCR**)[37] provide a basis for prohibiting discrimination more broadly. Given that these grounds are already covered in the employment context, the impact on business and more broadly of extending protection to all contexts would not be substantial.

As outlined above, PIAC supports adding religious belief as a protected attribute. In addition, PIAC submits that new grounds of housing status and victims of domestic violence should be included in the new consolidated Commonwealth Act.

7.1. Housing status

PIAC has particular expertise in relation to discrimination on the basis of housing status through its Homeless Persons Legal Service (**HPLS**). A joint initiative between PIAC and the Public Interest Law Clearing House (**PILCH**), HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness.

While there are some provisions in anti-discrimination legislation that can indirectly provide protections for homeless people,[38] there are no specific legal protections against discrimination on the basis of housing status. Discrimination on the basis of housing status is currently lawful in Australia. Sadly, it is frequent and widespread.

PIAC has proposed the term 'housing status' as it includes not only people who are homeless, but also people who are at risk of homelessness, people who were previously homeless, and people who are in public housing.

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[37] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

[38] For example, disability discrimination, as defined under section 4 of the DDA, can provide some protections to homeless people who have intellectual or physical disability, suffer from mental illness or addictions.

According to a study undertaken by the Victorian Homeless Persons Legal Clinic (**HPLC**) on behalf of the Victorian Government, 69% of homeless people surveyed reported having experienced discrimination on the basis of homelessness or social status at the hands of accommodation service providers.[39] These include private real estate agents, private landlords, hotels, boarding houses, public housing and transitional or crisis accommodation service providers. Approximately half of those surveyed reported that discrimination had prolonged their homelessness and made it more difficult to navigate out of homelessness.

According to the same study, 58% of homeless people surveyed reported that they had been discriminated against from providers of goods and services on the basis of homelessness or social status. Respondents reported that discrimination was most often experienced from restaurants, cafes, bars, banks, retail shops, hospitals and telecommunications providers.

Discrimination on the basis of homelessness may manifest itself in a number of different ways. Factors which form the basis of such discrimination include:

- appearance;
- source of income (eg. Centrelink benefits);
- association with, or assistance by, a welfare agency (eg, by presenting an emergency payment cheque from that agency for payment of rent); and
- being unable to meet certain requirements imposed for accessing goods and services, such as having a permanent address or landline telephone number.[40]

According to the study by the Victorian HPLC, discrimination can have serious consequences for a person experiencing homelessness, further exacerbating their pre-existing disadvantage.[41] These include:

- hindering access to accommodation, employment, goods and services;
- exacerbating social exclusion, negative stereotyping and stigmatisation, sometimes leading to relationship difficulties;
- entrenching homelessness, particularly where it results in an inability to secure private rental accommodation, causing a need to further rely on transitional or crisis accommodation, often at great cost;[42] and
- adverse physical and mental health consequences, including depression, anxiety and substance abuse. Poor physical health was a frequent occurrence in 35 to 40 per cent of cases.[43]

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39 PILCH Victoria Homeless Persons' Legal Clinic, *Report to the Department of Justice, Discrimination on the Grounds of Homelessness or Social Status,* 2007.

40 PILCH Victoria Homeless Persons' Legal Clinic, *Discrimination on the basis of homelessness: Position paper of the PILCH Homeless Persons' Legal Clinic*, available at: http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf. at 10 January 2012.

41 PILCH Victoria Homeless Persons' Legal Clinic, *Discrimination on the basis of homelessness: Position paper of the PILCH Homeless Persons' Legal Clinic*, available at http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf. at 10 January 2012.

42 A City of Sydney study showed that the public cost of someone remaining homeless is as much as $34,000 per person every year. ABC Radio, 'The Cost of Homelessness', *702 Sydney Breakfast Show,* 2 March 2006 <http://www.abc.net.au/sydney/stories/s1582528.html>.

The Victorian Equal Opportunity Review Final Report recommended that homelessness be included as a protected attribute under Victorian anti-discrimination law.[44] International law also provides support for including housing status as a protected attribute.[45]

Adding housing status as a protected attribute will, most importantly, provide those who are homeless, at risk of homelessness, or previously homeless, with a possible recourse if they are discriminated against on the basis of their housing status. Secondly, it sends an important educational and deterrent message to service providers and employers about discrimination on the basis of housing status. Even though it will not actually address the root causes of homelessness, law reform like this is an important part of a holistic strategy to reduce homelessness. This is particularly important given that the Federal Government has pledged to halve homelessness by 2020, a very ambitious target.

7.2. Domestic violence

PIAC also supports extending discrimination protection to victims of domestic violence. Domestic violence has a major impact on a person's life. Victims of domestic violence often have difficulties getting work, experience anxiety at work, need changes to schedules or work location for safety reasons, need to attend court or counselling appointments or have other interactions with the criminal justice system.[46] Including being a victim of domestic violence as a protected attribute, particularly in the area of employment, will provide protection from such discrimination.

8. Uniformity in State and Commonwealth laws

In many respects, the NSW Act provides greater protection against discrimination than Commonwealth legislation. The NSW Act operates in a no-costs jurisdiction and protects a larger number of protected attributes, for example, homosexuality and transgender discrimination and vilification are prohibited. PIAC notes that one of the principles guiding the Commonwealth consolidation is that there be no reduction in existing protections in federal anti-discrimination law. Similarly, PIAC stresses that the consolidation at a Commonwealth level should not result in diminished protection in NSW laws.

Ultimately PIAC supports in principle the concept of harmonised discrimination laws in Australia. The existing regime of different laws at State, Territory and Federal levels is confusing and unnecessarily complex for business and the broader community. Depending on the outcome of the federal reform process, the option of harmonising legislation across Australia might be one way to improve uniformity between State and Federal laws.

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43 PILCH Victoria Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 17.

44 Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008, 96 - 97.

45 ICESCR, article 11 (right to adequate standard of living and adequate housing), article 12 (right to highest attainable standard of physical and mental health).

46 Belinda Smith and Tashina Orchiston, "Domestic Violence Victims at Work: the Role of Anti-Discrimination Law", *Working Paper*, 12 December 2011.

The Commonwealth consolidation discussion paper indicated that the existing provisions in the Commonwealth legislation that specify that the Commonwealth does not intend to cover the field would be replicated in a consolidated bill. For this reason, unless an issue of direct inconsistency were to apply, inconsistency in relation to s 109 of the Australian Constitution would not arise.[47]

[47] *R v Credit Tribunal (SA); Ex Parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 562.