Getting Closer: Improving rights for all of us

Submission to the Standing Committee on Legal and Constitutional Affairs on the Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

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Recommendation 5: Henry VIII clause

The proposed new s 40(2B) of the SDA should be removed from the SDA Bill.

If the clause is not removed in its entirety, it should be replaced by a legislative mechanism for derogation, involving full parliamentary scrutiny and consultation with relevant affected people and stakeholders.

Recommendation 6: Exception for religious organisations

There should be no permanent exceptions for religious organisations in respect of any protected attributes in the SDA.

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

Any exceptions that are retained in the SDA should be limited to inherent requirements of an employment position. The exceptions should be further limited to 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 7: Exception for religious organisations in the provision of aged care

There should be no exception for religious organisations in the provision of aged care.

Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs (**the Committee**) in response to its inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (**SDA Bill**).

PIAC commends the Australian Government on the introduction, for the first time in Commonwealth anti-discrimination legislation, of protections for individuals to address discrimination on the grounds of: sexual orientation; gender identity and intersex status; and relationship status. This reform is long overdue, and will provide significant benefits to sex and gender diverse people in Australia.

PIAC's submission does not address every aspect of the SDA Bill. Rather, PIAC's submission focuses on areas relevant to PIAC's expertise and experience – especially through our casework.

On the whole, PIAC welcomes the SDA Bill in its current form. However, PIAC submits that there are aspects of the Bill that could be improved to achieve the Government's aims in undertaking this reform.

This submission supports certain provisions in the SDA Bill, 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 version of the Bill to provide for comprehensive protection from discrimination on the basis of sexual orientation, gender identity and intersex status in Australia.

More broadly, PIAC urges the Australian Government to expedite its consideration of the broader reform of anti-discrimination law that was proposed in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (**HRAD Bill**). The HRAD Bill was, of course, the subject of this Committee's report on 21 February 2013.

The broader suite of reforms contemplated by the HRAD Bill remain relevant and important. While the SDA Bill is also important, its scope is considerably narrower, and it would be very unfortunate for the broader reform to lose momentum. Given the overlap between the HRAD Bill and the SDA Bill, it seems appropriate for this Committee to provide its view on progress towards achieving broader anti-discrimination law reform.

The Public Interest Advocacy Centre

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

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

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

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Department of Trade and Investment, Regional Infrastructure and Services 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

[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, see: *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).

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

PIAC has represented people discriminated against or vilified on the basis of their sexual orientation, gender identity and intersex status. PIAC acted in a case of homosexual vilification on behalf of its client, Gary Burns, against radio personalities Steve Price, John Laws and Radio 2UE, [4] in relation to comments made about a gay couple appearing on the television show, *The Block*. PIAC has also acted for a gay male couple to challenge their lack of access to foster care services provided by a religious body in NSW.[5] In that case, PIAC's clients' application to become foster parents was refused by Wesley Mission.

PIAC has contributed to a range of public policy development and review processes in relation to the promotion of human rights and protection from discrimination of people on the basis of sexual orientation, gender identity and intersex status.[6]

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2 See, eg, Alexis Goodstone and Dr Patricia Ranald, 'Discrimination ... have you got all day?' Indigenous women, discrimination and complaints processes in NSW*'* (Report, Public Interest Advocacy Centre, 2001); Public Interest Advocacy Centre, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into 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, Submission to the Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill,* 12 January 2009*;* Gemma Namey, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010*, 27 October 2010; Lizzie Simpson and Robin Banks, Submission to the NSW Legislative Council's Select Committee, Parliament of NSW, *NSW Legislative Council's Select Committee on the NSW Taxi Industry,* 22 January 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, Submission, *National Human Rights Baseline Study,* 31 August 2011*,* Chris Hartley and Edward Santow, Submission, *ACT Government consultation on the inclusion of economic, social and cultural rights in the Human Rights Act 2004,* 24 August 2011*;* Edward Santow and Brenda Bailey, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Review of the Charter of Human Rights and Responsibilities Act 2006, 24 June 2011.

4 *Burns v Radio 2UE Pty Ltd & Ors* [2004] NSWADT 267 (Unreported, Rice DP, Alt and Bolt, 22 November 2004).

5 *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.

