



Aligning the pieces: consolidating a framework for equality and human rights

Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination Bill 2012

Michelle Cohen, Senior Solicitor

Jessica Do, Solicitor

Camilla Pandolfini, Senior Solicitor

Edward Santow, Chief Executive Officer

Table of Contents

Summary of recommendations	3
Introduction	8
The Public Interest Advocacy Centre.....	8
PIAC's expertise in discrimination law and equality.....	9
1. Chapter 2, Part 2 – 1, Division 2 (Section 17): The protected attributes 11	
2. Chapter 2, Part 2 – 2, Division 2 (Section 19): When a person discriminates against another person; and related concepts.....	23
3. Chapter 2, Part 2 – 2, Division 3 (Section 22): When discrimination is unlawful.....	26
4. Chapter 2, Part 2 – 2, Division 4, Subdivision A: Main Exceptions	27
5. Chapter 2, Part 2 – 2, Division 4, Subdivision C: Exceptions related to religion.....	30
6. Chapter 2, Part 2 – 5, Division 2: Equality before the law for people of all races.....	36
7. Chapter 3, Part 3 – 1, Divisions 5 and 6: Disability standards and compliance codes	37
8. Chapter 3, Part 3 – 1, Division 8: Temporary exemptions.....	39
9. Chapter 4, Part 4 – 2, Division 4: Investigation and conciliation of complaints	41
10. Chapter 4, Part 4 – 3, Division 2 (Section 122): Persons who may make an application.....	43
11. Chapter 4, Part 4 – 3, Division 2 (Section 124): Burden of proof in proceedings under section 120 etc.	46
12. Chapter 4, Part 4 – 3, Division 4 (Section 133): Costs	50
13. Further recommendations	52
Positive duty for public sector organisations	52

Summary of recommendations

Recommendation 1: The protected attributes

The Act should contain a non-exhaustive list of protected attributes that specifically prohibits discrimination on the basis of 'other status'.

Alternatively, section 17(1) of the Exposure Draft should be extended to include:

- irrelevant criminal record;
- victim or survivor of family violence; and
- social/housing status.

If these protected attributes are not included, the Act should mandate a review of the legislation, three years after its commencement, to consider whether additional attributes should be included. Irrelevant criminal record, victim or survivor of family violence and social/housing status should be considered as priority for inclusion as additional protected attributes.

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

The definition in the Exposure Draft should be amended to include the following definition of 'gender identity':

Gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes a person who identifies as transsexual and transgender.

PIAC submits that 'intersex' be included as a protected attribute in the new Act, and that definition of Intersex be as follows:

Intersex means the status of having physical, hormonal or genetic features that are -

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

The definition of family responsibilities in the Exposure Draft should be expanded to include carer responsibilities and include domestic relationships and cultural understandings of family.

Recommendation 2: Intersectional discrimination

Section 19 of the Exposure Draft should be retained insofar as it expressly covers intersectional discrimination.

Recommendation 3: Section 19(2)

Section 19(2)(a) of the Exposure Draft should be retained.

Section 19(2)(b) should be re-drafted to provide that ‘unfavourable treatment’ includes, but is not limited to, conduct that humiliates or intimidates the other person, or has the intent or effect of nullifying or impairing the other person’s enjoyment of human rights on an equal footing.

Recommendation 4: Protection of all attributes in all areas of public life

The attributes that are considered to be unlawful for the purposes of work and work-related areas only at section 22(3) of the Exposure Draft should not be so restricted. These attributes should be included as attributes with respect to which discrimination is unlawful in all areas of public life.

Recommendation 5: General limitations clause

All of the existing exceptions in the Exposure Draft should be replaced with the general limitations provision that is provided at section 23 of the Exposure Draft.

This provision should be included in the new Act, even if the specific exceptions at Division 4 of the Exposure Draft (sections 24 and sections 26-44) are retained.

The three-year sunset clause for review of exceptions that is provided at section 47 of the Exposure Draft should be retained.

Recommendation 6: Reasonable adjustments

The Act should contain a duty to make reasonable adjustments that applies to all attributes in all areas of public life. The requirement should be a standalone provision.

The Act should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.

Recommendation 7: Exemption for religious organisations

There should be no permanent exceptions for religious organisations in respect of any protected attributes. Discrimination should only be lawful where such discrimination can conform to the general limitations clause in section 23 of the Exposure Draft.

If permanent exceptions for religious organisations are retained, Commonwealth funded organisations should not be covered by those exceptions.

If permanent exceptions are to be retained, they should be limited to inherent requirements of an employment position. The exceptions should be further limited to the protected attributes of marital status, age, sexual orientation and gender identity in the areas of:

- 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.

Recommendation 8: Equality before the law

The new Act should provide for equality before the law for all protected attributes.

Recommendation 9: Standards

The Exposure Draft should be amended to specify that compliance codes should develop at an industry wide level, and that they are not intended to be developed for the purpose of an individual organisation.

The Exposure Draft should explicitly state that compliance codes may relate to any of the attributes that are protected under the Act.

The Commission should be adequately resourced to develop or assist with the development of the compliance codes, and should not charge any fee in relation to the development of compliance codes.

Any breach of a disability standard or a compliance code should be unlawful discrimination.

Recommendation 10: Temporary Exemptions

The Act should contain provision for applications to be made to the Commission for a temporary exemption up to five years.

Temporary exemptions should be assessed according to the following criteria:

- the application must be specific and specify what provisions the applicant is seeking exemption from, for how long the exemption is sought;

- the application should produce evidence as to why the exemption is required;
- the proposed exemption must be consistent with the objects of the Act;
- the proposed exemption must be necessary;
- the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;
- matters raised in any submissions in response to the application;
- whether there have been genuine attempts to comply with the provisions of the Act;
- whether the applicant has an action plan in which to ensure compliance with the Act, following the expiration of the temporary exemption; and
- whether it is appropriate to grant the exemption subject to any terms or conditions.

The temporary exemption application process should include:

- all applications should be published on the Commission's website;
- all applications are subject to a period of public consultation, in which submissions are invited;
- the Commission's temporary exemption decisions should be published on the Commission's website and in the Gazette;
- temporary exemptions should be granted for a period of no more than five years; and
- temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.

Recommendation 11: Conciliations

The Commission should retain the power to require attendance at conciliation and to require production of documents, including a written response to a discrimination complaint.

The Act should include provision for a complaint to be lodged directly with the federal courts, bypassing the Commission's investigation and conciliation processes.

Conciliation agreements should be automatically registered with the federal courts. Such a provision should be modelled on s 164(3) of the *Anti-Discrimination Act 1991* (Qld) and s 62 of the *Human Rights Commission Act 2005* (ACT).

Recommendation 12: Standing

The Act should include a provision allowing organisations to bring a complaint on behalf of a person to both the Commission and the federal courts. The Act should provide the courts with residual power to refuse to allow standing for an organisation on public interest grounds.

The Act should provide open standing to allow anyone to bring a complaint to enforce a breach of discrimination or harassment provisions. The provision should be modelled on s 123 of the *Environmental Planning and Assessment Act 1979* (NSW).

Alternatively, organisations should have standing to bring discrimination complaints to the Commission and to the federal courts in their own right. In order to satisfy this standing test, an organisation or group would need to show either:

- that a significant portion of the membership of the organisation or group is affected by the conduct in question; or
- the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.

Recommendation 13: Burden of proof

The shared burden of proof in the Exposure Draft should be retained.

Recommendation 14: Litigation costs

Section 133 of the Exposure Draft should be retained.

Section 133(3) of the Exposure Draft should be extended to enable courts to make an order as to costs where the complaint is successful and the matter is classed by the court as a public interest matter.

Recommendation 15: Positive duty

There should be a positive duty on public sector organisations to take reasonable steps to eliminate discrimination and harassment and promote equality.

There should also be a duty to have due regard to reducing inequalities relating to socio-economic disadvantage.

Public sector organisations, should be clearly and broadly defined to include:

- public officials;
- government departments;
- statutory authorities;
- state owned corporations;
- police;
- local Government;
- Ministers;
- Members of Parliamentary Committees when acting in an administrative capacity;
- an entity declared by regulations to be a public authority for the purposes of the legislation;
- an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and
- any entity that chooses to be subject to the legislative obligations of a public sector organisation.

The Act should include a power to make regulations so that organisations can be added to the category of 'public authority' as required.

Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs in response to its inquiry into the Human Rights and Anti-Discrimination Bill 2012 (Cth) – Exposure Draft Legislation (**Exposure Draft**).

PIAC commends the Australian Government on the anti-discrimination law consolidation project as part of improving human rights protection in Australia. The consolidation process represents a significant opportunity to enhance Australia's human rights protection and improve our anti-discrimination laws.

PIAC's submission does not address every aspect of the Exposure Draft. Rather, PIAC's submission focuses on areas relevant to PIAC's expertise and experience. On the whole, PIAC welcomes the Exposure Draft in its current form. However, PIAC submits that there are aspects of the Exposure Draft that can be improved and additional areas that should be included to address the current gaps in anti-discrimination legislation in Australia, and to achieve the Government's overarching aims in undertaking this reform.

This submission supports certain provisions in the Exposure Draft, which in PIAC's view are significant improvements to the existing anti-discrimination legislative regime. This submission also makes further recommendations that PIAC submits should be adopted in the final consolidated anti-discrimination act (**Act**) to achieve a fairer and more accessible anti-discrimination regime in Australia.

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 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;
- 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 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 and equality

PIAC has long played a leadership role in developing and using anti-discrimination law and in promoting equality in Australia. PIAC 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 development and review processes in relation to anti-discrimination law,² the promotion of equality and human rights.³

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 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) (**Disability Transport Standards**) 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 Randal, *'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*

PIAC previously made a submission to the Commonwealth Attorney-General's Department in relation to the drafting of the consolidated anti-discrimination legislation in February 2012.⁴

PIAC also contributed to the submissions made by the National Association of Community Legal Centres (**NACLC**) to the Attorney-General's Department in relation to the consolidation of anti-discrimination in March 2010, April 2010 and February 2012.⁵

(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).

⁴ Available from <<http://www.equalitylaw.org.au/elrp/submissions/>>.

⁵ Available from <<http://www.equalitylaw.org.au/elrp/submissions/>>.

1. Chapter 2, Part 2 – 1, Division 2 (Section 17): The protected attributes

PIAC strongly welcomes the inclusion of a number of new protected attributes in section 17(1) of the Exposure Draft, including religion, sexual orientation, gender identity and social origin.

PIAC submits, however, that the Bill should be amended to include the following further protected attributes: intersex; criminal record; housing status; being a victim or survivor of family violence; carer's responsibility; and, 'other status'.

'Other status' and non-exhaustive list of attributes

In our previous submission on the Discussion Paper, *Improving Access to Equality (Discussion Paper)* in February 2012, PIAC sought to articulate an exhaustive list of protected attributes, but with an understanding that additions could be made to this list from time to time.

An alternative approach supported by a number of other stakeholders with experience in anti-discrimination law and practice is to include a non-exhaustive list of protected attributes that specifically prohibits discrimination on the basis of 'other status'. This would be consistent with Australia's obligations under international human rights law and international best practice. The *International Convention on Civil and Political Rights (ICCPR)* and *International Covenant on Economic, Social and Cultural Rights (ICESCR)* prohibit discrimination on grounds including 'other status'.

The ICESCR requires that States use all their available resources to progressively realise the rights set out in the Covenant. Under Article 2(2) of ICESCR, these rights must be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**" (emphasis added).

Article 2(1) of the ICCPR also states:

Each State party undertakes to respect and to ensure to all individuals ...the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status** (emphasis added).

Article 26 of the ICCPR protects 'social origin' and 'any other status'.

This attribute, 'other status', provides protection to people linked by their common status. There is international jurisprudence that supports the inclusion of

homelessness, social status and criminal record within the definition of 'other status'.⁶

Protected Attributes: Exhaustive List

As PIAC submitted to the Attorney-General's Department, an alternative approach would be to include an exhaustive list of protected attributes that allows additions to be made. This would allow the Act to respond to social change and new forms of discrimination over time.

