

# Submission to Inquiry into Australia's Human Rights Framework

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Public Interest Advocacy Centre  
**ABN** 77 002 773 524  
[www.piac.asn.au](http://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 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

T: 0411 203 440

E: [alawrie@piac.asn.au](mailto:alawrie@piac.asn.au)

Website: [www.piac.asn.au](http://www.piac.asn.au)



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

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**Recommendation 1 – A national Charter of Rights**

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*The Parliamentary Joint Committee on Human Rights recommend that the Federal Government implement an Australian Charter of Human Rights.*

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**Recommendation 2 – Settle religious belief discrimination provisions prior to a national Charter of Rights**

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*The Parliamentary Joint Committee on Human Rights recommend that provisions prohibiting religious belief discrimination under Commonwealth law are resolved prior to the introduction of a Charter of Rights.*

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**Recommendation 3 – Consolidation of Commonwealth anti-discrimination laws**

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*The Parliamentary Joint Committee on Human Rights recommend that Commonwealth anti-discrimination laws be consolidated into a single Act.*

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**Recommendation 4 – Replacing the comparator test with the detriment test**

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*The Parliamentary Joint Committee on Human Rights recommend that the ‘comparator test’ in Commonwealth anti-discrimination law be replaced by the ‘detriment test’.*

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**Recommendation 5 – Equal access model for costs**

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*The Parliamentary Joint Committee on Human Rights recommend that Commonwealth anti-discrimination laws be reformed to adopt an ‘equal access model’ for costs orders.*

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**Recommendation 6 – Reform to religious exceptions**

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*The Parliamentary Joint Committee on Human Rights recommend that religious exceptions in Commonwealth anti-discrimination law be reformed to ensure they are narrow and appropriately targeted, including that they:*

- *Generally only apply to the protected attribute of religious belief*
- *Where it relates to employment, are linked to the inherent requirements of the role*
- *Where it relates to service delivery, are closely related to the exercise of religious freedom.*

*These reforms should be informed by existing approaches in anti-discrimination laws in Tasmania, the ACT, Victoria and the Northern Territory.*

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**Recommendation 7 – Religious belief protections equivalent to existing laws**

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*The Parliamentary Joint Committee on Human Rights recommend that religious belief protections be added to Commonwealth anti-discrimination laws consistent with existing protections afforded to other attributes, such as sex, race, disability, age and sexual orientation, without undermining the rights of other groups within the community to live their lives free from discrimination.*

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**Recommendation 8 – Reasonable adjustments for people with disability**

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*The Parliamentary Joint Committee on Human Rights recommend amendments to the ‘reasonable adjustments’ provisions of the Disability Discrimination Act 1992 (Cth), to address issues created by the Federal Court decision in *Sklavos v Australian College of Dermatologists*,*

and to ensure people with disability can fully participate in all areas of public life, including workplaces.

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**Recommendation 9 – Replace ‘intersex status’ with ‘sex characteristics’**

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*The Parliamentary Joint Committee on Human Rights recommend the protected attribute of ‘intersex status’ in Commonwealth anti-discrimination laws be replaced with ‘sex characteristics’, drawing on the definition recently introduced to the Anti-Discrimination Act 1991 (Qld).*

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**Recommendation 10 – Protect LGBTQ students and teachers in religious schools**

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*The Parliamentary Joint Committee on Human Rights recommend that LGBTQ students and teachers in religious schools are protected against discrimination, either through general amendments to religious exceptions in anti-discrimination laws, or in the alternative, through specific amendments to the Sex Discrimination Act 1984 (Cth).*

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**Recommendation 11 – Prohibit vilification on the basis of sexual orientation, gender identity and sex characteristics**

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*The Parliamentary Joint Committee on Human Rights recommend that the Commonwealth Government consider the introduction of provisions prohibiting vilification on the basis of sexual orientation, gender identity and sex characteristics.*

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**Recommendation 12 – Create a Sexual Orientation, Gender Identity and Sex Characteristics Discrimination Commissioner at the Australian Human Rights Commission**

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*The Parliamentary Joint Committee on Human Rights recommend that the Government create and appoint a Sexual Orientation, Gender Identity and Sex Characteristics Discrimination Commissioner at the Australian Human Rights Commission.*

# 1. Strengthening Australia's Human Rights Framework

## 1.1 Introduction

PIAC is a community legal centre that works with people and communities who are marginalised and facing disadvantage. Together we seek to build a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Human rights are at the heart of our work.