6 See, for example, Robin Banks, Submission to the Senate Legal and Constitutional Committee, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2009*, 26 August 2009, Gemma Namey, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010*, 27 October 2010; Lizzie Simpson, Submission to the Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Marriage Equality Amendment Bill 2010,* 2 April 2012.
Combined Community Legal Centres Group (NSW), Submission to the Australian Human Rights Commission, *Inquiry into Freedom of Religion and Belief in the 21st Century* 6 March 2009, Vijaya Raman and Jo Shulman, Submission to the Human Rights and Equal Opportunity Commission, *Inquiry into Discrimination against People*

PIAC previously made a number of submissions to the Australian Government Attorney-General's Department in relation to the drafting of the consolidated anti-discrimination legislation in February 2012.[7] 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.[8]

1. The Exposure Draft Human Rights and Anti-Discrimination Bill 2012

The SDA Bill has been introduced following a community consultation that considered a broader consolidation of federal anti-discrimination law. This process culminated in the publication of the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (**HRAD Bill**), considered by this Committee in February 2013.

The Government announced that implementation of the HRAD Bill would be delayed, and in the meantime the SDA Bill was introduced.[9] The HRAD Bill contained a number of improvements to anti-discrimination law that would streamline and simplify the complaint process in Australia. In addition, many of the features of the HRAD Bill would address deficiencies that apply to grounds of discrimination other than that covered by sex discrimination law. PIAC recommends that the Government continue the broader reform process of the consolidation of federal anti-discrimination law.

In particular, PIAC urges that this Committee promote the broader reforms set out in the HRAD Bill, including:

- the inclusion in the definition of discrimination of intersectional discrimination;
- the introduction of a general limitations clause;
- the provision that the religious exception will not apply if the discrimination relates to the provision of Commonwealth-funded aged care;
- the inclusion of a shared burden of proof provision; and
- the provision that for discrimination proceedings in the federal court, each party is to bear their own costs.

PIAC submits that the Government should commit to implementation of the HRAD Bill by June

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in Same-Sex Relationships: financial and work-related entitlements and benefits, 26 June 2006. These and most PIAC publications, including submissions, are available on the Centre's website: <http:///www.piac.asn.au/publications/pubs/dateindex.html>.

7 PIAC, Submission to the Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012; PIAC, Submission to the NSW Attorney General on the Consolidation of Commonwealth Anti-Discrimination Laws, *Embracing equality*, 14 Mar 2012; PIAC and King and Wood Mallesons, *Towards a unified Equality Act: why this matters for business* 1 Dec 2011.

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

9 The Honourable Mark Dreyfus, *Press Conference on Sex Discrimination Amendment Act*, (20 March 2013) Attorney General for Australia <http://www.attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx >.

2013.

Recommendation 1: Introduction of the HRAD Bill

The Government should expedite the broader reform of federal anti-discrimination law contemplated by the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

2. The SDA Bill: General comments

2.1 The need for education on the SDA Bill

PIAC submits that implementation of the SDA Bill should include broad federal education regarding discrimination against individuals on the basis of sexual orientation, gender identity and intersex status.

For example, the new s 43A introduces an exemption in relation to data collection. The Government notes in the Explanatory Memorandum that it is developing guidelines on gender recognition for departments and agencies. Further education on the issue of data collection, for both the government and private sector, would obviate the need for this permanent exemption.

The 2007 Review of Disability Standards for Accessible Public Transport conclude that the Standards

> have significantly changed the way governments and public transport operators and providers think about and deliver access to public transport for people with disability.[10]

Similarly, an education campaign on the importance of eradicating discrimination against individuals on the basis of sexual orientation, gender identity and intersex status may change the way government agencies and the private sector think about the rights of such individuals.

Recommendation 2: Education on the new grounds introduced by the Bill

The government should undertake an education campaign on the new grounds of sexual orientation, gender identity and intersex status introduced by the SDA Bill.

2.2 International obligations

The proposed amendments to the *Sex Discrimination Act 1984* (**SDA**) implement a number of Australia's international obligations in relation to the protection from discrimination of people on the basis of sexual orientation, gender identity and intersex status. PIAC submits that the Explanatory Memorandum to the SDA Bill should acknowledge relevant international obligations. Such acknowledgement would provide assistance in interpreting this legislation.[11]

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[10] The Allen Consulting Group, '*Review of the Disability Standards for Accessible Public Transport: Report to the Minister for Infrastructure, Transport, Regional Development and Local Government and the Attorney General*' (Report, Allen Consulting Group, 2009)

[11] See *Acts Interpretation Act 1901* (Cth), s15AB(2)(d) and (e).