PIAC submits that the list of protected attributes in the Act should extend coverage to a broader list of attributes than those proposed in the Exposure Draft. Our recommendations in relation to particular protected attributes are set out below.

Irrelevant Criminal Record

PIAC submits that the attribute of irrelevant criminal record be added to the list of protected attributes.

PIAC has particular expertise in relation to discrimination on the basis of housing status and criminal record through the Homeless Persons' Legal Service (**HPLS**), which is managed and overseen by PIAC. Originally a joint initiative between PIAC and the Public Interest Law Clearing House NSW, HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. HPLS currently operates ten free legal clinics on a roster basis at welfare agencies in the greater Sydney metropolitan region, coordinating and supervising 350 lawyers acting pro bono. In the previous financial year, HPLS helped 738 clients, and since its inception in 2004, HPLS has assisted nearly 7,000 clients.

Since early 2009, HPLS has been conducting work on a project exploring homeless people's experience of criminal record discrimination. As part of the criminal record discrimination project, HPLS has held a series of eight public consultations with people who are currently or who have formerly experienced homelessness, and also hosted an online survey. Over 80 people experiencing homelessness provided feedback and their stories of discrimination they suffered on the basis of prior criminal record.

From these consultations, it is clear that people experiencing homelessness are more likely to come in contact with the criminal justice system than other members of the community. This is in part due to the public nature of homelessness: without appropriate accommodation, many homeless people are forced to conduct their private activities such as sleeping, toileting, eating and drinking in public.

HPLS's consultations also revealed that a large number of people who are homeless are prevented from obtaining employment and achieving social inclusion on the

⁶ See Victorian Council of Social Services, *Submission to Discussion Paper regarding Review of Victorian Equal Opportunity Act*, January 2008. Also see S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2nd ed, 2004) 689.

basis of their prior criminal record. A large number of these individuals possessed single convictions for relatively minor offences.

Discrimination on the basis of criminal record can create a significant barrier to obtaining employment and housing, which may impede an individual's rehabilitation and increase the risk of recidivism.

Discrimination on the basis of irrelevant criminal record is prohibited under international law. The ICCPR and the ICESCR provide a basis for prohibiting discrimination more broadly.

The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958 (ILO111)* was ratified by Australia in 1973 and incorporated into domestic law by the *Human Rights and Equal Opportunity Commission Act 1986*. Under this Act, which is now known as the AHRC Act, the Australian Human Rights Commission can handle complaints about discrimination in employment or occupation on the basis of criminal record.⁷ In 2010-11, the Commission received 68 complaints on the basis of criminal record.⁸

Although the Commission may find that certain conduct is discriminatory, if the complaint is unable to be conciliated, the Commission's actions are limited to preparing a report with recommendations to the Attorney General, for tabling in the Australian Parliament. Unlike unlawful discrimination matters, remedies are not available from the Federal Court or the Federal Magistrates Court. The Consolidation of Commonwealth Anti-Discrimination Law Regulation Impact Statement (**Regulation Impact Statement**) specifically sets out an example of the limitations of the current regime.⁹

⁷ The Commission's powers and functions in relation to discrimination in employment on the ground of criminal record are contained in Part II – Division 4 (sections 30, 31 and 32) of the Act. Under section 31, the Commission has the authority to 'investigate any act or practice, including any systemic practice that may constitute discrimination and where appropriate try to resolve the complaint of discrimination by conciliation.'

⁸ *Consolidation of Commonwealth Anti-Discrimination Laws: Regulation Impact Statement*, Attorney General's Department <
<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Documents/Consolidation%20of%20Commonwealth%20Anti-Discrimination%20Laws%20-%20Regulation%20Impact%20Statement.pdf>>.

⁹ In *Mr CG v State of NSW (RailCorp NSW)* [2012] AusHRC 48, Mr CG was not offered employment at RailCorp despite being the selection panel's preferred candidate on the basis of his criminal record. The Commission found that RailCorp NSW had discriminated against Mr CG based on his criminal record, and recommended that he be paid compensation. However, RailCorp declined to pay any compensation to Mr CG, arguing that its decision not to offer Mr CG employment did not amount to discrimination. Both the Commission and Mr CG had no avenues available to enforce the recommendation. This mechanism promotes uncertainty and does not make it clear to respondents whether such conduct is permitted or not.

In some circumstances, it is unlawful to dismiss someone from employment on the basis of criminal record under the *Fair Work Act*.¹⁰

The Northern Territory¹¹ and Tasmania¹² have protections against discrimination on the basis of ‘irrelevant criminal record’ in broader contexts than employment. In the Australian Capital Territory, the *Discrimination Act 1991* (ACT) protects people from discrimination on the basis of a ‘spent conviction within the meaning of the *Spent Convictions Act 2000*’.¹³ In Western Australia, the *Spent Convictions Act 1988* (WA) makes it unlawful¹⁴ to discriminate against a person on the basis of a ‘spent conviction’, in both employment and employment-related areas.

In Victoria, New South Wales, South Australia and Queensland, anti-discrimination laws do not prohibit discrimination on the basis of criminal record.

The existing framework provides inconsistent and only partial protection from criminal record-based discrimination. Given that this ground is already covered in the employment context, the impact on business and more broadly of extending protection to all contexts would not be substantial. PIAC submits that the social benefits of adding criminal record as a protected attribute would outweigh any costs involved.

In setting the parameters of the project to consolidate federal anti-discrimination laws, the Government undertook that “there will be no diminution of existing protections currently available at the federal level.”¹⁵ In addition, the Exposure Draft Explanatory Notes state that the Government is seeking to “retain existing protections in federal anti-discrimination legislation.”¹⁶ PIAC submits that the most appropriate way of achieving this aim in this area is to include criminal record as a protected attribute, noting that some existing federal and state laws currently cover this attribute. Inclusion of criminal record as a protected attribute also would give effect to Australia’s international obligations and harmonise existing discrimination law.

Housing Status

Section 17(1)(r) of the Exposure Draft includes ‘social origin’ as a protected attribute, but the legislation does not provide a definition. The Explanatory Notes to the Exposure Draft state that the term ‘social origin’ “takes its ordinary meaning.”

PIAC submits that the new Act should also include ‘social status’ because this would have a broader operation, incorporating a person’s status as homeless, at risk of becoming homeless, unemployed or in receipt of social security payments.

¹⁰ *Fair Work Act 2009* (Cth), Div 2, s 382.

¹¹ *Anti-Discrimination Act 2004* (NT) s 26.

¹² *Anti Discrimination Act 1988* (Tas) s 50.

¹³ *Discrimination Act 1991* (ACT) s 7(1).

¹⁴ *Spent Convictions Act 1988* (WA) Part 3, Division 3.

¹⁵ Hon Robert McClelland MP (Media Release, 21 April 2010).

¹⁶ Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws, Human Rights and Anti-Discrimination Bill 2012: Exposure Draft Explanatory Notes*, 21.

Alternatively, PIAC submits that the new Act should include housing status as a protected attribute. 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.

PIAC has particular expertise in relation to discrimination on the basis of housing status, as described above, through its work on the HPLS.

PIAC's previous submission recommended that housing status be added as a protected attribute in the new Act. PIAC acknowledges that this attribute has not been included in the list of protected attributes in the Exposure Draft.

Since the Discussion Paper was released, however, the *Homelessness Bill 2012* has been released. The Bill states:

The Commonwealth Government remains committed to improving outcomes for people experiencing or at risk of homelessness. Ensuring that people who are experiencing homelessness receive high quality services and get every chance to move out of homelessness or avoid it altogether is key to the Government's policy agenda in this area.

Section 8(1) of the Exposure Draft *Homelessness Bill 2012* sets out that "the Commonwealth recognises that persons who are, or are at risk of, experiencing homelessness face barriers in achieving social inclusion."

The recognition of homelessness as a barrier to achieving social inclusion demonstrates the importance of including housing status as a protected attribute in the new Act.

While there are some provisions in anti-discrimination legislation that can indirectly provide protections for homeless people,¹⁷ there are no specific legal protections against discrimination on the basis of housing status. There is also no protection for other common related attributes such as unemployment, social status, drug dependency or receiving social security.

Discrimination on the basis of housing status is currently lawful in Australia. In PIAC's experience working with people experiencing homelessness, this form of discrimination is too frequent and widespread. The case study below illustrates the problem.

¹⁷ 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.

Case study 1¹⁸

Van Minh Nguyen is 45 years old. He started working for the NSW Attorney General's Department in 1991.

He worked in various roles in different locations, most recently as a court officer at Central Local Court in Sydney, in administration of bail undertakings and sureties.

He worked five days a week at the courts, and on the weekends had a thriving side business as a DJ in Sydney's nightclubs.

Being in a good financial situation, he and a friend went 50-50 in purchasing a \$700,000 investment property. He used all his savings to do so. A year later, the friend wanted to withdraw from the investment so Minh was faced with the choice of selling up too or borrowing more money to buy out his friend's share. He decided to borrow more money and take on the whole investment himself.

With the onset of the global financial crisis in 2009, Minh's DJ business declined and he experienced financial hardship. He did not have any close friends or family to help, having arrived in Australia after the Vietnam War as a child orphan. He was initially fostered out to a family in western NSW, but when the couple fell pregnant with their fourth child, they sent him back to be raised in Sydney orphanages.

When he could no longer pay his mortgage, his lenders garnished his income. While he managed to hold down his well-paid job, he had very little money to live on and became homeless.

He had 24-hour access to his workplace, a secure court building in Sydney, and as it was safer than the streets, he began sleeping there. After finishing work, he would leave the building and roam the streets of Sydney until 9pm when he would go back into work and sleep. He would set his alarm for 3am so he could have a shower in the magistrates chambers before the cleaners came, then walk the streets again in the morning until arriving for work at 7.30am.

He did this for two or three months. It was hugely mentally and physically tiring but he maintained his standard of work performance and did not tell anybody. When he accidentally responded to a work email in the early hours of one morning, he was discovered. The colleague that he'd sent it to questioned him the next day. He confessed he had been sleeping at the office, as he had no home to go to. While she was sympathetic, she told him she had to report it.

Thus began more than 12 months of investigations by the Attorney General's Department. Van Minh was interviewed at length, with investigators probing into how he had become homeless, where he was spending his money and whether he had a gambling problem. Van Minh had to produce his bank statements to show that

¹⁸ Acknowledgements to Van Minh Nguyen for wanting to share his story and to Lauren Martin, for her article about Minh in *Salvation Army, Pipeline Magazine*, October 2011, 20-23.

he did not have a gambling problem and that his financial strife had been caused by his bad property investment decision.

The Department was also concerned about their Code of Conduct being upheld and wanted to ensure the security of the building and files, and that Van Minh was not bringing other people into the building. (Security camera surveillance was obtained showing him consistently entering and leaving the building alone, so he was vindicated in this regard.)

Van Minh was eventually asked to attend a meeting with the Director-General of the Attorney General's Department. He found the Director-General to be a kind and compassionate man and thought that the investigation had been resolved and that the Department was going to help him get back on track.

He was therefore shocked when a few months later, he arrived at work to be told that the Director-General had issued an ultimatum – to resign or be terminated. Van Minh's last vestige of security – his employment and income – was taken away.

After 21 years of service with the Department, Van Minh could not believe it was ending in this way. He attempted suicide that day. He was then hospitalised at St Vincent's hospital psychiatric unit before being referred to Salvation Army's Street level Mission.

Van Minh cannot understand why his use of the building outside normal work hours is any more a breach of security than other staff who he saw accessing the building for their personal use. All staff had 24-hour access. He says he saw other staff using the car park on weekends, so that they could go to the movies or go shopping in the city.

His reason for using the building was merely for sleeping because he was desperate and homeless. He did not make it his home, and did not jeopardise security of the building or documents in any way.