This applies across the breadth of our current projects, which invoke everything from the right to housing (through our Homeless Persons' Legal Service), the right to seek asylum and to be protected against arbitrary detention and torture (our work on Asylum Seeker Rights), the rights of Indigenous peoples (through our First Nations Justice project), and the right to a healthy environment (including our Energy and Water Consumers' Advocacy Program).

In this context, PIAC has long supported the introduction of Human Rights Charters both federally and in NSW. We are members of the national Charter of Rights campaign, as well as the Human Rights Act for NSW working group.

We therefore welcome the current parliamentary inquiry into Australia's human rights framework, including its explicit consideration of 'whether the Australian Parliament should enact a federal Human Rights Act', as an important step along the path to the introduction of such a law.

One of the human rights which PIAC works most on is the right to be protected against discrimination. This involves casework, especially representing clients who have experienced discrimination on the basis of their disability, and law reform advocacy, including in relation to disability discrimination issues as well as engaging in debates around LGBTQ students and teachers in religious schools, and the previous Government's Religious Discrimination Bill(s).

We consider Australia's anti-discrimination laws, both at Commonwealth level and across the states and territories, to be a key pillar in Australia's human rights framework. Unfortunately, our experience shows this pillar to be in need of strengthening, with its 'scope and effectiveness' in need of improvement both systemically and in specific areas.

In this short submission, therefore, we will focus our comments on three main areas:

1. Support for a national Human Rights Charter (while noting the need to resolve issues of religious belief discrimination prior to its enactment)
2. Systemic improvements to Australia's anti-discrimination law framework (including consolidation, removing the comparator test, costs reform and reform to religious exceptions), and
3. Specific improvements to Australia's anti-discrimination framework (including the introduction of religious belief as a protected attribute, reforms to reasonable adjustments provisions for people with disability, and LGBTIQ anti-discrimination reforms).

## 2. Support for a national Human Rights Charter

### 2.1 Endorsing the submission of the national Charter of Rights campaign

As a member of the national Charter of Rights campaign, we endorse the submission made by that campaign, co-ordinated by the Human Rights Law Centre.

We believe a Charter of Rights will not only ensure that greater consideration is given to human rights in both the political and justice systems, but that it has the potential to have tangible benefits in the lives of individuals and communities. As noted in the national campaign submission:<sup>1</sup>

By ensuring human rights are at the heart of our laws, and that people can take action when their rights are violated, a Charter makes a huge difference to the lives of people across our community. Charters are of particular importance for parts of the community marginalised by a combination of neglect with respect to critical services, or cultural attitudes that lead to discrimination, and as a result are prevented from fully enjoying their rights. People need enforceable human rights to help redress the wrongs they face, but more importantly improve government laws and decisions so that they properly consider human rights at the outset.

Importantly, the national campaign submission identifies a number of practical outcomes from the operation of the existing *Human Rights Act 2004 (ACT)*, *Charter of Human Rights and Responsibilities 2006 (Vic)* and *Human Rights Act 2019 (Qld)*, across freedom of religion, the right to education and domestic violence survivors accessing housing, among other areas.

We look forward to the introduction of a national Charter of Rights to make possible similar positive outcomes across Australia in the policy areas in which PIAC operates.