In *Born Free and Equal*, the United Nations High Commissioner for Human Rights sets out that the rights of lesbian, gay, bisexual, queer, transgender and intersex (**LGBQTI**) people to freedom from discrimination is enshrined in a number of long-standing international treaties and conventions.[12] According to the report,

> in their jurisprudence, general comments and concluding observations, United Nations treaty bodies have consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law. In addition, the special procedures of the Human Rights Council have long recognised both sexual orientation and gender identity discrimination.[13]

The rights of all people to equality are contained in Article 2 of The Universal Declaration of Human Rights, the right to equality before the law contained in Article 7 of The Universal Declaration of Human Rights, Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, Article 2 of the International Covenant on Economic, Social and Cultural Rights, and Article 2 of the Convention on the Rights of the Child.

The *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, commonly known as the Yogyakarta Principles,[14] remain one the most widely cited international documents on the human rights of LGBQTI persons. Although not legally binding, the Yogyakarta Principles provide a persuasive explanation of how human rights obligations apply and relate to people of all sexual orientations and gender identities. The Yogyakarta Principles reaffirm the rights of all people to equal protection of the law without discrimination and set out the manner in which countries should implement these rights.

The Principles include the right to security of the person, the right to education,[15] the right to the highest attainable standard of health, accountability, and the right to work.[16] More specifically, Principle 3 provides, inter alia, that:

> States shall:
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> A. Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;

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12 UN Officer of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* UN Doc HR/PUB/12/06 (2012).

13 UN Officer of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* UN Doc HR/PUB/12/06, (2012) [41]

14 International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007)

15 Ibid [21]

16 International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) [18]

B. Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

Principle 29, which deals with accountability, provides:

> Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.
>
> States shall:
> A. Establish appropriate, accessible and effective criminal, civil, administrative and other procedures, as well as monitoring mechanisms, to ensure the accountability of perpetrators for human rights violations related to sexual orientation or gender identity;
> B. Ensure that all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity of the victim, including such crimes described in these Principles, are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished;
> C. Establish independent and effective institutions and procedures to monitor the formulation and enforcement of laws and policies to ensure the elimination of discrimination on the basis of sexual orientation or gender identity;
> D. Remove any obstacles preventing persons responsible for human rights violations based on sexual orientation or gender identity from being held accountable.

In 2008, France and The Netherlands, backed by the European Union, proposed a statement in the General Assembly of the United Nations intended as a declaration on sexual orientation and gender identity. The statement endorsed the Yogyakarta Principles and attracted the support of 94 member states including Australia.[17] The statement also prompted a statement opposing it.[18] Both statements remain open for signature and neither of them has been officially adopted by the United Nations General Assembly.

On June 17 2011, South Africa initiated a resolution in the United Nations Human Rights Council requesting the United Nations High Commissioner for Human Rights to draft a report detailing the situation of LGBT people worldwide. The resolution was passed by a vote of 23 in favor, 19 against, and 3 abstentions. Australia co-sponsored the resolution. The report, which was

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17 UN General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008, <http://www.refworld.org/docid/49997ae312.html>.

18 UN General Assembly, *Response to SOGI Human Rights Statement, Read by Syria*, Text available at <http://arc-international.net/global-advocacy/sogi-statements/syrian-statement> 18 December 2008.

published in December 2011, documented violations of the rights of LGBT people, including hate crime, criminalisation of homosexuality, and discrimination.[19]

Recommendation 3: International obligations

The Explanatory Memorandum to the SDA Bill should acknowledge Australia's relevant international law obligations, to provide assistance in interpreting this legislation.

3. Subsection 4(1): Definitions

PIAC supports the inclusion of gender identity, sexual orientation and intersex status as new grounds on which discrimination is prohibited, and the broad definitions used within the Bill. These definitions are broad and inclusive, and reflect the definitions recommended by PIAC in our submission to the Senate Legal and Constitutional Affairs Committee on the HRAD Bill.[20] The definitions also reflect those recommended by a number of peak LGBQTI organisations in their submissions to the Senate Legal and Constitutional Committee on the HRAD Bill.[21]

The *Yogyakarta Principles* include broad definitions of sexual orientation and gender identity,[22] and recognise that people may experience discrimination because they are, or are perceived to have a particular sexual orientation or gender identity.[23] A person's sexual orientation and gender identity can encompass a broad spectrum of outward appearance and behaviour, and a narrow definition risks excluding some people from protection from discrimination. Broad definitions align with the highest current standards at an international, State and Territory level.

