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Parliamentary Joint Committee on Human Rights
Inquiry into Australia's Human Rights Framework
By email: human.rights@aph.gov.au

Dear Committee,

Inquiry into Australia's Human Rights Framework: Submission by Equality Australia

Equality Australia is grateful for the opportunity to make this submission to the inquiry into Australia's human rights framework. We would be very happy to provide the Committee with further information or evidence, including appearing at a public hearing if requested.

As a leading national LGBTIQ+ organisation working to ensure equality for LGBTIQ+ people and their families, we wish to make the following key points to inform your inquiry.

LGBTIQ+ people unfortunately continue to experience disproportionately high levels of discrimination, harassment and vilification based on their sexual orientation, gender identity and innate variations of sex characteristics. Australia's human rights framework can better recognise and address these experiences of discrimination and disadvantage by undertaking two key reforms:

- **Modernise federal anti-discrimination law:** As a national priority, we need updates to federal anti-discrimination laws to ensure they are coherent, consistent and provide necessary protections for people who experience discrimination, harassment and vilification. In particular, federal anti-discrimination laws and the discrimination framework in the *Fair Work Act 2009* (Cth) are inconsistent, complex and lack much needed protections, including for LGBTIQ+ people. They are increasingly out-of-step with state and territory protections. Short of consolidating federal anti-discrimination laws in one Act, we have included an **annexure** of key technical improvements that could be made to modernise and harmonise Commonwealth anti-discrimination laws.

- **Human Rights Act:** We support a federal statutory human rights charter that sets out an enumerated list of human rights that Commonwealth public authorities (and bodies exercising Commonwealth public functions) must comply with when making decisions. In this regard, we endorse the recommendations of the Human Rights Law Centre recommendation for an Australian Charter of Human Rights. This important reform would complement Australia's human rights framework and have important work to do. It complements but does not replace the need for much-needed federal anti-discrimination law reform.

We set out our recommendations for reforms to Australia's anti-discrimination framework in the following annexure.

ANNEXURE: REFORMS TO AUSTRALIA'S ANTI-DISCRIMINATION FRAMEWORK

Australia's national anti-discrimination framework is complex, inconsistent and does not afford equal protection to everyone who suffers discrimination, harassment and vilification, including LGBTIQ+ people. A series of piecemeal reforms has left the system lacking coherence and being excessively complex. In this annexure, we address some modest changes that would significantly improve the coherence of the federal anti-discrimination framework so it works to address and prevent discrimination, harassment and vilification for everyone who experiences it.

RECOMMENDATION 1: CONSISTENT AND SIMPLER DEFINITIONS OF DISCRIMINATION

There are different definitions of 'direct' and 'indirect' discrimination across Commonwealth anti-discrimination law and the *Fair Work Act 2009* (Cth) (FWA). These tests make it harder for people who experience discrimination to seek a remedy, particularly if intersectional forms of discrimination are alleged. For example:

- some Commonwealth laws require complainants to prove that their treatment was less favourable than a comparator in materially similar circumstances. This introduces significant uncertainty and legal complexity in how a complaint of direct discrimination is framed. The ACT and Victoria have both removed the comparator test from their definitions of direct discrimination, preferring a simpler "because of" test.¹ The ACT also clarifies that discrimination can be framed on a combination of attributes e.g. age and gender.² The Queensland Human Rights Commission and Western Australian Law Reform Commission have made similar recommendations for reform in Queensland and Western Australia, which have been broadly accepted by state governments working on these reforms.³
- indirect discrimination is currently defined differently in each of the different federal anti-discrimination acts, and there is a question over whether indirect discrimination is recognised under section 351 of the FWA at all.⁴ Recent authority from the Full Federal Court also brings into question whether the current test for indirect discrimination under the SDA is meeting its intended purpose of protecting classes of people who disproportionately experience disadvantage based on a protected attribute.⁵

¹ *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1). See also *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 at [51]-[53]; *Tsikos v Austin Health* [2022] VSC 174 at [47] where the Supreme Court of Victoria endorsed the decision in *Slattery*.

² *Discrimination Act 1991* (ACT) ss 8(2)-(3).