#### ***Recommendation 1 – A national Charter of Rights***

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*The Parliamentary Joint Committee on Human Rights recommend that the Federal Government implement an Australian Charter of Human Rights.*

### 2.2 Settle religious belief discrimination provisions prior to a national Charter of Rights

In March 2023, the Australian Human Rights Commission released its report 'Free and Equal: A Human Rights Act for Australia'.<sup>2</sup>

As part of this report, it provided drafting for what a national Human Rights Act, or Charter, could look like, if adopted by Federal Parliament. Among the proposed rights included the following:<sup>3</sup>

#### **Recognition and equality before the law; and Freedom from discrimination**

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy the person's human rights without discrimination.

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<sup>1</sup> Charter of Rights Campaign, 'A Human Rights Charter Benefits Everyone (Submission)', 7 July 2023, p13.

<sup>2</sup> Australian Human Rights Commission, 'Free and Equal: A Human Rights Act for Australia', March 2023, available at: <https://humanrights.gov.au/human-rights-act-for-australia>

<sup>3</sup> Ibid, p341.



(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.

(4) Every person has the right to equal and effective protection against discrimination.

(5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

(6) Discrimination in the context of the Human Rights Act has the same meaning as discrimination in federal discrimination laws (including any future discrimination legislation):

*Age Discrimination Act 2004*

*Disability Discrimination Act 1992*

*Racial Discrimination Act 1975*

*Sex Discrimination Act 1984*

*Fair Work Act 2009*

We note that this provision, and especially sub-clause (6), recognises the clear inter-relationship between a Charter of Human Rights and anti-discrimination law. We endorse in principle the approach of ensuring that discrimination clauses in any Charter are consistent with discrimination as defined in existing anti-discrimination laws.

This will provide additional clarity around what is, and is not, discrimination for the protected attributes already covered by the Age, Disability, Racial and Sex Discrimination Acts, including race, sex, disability, age, sexual orientation, gender identity and intersex status (while noting we also support improvements to these laws, as discussed later in this submission).

However, we also note this list reflects a major gap in federal anti-discrimination protections, namely the failure to prohibit discrimination on the basis of religious belief (outside of limited protections related to adverse action<sup>4</sup> and unlawful termination<sup>5</sup> in the *Fair Work Act 2009*).

Over many years, PIAC has advocated for the inclusion of religious belief as a protected attribute in federal anti-discrimination law<sup>6</sup> (and in NSW anti-discrimination law where a similar gap also exists). We continue to do so now (see section 4.1 in this submission), on the basis that such protection not undermine the rights of other groups within the community, including women, LGBTQ people, people with disability and people of minority faiths, to live their own lives free from discrimination.

In our view, it is appropriate for this issue to be resolved prior to the introduction of a national Charter of Human Rights. There are a number of reasons for this, including that we believe it is necessary for specific religious belief discrimination provisions to add clarity and detail to the broader freedom from discrimination clause in a Charter.

Given the highly-contested nature of the scope of the right to freedom of conscience and religion in recent public debates, the failure to settle on clear religious belief discrimination provisions ahead of the introduction of a Charter might lead to anxiety among some community groups about possible adverse impacts of a Charter prohibition on religious discrimination without this

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<sup>4</sup> Section 351 *Fair Work Act 2009* (Cth).

<sup>5</sup> Section 772 *Fair Work Act 2009* (Cth).

<sup>6</sup> See for example: PIAC, 'Submission to the Religious Freedom Review', 14 February 2018, available at: <https://www.piac.asn.au/wp-content/uploads/2018/02/18.02.14-PIAC-Submission-re-Religious-Freedom-Review-FINAL.pdf>

detail. And, if enacted, might also lead to a disproportionate number of Charter complaints relating to religious belief discrimination issues, potentially undermining community support for the Charter.

In the three Australian jurisdictions which have adopted Human Rights Acts or Charters, all three had successfully prohibited religious belief discrimination beforehand.<sup>7</sup> We recommend the same sequencing should be adopted under Commonwealth law.