Item 6 of Schedule 1 inserts a definition of 'gender identity', which is introduced as a protected attribute in the SDA Bill. The definition is based on the definition in the Anti-Discrimination Amendment Bill 2012 (Tas). The Senate Standing Committee on Legal and Constitutional Affairs, in its final report on the Inquiry into the HRAD Bill, recommended that this definition from Tasmania be used in preference to the definition in the HRAD Bill itself.[24]

PIAC supports the inclusion of gender identity as a protected attribute, and the definition contained in the SDA Bill.

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19 UN General Assembly, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* Report of the United Nations High Commissioner for Human Rights, A/HRC/19/41, 17 November 2011.

20 PIAC, Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination Bill 2012, *Aligning the pieces: consolidating a framework for equality and human rights*, 21 December 2012.

21 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Final Report on the Inquiry into the Exposure Draft Human Rights and Anti Discrimination Bill 2012* (2012) 85.

22 International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) [6].

23 Ibid.

24 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Final Report on the Inquiry into the Exposure Draft Human Rights and Anti Discrimination Bill 2012* (2012) 85

Item 7 of Schedule 1 inserts a definition of 'intersex status', which is introduced as a protected attribute in the Bill. Again, the definition is based on the definition in the Anti-Discrimination Amendment Bill 2012 (Tas). Again, this Committee recommended, in its February 2013 report on the HRAD Bill, that intersex status be included as a separate protected attribute to gender identity in the HRAD Bill.

PIAC also supports the inclusion of intersex status as a separate protected attribute, and the definition contained in the SDA Bill.

Item 12 of Schedule 1 inserts a definition of 'sexual orientation', which is introduced as a protected attribute in the Bill. This provides protection from discrimination on the basis of sexual orientation at a Commonwealth level. As sexual orientation is protected in other State and Territory laws,[25] this brings federal law in this area into harmony with much of the rest of Australian domestic legislation. PIAC supports the inclusion of sexual orientation as a protected attribute, and the definition within the SDA Bill.

PIAC welcomes the extension of the existing ground of marital status to marital or relationship status, to provide protection from discrimination for same sex de facto couples. The Senate SDA Inquiry recommended that the SDA be amended to replace references to marital status with marital or relationship status.[26]

4. New section 43A: exception for data collection

Item 60 of Schedule 1 inserts s 43A into the SDA, which would have the effect of making it not unlawful under the SDA to request information, or to keep records, in a way that does not allow for a person to identify, or be identified, as being neither male nor female.

The Explanatory Memorandum to the SDA Bill notes that 'the need for these exemptions may be reconsidered in the future, if organisations (both government and private sector) have revised their data collection and record keeping practices to allow for a person to identify as neither male nor female'. It is noted that 'the Government is currently developing guidelines on gender recognition for departments and agencies'.[27]

One can infer from the Explanatory Memorandum that this new provision is necessary for practical reasons. Presumably, the Australian Government has determined that the impact of requiring that data collection and record keeping practices to change immediately would impose

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25 *Anti Discrimination Act 1977* (NSW) s 49ZG; *Anti Discrimination Act 1991* (QLD) s 7; *Discrimination Act 1991* (ACT) s 7; *Equal Opportunity Act 1995* (Vic) s 6; *Anti-Discrimination Act 1998* (TAS) s 16; *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act* (NT) s 19; *Equal Opportunity Act 1984* (WA) s 35O.

26 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) Recommendation 4.

27 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 22.

an intolerable burden on government and private sector bodies that must collect and record personal information.