³ Queensland Human Rights Commission (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991 (Building Belonging)*, recs 3.1-3.3 and at 88-95; Queensland Government (2022) *Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, items 3.1-3.3; Law Reform Commission of Western Australia (2022) *Review of the Equal Opportunity Act 1984 (WA) Project III Final Report (LRCWA Report)*, recs 5 and 13 and at 52-55, 63-64; The Hon John Quigley, Attorney General (2022) *'WA's anti-discrimination laws set for overhaul'*, 16 August.

⁴ *Racial Discrimination Act 1975* (Cth) (RDA) s 9(1A); *Sex Discrimination Act 1984* (Cth) (SDA) s 5(2); *Disability Discrimination Act 1992* (Cth) (DDA) s 6; *Age Discrimination Act 2004* (Cth) (ADA) s 15. Discrimination is not defined under the FWA and the case law considering the meaning of discrimination under s 351 of the FWA is unclear as to whether discrimination includes indirect discrimination: see *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [88]-[102]; *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at [155].

⁵ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FACFC 82 at [169]-[171] (per Besanko and Perram JJ). In this case, the court reasoned that women were not being discriminated against by being required to continue to work with the perpetrator of sexual harassment because a man who was sexually harassed would be similarly disadvantaged by that requirement, notwithstanding that women were more likely to experience sexual harassment. This reasoning suggests there

Consistent and simpler discrimination rules would go some way to addressing the unacceptably high rates of discrimination still faced by LGBTIQ+ people. In a recent large Australian study, the *Private Lives 3* report showed that only 60.7% of LGBTIQ respondents felt accepted at work ‘a lot’ or ‘always’, meaning that 39.3% of LGBTIQ respondents still feel limited or no acceptance at work. In other public settings, the proportion of LGBTIQ respondents who feel accepted ‘a lot’ or ‘always’ in health or support services, in public, at non-LGBTIQ events/venues, or faith-based events or services is even lower, ranging from 43.4% to as low as 10.5%.⁶

In healthcare settings, respectively 55% and 42% of respondents in a 2015 Australian Human Rights Commission (AHRC) consultation said they felt uncomfortable disclosing their sexual orientation or gender identity in a clinical healthcare settings.⁷

We **recommend** amending the definitions of direct discrimination and indirect discrimination in each federal anti-discrimination law and the FWA so that they are consistent across federal law and align with best practice, including:

1. removing the comparator test for direct discrimination;
2. ensuring discrimination based on a combination of attributes (intersectional discrimination) is recognised within the definitions of discrimination.

RECOMMENDATION 2: HARRASSMENT

Harassment based on a protected attribute has long been recognised as a form of discrimination.⁸ The *Sex Discrimination Act 1984* (Cth) (SDA) and *Disability Discrimination Act 1992* (Cth) (DDA) provide separate harassment protections based on sex,⁹ sexual harassment,¹⁰ and disability.¹¹ These standalone protections make bringing a complaint of harassment easier. Harassment based on race, age, and the protected attributes in the SDA (including sexual orientation, gender identity and intersex status) currently do not have standalone harassment protections.

In the largest studies of their kind in Australia, the *Private Lives* reports suggests that there is an increase in the proportion of people who have experienced violence and harassment due to their sexual orientation or gender identity.¹² The latest *Private Lives* study showed that around 1 in 4 LGBTIQ people experienced harassment (such as being spat at or offensive gestures) in the past 12

may be a need to look at whether the legislative purpose of indirect discrimination protection is being realised in circumstances where a class of persons are more likely to be disadvantaged by a condition, requirement, or practice, even if some people not in that class would experience similar disadvantage.

⁶ Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia* (**Private Lives 3**), Melbourne: ARCSHS, La Trobe University at 37.

⁷ Australian Human Rights Commission (2015) *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights, National Consultation Report*, at 33.