In regard to his dismissal, by the time Van Minh sought legal advice it was too late to make an unfair dismissal application within the short statutory time period provided by the legislation. The costs implications of pursuing a common law action for wrongful dismissal arguing breach of procedural fairness are prohibitive. As NSW and Commonwealth discrimination laws currently stand, none of the protected attributes provided a sound basis on which Van Minh could challenge his termination. He also cannot make an application for unlawful termination in breach of the General Protections provisions of the *Fair Work Act 2009*, as housing status is not a protected attribute in s 351 of that Act. He therefore has no legal recourse in respect of his dismissal.

If housing status were a protected attribute under Commonwealth anti-discrimination legislation, the Department would have been required to handle this matter with the greater sensitivity it deserved. The Department's actions in forcing Van Minh's resignation on the basis that he was sleeping in the building because he was homeless would have clearly exposed them to a discrimination complaint.

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.¹⁹ 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 that 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.²⁰

The Final Report of the Victorian Equal Opportunity Review extracted an example from the Victorian MPLC submission to illustrate the experience of discrimination on the basis of homelessness:

A homeless man approached the local backpackers' hostel and asked whether they had a vacancy. They advised that they did and the man went to the Salvation Army for financial assistance. The man then returned to the hostel with a Salvation Army cheque for his accommodation. Upon seeing the cheque, the hostel owner told him that all their vacancies had been filled...

In [this] example, the use of a Salvation Army cheque revealed, or possibly confirmed, the man's homelessness to the hostel owner. It is likely that the hostel owner made a number of assumptions about the man's ability to pay, lifestyle and character. His decision to refuse accommodation was based on the man's homeless status and use of a cheque from a support service to pay for his accommodation....

¹⁹ PILCH Victoria Homeless Persons' Legal Clinic, *Report to the Department of Justice, Discrimination on the Grounds of Homelessness or Social Status*, 2007.

²⁰ 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.

As a general rule, if a person can pay for a service they should have the right to access that service without discrimination. The refusal of charity or Housing Establishment Fund cheques is an overt form of discrimination against homeless people. The consequences of this discrimination are immediate and real – a person may end up without accommodation.²¹

According to the study by the Victorian HPLC, discrimination can have serious consequences for a person experiencing homelessness, further exacerbating their pre-existing disadvantage.²² These consequences 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;²³ 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.²⁴

Research by Vic Health illustrates that people who suffer from discrimination are more likely to develop depression and anxiety. The report also notes that there is a strong link between poor mental health and poor physical health.²⁵

While housing status is not a protected attribute under domestic Australian law, a number of overseas jurisdictions include housing status or social status in anti-discrimination law.

The Victorian Equal Opportunity Review Final Report recommended that homelessness be included as a protected attribute under Victorian anti-discrimination law.²⁶

International law provides support for including housing status as a protected attribute. The ICESCR requires that States use all their available resources to progressively realise the rights set out in the Covenant. Article 11 recognises the right to an adequate standard of living and this includes adequate housing. Article 12 states that everyone has the right to enjoy the highest attainable standard of physical and mental health.

²¹ Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008, 96-97.

²² PILCH Victoria Homeless Persons' Legal Clinic, above n 20.

²³ 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>>.

²⁴ PILCH Victoria Homeless Persons' Legal Clinic, above n 19, 17.

²⁵ Vic Health, *More than Tolerance: Embracing Diversity for Health*, September 2007.

²⁶ Victorian Department of Justice, above n 21.

As set out above, Article 26 of the ICCPR protects ‘social origin’ and ‘any other status’. This attribute ‘other status’ provides protection to people linked by their common status. There is international jurisprudence that supports the inclusion of homelessness, social status and criminal record within the definition of ‘other status’.²⁷

There is international precedent for specifically prohibiting discrimination on the basis of housing status. The New Zealand *Human Rights Act 1993* contains ‘employment status’ as a protected attribute and the definition of the attribute includes being a recipient of benefits under social security law. In Canada, ‘receipt of public assistance’ is protected under discrimination legislation in a number of provinces and some jurisdictions prohibit discrimination on the basis of ‘social condition’. There is also a federal Canadian guarantee of freedom from discrimination on a number of grounds (that do not include housing status) but the list is not exhaustive. The UK *Human Rights Act 1998* incorporates article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which guarantees a right to freedom from discrimination on any ground, including social status.

Adding housing status as a protected attribute, most importantly, would 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 Australian Government has pledged to halve homelessness by 2020, a very ambitious target.

The Regulation Impact Statement acknowledges that “a key focus of anti-discrimination regulation is to change attitudes about traditionally vulnerable and marginalised groups within society.”²⁸ Inclusion of housing status as a protected attribute would demonstrate the Government’s commitment to improving outcomes for people experiencing or at risk of homelessness.

Victims or Survivors of Family Violence

PIAC submits that ‘status as a victim or survivor of family violence’ should be included as an attribute in the new Act.

PIAC’s submission in relation to the Discussion Paper recommended that ‘victim of domestic violence’ be added as a protected attribute in the new Act.

PIAC endorses the proposed wording of the definition in Belinda Smith and Tashina Orchiston’s working paper.²⁹

²⁷ Victorian Council of Social Services, above n 6.

²⁸ Above n 8, 12.

²⁹ Ibid.

Family violence has a major impact on a person's life. Victims of family 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.³⁰ Domestic and family violence is a major cause of homelessness.³¹ Escaping violence is the most common reason provided by people who seek help from specialist homelessness services, making up 22% of all requests and 55% of women with children.³²

Although victims of family violence are often female, the protection under the SDA, or under the DDA if someone has a disability, is very limited. The SDA does not suitably cover particular groups of women; hence breastfeeding, pregnancy and family responsibilities have each been introduced as separate grounds of unlawful discrimination. The DDA only assists survivors or victims who have impairment and have identified as having that impairment; for example, an injury as a result of family violence. Furthermore, the reasonable adjustment provision only relates to needs that are due to the impairment, not other needs arising from domestic violence.

Gender Identity

PIAC welcomes the inclusion of gender identity in the list of protected attributes. We welcome the definition of gender identity that refers to a person's self identification and gender expression, rather than surgical requirements in order for anyone to be recognised under the law, as this is consistent with Australia's international human rights law obligations.³³

PIAC submits, however, that the phrase 'on a genuine basis' in the definition in the Exposure Draft be removed. No other definition of a protected attribute includes this requirement.

PIAC submits that the definition of gender identity should also include provision for 'gender non-conformity', or 'gender expression'. Gender expression or non-conformity refers to the way that a person expresses gender through their outward presentation and may not otherwise be captured by the current definition in the Exposure Draft.

PIAC recommends that the definition in the Exposure Draft be amended to reflect the definition of the *Tasmanian Anti-Discrimination Amendment Bill 2012*. As at 4 December 2012, the *Tasmanian Anti-Discrimination Amendment Bill 2012* had been passed by the Tasmanian House of Assembly and was awaiting passage by the

³⁰ Belinda Smith and Tashina Orchiston, "Domestic Violence Victims at Work: the Role of Anti Discrimination Law", *Working Paper*, 12 December 2011.

³¹ Spinney, Angela, *Home and Safe? Policy and Practice Innovations to prevent women and children who have experienced domestic and family violence from becoming homeless*, November 2012.

³² The White Paper, *The Road Home: A National Approach to Reducing Homelessness* (Commonwealth of Australia 2008).

³³ *International Covenant on Civil and Political Rights* art 6.

Tasmanian Upper House. The definitions of 'gender identity' and 'intersex' contained within that bill have enjoyed multi-partisan support from the Coalition, the Greens and the Tasmanian Labor Party.

Intersex

PIAC submits that there should be clear protections to ensure that intersex persons are protected from discrimination. We submit that 'intersex' should be included as a separate protected attribute. This recognises the distinct discrimination intersex persons may experience and the distinct characteristics of intersex persons.

The *Tasmanian Anti-Discrimination Amendment Bill 2012* also includes intersex as a protected attribute, and PIAC submits that the definition contained within the Tasmanian Bill be included in the new Act.

Family Responsibilities

PIAC submits that the definition of family responsibilities at section 17(1)(d) of the Exposure Draft be expanded to include carer responsibilities and include a broader definition that reflects understandings of family in Australia. It is important that carer and family responsibilities be protected under consolidated anti-discrimination legislation.

The definition of family responsibilities in the Exposure Draft does not adequately reflect the diversity of meanings of family in Australia, such as domestic relationships and kinship groups.

Section 65 of the *Fair Work Act* provides for a slightly expanded definition of carer responsibilities:

An employee who is a parent, or has responsibility for the care of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:

- (a) Is under school age; or
- (b) Is under 18 and has a disability.

If one or more of the attributes above are not included in the Act, PIAC submits that the Act should mandate a review of the legislation with particular consideration given to the need to add additional protected attributes, three years from commencement of the Act. PIAC submits the following attributes be considered as priority for inclusion as additional protected attributes under section 17(1) at the three year review of the legislation:

- irrelevant criminal record;
- victim or survivor of family violence; and
- social/housing status.

Recommendation 1: The protected attributes

The Act should contain a non-exhaustive list of protected attributes that specifically prohibits discrimination on the basis of 'other status'.

Alternatively, section 17(1) of the Exposure Draft should be extended to include:

- *irrelevant criminal record;*
- *victim or survivor of family violence; and*
- *social/housing status.*

If these protected attributes are not included, the Act should mandate a review of the legislation, three years after its commencement, to consider whether additional attributes should be included. Irrelevant criminal record, victim or survivor of family violence and social/housing status should be considered as priority for inclusion as additional protected attributes.

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

The definition in the Exposure Draft should be amended to include the following definition of 'gender identity':

Gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes a person who identifies as transsexual and transgender.

PIAC submits that 'intersex' be included as a protected attribute in the new Act, and that definition of Intersex be as follows:

Intersex means the status of having physical, hormonal or genetic features that are -

(a) neither wholly female nor wholly male; or

(b) a combination of female and male; or

(c) neither female nor male.

The definition of family responsibilities in the Exposure Draft should be expanded to include carer responsibilities and include domestic relationships and cultural understandings of family.

2. Chapter 2, Part 2 – 2, Division 2 (Section 19): When a person discriminates against another person; and related concepts

Intersectional discrimination

PIAC welcomes the inclusion in the definition of discrimination at section 19 of the Exposure Draft of intersectional discrimination.

PIAC submits that modern discrimination laws should recognise that people are multi-layered and may be subject to discrimination based on several aspects of their identity. At an international level, there is a growing recognition of intersectional discrimination, which is also sometimes referred to as 'intersectionality' and 'multiple discrimination'.³⁴ Although these terms are often used interchangeably, it has been argued intersectional discrimination is a form of multiple discrimination. Multiple discrimination occurs when someone experiences discrimination on the basis of more than one protected attribute; for example, being treated less favourably on the grounds of both age and disability. Intersectional discrimination occurs when multiple aspects of a person's identity compound each other and cannot be separated. Intersectional discrimination means people are discriminated against in qualitatively different ways as a consequence of the combination of their individual characteristics.³⁵

Australia's existing anti-discrimination laws do not adequately allow for the recognition of discrimination that occurs on the basis of more than one protected attribute.³⁶ Currently, if a person believes they have been subjected to discrimination based on more than one attribute they must plead each ground separately; a court then considers each ground of discrimination one at a time, not in combination.

PIAC supports the inclusion of intersectional discrimination in the Exposure Draft as this has the potential to address multiple discrimination.

Recommendation 2: Intersectional discrimination

Section 19 of the Exposure Draft should be retained insofar as it expressly covers intersectional discrimination.

Section 19(2)

Generally, section 19(2) is supported by evidence that has been provided from the Australian community that more targeted and explicit legal protection for harassment

³⁴ See, eg, The Platform for Action for Equality, Development and Peace at the United Nations' Fourth World Conference on Women in Beijing cited in European Network Against Racism, July 2011 ENAR Factsheet 44, *The Legal Implications of Multiple Discrimination*, <<http://cms.horus.be/files/99935/MediaArchive/publications/FS44%20-%20The%20legal%20implications%20of%20multiple%20discrimination%20final%20EN.pdf>> 12 December 11. See also report of the United Nations Expert Group Meeting on Gender and Race Discrimination held in Zagreb, Croatia, 21-24 November 2001 <<http://www.un.org/womenwatch/daw/csw/genrac/report.htm>>.