Assuming that such an analysis is correct, it nevertheless should be acknowledged that this exception allows treatment that could be embarrassing, upsetting or even discriminatory in respect of a protected attribute – namely, a person's intersex status. As a result, it is important that any such impingement on the protection afforded to this protected attribute be framed in a way that is proportionate to the achievement of the Government's other legitimate objective. Such an approach is an orthodox principle of international human rights law.[28]

Applying the proportionality principle, it would seem appropriate for the Australian Government to assist government agencies and private sector organisations to update their practices for collecting and storing personal information, so that there is incremental change in this area. Such a task might logically be given to the Australian Human Rights Commission or the Office of the Australian Information Commission, given its remit covers the related area of privacy.

In addition, given the government recognises that the need for these provisions may diminish over time, PIAC submits that this exception should be subject to a three-year sunset clause, whereupon the need for the exception could be re-considered in light of changes to data collection and storage practices. Such an approach complies with the proportionality principle, because it would ensure that the impingement on the right not to be discriminated against on the basis of one's intersex status is no more than is reasonably necessary in the circumstances.

Recommendation 4: The exception in relation to data collection

The Australian Government should assist the public and private sectors to update their record keeping to allow for a person to identify as neither male nor female. In the short term, the proposed exception in relation to data collection and storage (Item 60, Schedule 1 of the SDA Bill) should be subject to a three-year sunset clause.

5. Other new exceptions

Item 52 of Schedule 1 introduces two new exceptions into s 40(2) of the SDA.

The second exception, introduced in s 40(2B), provides that the prohibitions on discrimination on the basis of sexual orientation, gender identity and intersex status do not apply to anything done by a person in direct compliance with a prescribed law of the Commonwealth, State or Territory, as prescribed by regulation.

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[28] For example, see United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985): Principle A (10): Whenever a limitation is required in the terms of the Covenant to be 'necessary', this term implies that the limitation: Is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant, Responds to a pressing public or social need, Pursues a legitimate aim, and Is proportionate to that aim. Any assessment as to the necessity of a limitation shall be made on objective considerations.

The Explanatory Memorandum to the Bill sets out that

> The Government has not made any decision regarding the prescription of laws under this provision. Initial consideration of laws will be done prior to commencement in consultation with State and Territory governments.[29]

PIAC submits that this exception should not be retained. Our primary concern is that the proposed s 40(2B) seems to be a species of Henry VIII clause. The former Queensland Scrutiny of Legislation Committee's 1997 report on the use of 'Henry VIII Clauses' in Queensland law defined a Henry VIII clause as:

> an Act of Parliament, which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.[30]

Henry VIII clauses are so named because of their actual use by Henry VIII, for example in the *Statute of Proclamations*, which allowed the King to issue proclamations that had the force of parliament.[31]

The Queensland Scrutiny of Legislation Committee noted in the 1997 report that:

> It is the power of the Executive by means of subordinate legislation to override the intention of Parliament as expressed in an Act that causes consternation over "Henry VIII clauses". These clauses are sometimes regarded as having insufficient regard for the doctrine of separation of powers and ultimately, for the institution of Parliament.[32]

The Committee advised that legitimate use of Henry VIII clauses

> would only apply to very limited circumstances in which such use is fully justified. In all other circumstances the Committee will continue to oppose the inclusion of "Henry VIII clauses" in principal legislation and, where necessary, will move for the disallowance of subordinate legislation made pursuant to objectionable "Henry VIII clauses". [33]

The proposed amendment would allow derogation from the SDA to occur via subordinate legislation. This would reduce the level of parliamentary scrutiny in respect of a decision that necessarily involves impingement on human rights. The consequence is to place exceptional power in the hands of whichever Minister is, or Ministers are, empowered to promulgate relevant subordinate legislation, and to do so subject only to the more limited scrutiny and disallowance mechanisms available under the *Legislative Instruments Act 2003* (Cth).

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29 Explanatory Memorandum, Sex Discrimination Amendment (Sexual orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 21

30 The Scrutiny of Legislation Committee, Parliament of Queensland, *The use of "Henry VIII Clauses" in Queensland Legislation*, January 1997, ii.

31 Scrutiny of Legislation Committee, Parliament of Queensland, *The use of Henry VIII clauses in Queensland Legislation* January 1997, 2.