⁸ See *Hall v A & A Sheiban Pty Ltd* (1988) 20 FCR 180 at [235], [250] (per Wilcox J); *O’Callaghan v Loder* [1983] 3 NSWLR 89 at [92]; *Elliot v Nanda* (2001) 111 FCR 240 at [107]-[110]; *Daniels v Hunter Water Board* (1994) EOC at [92]-[626]; *Qantas Airways v Gama* (2008) 157 FCR 537 at [73]-[78] (as per French and Jacobson JJ).

⁹ SDA s 28AA.

¹⁰ SDA s 28A.

¹¹ DDA ss 35, 37, 39.

¹² Leonard et al (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians* (**Private Lives 2**), Melbourne: ARCSHS, La Trobe University at 47; Hill et al (2020) *Private Lives 3* at 40. For example, 25.5% of participants in *Private Lives 2* reported verbal abuse, compared to 34.6% in *Private Lives 3*; 15.5% reported harassment such as being spat at or offensive gestures in *Private Lives 2*, compared to 23.6% in *Private Lives 3*; 2.9% reported sexual assault in *Private Lives 2*, compared to 11.8% in *Private Lives 3*; and 1.8% reported experiencing a physical attack or assault with a weapon in *Private Lives 2*, compared to 3.9% in *Private Lives 3*. While the surveys each asked slightly different questions which makes it difficult to draw direct comparisons, this data suggests an increase in the proportion of LGBTIQ people reporting recent experiences of violence and harassment based on their sexual orientation (and in 2020 also based on their gender identity).

months because of their sexual orientation or gender identity.¹³ Among young same sex attracted and gender questioning young people, the *Writing Themselves In 3* report shows that 61% have experienced verbal abuse and 18% have experienced physical abuse, with 80% of all abuse reported having occurred at school.¹⁴

We **recommend** introducing freestanding harassment protections in federal anti-discrimination laws for all protected attributes, including based on sexual orientation, gender identity and variations in sex characteristics.

RECOMMENDATION 3: UPDATING LGBTIQ+ ATTRIBUTES

The SDA currently uses outdated definitions of ‘sexual orientation’, ‘gender identity’ and ‘intersex status’. Most states and territories have now either updated, or are currently considering updating, their definitions to be more inclusive and in line with international best practice.¹⁵

However, we do not recommend a simple adoption of state and territory definitions without ensuring they interact properly with the definitions of discrimination in federal anti-discrimination law. In particular, the ‘gender identity’ attribute has been difficult to interpret. To prove direct discrimination on the basis of gender identity, a person must show less favourable treatment compared to a person ‘who has a *different* gender identity’.¹⁶ To prove indirect discrimination on the basis of gender identity, a person must show that a condition, requirement or practice disadvantages persons who have ‘the *same* gender identity as the aggrieved person’.¹⁷ This statutory language is awkward to apply in practice because women and men who are transgender have the same gender identity as women and men who are cisgender. The statutory language is therefore not apt to describe discrimination based on transgender experience (or transphobia).

Accordingly, together with recommendation 1, we **recommend** updating the definitions of ‘sexual orientation’, ‘gender identity’ and ‘intersex status’ to align with international best practice. These recommendations must be progressed together to avoid unintended legal consequences.

RECOMMENDATION 4: PROTECT CHILDREN OF RAINBOW FAMILIES FROM DISCRIMINATION

Unlike the *Racial Discrimination Act 1975* (Cth) (RDA) and DDA, the *Age Discrimination Act 2004* (Cth) (ADA), SDA and FWA do not currently extend discrimination protections to personal associates.¹⁸ This means that people who face discrimination based on their association with others of a particular sexuality, gender identity or age etc., such as the children of rainbow families, do not have adequate protection from discrimination. For example, in 2015, a 7-year-old was told by a religious school in Western Australia that she could only remain enrolled at the school if she did not speak about her

¹³ Hill et al (2020) *Private Lives 3* at 40.

¹⁴ Hillier et al (2010) *Writing Themselves In 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Melbourne: ARCSHS, La Trobe University at 39.