³⁵ Equality and Diversity Forum, *Multi-dimensional discrimination: Leaflet*, <http://www.edf.org.uk/blog/?p=12670> on 17 December 2012.

³⁶ See, eg, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, CEDAW, 34th sess, 28, UN Doc /C/AUL/CO/5 (2006), cited in Cambridge Pro Bono Project, 23. See also Andrew Thackrach, "From Neutral to Drive: Australian anti-discrimination law and identity", (2008) 33(1), *Alternative Law Journal*, 31-32.

and discrimination is in line with public interest objectives. Paragraph 80 of the Australian Human Rights Commission's submission to the Discussion Paper reports that:

Participants in the Commission's consultations revealed personal stories of discrimination, vilification and harassment that provide compelling evidence of a need for change. They also presented evidence of the negative impact discrimination has had on their health and wellbeing.³⁷

PIAC supports retaining the definition of 'unfavourable treatment' that is set out in section 19(2)(a) of the Exposure Draft to include harassing another person. This provision is an apt reflection of the now well-accepted understanding that harassment, when based on a protected attribute, is unfavourable treatment that in itself is discriminatory.³⁸ On that basis, it is appropriate that the legislation provides that harassment be unlawful on the basis of any protected attribute, in all areas of public life. The Explanatory Notes to the Exposure Draft clarify that section 19(2)(a) has been adopted largely because it reflects existing Australian case law.³⁹

Section 19(2)(b) contains a further explication of what constitutes 'unfavourable treatment' – namely, "other conduct that offends, insults or intimidates the other person". PIAC acknowledges that some concern has been expressed publicly about section 19(2)(b). For example, the former Chief Justice of NSW, the Hon James Spigelman AC, was concerned about the extent to which this provision might impinge on freedom of expression.

In response, the SDA contains protections against harassment that use the words 'offend, insult or intimidate' to help define the term harassment. However, the existing jurisprudence in respect of the corresponding provisions in the SDA suggests that section 19(2)(b) would not impose an improper fetter on freedom of expression. After all, while freedom of expression is fundamental to the operation of a liberal democratic society, it is well understood that this freedom is not absolute, and it cannot be used to justify expression that has the purpose or effect of harassing another person.

Nevertheless, PIAC accepts that the inclusion of the words 'offends, insults or intimidates another person' in section 19(2)(b) could cause confusion. PIAC therefore proposes that section 19(2)(b) be re-drafted.

PIAC has had the advantage of reading, in draft form, the submission to this inquiry of the Human Rights Law Centre (HRLC). PIAC agrees with the HRLC's proposal to re-draft section 19(2)(b) to provide that 'unfavourable treatment' includes, but is not limited to conduct in the following two categories. The first category is conduct that humiliates or intimidates the other person. The second category, which picks up on the wording of existing provisions such as section 9 of the RDA, is conduct that has

³⁷ Australian Human Rights Commission, above n 38, 21, [80].

³⁸ Australian Human Rights Commission, *Submission to the Attorney-Generals Department on the Consolidation of Commonwealth Discrimination Law*, 6 December 2011, 20, [75].

³⁹ *Ibid*, 26-27, [107].

the intent or effect of nullifying or impairing the other person's enjoyment of human rights on an equal footing.

Anti-vilification law

It is worth noting there is at least a conceptual link between section 19(2)(b), as currently drafted, and anti-vilification provisions in other current Australian legislation. The *Discrimination Act 1991* (ACT) makes inciting severe ridicule of a person or a group of people an offence.⁴⁰ The test is one of recklessness as to whether the act incites severe ridicule. The NSW Act makes severe ridicule an offence in respect of both racial and HIV/AIDS vilification.⁴¹ The *Anti-Discrimination Act 1991* (Qld) makes inciting severe ridicule of a person or a group of people an offence.⁴² The *Anti-Discrimination Act 1998* (Tas) makes conduct an offence on seven grounds, including gender, marital status, pregnancy, and family responsibilities, if a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.⁴³ Finally, section 18C of the RDA provides that racial vilification is unlawful.

In the Exposure Draft, racial vilification is dealt with separately in section 51. PIAC notes that a countervailing protection of freedom of expression is provided by section 53(2)(b)(ii). That exception allows for fair or accurate reporting of, or fair comment on, matters of public interest. The Explanatory Notes to the Exposure Draft confirm that the purpose of this exception is to ensure that unintended liability is not imposed on news organisations fairly reporting or commenting on events.⁴⁴

Recommendation 3: Section 19(2)

Section 19(2)(a) of the Exposure Draft should be retained.

Section 19(2)(b) should be re-drafted to provide that 'unfavourable treatment' includes, but is not limited to, conduct that humiliates or intimidates the other person, or has the intent or effect of nullifying or impairing the other person's enjoyment of human rights on an equal footing.

3. Chapter 2, Part 2 – 2, Division 3 (Section 22): When discrimination is unlawful

Protection of all attributes in all areas of public life

PIAC submits that the definition of unlawful discrimination in Part 2 of the Exposure Draft should be extended so that those attributes that are considered to be unlawful for the purposes of work and work-related areas only (at section 22(3) of the

⁴⁰ *Discrimination Act 1991* (ACT) ss 66 and 67.

⁴¹ NSW Act ss 20D and 49ZXC.

⁴² *Anti-Discrimination Act 1991* (Qld) s 124A.

⁴³ *Anti-Discrimination Act 1998* (Tas) s 17.

⁴⁴ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws, Human Rights and Anti-Discrimination Bill 2012: Exposure Draft Explanatory Notes*, [254].

Exposure Draft) are also included as attributes with respect to which discrimination will be unlawful in other areas of public life.

It is our view that it is entirely foreseeable that a person could be discriminated against on the basis of their nationality, social origin, religion or political opinion when seeking accommodation or education. It is also possible that a person could unreasonably be refused access to a service on the basis of their social origin, medical history or political opinion.

PIAC submits that the inclusion of a general limitations provision within the Act would ensure that the appropriate balance is met for duty holders under the Act. That is, discrimination with regard to all of the attributes set out in section 17 of the Exposure Draft would be lawful where the proposed discrimination can be justified as a necessary and proportionate means of achieving a legitimate aim. In addition, PIAC notes that the absence of protection from discrimination in all areas of public life for the attributes set out at section 22(3) of the Exposure Draft is inconsistent with the scope of protection that is provided to those attributes in other jurisdictions. For example, PIAC notes that political belief or activity, industrial activity and religious belief or activities are protected under the Victorian Act in all areas of public life.⁴⁵

It is also important to note that the attributes are also protected in areas of life other than in employment, by international human rights instruments to which Australia is a party.⁴⁶

Recommendation 4: Protection of all attributes in all areas of public life

The attributes that are considered to be unlawful for the purposes of work and work-related areas only at section 22(3) of the Exposure Draft should not be so restricted. These attributes should be included as attributes with respect to which discrimination is unlawful in all areas of public life.

4. Chapter 2, Part 2 – 2, Division 4, Subdivision A: Main Exceptions

General limitations clause

PIAC welcomes the introduction of a general limitations clause in the Exposure Draft. Such a clause simplifies the exception and permanent exemption regime, by imposing a single defence provision that will be easier to apply and understand, removing the need for other defences, such as unjustifiable hardship.

The general limitations clause will enhance the flexibility of anti-discrimination law, as well as the defences in relation to discriminatory acts. The requirement for duty

⁴⁵ See *Equal Opportunity Act 2010* (Vic) s 6.

⁴⁶ For example, Article 17 of the *International Covenant on Civil and Political Rights* protects prohibits discrimination on any ground, including s race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

holders to set out why proposed behaviour is not unlawful discrimination, by stating that 'the action was a proportionate means of achieving a legitimate aim',⁴⁷ creates a standard that can adapt over time in line with changing community expectations.

However, PIAC submits that the general limitations clause in the Exposure Draft should be extended to replace *all* exceptions and permanent exemptions that exist under the current federal anti-discrimination laws.

On a practical level, the benefits of including a general limitations clause, which are set out above, will permeate the entire anti-discrimination regime and create a clearer and simpler test that, consistent with Australia's obligations under international human rights law, can be applied to all areas of public life. On a symbolic level, including a single defence provision for all exceptions under the Act will balance the interests of duty holders against the rights of individuals represents a powerful message about the importance of equality in Australian society.

PIAC supports making all of the exceptions and defences under the Exposure Draft subject to a three-year sunset clause.⁴⁸ PIAC submits that the Exposure Draft should expressly require Parliament to consider whether the general limitations defence should be extended to other areas of public life at the point of review of these legislative provisions.

Finally, PIAC endorses the Discrimination Law Experts' Group proposal that the objects, definition of discrimination and justification provisions should be interconnected. We believe that it is appropriate that the general limitations provision in the Exposure Draft has been directly tied to the objectives of the Exposure Draft.

PIAC submits that the list of factors to be taken into account when determining whether discriminatory action is justified (at section 23 of the Exposure Draft) is appropriate and must be retained in order to ensure that the limitations provision can operate as intended. PIAC suggests, however, that the Exposure Draft should make it clear that the balancing exercise should be weighted in favour of achieving the objects of the Act.

PIAC further suggests that consideration be given to providing the Commission with the power to issue guidelines providing examples and more details about how the general justification provision should be applied.

⁴⁷ See for eg, UK Act 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 UK Act ss 15(1)(b) and 19(2)(d).

⁴⁸ 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 Elimination Discrimination and Promoting Gender Equality*, September 2008 <http://www.hreoc.gov.au/legal/submissions/2008/20080901_SDA.html> at 20 December 2012, 151, 163-4.

Recommendation 5: General limitations clause

All of the existing exceptions in the Exposure Draft should be replaced with the general limitations provision that is provided at section 23 of the Exposure Draft.

This provision should be included in the new Act, even if the specific exceptions at Division 4 of the Exposure Draft (sections 24 and sections 26-44) are retained.

The three-year sunset clause for review of exceptions that is provided at section 47 of the Exposure Draft should be retained.

The non-exhaustive list of matters to be taken into account when determining whether the behaviour is justified that is provided for at section 23 of the Exposure Draft should be retained.

Consideration should be given to granting the Commission power to issue more detailed guidelines about the general justification provision.

Duty to make reasonable adjustments should be extended to all attributes

PIAC supports the inclusion, as an object of the Exposure Draft, to “recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments.”⁴⁹

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.

PIAC submits, however, that the duty to make reasonable adjustments should be extended to all other attributes and that such a duty should be a standalone positive duty. Section 25 of the Exposure Draft provides that the duty to make reasonable adjustments is only limited to people with a disability. We recommend that the Act provides that the failure to make a reasonable adjustment is itself unlawful discrimination on the basis of a protected attribute.

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 Work 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

⁴⁹ *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* s 3(1)(e).

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 factors such as the size of the shopping centre.

Recommendation 6: Reasonable adjustments

The Act should contain a duty to make reasonable adjustments that applies to all attributes in all areas of public life. The requirement should be a standalone provision.

The Act should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.

5. Chapter 2, Part 2 – 2, Division 4, Subdivision C: Exceptions related to religion

Application of exceptions to religious organisations

PIAC's primary position is that there should be no permanent exceptions for religious organisations in respect of any protected attribute. PIAC submits that religious bodies, if they wish to discriminate on certain grounds, should be required to justify such discrimination.

It is our view that inclusion of the section 33 religious exceptions in the Exposure Draft means that the rights afforded to vulnerable communities under international law, in particular women and LGBTI people, will continue to be diminished on an improper basis.