32 Ibid, 7.

33 Ibid.

The proposed s 40(2B) seems inconsistent with Principle B of the Regulations and Ordinances Committee's *Guidelines on the Committee's Application of its Principles* – namely, that delegated legislation should not trespass unduly on personal rights and liberties, and in particular, must not 'lessen the operation of provisions protecting human rights'.[34]

Similarly, the Department of Prime Minister and Cabinet *Legislation Handbook* specifically identifies 'rules which have a significant impact on individual rights and liberties' as requiring the superadded scrutiny that goes along with primary legislation. The Handbook states:

> 1.12 While it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance. Matters of the following kinds should be implemented only through Acts of Parliament:
> (a) appropriations of money;
> (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
> (c) *rules which have a significant impact on individual rights and liberties*;
> (d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
> (e) provisions conferring enforceable rights on citizens or organisations; . . .
> (k) procedural matters that go to the essence of the legislative scheme;
> (l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and
> (m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).[35] [emphasis added]

Subsection 47(2) of the *Disability Discrimination Act* contains a similar provision to that proposed in the Bill. Relevantly, s 47 states:

> (2) This Part does not render unlawful anything done by a person in direct compliance with a prescribed law.
> …
> (5) In subsection (2):
> ***law*** means:
> (a) a law of the Commonwealth or of a State or Territory; or
> (b) regulations or any other instrument made under such a law.
>
> Note: See also subsection 98(6B) of the *Civil Aviation Act 1988*, which allows regulations made under that Act to contain provisions that are inconsistent with this Act if the inconsistency is necessary for the safety of air navigation.

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34 Senate Standing Committee on Regulations and Ordinances, *Guidelines on the Committee's Application of its principles* (April 2013) Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/guidelines.htm>

35 Above n 23, 3.

The *Disability Discrimination Regulations 1996* (Cth), which prescribe laws under s 47(2) of the DDA, came into effect on 24 March 1999. A motion to disallow these Regulations in the Senate on 24 May 1999 was not passed.

The motion to disallow the regulations was introduced by Senator Margetts, a Greens Senator, and was supported by the Australia Labor Party (then in Opposition). The Opposition strongly advocated for consultation with peak disability organisations on the Regulations, rather than just consultation with State and Territory governments.

In supporting the motion to disallow the Regulations, Senator Chris Evans said:

> The call to disallow these regulations has come from various disability groups who are concerned that there has been absolutely no consultation on the policy decisions underpinning these regulations by the Commonwealth Attorney-General or the New South Wales and South Australian state governments. This is clearly not satisfactory. The Australian disability community and the people it represents are entitled to be consulted, like any other group in society, about changes that will seriously affect their ability to pursue the rights to be free of inappropriate discrimination.
>
> The federal parliamentary Labor Party is particularly concerned that the Commonwealth Attorney-General engaged in no such consultation. In discussions between the Labor Party and the government, the Attorney's office indicated that they do not regard it as the Commonwealth's responsibility to consult on these matters. In Labor's view, that is a total abrogation of the responsibility that the Attorney has to administer the laws he controls. It is not enough for the Commonwealth to simply fob off this responsibility to the states and territories. The Disability Discrimination Act is a Commonwealth act that implements Australia's international legal obligations to protect the rights of one of the most vulnerable groups in our society: those living with a disability.[36]

Senator Gibbs, also from the Australian Labor Party, said:

> Disability organisations and their representatives have been calling for these regulations to be disallowed, primarily because they were formulated with no appropriate consultation and therefore fail to adequately address a number of key issues. The Attorney General has failed to initiate any meaningful discussion or negotiation with key players, despite the fact that these regulations have been on the drawing board for nearly four years. The Attorney General's refusal to consult with disability sector interests and with the wider community with regard to the regulations reveals a serious neglect of his ministerial responsibility and commitment to accountability.
>
> . . . I belong to a party that believes all Australians deserve equal rights to self-determination. The exclusionist practices of this government in formulating the regulations have been discriminatory, unfair and unethical in the extreme. Therefore, I support this disallowance motion.[37]

PIAC has direct experience through casework of the impact of s 98(6B) of the *Civil Aviation Act 1988* (Cth), which allows regulations made under that Act to contain provisions that are inconsistent with the Act if the inconsistency is necessary for the safety of air navigation. This subsection creates uncertainty and inconsistency in relation to the interaction between the DDA, the *Civil Aviation Act 1988*, and the *Civil Aviation Regulations*. This is particularly the case in relation to the DDA provisions relating to assistance animals and the Civil Aviation Safety

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36 Commonwealth, *Parliamentary Debates*, Senate, 24 May 1999, 5175 (Chris Evans)

37 Commonwealth, *Parliamentary Debates*, Senate, 24 May 1999, 5185 (Brenda Gibbs)

Authority (**CASA**) general written permission issued to airlines regarding the carriage of assistance animals in the cabin with a passenger.