¹⁵ *Equal Opportunity Act 2010* (Vic) s 4 (definitions of ‘sex characteristics’ and ‘gender identity’); *Discrimination Act 1991* (ACT) Dictionary (definitions of ‘sex characteristics’, ‘sexual orientation’ and ‘gender identity’); *Anti-Discrimination Act 1992* (NT) s 4 (definitions of ‘sex characteristics’, ‘sexual orientation’ and ‘gender identity’); *Anti-Discrimination Act 1991* (Qld) Schedule 1 (definitions of ‘sex characteristics’ and ‘gender identity’ as updated by the *Births Deaths and Marriages Registration Act 2023* (Qld) s 157). Queensland Human Rights Commission (2022) *Building Belonging Report*, recs 22, 23 and 28 and at 272-285, 312-315; Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 27-30, 52-54 and at 78-82, 113-117.

¹⁶ SDA s 5B(1).

¹⁷ SDA s 5B(2).

¹⁸ RDA ss 11, 12, 13, 15; DDA s 7.

father's sexuality or his male partner.¹⁹ This student currently has no protection under the SDA because the children of rainbow families are not protected from discrimination based on the sexual orientation of their parents.

We **recommend** amending the SDA, ADA and FWA to protect individuals who are discriminated against because of their personal association with an individual who has a protected attribute.

RECOMMENDATION 5: PAST, FUTURE OR PRESUMED ATTRIBUTES

Most states and territories extend their protections to discrimination based on protected attributes that people are presumed to have, have had in the past, or may have in the future.²⁰ Not all Commonwealth laws currently have these extensions of protection. For example, the ADA, RDA, SDA and FWA do not protect people who are *presumed* to have a protected attribute, such as a presumed age, race or sexuality. Further, not all attributes that may change over time (such as gender identity, age, or marital status) include protections based on past or future attributes.

We **recommend** amending the RDA, SDA, ADA and FWA to protect individuals who are discriminated against because of protected attributes they have held in the past, may hold in the future, or are presumed to have, where these extensions of protection are relevant.

RECOMMENDATION 6: REMOVING UNFAIR EXEMPTIONS

Australia's anti-discrimination framework is replete with exemptions that leave people who have suffered discrimination with insufficient protections. For LGBTIQ+ people, the exemptions which are most concerning include:

- sections 23(3)(b), 37(1)(d) and 38 of the SDA, which provide religious schools and organisations with exemptions allowing them to discriminate against LGBTQ+ students, staff and people who rely on their services, such as healthcare, disability support, family violence, financial support and accommodation;
- sections 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b) of the FWA, which may be used by religious schools and organisations to discriminate against LGBTIQ+ staff, including on the basis of discriminatory religious beliefs regarding sexuality or gender;
- sections 135(2)(a), 195(2)(a), 351(2)(a)-(b) and 772(2)(a) of the FWA, which in some cases import broad and unfair exemptions from state and territory laws, and in other cases provide exemptions which go beyond the requirements contained in other federal laws; and
- section 43A of the SDA, which allows discrimination against non-binary people in the making of requests for information or the keeping of records.

Equality Australia has already made extensive submissions to the Australian Law Reform Commission's Religious Educational Institutions Inquiry and the 2023 Workplace Reform Consultation being conducted by the Commonwealth Department of Employment and Workplace

¹⁹ E Young and N Hondros (2015) '[Mandurah School that censored gay man's child silent in face of criticism](#)', *The Age*, 30 October.

²⁰ *Discrimination Act 1991* (ACT) ss 5AA(2), 7(2); *Anti-Discrimination Act 1977* (NSW) ss 49A, 49S(2), 49ZF, 49ZXB(1); *Anti-Discrimination Act 1991* (Qld) s 8; *Equal Opportunity Act 2010* (Vic) ss 4 (definition of 'impairment') 7(2); *Equal Opportunity Act 1984* (WA) s 4 (definitions of 'impairment' and 'sexual orientation'); *Anti-Discrimination Act 1998* (Tas) ss 3 (definition of 'disability'), 14(2); *Anti-Discrimination Act 1992* (NT) ss 19(ec), 19(r). The *Disability Discrimination Act 1992* (Cth) also extends protections in respect of disability, see s 4 (definition of 'disability').

Relations. However, neither of these reviews are looking comprehensively at the exemptions which remain across federal anti-discrimination laws to ensure they are fair and necessary.