PIAC submits that discrimination on any grounds, including religion, should only occur where such discrimination can conform to the general limitations clause which is now included in section 23 of the Exposure Draft. That is, discrimination may occur if it is a proportionate means of achieving a legitimate aim. It is our view that the current blanket religious exception means that in many cases, the rights of individuals are not properly considered vis-à-vis the right to freedom of religion.

Many of the discriminatory practices by religious organisations that currently rely on the permanent exceptions would fall within the terms of such a justification clause. In particular, the addition of religion as a protected attribute would ensure that in performing the balancing exercise required by such a limitation clause, the importance of religious beliefs would be taken into account.

PIAC welcomes section 33(3) of the Exposure Draft, which provides that the religious exception at section 33 of the Exposure Draft will not apply if the discrimination relates to the provision of Commonwealth funded aged care. PIAC views this change as striking an appropriate balance between equal opportunity and

preserving the ability of religious organisations to operate in accordance with their objectives and obligations.

PIAC believes that the majority of discriminatory practices by religious organisations in the area of Commonwealth-funded aged care will fall within the terms of section 23 of the Exposure Draft. Commonwealth-funded aged care organisations may also seek a temporary exemption from the Commission to allow them to discriminate on the basis of religion if circumstances require them to do so.

PIAC does not support discrimination by organisations that are in receipt of public funding and are performing a service on behalf of government. PIAC therefore submits that, at the very least, the Exposure Draft should be amended to ensure that the religious exception will not apply to a religious organisation in receipt of public funds.

Rationale

PIAC acknowledges that it is difficult to balance the right to freedom of religion and belief, and freedom from discrimination. Some have argued that freedom of religion should be accorded more weight than other human rights because it is non-derogable and it is the only right in the ICCPR where the limitation provision is qualified by the word 'fundamental'. However, PIAC endorses the orthodox, more widely accepted position that there is no hierarchy of rights. This view is supported by UN General Comment 24, which states there is no hierarchy of rights under the ICCPR.⁵⁰

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 exceptions for religious organisations should be no broader than is justifiable and necessary.

Many of the discriminatory practices by religious organisations, which currently rely on the permanent exemptions, would fall within the terms of such a justification clause. In particular, the addition of religion as a protected attribute would ensure that in performing the balancing exercise required by such a limitation clause, the importance of religious beliefs would be taken into account. Nonetheless it is important that religious organisations are treated in the same way as other organisations and are not given privileged status and be permitted to discriminate on a permanent basis.

Although PIAC believes most discriminatory action by religious bodies would be justifiable under the proposed new general limitations clause, it is possible that some conduct may fall outside the scope of the limitation provision. In those

⁵⁰ General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant: 11/04/1994. CCPR/C/21/Rev.1/Add.6.

circumstances, it would be open to religious organisations to apply for a temporary exemption from the Commission.

PIAC acknowledges that religious groups 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...⁵¹

If the Committee is not minded to remove the permanent exception at section 33 of the Exposure Draft, PIAC submits that a number of restrictions should be placed on the way the existing exemptions in the SDA and ADA are currently framed. Existing protections should not be diminished (this is a key principle in considering options for reform) and therefore PIAC is concerned to ensure that these religious exemptions do not extend to disability, race or any other protected attributes that are not already covered.

The current religious exemptions under federal discrimination law are unnecessarily broad. For example, in relation to age discrimination, the current provisions are not limited to discrimination on the basis of age in relation to the ordination or appointment of religious members. The exemptions apply to employment, education, access to premises, goods, services and facilities, accommodation, land and requests for information.

Under the SDA, the exemptions apply to sex, marital status, pregnancy, potential pregnancy, breastfeeding and family responsibilities in the areas of employment, education, goods and services, accommodation, land, clubs and requests for information.⁵² PIAC endorses the recommendation of the Senate SDA Inquiry to:

- retain the exemption in relation to discrimination on the basis of marital status;
- remove the exemption on the grounds of sex and pregnancy; and
- introduce a requirement that discrimination be reasonable in the circumstances.⁵³

Additionally, PIAC submits that a religious exception should not apply to the ground of family responsibilities or breastfeeding.

⁵¹ 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.

⁵² Family responsibilities applies only to the employment.

⁵³ 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) (**SDA Inquiry**), Recommendation 35.

Discrimination in educational institutions established for religious purposes that is currently allowed under the SDA is supposed to be done 'in good faith' in 'order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.⁵⁴ However, there is no requirement that the religious organisation demonstrate the discrimination has been exercised in good faith. All exceptions should require justification by the religious organisation as to why the exception should apply.

There is also a section of the SDA that allows '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'.⁵⁵ 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.

Given these problems with the wording of the current provisions in the SDA, PIAC recommends that permanent religious exceptions in the Exposure Draft, limited to marital status and age, should be narrowed to two areas:

- 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.⁵⁶

Accordingly, the permanent exceptions in the Exposure Draft should not extend to goods, services and facilities, access to premises, accommodation, land and requests for information.

Religious exemption on ground of sexuality and gender identity

In relation to discrimination on the ground of sexual orientation or gender identity, PIAC submits that there should be no permanent exceptions. Rather, as explained above, the only exception should be the general limitations provision, or the ability to apply for a temporary exemption.

However, if the Act is to include a permanent exemption on these grounds, then as explained above, it should be limited to:

- 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.

PIAC submits that the exemption should be limited to these two areas and should not apply to goods, services and facilities, access to premises, accommodation, land and requests for information.

⁵⁴ SDA s 38.

⁵⁵ SDA s 37.

⁵⁶ The in relation to age may not be necessary in relation to educational institutions.

Case study 2 – OV and OW v Wesley Mission⁵⁷

PIAC represented a homosexual male couple, OV and OW, in their case against Wesley Mission. 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 couple applied to the Wesley Mission agency because it was the only one in their area offering the type of foster care that they wanted to provide. 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 *Anti-Discrimination Act 1977* (NSW), particularly paragraphs (c) and (d) to claim that its conduct was lawful. Section 56 provides:

Nothing in this Act affects:

- a) the ordination or appointment of priests, ministers of religion or members of any religious order,*
- b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,*
- c) the appointment of any other person in any capacity by a body established to propagate religion, or*
- d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*

At first instance, the NSW Administrative Decisions Tribunal (**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 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 (**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

⁵⁷ *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.

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 Act. PIAC submits that a similar outcome should be avoided under Commonwealth laws. Even the Tribunal that ultimately found in favour of Wesley Mission suggested that the exemptions needed to be reformulated. As a matter of public policy, 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.

Recommendation 7: Exemption for religious organisations

There should be no permanent exceptions for religious organisations in respect of any protected attributes. Discrimination should only be lawful where such discrimination can conform to the general limitations clause in section 23 of the Exposure Draft.

If permanent exceptions for religious organisations are retained, Commonwealth funded organisations should not be covered by those exceptions.

If permanent exceptions are to be retained, they should be limited to inherent requirements of an employment position. The exceptions should be further limited to the protected attributes of marital status, age, sexual orientation and gender identity in the areas of:

- 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.*

6. Chapter 2, Part 2 – 5, Division 2: Equality before the law for people of all races

Section 60 of the Exposure Draft limits equality before the law to the protected attribute of race. Section 10 of the RDA provides for a general right to equality before the law.⁵⁸

PIAC submits that equality before the law should be extended to all protected attributes.

Equality before the law is an important principle of international human rights law.⁵⁹ Article 27 of the ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Other jurisdictions also provide for equality before the law. For example, the *Canadian Charter of Rights and Freedoms* sets out at section 15(1) that

every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A comprehensive equality before the law provision is essential to ensure that Australia's laws are non-discriminatory in operation and effect.

Recommendation 8: Equality before the law

The new Act should provide for equality before the law for all protected attributes.

⁵⁸ Section 10 implements the obligation imposed by Article 5 of *International Convention on the Elimination of All Forms of Racial Discrimination* to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”.

⁵⁹ “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”: Human Rights Committee, *General Comment No. 18: Non-Discrimination (Thirty-seventh session, 1989) Compilation of General Comments and General recommendations Adopted by Human Rights treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) [1].

7. Chapter 3, Part 3 – 1, Divisions 5 and 6: Disability standards and compliance codes

PIAC supports the introduction of compliance codes at Part 3-1, Division 6 of the Exposure Draft, and the continuation of disability standards.

In some respects, compliance codes for industry are similar to the disability standards that have been established under the DDA, and which are continued in Part 3 of the Exposure Draft. Compliance codes establish the ability to develop a compliance framework for a variety of sectors in relation to all attributes protected under the Act. It is our view that this change forms a vital part of the compliance mechanisms that have been included in the Exposure Draft that go towards addressing systemic discrimination.

To date, the disability standards have provided important guidance to duty holders in particular areas, namely education, public transport and access to premises. The application of standards to other attributes aside from disability may be useful in the area of employment⁶⁰ across all attributes and in the area of family responsibilities and breastfeeding. For example, standards could outline in what circumstances facilities must be made available for breastfeeding mothers.

PIAC supports the Commission having the power to formulate or approve standards or compliance codes, rather than the Attorney-General. As expressly provided for in the Exposure Draft, the development of standards and compliance codes should be done in consultation with the relevant industry and the broader community.

With regard to the compliance codes, PIAC submits that the Exposure Draft should make clear that compliance codes are to be developed at an industry-wide level, or by an industry association. PIAC's view is that the current Exposure Draft could be construed to allow for the development of compliance codes for an individual or group of businesses. Our view is that this would create a fragmented approach to compliance with the Act that could not be monitored or enforced without a great degree of difficulty by the Commission or a consumer. By way of example, compliance codes should not be seen as similar to an Equal Employment Opportunity policy, which are generally developed taking into account the particular needs and objectives of individual organisations.

PIAC also submits that it is appropriate that compliance codes be able to address any of the protected attributes that are protected under the Act. We therefore welcome the absence of a restriction on the attributes that a compliance code may apply to in the Exposure Draft.

PIAC's own extensive experience in relation to working with the Disability Standards for Public Transport 2002 has indicated that in order for the standards to be effective that there needs to be:

⁶⁰ Although the draft Disability Standards for Employment were never finalised.

- regular monitoring to ensure compliance;
- integration with other relevant industry codes/regulations, to ensure more effective compliance and less red tape;⁶¹ and
- regular reviews.⁶²

PIAC submits that the Commission should be required to address each of these factors all of those factors should be addressed by the Commission in the development or review of all current and future disability standards and compliance codes.

To date the development of the standards has been a lengthy process; adequately resourcing the Commission to either develop or lead the development of standards and compliance codes may result in the more timely development of these instruments. PIAC is of the view that because the Commission may quite rightly have a function related to enforcing compliance codes,⁶³ it would not be appropriate for the Commission to charge a fee to develop or assist with the development of the codes.

It is important that the standards and the new compliance codes retain their legal force. Any breach of a standard or of a compliance code should be unlawful discrimination.

⁶¹ In this respect, the *Disability (Access to Premises-Buildings) Standards 2010* (Cth) are an improvement on the Disability Transport Standards as they are linked to the Building Code of Australia. See also Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004), Recommendation 14.4.

⁶² The Disability Transport Standards were due for review in 2007, five years after they commenced. However the Review Report was only released on 3 June 2011.

⁶³ For example, the Commission may receive a complaint regarding a breach of a compliance code, or may receive an application for a temporary exemption from a compliance code.

Recommendation 9: Standards

The Exposure Draft should be amended to specify that compliance codes should develop at an industry wide level, and that they are not intended to be developed for the purpose of an individual organisation.

The Exposure Draft should explicitly state that compliance codes may relate to any of the attributes that are protected under the Act.

The Commission should be adequately resourced to develop or assist with the development of the compliance codes, and should not charge any fee in relation to the development of compliance codes.

Any breach of a disability standard or a compliance code should be unlawful discrimination.

8. Chapter 3, Part 3 – 1, Division 8: Temporary exemptions

PIAC supports the continued availability of temporary exemptions within the new Exposure Draft, and the harmonisation of the current mechanisms for granting temporary mechanisms under the SDA, ADA and DDA. PIAC welcomes the absence of permanent exemptions in the Exposure Draft.