The confusion and lack of clarity created by the exception to the DDA in the *Civil Aviation Act 1988* is an issue that has been raised in the *2007 Review of the Disability Transport Standards* undertaken by Allen Consulting Group for the Federal Government,[38] and by the Disability Discrimination Commissioner, Graeme Innes AM, in his resignation from the Federal Government's Accessible Airlines Working Group[39]. PIAC's experience is that both airline users and operators are frustrated at the lack of clarity on the issue.

It is also worth noting that the proposed provision would lead to a peculiar constitutional result, by allowing State law to override the SDA – subject only to the lower scrutiny associated with subordinate legislation. That is, the proposed s 40(2B) seems intended to subvert the operation of s 109 of the Australian Constitution, which provides: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

PIAC accepts that the Commonwealth Parliament chooses not to 'cover the field' in respect of all the areas in which it passes legislation, and that there is nothing inherently objectionable about making such a choice. However, it seems inappropriate to adopt a mechanism for making such a choice that carries with it minimal parliamentary scrutiny – especially in an area that affects fundamental rights and interests.

Recommendation 5: Henry VIII clause

The proposed new s 40(2B) of the SDA should be removed from the SDA Bill.

If the clause is not removed in its entirety, it should be replaced by a legislative mechanism for derogation, involving full parliamentary scrutiny and consultation with relevant affected people and stakeholders.

6. Exceptions related to religion

6.1 General exceptions related to religion

The SDA Bill maintains the current exceptions in ss 37 and 38 of the SDA related to religion. Item 50 of Schedule 1 inserts the protected attributes of sexual orientation and gender identity into s 38.

Section 37 of the SDA provides:

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38 The Allen Consulting Group, '*Review of the Disability Standards for Accessible Public Transport: Report to the Minister for Infrastructure, Transport, Regional Development and Local Government and the Attorney General*' (Report, Allen Consulting Group, 2009) 9.

39 Graeme Innes, *Media Release* (2013) Australian Human Rights Commission <http://www.humanrights.gov.au/about/media/news/2013/10_13.html>.

Nothing in Division 1 or 2 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 selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
(d) 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.

Section 38 currently provides:

(1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's marital status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

As explained in previous submissions on the HRAD Bill,[40] PIAC submits that the SDA should not contain any 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 protected attributes of sexual orientation and gender identity in s 38, and the maintenance of the ss 37 and 38 religious exceptions in the SDA in respect of all protected attributes under the SDA, means that the rights afforded to vulnerable communities under international law, in particular women and LGBQTI people, will continue to be diminished in a way that fails to meet the proportionality test.

[40] PIAC, Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination BIll 2012, *Aligning the pieces: consolidating a framework for equality and human rights*, 21 December 2012, 30; PIAC, Submission to the Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, 50; PIAC, Submission to the NSW Attorney General on the Consolidation of Commonwealth Anti-Discrimination Laws, *Embracing equality*, 14 Mar 2012, 9.

Discrimination on any grounds, including religion, should only occur where such discrimination is a proportionate means of achieving a legitimate aim. This is a fundamental principle of international human rights law.[41] PIAC considers that the current blanket religious exceptions mean that in many cases, the rights of individuals are not properly considered vis-à-vis the right to freedom of religion.[42]

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.[43]

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 are justifiable and necessary. It is important that religious organisations are treated in the same way as other organisations, not be given privileged status and not be permitted to discriminate on a permanent basis.

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...[44]

The Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the SDA made a number of recommendations in relation to the religious exemptions in the SDA. PIAC endorses the recommendations of that inquiry to:

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41 Above n 21.

42 PIAC, Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination BIll 2012, *Aligning the pieces: consolidating a framework for equality and human rights*, 21 December 2012, 30; PIAC, Submission to the Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, 50; PIAC, Submission to the NSW Attorney General on the Consolidation of Commonwealth Anti-Discrimination Laws, *Embracing equality*, 14 Mar 2012, 9.