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***Recommendation 2 – Settle religious belief discrimination provisions prior to a national Charter of Rights***

*The Parliamentary Joint Committee on Human Rights recommend that provisions prohibiting religious belief discrimination under Commonwealth law are resolved prior to the introduction of a Charter of Rights.*

### **3. Systemic improvements to anti-discrimination laws**

A range of systemic improvements should be made to Commonwealth anti-discrimination laws, in order to improve Australia's overall human rights framework:

#### **3.1 Consolidation of Commonwealth anti-discrimination laws**

Federal anti-discrimination protections are scattered across the *Age Discrimination Act*, *Disability Discrimination Act*, *Racial Discrimination Act*, and *Sex Discrimination Act*, as well as *Australian Human Rights Commission Act 1986* (Cth) which articulates the roles and responsibilities of the Australian Human Rights Commission as well as important procedural matters.

In contrast, state and territory anti-discrimination laws are contained in single Acts.<sup>8</sup>

PIAC has consistently advocated for the consolidation of Commonwealth anti-discrimination provisions into a single Act. This would provide a number of benefits, including increasing public access to and understanding of their rights under anti-discrimination legislation.

Consolidation would also help to improve consistency across anti-discrimination laws in terms of definitions, scope and exceptions (and limit the potential for further inconsistency, such as by the introduction of a separate, stand-alone Religious Discrimination Act). While the process of consolidation could provide an opportunity to address some of the other issues identified in this submission, such as the comparator test and costs.

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***Recommendation 3 – Consolidation of Commonwealth anti-discrimination laws***

*The Parliamentary Joint Committee on Human Rights recommend that Commonwealth anti-discrimination laws be consolidated into a single Act.*

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<sup>7</sup> Through the *Discrimination Act 1991* (ACT), *Equal Opportunity Act 1984* (Vic) (predecessor to the *Equal Opportunity Act 2010* (Vic)), and *Anti-Discrimination Act 1991* (Qld).

<sup>8</sup> Other than the Victorian *Equal Opportunity Act 2010*, which is supplemented, in relation to vilification only, by the *Racial and Religious Tolerance Act 2001* (Vic).

### 3.2 Removal of the comparator test

Another systemic reform to Commonwealth anti-discrimination laws which PIAC supports is the removal of the ‘comparator test’. An example of this can be found in section 5(1) of the *Disability Discrimination Act 1992*:

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or propose to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

This definition, of direct discrimination, creates an additional step in determining whether discrimination has occurred – the selection of an appropriate ‘comparator’. And can lead to perverse outcomes when an arguably wrong hypothetical comparator is chosen (leading to situations where conduct which most people would reasonably consider to be discriminatory in nature is found not to be discrimination for the purposes of anti-discrimination law by a court).<sup>9</sup>

An alternative approach, the detriment test, is found in s 8 of the *Discrimination Act 1991 (ACT)*:

- (1) For this Act, discrimination occurs when a person discriminates, either directly or indirectly, or both, against someone else.
- (2) For this section, a person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.

This test is much simpler, focusing on the unfavourable treatment which a person experiences and avoiding some of the potential for perverse outcomes arising because of an inappropriate comparator being chosen. We recommend that the comparator test in Commonwealth anti-discrimination law be replaced by the detriment test.

#### ***Recommendation 4 – Replacing the comparator test with the detriment test***

*The Parliamentary Joint Committee on Human Rights recommend that the ‘comparator test’ in Commonwealth anti-discrimination law be replaced by the ‘detriment test’.*

### 3.3 Equal access model for costs

Another systemic improvement needed in Commonwealth anti-discrimination law is to reform the current approach to costs which causes barriers to complainants with limited financial resources.