In respect of the exemptions for religious schools and faith-based service providers in the SDA and FWA, over the last few years Equality Australia has supported many people who have experienced discrimination based on their sexual orientation or gender identity, or because they have affirming religious beliefs concerning sexuality or gender. Among these people are teachers who have lost their jobs, students who have been denied leadership opportunities or who have been forced to move schools, and parents who have been unhappy about religious schools requiring them or prospective staff to affirm discriminatory views about LGBTIQ+ people as conditions of employment or enrolment.²¹

Commonwealth anti-discrimination laws currently prohibit faith-based aged care service providers from discriminating against LGBTIQ+ people in Commonwealth funded aged care services.²² It is now time to ensure that workers, students and people who receive or access other goods, services, facilities or accommodation from faith-based organisations, such as healthcare providers, education providers, disability support providers, family violence service providers and accommodation providers, are protected from discrimination based on their sexual orientation or gender identity, or their support for LGBTIQ+ people.

Narrowing the religious exemptions in the SDA and FWA in this way would be in line with recent reforms and recommendations at the state and territory level.²³ Addressing these exemptions would also leave intact separate exemptions relating to the ordination, appointment, training or education of religious leaders, or the selection or appointment of persons connected with or participating in religious observance or practice.²⁴

In respect of the exemption in section 43A of the SDA, gender diverse people still face obstacles and inconsistent rules for updating their gender markers on public and personal records. Having inconsistent identification documents means that gender diverse people may be outed against their will or exposed to violence or harassment when their gender history is disclosed or questioned. Gender diverse people also find it more difficult to navigate everyday interactions (such as opening a bank account, applying to study or work) where consistent proof of identity is necessary. With non-binary recognition now in place in almost every state and territory and under Commonwealth guidelines,²⁵ it is time to ensure gender diverse people have the dignity and respect of being able to

²¹ Some recent case studies are contained in our submission to the Australian Human Rights Commission inquiry into Religious Educational Institutions and Anti-Discrimination Laws. See Equality Australia (2023) [A Simple Ask for Dignity and Respect: Equality Australia's submission to the Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws](#), Sydney at 5-8.

²² SDA s 23(3A).

²³ See *Equal Opportunity Act 2010* (Vic) ss 39, 61, 82A, 83, 84; *Discrimination Act 1991* (ACT) s 32, 33B, 33C (as amended by *Discrimination Amendment Act 2023* (ACT) ss 9, 10); *Anti-Discrimination Act 1992* (NT) ss 35A, 37A, 40(3)-(6) (as amended by *Anti-Discrimination Amendment Act 2022* (NT) ss 16-18); *Anti-Discrimination Act 1998* (Tas) Pt 5, Div 8. See also Queensland Human Rights Commission (2022) *Building Belonging*, rec 38 and at 378; Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 76-77 and at 176-177.

²⁴ SDA s 37(1)(a)-(c).

²⁵ Australian Government Guidelines on the Recognition of Sex and Gender at [19]-[20]; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24(1)(c); ACT Government, [Application to Alter Birth Register to Record Change of Sex Form](#); *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [2]; *Births, Deaths and Marriages Registration Act 1996* (NT) s 28B(5); *Births, Deaths and Marriages Registration Regulations 1996* (NT), regs 4A(c)-(d); *Births, Deaths and Marriages Registration Act 2023* (Qld) s 39 (a)-(b) [yet to commence]; *Births, Deaths and Marriages Registration Act 1995* (SA) s 29L(2)(a); *Births, Deaths and Marriages Registration Regulations 2011* (SA) regs 7A(c)-(d); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 3A(1); *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 4 (definition of 'sex descriptor'), 30A(2).

update all their personal records of information, including with Government agencies, employers, and service providers.