43 Officer of the High Commissioner for Human Rights, *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*, 52nd session, UN Doc CCPR/C/21/Rev.1/Add.6 (11 April 1994)

44 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.

- remove the exemption on the grounds of sex and pregnancy; and
- introduce a requirement that discrimination be reasonable in the circumstances.[45]

Additionally, PIAC submits that a religious exception should not apply to the ground of family responsibilities or breastfeeding, or the new protected attributes of sexual orientation and gender identity.

Discrimination in educational institutions established for religious purposes is currently permitted under the SDA provided it is done 'in good faith' in 'order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'[46] 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.'[47] 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 SDA, including in relation to the new protected attributes introduced by the Bill, 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.

Case study 2 – OV and OW v Wesley Mission[48]

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

45 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) Recommendation 35.

46 *Sex Discrimination Act 1984* (Cth), s 38.

47 *Sex Discrimination Act 1984* (Cth), s 37.

48 *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.

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 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 6: Exception for religious organisations

There should be no permanent exceptions for religious organisations in respect of any protected attributes in the SDA.

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

Any exceptions that are retained in the SDA should be limited to inherent requirements of an employment position. The exceptions should be further limited to 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*

6.2 Exceptions related to religion in the provision of aged care

PIAC submits that consideration should be given to a provision setting out that the religious exceptions in ss 37 and 38 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.

Section 33(3) of the HRAD Bill states:

> (3)The exception in subsection (2) does not apply if
> (a) the discrimination is connected to the provision, by the first person, of Commonwealth funded aged care; and
> (b) the discrimination is not connected to the employment of persons to provide that aged care.[49]

The Honourable Mark Dreyfus, when announcing the SDA Bill, and explaining the introduction of the HRAD Bill would be delayed, said in relation to religious exceptions and aged care:

> No. We haven't proposed a change to the exemptions that have been there for religious

[49] *Human Rights and Anti-Discrimination Bill* sub-cl 33(3)

> organisations for many years other than, and I'd stress this, the removal of the exemption for aged care services. And that's government policy. That's something that was clearly set out in the bill. We drew attention to it. It's something I'd add that the responsible minister for aged care services, Mark Butler, has spent a lot of time consulting about. And we would be proposing to go forward with that, not least because there was very, very little criticism, very few of the hundreds of submissions to the Senate Committee raised any objection at all to the removal of the exemption for religious institutions that provide aged care services.[50]

The AHRC has expressed its disappointment that the exemption is retained in relation to religious exemptions in the provision of aged care.[51]

The Final Report of this Committee's inquiry into the HRAD Bill also agreed with the limitation of the religious exception for Commonwealth funded aged care. The Committee noted that it heard

> evidence, in particular, on the negative effects of discrimination against older LGBTI Australians in aged care settings, and considers that it is fundamentally important that all older Australians maintain the right to access aged care services on an equal basis. The committee notes that in some areas of Australia there is very limited choice of aged care service providers, and hence does not agree with the argument that individuals will always be able to choose a non-religious service provider should they so wish.[52]

Recommendation 7: Exception for religious organisations in the provision of aged care

There should be no exception for religious organisations in the provision of aged care.

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50 Above n 9

51 Australian Human Rights Commission, LGBTI protection in aged care is necessary (21 March 2013) < http://www.humanrights.gov.au/news/stories/lgbti-protection-aged-care-necessary-2013>

52 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Final Report on the Inquiry into the Exposure Draft Human Rights and Anti Discrimination Bill 2012* (2013)

Abbreviations

ADA	*Age Discrimination 2002* (Cth)
AHRC Act	*Australian Human Rights Commission Act 1986* (Cth)
Commission	Australian Human Rights Commission
DDA	*Disability Discrimination Act 1992* (Cth)
Disability Transport Standards	*Disability Transport Standards for Accessible Public Transport 2002* (Cth)
Discussion Paper	Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011
Fair Work Act	*Fair Work Act 2009* (Cth)
LGBTQI	Lesbian, gay, bisexual, transgender, queer and intersex
HRAD Bill	Exposure Draft Human Rights and Anti-Discrimination Bill 2012
NSW Act	*Anti-Discrimination Act 1977* (NSW)
RDA	*Racial Discrimination Act 1975* (Cth)
SDA	*Sex Discrimination Act 1984* (Cth)
SDA Bill	*Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*
SDA Inquiry	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)