PIAC has participated in a number of public consultations relating to temporary exemption applications by transport operators for exemption from the provisions of the DDA and Disability Transport Standards. Currently, PIAC represents a party in proceedings in the Administrative Appeals Tribunal in an appeal of a decision of the Commission to refuse to grant an exemption application.

PIAC welcomes the inclusion of section 74 of the Exposure Draft, which provides that exceptions and exemptions contained within the Act do not apply to the Disability Standards. PIAC believes that this is appropriate given how long disability discrimination laws have been in place in Australia.

Given the significance of temporary exemptions within anti-discrimination legislation (they provide authorisation to discriminate), PIAC submits that the Act should set out the specific process and criteria for granting temporary exemptions, rather than leaving the process to be developed in guidelines produced by the Commission, as is the current position. This would provide great clarity and certainty for duty holders and affected persons regarding how temporary exemption provisions are intended to operate and apply.

Part 3-1, Division 8 of the Exposure Draft, which deals with temporary exemptions, requires the Commission to comply with the consultation requirements of Part 3 of the *Legislative Instruments Act 2003* (Cth). However, no further detail is included regarding how the consultation process for granting temporary applications should occur.

PIAC submits that the process for granting temporary exemptions should include that:

- all temporary exemption applications should be published on the Commission's website;
- all applications are subject to a period of public consultation, in which submissions are invited;
- the Commission's temporary exemption decisions should be published on the Commission's website and in the *Gazette*;
- temporary exemptions should be granted for a period of no more than five years; and
- temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.

PIAC submits that the following criteria, many of which are currently used by the Commission in assessing applications,⁶⁴ should be included in the Act and be used by the Commission in determining whether to grant an exemption application:

- the application must be specific and specify what provisions the applicant is seeking exemption from and for how long the exemption is sought;
- the application should produce evidence as to why the exemption is required;
- the proposed exemption must be consistent with the objects of the Act;⁶⁵
- the proposed exemption must be necessary;
- the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;
- matters raised in any submissions in response to the application;
- whether there have been genuine attempts to comply with the provisions of the Act;
- whether the applicant has an action plan in which to ensure compliance with the Act, following the expiration of the temporary exemption; and
- whether it is appropriate to grant the exemption subject to any terms or conditions.

PIAC also submits that whilst it is appropriate that the Commission determine the time period for the granting of each temporary exemption, in order to ensure that exemptions remain relevant to and further the objectives of the Act, that no temporary exemption should be made for a period longer than five years.

PIAC submits that, while there are certain circumstances in which a temporary exemption from a discrimination provision may be appropriate, there should be no provisions allowing temporary exemptions from harassment or racial vilification, as is currently the position adopted by the Exposure Draft, and under current federal anti-discrimination laws.

⁶⁴ See <<http://www.hreoc.gov.au/legal/exemptions/index.html>> at 11 December 2012.

⁶⁵ The SDA Inquiry report recommended that the SDA clarify that the power to grant temporary exemptions should be exercised in accordance with the objects of the Act (Recommendation 28).

Recommendation 10: Temporary Exemptions

The Act should contain provision for applications to be made to the Commission for a temporary exemption up to five years.

Temporary exemptions should be assessed according to the following criteria:

- the application must be specific and specify what provisions the applicant is seeking exemption from, for how long the exemption is sought;*
- the application should produce evidence as to why the exemption is required;*
- the proposed exemption must be consistent with the objects of the Act;*
- the proposed exemption must be necessary;*
- the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;*
- matters raised in any submissions in response to the application;*
- whether there have been genuine attempts to comply with the provisions of the Act;*
- whether the applicant has an action plan in which to ensure compliance with the Act, following the expiration of the temporary exemption; and*
- whether it is appropriate to grant the exemption subject to any terms or conditions.*

The temporary exemption application process should include:

- all applications should be published on the Commission's website;*
- all applications are subject to a period of public consultation, in which submissions are invited;*
- the Commission's temporary exemption decisions should be published on the Commission's website and in the Gazette;*
- temporary exemptions should be granted for a period of no more than five years; and*
- temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.*

9. Chapter 4, Part 4 – 2, Division 4: Investigation and conciliation of complaints

Option of no conciliation conference

The enforcement of Commonwealth anti-discrimination law relies on a two-stage process: an individual making a complaint to the Commission, and if following investigation and conciliation the matter does not resolve, then commencing proceedings in the Federal Court or Federal Magistrates Court. State and Territory anti-discrimination laws rely on the same model of enforcement. PIAC submits that the Act should include a provision for a complaint to be lodged directly with the federal courts, bypassing the Commission's investigation and conciliation processes.

PIAC generally supports the use of conciliation conferences to resolve discrimination complaints. Conciliation is an informal, flexible, low-cost method of resolving disputes and in many cases results in a satisfactory outcome for all parties. Therefore, PIAC supports the provision in the Exposure Draft, which retains the Commission's power to require attendance at conciliation conferences.

However, while many discrimination complaints are able to successfully resolve at conciliation, some complaints are plainly unlikely to resolve at conciliation. Examples include cases in which the parties have a fixed position, where the case may have significant implications for the parties, or other people, or where there is a significant power imbalance between the parties. Many of the matters PIAC acts in fall into this category as they tend to be test cases and not susceptible to conciliated results. PIAC submits that in such circumstances it would be preferable for complainants to be able to file directly with the courts, rather than be delayed by the Commission's investigation and conciliation process. A similar provision exists in section 122 of the Victorian Act. Additionally, the benefits of conciliation or alternative dispute resolution are often not lost if a complaint is lodged with federal courts as parties are generally ordered to attend compulsory dispute resolution at the first directions hearing.

PIAC submits that the Act should include a provision for a complaint to be lodged directly with the federal courts, bypassing the Commission's investigation and conciliation processes.

Requiring the production of documents

PIAC also supports the retention of the provision that allows the President of the Commission to require the production of documents. In particular, PIAC would like this provision retained and used by the Commission to ensure that when parties attend a conciliation conference the respondent has already submitted a written response to the complaint. In PIAC's experience, it is not uncommon for respondents to provide no response in writing prior to a conciliation conference. This puts the complainant at a significant disadvantage as they are not aware of the respondent's position, and have not had the opportunity to obtain legal advice, prior to the conciliation. This can exacerbate what is already often an uneven playing field between the parties.

Registration of conciliation agreements

PIAC submits that provision should be made in the Act for the compulsory registration of conciliation agreements with the Federal Court and Federal Magistrates Court so that they are enforceable as if they were orders of the Court. PIAC notes that the Productivity Commission made a similar recommendation in its report on the DDA.⁶⁶ Unlike many State and Territory anti-discrimination statutes,⁶⁷ there is no provision in the AHRC Act for the registration of conciliated agreements with the Federal Court or Federal Magistrates Court. As a result, many discrimination

⁶⁶ Productivity Commission, above n 61, Recommendation 13.3.

⁶⁷ See *Anti-Discrimination Act 1977* (NSW) s 91A(6), *Equal Opportunity Act 2010* (Vic) s 120, *Anti-Discrimination Act 1991* (Qld) s 164, *Anti-Discrimination Act 1998* (Tas) s 76, *Human Rights Commission Act 2005* (ACT) s 62.

complaints settle at conciliation but the respondent often never implements the terms of the settlement agreement.

The process of enforcing conciliated agreements should be low-cost and straight-forward. PIAC submits that the provisions in section 164(3) of the *Anti-Discrimination Act 1991* (Qld) and section 62 of the *Human Rights Commission Act 2005* (ACT) provide good models for the compulsory registration of conciliation agreements.

Recommendation 11: Conciliations

The Commission should retain the power to require attendance at conciliation and to require production of documents, including a written response to a discrimination complaint.

The Act should include provision for a complaint to be lodged directly with the federal courts, bypassing the Commission's investigation and conciliation processes.

Conciliation agreements should be automatically registered with the federal courts. Such a provision should be modelled on s 164(3) of the Anti-Discrimination Act 1991 (Qld) and s 62 of the Human Rights Commission Act 2005 (ACT).

10. Chapter 4, Part 4 – 3, Division 2 (Section 122): Persons who may make an application

PIAC is concerned that the Exposure Draft retains the current position in relation to standing for discrimination matters in the federal courts.

Section 122 of the Exposure Draft provides that only a person who is an affected party in relation to a complaint can make an application to the courts.

Currently, there is inconsistency regarding the rules of standing to bring a complaint to the Commission and a complaint to the relevant federal courts. Complaints to the Commission can be made by or on behalf of a 'person aggrieved' (section 46P(2) of the AHRC Act). However, only an 'affected person' (section 46PO(1)) can bring proceedings in the courts if the complaint does not resolve at conciliation. This 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 is concerned that this approach has been adopted in the Exposure Draft.

In PIAC's experience, the inconsistencies in standing can create problems. 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 sections 46P(2) and 46PO(1), it would be difficult for the organisation to continue acting on behalf of the individuals in the Federal Court. Given 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.

It is PIAC's view that, 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, as they are generally better equipped to do so.

PIAC submits that standing be extended in the Act to allow organisations to have standing to bring such complaints on behalf of individuals. The courts should also have residual power to refuse to allow an organisation to have standing on public interest grounds. In considering whether an organisation should be refused standing, the court should be permitted to take into account the relationship between the individual and the organisation. PIAC considers this to be a practical way of promoting access to justice, without running the risk of 'opening the floodgates' to inappropriate, vexatious or unmeritorious litigation.

Additionally, PIAC submits that organisations should be able 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.⁶⁸ 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 section 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'.⁶⁹

This decision appears to have inhibited other organisations making complaints about systemic discrimination.⁷⁰ The test outlined in *Access for All* that applies to the standing of an organisation to bring a discrimination complaint is very limited and hampers the ability of organisations to bring action to address systemic discrimination.

PIAC's primary submission is that the Act should adopt a liberal approach to the question of standing. PIAC recommends the Act include open standing for discrimination complaints, in similar terms to section 123 of the *Environmental*

⁶⁸ *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (**Access for All**).

⁶⁹ Ibid at [58].

⁷⁰ 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](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.

Planning and Assessment Act 1979 (NSW). It is also arguable that the NSW Act⁷¹ and Western Australian Act⁷² include open standing provisions, which permit any person, whether personally affected or not, to lodge a complaint that a contravention of the Act has occurred.

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.⁷³ In each case, the problems identified about access not only affected the individuals involved, but also affected many other people with disability. In this sense, they were cases of genuine public interest. An open standing provision would have allowed a disability organisation, or an organisation such as PIAC, to bring the proceedings, rather than the individuals.

An open standing provision would make it easier for organisations to bring proceedings to address systemic discrimination, taking the pressure off individuals who are often less equipped in bringing such claims. Courts already have the power to dismiss an action which 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 unmeritorious claims being brought before the courts.

In the event that open standing is not adopted in the new Act, PIAC submits at the least the Act should include a test for standing for organisations or groups, in particular incorporated organisations, to bring discrimination proceedings. In order to satisfy this standing test, an organisation or group would need to show either:

- that a significant portion of the membership of the organisation or group is affected by the conduct in question; or
- 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.⁷⁴ The second criterion derives from section 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), an

⁷¹ NSW Act s 87A(1).

⁷² *Equal Opportunity Act 1984* (WA) s 83(1).

⁷³ 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.

⁷⁴ See *Access for All*, above n 68 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.

uncontroversial provision, which PIAC submits should be extended to this context. PIAC notes that earlier this year the Administrative Review Council proposed a similar provision to be added to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁷⁵

PIAC submits that these criteria should be included in the Act to provide guidance on standing for groups and organisations.

Recommendation 12: Standing

The Act should include a provision allowing organisations to bring a complaint on behalf of a person to both the Commission and the federal courts. The Act should provide the courts with residual power to refuse to allow standing for an organisation on public interest grounds.

The Act should provide open standing to allow anyone to bring a complaint to enforce a breach of discrimination or harassment provisions. The provision should be modelled on s 123 of the Environmental Planning and Assessment Act 1979 (NSW).