We recommend:

- repealing the religious educational institution exemptions in sections 23(3)(b) and 38 of the SDA to prohibit discrimination based on sexual orientation or gender identity in employment or education by religious educational institutions;
- amending the religious bodies exemption in section 37(1)(d) of the SDA so that it does not apply to employment and service delivery by religious organisations (including religious educational institutions) providing goods, services, accommodation and facilities to the general public;
- amending the inherent requirements exemptions in ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(2)(a) of the FWA to be consistent with other Commonwealth anti-discrimination laws, and more targeted to attributes not otherwise protected by other Commonwealth anti-discrimination laws;²⁶
- amending the religious exemptions in ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b) of the FWA so that faith-based organisations are not permitted to discriminate against employees on grounds other than religion, and only when it is relevant to the role in question, conforms with religious doctrine or is necessary to meet religious sensitivities, and is reasonable and proportionate to the circumstances of the case;
- amending s 351(2)(a) of the FWA so that workers across Australia have the highest standard of protection from discrimination no matter where they live, rather than importing existing Commonwealth, state and territory legal anti-discrimination deficiencies into federal employment laws;²⁷
- repealing section 43A of the SDA to protect non-binary people from discrimination when information is required or recorded regarding their gender identity.

RECOMMENDATION 7: STAND UP AGAINST HATE

LGBTIQ+ people are seeing a frightening spike in vilification and hate-based conduct against them, yet only vilification based on race is currently prohibited under Commonwealth anti-discrimination laws.²⁸ There are also no protections against LGBTIQ+ vilification in Victoria, South Australia and Western Australia.

We have also seen a number of high-profile incidents where LGBTIQ+ people have been targeted with threats and violence. Recent incidents have included:

²⁶ We address this further in our submission to the Commonwealth Department of Education and Workplace Relations Consultation Paper on *Updating the Fair Work Act 2009 to provide stronger protections for workers against discrimination*. We'd be happy to provide the Committee with this submission if it would assist your deliberations.

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²⁸ RDA s 18C.

- violent attacks that have been experienced by LGBTIQ+ people attending, or in the vicinity of queer-identified spaces, such as pride events and LGBTIQ+ venues;
- threats of violence directed at LGBTIQ+ people, particularly transgender people and drag artists, who are involved in performances or events designed to introduce young people to diversity and inclusion;
- campaigns of online abuse targeting LGBTIQ+ people.

We **recommend** national anti-vilification and anti-hate laws protecting LGBTIQ+ people and others from public hate-based conduct which humiliates, intimidates or has a profound and serious effect on their dignity or sense of safety.

RECOMMENDATION 8: POSITIVE DUTIES TO PREVENT DISCRIMINATION

Under Commonwealth law, certain entities have a positive duty to prevent sex discrimination and sexual harassment but this duty only applies to workplaces and does not extend to all attributes protected under federal anti-discrimination laws.²⁹ By contrast, Victoria, the NT and the ACT have introduced positive duties to eliminate discrimination, harassment and victimisation, and Queensland and Western Australia are currently considering similar reforms.³⁰

Positive duties reduce the burden on individuals who experience discrimination by seeking to prevent discrimination before it happens. They would make a tangible difference where practices and policies could be reviewed to address systemic issues.

For example, despite federal laws prohibiting discrimination based on sexual orientation and gender identity since 2013, a 2019 survey conducted by Rainbow Families reported that LGBTIQ+ parents still faced difficulties with obtaining passports for their children, obtaining citizenship for their children, obtaining paid parental leave through Centrelink, and registering their family for Medicare.³¹ LGBTQ+ parents often faced these difficulties because administrative forms or procedures did not accurately reflect their families (for example, in not allowing for two mums or two dads, or where a trans or gender diverse parent had changed their own personal identification documents). Ensuring the administration of Commonwealth programs and laws are not discriminatory is an existing obligation under section 26 of the SDA. Yet, it appears that these obligations are not being routinely considered in policy development and implementation by Commonwealth agencies. A positive duty would proactively require a review of existing practices to identify and eliminate unlawful discrimination before it happens.

We **recommend** replacing the positive duty under section 47C of the SDA with one that extends to all attributes protected under the SDA and which extends to all duty holders wherever they have existing obligations under the SDA. We also **recommend** inserting identical positive duties under the ADA, DDA and RDA.

²⁹ SDA s 47C.