As PIAC and the Grata Fund stated in our recent joint submission to the Attorney-General’s Department’s review into an appropriate cost model for Commonwealth anti-discrimination laws:<sup>10</sup>

the status quo for costs in litigated discrimination claims acts as a barrier that prevents applicants from enforcing their rights through the courts. For federal discrimination matters lodged in the Federal Court

<sup>9</sup> See the discussion of *Purvis v New South Wales [2003] HCA 62*, in Australian Human Rights Commission, ‘Free and Equal: A reform agenda for federal discrimination laws’, December 2021, p282.

<sup>10</sup> PIAC and 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, p3 available at: <https://piac.asn.au/wp-content/uploads/2023/04/20230414-GrataPIAC-Joint-Submission-to-AGD-Costs-Consultation-encl-Report.pdf>

and Federal Circuit and Family Court, courts generally apply the usual rule where costs follow the event. This creates significant uncertainty for applicants, and for many, the risk of an adverse costs order is the single largest barrier to pursuing and litigating a claim. The costs risk posed by proceeding, even with a meritorious claim, can be simply too great to overcome. In many instances, applicants are left with little choice but to accept unsatisfactory settlement offers that do not adequately compensate them or address the discriminatory practices underlying their claim.

This is a serious weakness of anti-discrimination laws generally, which are largely complaint-driven. PIAC and the Grata Fund recommend this approach be replaced by an 'equal access model' ... 'to remove the costs risk for applicants in discrimination and harassment matters so they can take meritorious cases to court with the confidence that, even if they happen to lose, they will not be subject to an adverse cost order'. As explained further in that submission:<sup>11</sup>

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.

### ***Recommendation 5 – Equal access model for costs***

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*The Parliamentary Joint Committee on Human Rights recommend that Commonwealth anti-discrimination laws be reformed to adopt an 'equal access model' for costs orders.*

## **3.4 Reform to religious exceptions**

There is significant inconsistency in the approach to religious exceptions in Commonwealth anti-discrimination legislation, in both the test which creates these exceptions and the attributes to which these exceptions apply.

For example, while the general religious exceptions in s 37(1)(d) of the *Sex Discrimination Act 1984* (SDA) and s 35 of the *Age Discrimination Act 2004* (ADA) are similarly worded,<sup>12</sup> the SDA exception also explicitly applies to the following areas which are not named in the ADA:

- (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; [and]
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice.

On the other hand, there are no religious exceptions in the *Racial Discrimination Act 1975* or *Disability Discrimination Act 1992*.

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<sup>11</sup> Ibid, p4.

<sup>12</sup> 'any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion', s37(1)(d) *Sex Discrimination Act 1984*.

Meanwhile, the religious exceptions in the *Fair Work Act* are broader than those in the SDA and ADA, both in the test as defined,<sup>13</sup> and in their application to all of the protected attributes included in that legislation, including ‘race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.’<sup>14</sup>

However, more significant than the inconsistency between religious exceptions in Commonwealth anti-discrimination laws is the fact that they are so broad, and permit discrimination that would otherwise be unlawful against too many people, in too many circumstances.

This includes LGBTQ students and teachers in religious schools (discussed in more detail at 4.4, below), as well as a range of other people accessing Government-funded services in the public sphere delivered by religious organisations (across aged care, disability, health, housing, welfare and other community services), and against workers in similar sectors, where such discrimination is not connected to the inherent requirements of the role.

We consistently advocated for religious exceptions to be drafted as narrowly as possible so that they apply in situations where concerns around religious freedom are genuinely raised, while guaranteeing as far as possible that the legitimate rights of others to be protected against discrimination are respected.<sup>15</sup>

In particular, this requires:

- Generally only allowing discrimination on the basis of religious belief, rather than other attributes like race, sex, disability, age, sexual orientation, gender identity or sex characteristics
- Where an exception applies in relation to employment, linking these exceptions to the inherent requirements of the role, and
- Where an exception applies in relation to access to services, ensuring it is clearly linked to the exercise of religious freedom.<sup>16</sup>

A number of states and territories have already adopted religious exceptions in their anti-discrimination laws which broadly align with these principles, including Tasmania, the ACT,

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<sup>13</sup> ‘if the person is a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – the employment is terminated:  
(i) in good faith; and  
(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.’