Alternatively, organisations should have standing to bring discrimination complaints to the Commission and to the federal courts in their own right. In order to satisfy this standing test, an organisation or group would need to show either:

- that a significant portion of the membership of the organisation or group is affected by the conduct in question; or*
- the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.*

11. Chapter 4, Part 4 – 3, Division 2 (Section 124): Burden of proof in proceedings under section 120 etc.

PIAC welcomes the inclusion of a shared burden of proof provision in section 124 of the Exposure Draft.

Currently, there are a number of elements that need to be proved to establish unlawful discrimination. For direct discrimination, this includes proof that:

- the complainant has an attribute that is protected by the legislation;
- an action that is discriminatory under the legislation occurred, that is that the complainant was treated less favourably,⁷⁶ or the treatment nullified or limited their enjoyment of a human right;⁷⁷

⁷⁵ Administrative Review Council, *Federal Judicial Review in Australia* (Report No. 50, 2012), Recommendation 10.

⁷⁶ For direct discrimination under the ADA, SDA and DDA.

- the respondent was responsible for the discriminatory act;
- the action was taken because of the protected attribute;
- the action is not justified or excused by a defence; and
- the action is not covered by an exception or exemption.

The burden of proof for direct discrimination currently falls almost entirely on the complainant. The onus is only on the respondent to prove the existence of a defence or an exception or exemption if the complainant has proved the discrimination. This causes a number of difficulties for complainants as usually all evidence of the reason for the action lies with the respondent.

Currently, it is often 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 their family responsibilities was the reason why they did not get the job. 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.

For indirect discrimination, the elements that need to be proved are that:

- the complainant has an attribute that is protected by the legislation;
- a condition, requirement or practice covered by the legislation has been imposed;
- the respondent was responsible for imposing the condition, requirement or practice;
- the requirement disadvantages people with a protected attribute;
- the complainant does not or cannot comply;⁷⁸
- the condition, requirement or practice is not reasonable in the circumstances;
- the action is not excused by a defence; and
- the action is not covered by an exception or exemption.

In indirect discrimination matters under the SDA, DDA and ADA, once the complainant provides sufficient evidence that a condition, requirement or practice has the required effect of disadvantaging people with the relevant attribute, the burden of proving that the condition, requirement or practice is reasonable in the circumstances then shifts to the alleged discriminator.⁷⁹ In other words, the respondent only bears the onus of proof once the complainant has shown that a condition, requirement or practice disadvantages people with the relevant attribute.

PIAC submits that the burden of proof should be borne by the party most able to adduce the evidence in each situation. PIAC is of the view that the shared burden of proof under the Exposure Draft successfully achieves this.

It is only logical that for both direct and indirect discrimination, 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

⁷⁷ For direct discrimination under the RDA.

⁷⁸ For indirect discrimination under the RDA and DDA.

⁷⁹ SDA s 7D, DDA s 6(4), ADA s 15(2).

arise that an action was taken for the reason alleged by the complainant and the onus falls on the respondent to rebut that presumption. This approach 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.”⁸⁰

Under the shared burden of proof in the Exposure Draft, the complainant rightfully does not bear the unreasonably difficult burden of establishing the state of mind of the respondent in a direct discrimination claim. For indirect discrimination, it means that the respondent has the burden of proving that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a legitimate aim (or is reasonable under the current test).

Case study 3

PIAC has received a number of complaints about discrimination on the basis of race by a bowling club. PIAC represented a particular Aboriginal woman in a complaint against the bowling club under the RDA. Our client’s membership of the club was suspended because she used minor offensive language. Her membership was then suspended for a further 12 months for no apparent reason.

Not only was the punishment completely disproportionate to the breach of the club rules, our client believed that Aboriginal members of the club received harsher penalties than non-Aboriginal members of the club for the same or similar breaches of the club rules.

This kind of racial discrimination is very difficult for a complainant to prove. Our client had enough evidence to establish a prima facie case of discrimination but did not have any of the evidence concerning causation. For example, she did not have access to the minutes of the meetings where her membership status was discussed and the decision taken to suspend her membership. Furthermore, our client did not know about the total number of memberships suspended and their race of those members, she only had anecdotal evidence regarding those issues.

Our client decided to settle the matter, partially because of these difficulties with the onus of proof. This case study demonstrates the appropriateness of a shared burden of proof; once a complainant has outlined a prima facie case of discrimination the onus should shift to the respondent to prove the contrary as the evidence rests with the respondent.

Under the *Fair Work Act*, once a 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.⁸¹ The current burden of proof is therefore inconsistent with the *Fair Work Act* and is problematic because the most common area of discrimination complaints is in employment. The shared burden of proof under the Exposure Draft therefore harmonises the burden of proof for employment discrimination at the federal level. It is a common sense approach that allows case law about both provisions to develop together.

⁸⁰ *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].

⁸¹ *Fair Work Act 2009* (Cth) s 361.

The position adopted in the Exposure Draft is supported by the SDA Inquiry report.⁸² Recommendation 22 of that report states:

The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the Sex Discrimination Act 1975 (UK) so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

PIAC also submits that the shared burden in the Exposure Draft will not unduly hamper respondents. There must first be facts from which the court could decide that discrimination has occurred in the absence of any other explanation. The burden of proof will only shift to the respondent where the complainant has already shown there are proper grounds to believe that discrimination might have occurred.

The UK, EU and Canada show that a shared burden of proof in discrimination claims is unlikely to disadvantage respondents unfairly. Similar to the burden of proof in the Exposure Draft, in the UK, EU 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. In fact, the UK Court of Appeal in *Ingen Ltd v Wong* [2005] EWCA Civ 142 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 treated.”⁸³

Case study 4

The case of *Hussain v Vision Security & Mitie Security Group* [2011] UKEAT/0439/10/DA illustrates the way the burden of proof works in the UK.⁸⁴ The complainant, Mr Hussain, was 64 years old and was one of three security guards working at a particular site. The other two guards were 34 and 36 years old. They were all told that they were no longer required at that particular site but would continue to work as relief guards until they found permanent positions. The 34 and 36 year old guards were given permanent positions at a new site shortly after. There was a third job at the new site but it was not given to the complainant. Mr Hussain claimed that he was the victim of age discrimination.

At the Tribunal, the manager said that Mr Hussain was not given a job at the new site as he had refused to move to the new site when this was suggested at a telephone meeting. Mr Hussain said that no such conversation took place, and the other two guards supported this evidence. The Employment Tribunal accepted the claimant’s version of events and determined that the manager’s evidence was ‘unreliable’. However, the Tribunal did not draw an adverse inference that the reason for the treatment was due to age discrimination.

⁸² SDA Report, above n 53.

⁸³ *Ingen Ltd v Wong* [2005] EWCA Civ 142 at [31].

⁸⁴ For a short summary of the case, see Veale Wasbrough Vizards, ‘Discrimination: the reverse burden of proof’, 21 October 2011, available at: http://www.vwv.co.uk/site/briefings/briefingsdetail/empezine2_reverse_burden_proof211011.html at 14 December 2012.

The Employment Appeals Tribunal found that there were facts from which the Tribunal could decide that discrimination had occurred, such as the fact that the younger guards were given jobs when the employee close to retirement was not. Given the employer's evidence was untruthful in their opinion, the facts enabled an adverse inference to be drawn.

Given the employer bore the burden of proof, and their evidence was untruthful, discrimination had been proved.

How can the respondent rebut the presumption?

Under the shared burden and in relation to direct discrimination, the respondent can rebut the presumption by providing evidence that the reason for the conduct does not relate to a protected attribute; that is, there was some other legitimate reason for the conduct.

For indirect discrimination, the respondent can show that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a legitimate aim. This is broadly consistent with the existing burdens under the SDA, ADA, and DDA in relation to the respondent showing the condition, requirement or practice is reasonable in the circumstances.

In cases of both direct and indirect discrimination, the respondent could show that the discriminatory behaviour was justified as it was a 'proportionate means of achieving a legitimate aim', therefore satisfying section 23 of the Exposure Draft. Of course, if the respondent had a relevant temporary exemption granted by the Commission then this would be a defence to a discrimination complaint.

Recommendation 13: Burden of proof

The shared burden of proof in the Exposure Draft should be retained.

12. Chapter 4, Part 4 – 3, Division 4 (Section 133): Costs

The Exposure Draft provides that, for discrimination proceedings in the federal courts, each party is to bear their own costs. PIAC supports this provision as it enables greater access to justice.

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

Proceedings can be lengthy and incur significant legal costs, frequently in the tens of thousands of dollars. It is not unusual for respondents to retain large law firms and senior and junior counsel to represent them and costs, even on a party/party basis can be significant. Due to the risk of an adverse costs order, many strong discrimination complaints settle. This removes any precedent impact a successful court decision might have. Other times, clients often opt to file their complaint under State and Territory legislation which provide a presumption in favour of each party paying their own costs.⁸⁵

If parties bear their own costs, this will ensure consistency with General Protection claims under the *Fair Work Act* and State and Territory anti-discrimination laws. It will improve access to justice for individuals who have been victims of discrimination.

PIAC is also of the view that section 133(1) of the Exposure Draft is balanced by sections 133(2) and 133(3) which recognises that in some circumstances it may be appropriate to make a costs order. If a party has conducted the matter in a way to add unnecessary delay then 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. PIAC notes that while it endorses the National Association of Community Legal Centres' submission, PIAC acknowledges that there is a slight divergence in views regarding section 133(3) in that PIAC generally supports the provision as drafted in the Exposure Draft.

PIAC submits that section 133(3) should be extended to include where a discrimination matter is a public interest matter and the complainant is successful, the court should be able to make a public interest costs order, to allow the complainant to recover its costs. PIAC supports the recommendations of the Australian Law Reform Commission in its report *Costs Shifting - who pays for litigation*⁸⁶ regarding the availability of a public interest costs order. The availability of such an order recognises the benefits to the whole community in having discrimination laws enforced and allows for the costs of pursuing such litigation to be spread more broadly than on the individual who has suffered discrimination or harassment. A public interest costs order would also allow consideration to be given to the resources of the respondent, which are often large well-resourced organisations who have the benefit of litigation insurance and tax deductibility for litigation costs. PIAC submits that in such circumstances it would be appropriate for a successful complainant to be able to recover their legal costs.

⁸⁵ PIAC's experience is supported by the research of Beth Gaze and Rosemary Hunter who found that the costs rules in the federal courts operate as a barrier to access and a disincentive. See Beth Gaze and Rosemary Hunter, *Enforcing human rights: an evaluation of the new regime* (2010) 8.3.

⁸⁶ Australian Law Reform Commission, *Costs Shifting - who pays for litigation* (Report No 75, 1995) Recommendation 47.

In PIAC's view, section 133 of the Exposure Draft addresses the current significant barriers to access to justice. It will ensure that complainants with meritorious cases are not deterred from commencing litigation because of the risk of an adverse cost order. Sections 117 and 121 of the Exposure Draft operate to ensure that only cases with relative merit are able to make an application to federal courts. In PIAC's view, these provisions are sufficient to address any concerns that if parties bear their own costs this would result in a flood of vexatious and frivolous complaint being brought before the courts.

Recommendation 14: Litigation costs

Section 133 of the Exposure Draft should be retained.

Section 133(3) of the Exposure Draft should be extended to enable courts to make an order as to costs where the complaint is successful and the matter is classed by the court as a public interest matter.

13. Further recommendations

Positive duty for public sector organisations

PIAC endorses the National Association of Community Legal Centres' submission regarding the imposition of a positive duty of equality on both public and private bodies.

In this submission, PIAC has focused on public sector organisation in relation to the imposition of a positive duty of equality.

PIAC believes that the Act should expressly provide that public sector organisations have a positive duty to eliminate discrimination and harassment.