³⁰ *Equal Opportunity Act 2010* (Vic) Part 3; *Anti-Discrimination Act 1992* (NT) Part 2A; *Discrimination Act 1991* (ACT) Part 9. Queensland Human Rights Commission (2022) *Building Belonging Report*, rec 15 and at 230; Queensland Government (2022) [Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991](#), items 15.1-15.3. Law Reform Commission of Western Australia (2022) *LRCA Report*, recs 121, 125 and at 239, 241; The Hon John Quigley, Attorney General (2022) ['WA's anti-discrimination laws set for overhaul'](#), 16 August.

³¹ Rainbow Families (2019) ['Love \(still\) makes a family: A report into discrimination faced by LGBTIQ+ parented families when accessing Australian government services'](#), New South Wales at 13-15, 18, 24.

RECOMMENDATION 9: SHIFTING THE BURDEN OF PROOF

A person who has been discriminated against often does not know the reason why they have been denied a job, opportunity or treated unfavourably. However, they currently have the burden of establishing all the elements to make out a case of direct discrimination. In the UK, where a proceeding is brought for a contravention of the *Equality Act*, if a prima facie case has been found by the court, the court must hold that the contravention occurred, except where the respondent persuades the court otherwise.³² This addresses the imbalance of knowledge when a person is treated unfairly but cannot show – without more evidence from the defendant – that discrimination was a real reason for the unfavourable treatment. Reviews into Queensland and Western Australian anti-discrimination laws have made similar recommendations.³³

We **recommend** introducing provisions that reverse the evidentiary burden in discrimination complaints once a complainant has established a prima facie case of discrimination.

RECOMMENDATION 10: REPRESENTATIVE ACTIONS

Following the recent Respect@Work changes to the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), there are now inconsistent requirements for bringing a representative complaint to the AHRC as there are for continuing that same complaint before the federal courts.³⁴ We raised this issue at the time but the speed by which those reforms were passed did not enable a solution to this problem.³⁵

Representative complaints should allow an organisation (such as a peak organisation or union) to bring an action on behalf of a class of persons who are aggrieved by the same conduct, without requiring those persons to individually do so. Requiring an organisation to individually name and obtain consent from the beneficiary class defeats the purpose of enabling an organisation to be bring a complaint on its own as a representative for a protected class.³⁶ An example of this kind of complaint is a peak disability rights organisation challenging a policy that affects people with a particular disability as a whole.

As an alternative approach, the ACT currently allows anyone to make a discrimination complaint to the ACT Human Rights Commission where that person has ‘sufficient interest’ in the complaint.³⁷ This includes organisations representing the interests of a protected class of people.³⁸ Reviews into Queensland and Western Australian anti-discrimination laws have made similar recommendations.³⁹

³² *Equality Act 2010* (UK) s 136; See also *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913 at [93].

³³ Queensland Human Rights Commission (2022) *Building Belonging Report*, rec 13 and at 203; Law Reform Commission of Western Australia (2022) *LRCWA Report*, rec 97 and at 211-212.

³⁴ See *Australian Human Rights Commission Act 1986* (Cth) ss 46PB(2)-(4) versus s 46POA.

³⁵ Equality Australia (2022) [Everyone Deserves Respect @ Work: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment \(Respect at Work\) Bill 2022](#), Sydney at 10.

³⁶ See *Australian Human Rights Commission Act 1986* (Cth) s 46POA (as compared with s 46PB(2)-(4)).

³⁷ *Human Rights Commission Act 2005* (ACT) s 43(1)(f).

³⁸ *Human Rights Commission Act 2005* (ACT) s 43(2).

³⁹ Queensland Human Rights Commission (2022) *Building Belonging Report*, recs 10, 11 and at 179, 185. Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 135-136 and at 253-254.

We **recommend** fixing the inconsistencies between the representative application regime in section 46POA of the AHRC Act and the requirements for making a representative complaint under section 46PB of the Act, by:

- allowing a representative organisation, such as a not-for-profit organisation or union, to bring a complaint to the Commission and a claim to the courts on behalf of another person or persons whose interests it represents; and
- not requiring the organisation to individually name or obtain consent from the beneficiary class, provided it has described or otherwise identified them and specified the nature of the complaints made and the nature of the relief sought.