<sup>14</sup> S772(2)(d) *Fair Work Act 2009* (Cth).

<sup>14</sup> S772(1)(f) *Fair Work Act 2009* (Cth).

<sup>15</sup> See for example: PIAC, ‘Submission to the Religious Freedom Review’, 14 February 2018, and IAC, ‘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/>

<sup>16</sup> For example, allowing religious schools to discriminate against students on the basis of religious belief at the point of enrolment, to allow faith communities to form schools in which to educate their children, while prohibiting discrimination beyond the point of enrolment to respect the right of children and young people to question and ultimately develop their own religious beliefs as they grow up.

Victoria and most recently the Northern Territory.<sup>17</sup> These schemes provide guidance for how similar reforms could be made to religious exceptions under Commonwealth law.

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### **Recommendation 6 – Reform to religious exceptions**

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*The Parliamentary Joint Committee on Human Rights recommend that religious exceptions in Commonwealth anti-discrimination law be reformed to ensure they are narrow and appropriately targeted, including that they:*

- *Generally only apply to the protected attribute of religious belief*
- *Where it relates to employment, are linked to the inherent requirements of the role*
- *Where it relates to service delivery, are closely related to the exercise of religious freedom.*

*These reforms should be informed by existing approaches in anti-discrimination laws in Tasmania, the ACT, Victoria and the Northern Territory.*

## **4. Specific improvements to anti-discrimination laws**

In addition to the systemic reforms to Commonwealth anti-discrimination laws outlined above, PIAC supports the following additional reforms to specific areas of these laws.

### **4.1 Prohibition of discrimination on the basis of religious belief**

As noted in 2.2 above, PIAC supports introducing religious belief as a protected attribute in Commonwealth anti-discrimination law. However, the form that religious belief discrimination protections should take is critical.

In our view, there is a clear role for Commonwealth Parliament to provide effective protection against discrimination on the grounds of religious belief in public life, consistent with the protection afforded other grounds such as sex, race, disability, age and sexual orientation.<sup>18</sup>

Importantly, such protections must not undermine the rights of other groups within the community, including women, LGBTQ people, people with disability and people of minority faiths, to live their own lives free from discrimination.

For both of these reasons – departure from existing anti-discrimination law standards, and undermining the rights of other groups within the community – we were unable to support the previous Government’s iterations of the Religious Discrimination Bill. Nevertheless, we would support a future Religious Discrimination Bill that meets these criteria.

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### **Recommendation 7 – Religious belief protections equivalent to existing laws**

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*The Parliamentary Joint Committee on Human Rights recommend that religious belief protections be added to Commonwealth anti-discrimination laws consistent with existing protections afforded*

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<sup>17</sup> See for example: ss 51, 51A and 52 *Anti-Discrimination Act 1998* (Tas); ss 82, 82A, 82B, 83, 83A *Equal Opportunity Act 2010* (Vic); ss 18, 32, 44 and 46 *Discrimination Act 1991* (ACT) and reforms to religious exceptions arising from the *Anti-Discrimination Amendment Act 2022* (NT).

<sup>18</sup> See our ‘Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Religious Discrimination Bills’, 17 December 2021, p3 available at: <https://piac.asn.au/wp-content/uploads/2022/01/21.12.17-PIAC-Submission-Senate-re-Religious-Discrimination-Bills-copy.pdf>



to other attributes, such as sex, race, disability, age and sexual orientation, without undermining the rights of other groups within the community to live their lives free from discrimination.

## 4.2 Reasonable adjustments for people with disability

People with disability should enjoy the same right to participate in society as other Australians. Historically, this was supported by provisions of the *Disability Discrimination Act 1992* which required that employers and service providers make ‘reasonable adjustments’ for people with disability as long as making the adjustment did not impose an unjustifiable hardship.