Discrimination law is currently largely reactive and change relies on individual complaints. This characterises the discrimination as a personal dispute and does not encourage organisations to look at holistic change, particularly since the penalties are generally minor. A positive duty will ensure that public sector organisations are proactive in preventing discrimination rather than simply responding after a complaint is made. Imposing a positive duty on public sector organisations would promote substantive equality and eliminate systemic discrimination.

A positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible is not a new concept. A positive duty was introduced in the Victorian Act and applies to not only public sector organisations but also businesses, clubs and sporting organisations.⁸⁷ The Victorian Act contains a list of factors that must be considered in determining whether a measure is reasonable and proportionate and the Victorian Act also contains examples.⁸⁸ The Victorian Equal Opportunity and Human Rights Commission may investigate a breach of this duty or conduct a public inquiry, but it

⁸⁷ *Equality Opportunity Act 2010* (Vic) s 15(2).

⁸⁸ *Equality Opportunity Act 2010* (Vic) s 15(6).

cannot receive individual complaints.⁸⁹ If the Commission finds a breach of the duty, it can issue a compliance notice and the Victorian Civil and Administrative Tribunal can enforce the notice.⁹⁰

The UK is an interesting model for such a duty. Under the new UK Act,⁹¹ public authorities have a duty to have due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity between persons who share a protected characteristic and persons who do not share it, and foster good relations between persons who share a protected characteristic and persons who do not share it.⁹²

These requirements are further defined as removing or minimising disadvantages suffered by people due to their protected characteristics, taking steps to meet the needs of people with protected characteristics and encouraging people from protected groups to engage in public life. The duty covers the following characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Under the previous UK legislation a positive duty existed for the public sector in relation to gender, disability and race.⁹³

A breach of the provisions in the UK Act does not give rise to a cause of action at private law.⁹⁴ The UK Equality and Human Rights Commission has a number of statutory powers to enforce the duty, including undertaking assessments to assess to what extent a body has complied with the duty, serving compliance notices and then enforcing the notices through the courts.⁹⁵ The provisions can also be enforced through an application to the High Court for judicial review.⁹⁶ A person or a group of people with an interest in the matter, or the UK Commission, could make an application for judicial review.

The SDA Inquiry report also proposed the introduction of a positive duty to eliminate sex discrimination and sexual harassment and promote gender equality.⁹⁷

What should the positive duty consist of?

The positive duty to eliminate discrimination and harassment needs to be carefully defined.

First, PIAC submits that public sector organisations should be required to take *reasonable steps* to eliminate discrimination and harassment, rather than just pay *due regard* to the need to do so. This makes the duty more action and outcome focused. In this regard, the Victorian legislation is a better model than the UK Act.

⁸⁹ *Equality Opportunity Act 2010* (Vic) s 15(3) and s 15(4).

⁹⁰ *Equality Opportunity Act 2010* (Vic) s 139 and 151.

⁹¹ The duty commenced on 5 April 2011.

⁹² *Equality Act 2010* (UK) s 149(7).

⁹³ *Equality Act 2006* (UK), imposed a duty in relation to gender, the *Race Relations (Amendment) Act (2000)* (UK) imposed a duty in relation to race and the *Disability Discrimination Act 2005* (UK) imposed a duty for disability.

⁹⁴ *Equality Act 2010* (UK) s 156.

⁹⁵ *Equality Act 2006* (UK) s 31 and 32.

⁹⁶ Explanatory Notes to the *Equality Act 2010* (UK) [521].

⁹⁷ SDA Report, above n 53, Recommendation 40.

Public sector organisations should be required to set defined goals in relation to substantive equality and discrimination and harassment. There should be mandatory reporting on the progress towards these defined goals.

The UK *Equality Act 2010 (Specific Duties) Regulations 2011* requires public authorities to publish information to demonstrate their compliance with the general equality duty at least annually. The information must include information relating to people who share a relevant protected characteristic who are its employees (for authorities with more than 150 staff); and people affected by its policies and practices, such as service users. The information must be published in a manner that is accessible to the public.

The new Act or regulations could set out similar requirements to the UK in relation to requiring public authorities to report and publish information.

Secondly, PIAC submits that public sector organisations should be required to ensure that their policies, practices and services do not have an unjustifiable adverse impact on certain groups of people. This requires public sector organisations to conduct an audit of their policies, practices and services to monitor compliance with this obligation.

The duty should also consist of general requirements to promote equality.

Furthermore, s 1 of the UK Act creates a general duty on public authorities to have due regard to the desirability of reducing inequalities arising from socio-economic disadvantage when making strategic decisions about how to exercise their functions. Unfortunately, this provision has not been brought into force.⁹⁸ It would be desirable to include this general duty in the new Act.

Ideally, such a positive duty should be enforceable by individuals. The effectiveness of the positive duty is limited if it does not give rise to any enforceable private law rights. The availability of judicial review of decisions by public sector authorities is not sufficient as there is rarely an order for compensation in judicial review proceedings.

This would not have an undue burden on these organisations as many larger organisations already have policies that aim to eliminate discrimination and harassment. Furthermore, employers are required under the Commonwealth anti-discrimination Acts to take reasonable steps to prevent discrimination and harassment to avoid vicarious liability.

According to the Regulation Impact Statement, government agencies are already expected to have existing procedures and policies in place and therefore the key impact on government will relate to updating these procedures and policies.⁹⁹ The Regulation Impact Statement further states that:

additional costs arising from alterations to infrastructure (for example to provide disability access) are likely to be minimal, as Government agencies are expected to already be proactively addressing these issues.¹⁰⁰

⁹⁸ *Equality Act 2010* (UK) s 1.

⁹⁹ Above n 8, 58

¹⁰⁰ Ibid.

Beyond proactively promoting substantive equality, a predicted key benefit of imposing a positive duty on public sector organisations is the likely improvements in workplace retention.¹⁰¹ According to the Regulation Impact Statement, replacing staff can cost up to 33 to 75% of the employee's initial salary.¹⁰² Taking a long-term perspective, the Commission is likely to receive fewer complaints as a result of public sector organisations being proactive about their compliance obligations and the likely reduction of discrimination experienced by individuals.

PIAC submits that the likely benefits of the imposition of a positive duty outweigh the potential costs and therefore strongly supports the inclusion of a positive duty in the Act which requires public sector organisations to take reasonable steps to eliminate discrimination and harassment, and to promote equality.

The importance of having a broad definition of a public sector organisation

One of the most important questions for the operation of the Act is determining the definition of 'public sector organisations', which in turn determines the application of the duty.

PIAC submits that the definition of 'public sector organisations' needs to be broad and detailed. The definition should expressly include the following:

- public officials;
- government departments;
- statutory authorities;
- state owned corporations;
- police;
- local Government;
- Ministers;
- Members of Parliamentary Committees when acting in an administrative capacity;
- an entity declared by regulations to be a public authority for the purposes of the legislation;
- an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and
- any entity that chooses to be subject to the legislative obligations of a public sector organisation.

PIAC recommends that the Act include a power to make regulations so that organisations can be added to the category of 'public authority'. This will ensure that the Act will retain a degree of flexibility.

PIAC also recommends that the Act provide some guidance on the definition of "*an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority*". It is a common feature of modern government that various non-state actors, for example, not-for-profit organisations, religious or faith based bodies and private companies, are involved with the delivery of government and public services.¹⁰³

¹⁰¹ Ibid, 60.

¹⁰² Ibid.

¹⁰³ This transformation in the way government and public services are delivered was the subject of research undertaken by PIAC in partnership with the Whitlam Institute and the Social Justice

PIAC recommends that the Legislation should include guidance, such as examples and a list of indicia, as to when an entity is performing a “function of a public nature”.¹⁰⁴ The list of indicia should include whether:

- the function is conferred on the entity under a statutory provision;
- the function is connected to or generally identified with functions of government;
- the function is of a regulatory nature;
- the entity is publicly funded to perform the function; and
- the entity is a State or Council owned company.

The Legislation should also indicate that these indicia are neither exhaustive nor determinative, but are merely matters that can be taken into account.

PIAC recommends that the Act provide that certain specified functions, which are central to effective public service delivery, are taken to be of a public nature.¹⁰⁵ The functions that should be specified include the operation of detention places and correctional centres, the provision of the following services: gas, electricity and water supply, emergency services, public health services, public education, public transport, and public, community or social housing.

Under the recommended definition of ‘public authority’ and the indicia for ‘functions of a public nature’ referred to above, the issue of government funding or government control of a non-government service provider are among the criteria used to assess whether that service is performing a “function of a public nature on behalf of the state”, and as such, is bound by the Legislation. PIAC therefore recommends that the Act should not be limited to those non-government service providers who provide services funded or controlled by government. The fact that a service is funded and/or controlled by government should not definitively determine whether it is a function of a public nature.

Secondly, to confine the guidance in this way undermines the purpose of the provision, namely to assess whether the entity performs the functions of a public authority. Confining the aspects to be considered to the existence of government funding and control would result in a number of activities and functions being excluded from the definition of ‘public authority’, including any privatised public transport, privatised utility services, and some welfare and charitable services that have a readily identifiable ‘public service’ aspect to their character.

PIAC also recommends that the Act allow any entity that is not a public sector organisation to choose to be subject to the legislative obligations of public sector organisations. Such a provision could encourage the private and non-government

and Social Change Research Centre of the University of Western Sydney in 2009. See Public Interest Advocacy Centre, The Whitlam Institute within the University of Western Sydney, and Social Justice and Social Change Research Centre, University of Western Sydney (2009), *A question of Balance: Principles, contracts and the government-not-for-profit relationship*, July 2009.

¹⁰⁴ This is the approach adopted in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2) and the *Human Rights Act 2004* (ACT) s 40A(1).

¹⁰⁵ This was also included in the *Human Rights Act 2004* (ACT) s 40A(3).

sector to subject itself voluntarily to the anti-discrimination obligations under the legislation.¹⁰⁶ Non-government entities that voluntarily choose to be subject to the legislative non-discrimination obligations may be considered favourably by government for tendered services. Alternatively, certain government contracts may specifically require contractors to comply with the Act.

Recommendation 15: Positive duty

There should be a positive duty on public sector organisations to take reasonable steps to eliminate discrimination and harassment and promote equality.

There should also be a duty to have due regard to reducing inequalities relating to socio-economic disadvantage.

Public sector organisations, should be clearly and broadly defined to include:

- *public officials;*
- *government departments;*
- *statutory authorities;*
- *state owned corporations;*
- *police;*
- *local Government;*
- *Ministers;*
- *Members of Parliamentary Committees when acting in an administrative capacity;*
- *an entity declared by regulations to be a public authority for the purposes of the legislation;*
- *an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and*
- *any entity that chooses to be subject to the legislative obligations of a public sector organisation.*

The Act should include a power to make regulations so that organisations can be added to the category of 'public authority' as required.

¹⁰⁶ This is similar to the *Privacy Act 1988* (Cth) s 6EA and the *Human Rights Act 2004* (ACT) s 40. As at January 2012, 237 small businesses have opted in to be covered by the *Privacy Act* and three organisations have chosen to be subject to the obligations of public authorities in the ACT: Companion House Inc, Centre for Australian Ethical Research and Women's Legal Centre (ACT and Region).

Abbreviations

ADA	<i>Age Discrimination 2002 (Cth)</i>
AHRC Act	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
Commission	Australian Human Rights Commission
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
Disability Transport Standards	<i>Disability Transport Standards for Accessible Public Transport 2002 (Cth)</i>
Discussion Paper	Attorney-General's Department, <i>Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper</i> , September 2011
Fair Work Act	<i>Fair Work Act 2009 (Cth)</i>
LGBTI	Lesbian, gay, bisexual, transgender and intersex
NSW Act	<i>Anti-Discrimination Act 1977 (NSW)</i>
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
SDA	<i>Sex Discrimination Act 1984 (Cth)</i>
SDA Inquiry	Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, <i>Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality</i> (2008)
UK Act	<i>Equality Act 2010 (UK)</i>
Victorian Act	<i>Equal Opportunity Act 2010 (Vic)</i>