Unfortunately, however, ‘the existing ‘reasonable adjustment’ provisions of the *Disability Discrimination Act 1992* (Cth) (DDA) have been rendered effectively unworkable by the decision of the Federal Court in *Sklavos v Australian College of Dermatologists*.<sup>19</sup>

As described in our Submission re Fair Work Legislation Amendment Bill 2022:<sup>20</sup>

The effect of the *Sklavos* decision is that for the right to a reasonable adjustment, not only must a person with disability show they are disadvantaged by a failure to provide a reasonable adjustment, but that the failure to provide the adjustment was *caused* by the person’s disability.

PIAC has worked with People with Disability Australia to draft amendments to the *Disability Discrimination Act* to make it clear that it is unlawful to fail to provide reasonable adjustments.<sup>21</sup> We submit that these amendments are essential to support the ability of people with disability to participate in society, and to improve our overall human rights framework.

### ***Recommendation 8 – Reasonable adjustments for people with disability***

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*The Parliamentary Joint Committee on Human Rights recommend amendments to the ‘reasonable adjustments’ provisions of the Disability Discrimination Act 1992 (Cth), to address issues created by the Federal Court decision in Sklavos v Australian College of Dermatologists, and to ensure people with disability can fully participate in all areas of public life, including workplaces.*

## 4.3 LGBTIQ anti-discrimination reforms

There are a range of specific improvements required to LGBTIQ anti-discrimination protections under Commonwealth law, including:

### **Replace ‘intersex status’ with ‘sex characteristics’**

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* saw Australia become one of the first jurisdictions in the world to protect intersex people against discrimination. It did so by introducing a new protected attribute of ‘intersex status’, defined as:<sup>22</sup>

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<sup>19</sup> *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128.

<sup>20</sup> PIAC, ‘Submission re Fair Work Legislation Amendment Bill 2022’, 11 November 2022, p2 available at: <https://piac.asn.au/wp-content/uploads/2022/11/22.11.11.-PIAC-Submission-Fair-Work-Amendment-Legislation-Inquiry.pdf>

<sup>21</sup> As detailed in PIAC, ‘Submission re Fair Work Legislation Amendment Bill 2022’, 11 November 2022, p2-3.

<sup>22</sup> Section 4 *Sex Discrimination Act 1984* (Cth).

the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male.

This terminology (intersex status)<sup>23</sup> and associated definition are no longer considered best practice, with peak body Intersex Human Rights Australia advocating for its replacement with ‘sex characteristics’, which was recently defined in amendments to the Queensland *Anti-Discrimination Act 1991*<sup>24</sup> in the following way:

sex characteristics, of 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.

This attribute, and definition, is also more consistent with developments in other jurisdictions, as well as international human rights law through the Yogyakarta Principles Plus 10.<sup>25</sup>

### ***Recommendation 9 – Replace ‘intersex status’ with ‘sex characteristics’***

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*The Parliamentary Joint Committee on Human Rights recommend the protected attribute of ‘intersex status’ in Commonwealth anti-discrimination laws be replaced with ‘sex characteristics’, drawing on the definition recently introduced to the Anti-Discrimination Act 1991 (Qld).*

### **Protect LGBTQ students and teachers in religious schools against discrimination**

PIAC has consistently advocated for amendments to the *Sex Discrimination Act 1984* (Cth) to ensure LGBTQ students and teachers in religious schools are protected against discrimination. Most recently, we highlighted this issue in our submission to the Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws.<sup>26</sup>

If the general amendments to religious exceptions we recommend above, at 3.4, are made, LGBTQ students and teachers at religious schools would be protected as part of that reform. However, even if those changes are not made, we support specific amendments to the *Sex Discrimination Act* to ensure that all students are free to learn, free from discrimination on the basis of who they are. And that all teachers are hired on the basis of their ability, not their sexual orientation or gender identity.

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<sup>23</sup> The same attribute, and definition, was also recently introduced for the purposes of adverse action and unlawful termination provisions of the *Fair Work Act 2009* (Cth).

<sup>24</sup> As introduced via the *Births, Deaths and Marriages Registration Bill 2022* (Qld).

<sup>25</sup> *The Yogyakarta Principles Plus 10 – Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, available at: [https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf)

<sup>26</sup> PIAC, ‘Submission to Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws’, 3 March 2023, available at: <https://piac.asn.au/2023/03/10/submission-to-alrc-inquiry-into-religious-educational-institutions-and-anti-discrimination-laws/>



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### **Recommendation 10 – Protect LGBTQ students and teachers in religious schools**

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*The Parliamentary Joint Committee on Human Rights recommend that LGBTQ students and teachers in religious schools are protected against discrimination, either through general amendments to religious exceptions in anti-discrimination laws, or in the alternative, through specific amendments to the Sex Discrimination Act 1984 (Cth).*

#### **Prohibit vilification on the basis of sexual orientation, gender identity and sex characteristics**

Currently, the only attribute protected against vilification under Commonwealth anti-discrimination law is race.<sup>27</sup> This is in contrast to several state and territory laws where a wider variety of protected attributes are covered.<sup>28</sup>

The first half of 2023 saw several disturbing developments involving vilification of LGBTIQ people around Australia. This included the March 2023 rally against trans rights during which neo-Nazis rallied on the steps of Victorian Parliament, and the March 2023 incident in Belfield, Sydney, where a mob engaged in violence against LGBTIQ protestors and police. There have also been a number of LGBTIQ community events which have had to be cancelled following threats of public violence.

In this context and against the troubling history of hate crimes against LGBTIQ people, we submit that consideration should be given to prohibiting vilification on the basis of sexual orientation, gender identity and sex characteristics in jurisdictions where this is not currently prohibited, including Commonwealth law.

### **Recommendation 11 – Prohibit vilification on the basis of sexual orientation, gender identity and sex characteristics**

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*The Parliamentary Joint Committee on Human Rights recommend that the Commonwealth Government consider the introduction of provisions prohibiting vilification on the basis of sexual orientation, gender identity and sex characteristics.*

#### **Create a Sexual Orientation, Gender Identity and Sex Characteristics Discrimination Commissioner at the Australian Human Rights Commission**

In addition to the President, the Australian Human Rights Commission currently features the following Commissioners:

- Aboriginal and Torres Strait Islander Social Justice
- Age Discrimination
- Children's Commissioner
- Disability Discrimination
- Human Rights Commissioner
- Race Discrimination, and
- Sex Discrimination.

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<sup>27</sup> Section 18C Racial Discrimination Act 1975 (Cth).

<sup>28</sup> For example, the *Anti-Discrimination Act 1977* (NSW) covers race, homosexuality, transgender status and HIV/AIDS status.

LGBTIQ people are the only community group currently protected against discrimination under the four stand-alone Commonwealth anti-discrimination laws without a relevant Commissioner covering these attributes. Instead, responsibility for these issues has variously been held, on an ad-hoc and part-time basis, by the President, Human Rights Commissioner and Sex Discrimination Commissioner.

This has inevitably led to issues relating to sexual orientation, gender identity and sex characteristics (intersex status) discrimination being accorded lower priority than issues where a stand-alone commissioner does exist. The best way to remedy this deficit would be to create and appoint a dedicated Sexual Orientation, Gender Identity and Sex Characteristics.

***Recommendation 12 – Create a Sexual Orientation, Gender Identity and Sex Characteristics Discrimination Commissioner at the Australian Human Rights Commission***

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*The Parliamentary Joint Committee on Human Rights recommend that the Government create and appoint a Sexual Orientation, Gender Identity and Sex Characteristics Discrimination Commissioner at the Australian Human Rights Commission.*