RECOMMENDATION 11: COMPLAINTS MECHANISM

Under federal law, if an initial conciliation is unsuccessful, a person making a discrimination complaint must apply to federal courts to have their matter resolved. This process is expensive, time consuming, may require access to legal advice and representation if it is likely to succeed, and may expose the person to adverse costs risk.

Our discrimination complaints system was instated following the decision in *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10. However, jurisprudence on Chapter III judicial power has evolved since 1995, and there are ways, short of exercising judicial power, in which a regulator can take lawful action to address breaches of federal law.⁴⁰ There are also a number of dispute resolution bodies that we can learn from to design a better complaints pathway, such as arbitration models or allowing complaints against the Commonwealth to be dealt with through the foreshadowed replacement for the Administrative Appeals Tribunal. We need a mechanism that results in more jurisprudence to help guide complainants and respondents alike as to their rights and obligations, or which allows the regulator to provide a view as to the merits of a matter to inform industry practice without the need for individual complaints.

We **recommend** investigating options for a better complaints mechanism that enables a greater body of jurisprudence to develop on anti-discrimination law.

RECOMMENDATION 12: ENFORCEMENT POWERS AND REMEDIES

Unlike other Commonwealth regulators, like the Australian Competition and Consumer Commission, the Fair Work Ombudsman or the Australian Securities and Investments Commission, the AHRC has comparatively less regulatory powers as part of its regulatory toolkit. For example, when responding to systemic discrimination, the AHRC is limited to producing and publishing a report and presenting that report to the Minister.⁴¹ Following the Respect@Work reforms, the AHRC was given additional inquiry and enforcement powers, but those powers are limited only in respect of compliance with the new positive duty to prevent discrimination on the basis of sex.⁴²

⁴⁰ See e.g. *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 at [59].

⁴¹ *Australian Human Rights Commission Act 1986* (Cth) s 35Q.

⁴² *Australian Human Rights Commission Act 1986* (Cth) ss 35B – 35K, as inserted by *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).

As a result, the discrimination framework largely places the burden of policing compliance on the individuals most affected, when that burden would be better placed with a regulatory agency that can investigate a potential breach and take appropriate steps where a contravention has occurred.

We **recommend** that the AHRC be given appropriate regulatory powers and funding to perform functions similar to other Commonwealth regulatory bodies where serious or systemic discrimination has occurred. These functions should include:

- the power to enter enforceable undertakings (in lieu of a civil penalty);
- the power to issue lower-level fines as part of its compliance notice power; and
- the power to seek larger civil penalties from a court for failure to comply with the law or an enforceable undertaking.

These functions should be exercisable subject to standard duties to afford procedural fairness to all parties and should be appropriately reviewable by a court.

RECOMMENDATION 13: PROTECTIONS AGAINST ADVERSE COSTS ORDERS

Discrimination complaints go to fundamental injustices and harms to dignity. For this reason, the usual costs recovery approach that might work well in a commercial dispute, or a dispute where monetary damages are likely to be higher or more readily calculable, are not appropriate in the discrimination context and discourage worthy complaints from people who have been discriminated against. However, it still costs money to obtain legal advice and representation when someone has been discriminated against, and those costs are really part of the harm that the complainant has suffered and would not have been incurred but for the discriminatory conduct.

As we have previously submitted in response to the Commonwealth's consultation on the appropriate costs model for Commonwealth anti-discrimination laws, we support a costs regime similar to section 1317AH of the *Corporations Act 2001* (Cth) for discrimination complaints. This would ensure that successful complainants can recover their reasonable legal costs while unsuccessful complainants are protected from adverse costs orders unless they have instituted the proceedings vexatiously or without reasonable cause, or have caused the respondent to incur costs through unreasonable acts or omissions.

This is sometimes referred to as an asymmetric costs regime and recognises that:

- a complainant is unlikely to be insured (while the respondent is likely to have insurance and/or greater financial resources);
- a complainant may have no choice but to proceed to court;
- a complainant is not always able to reliably predict the prospects of the claim at the outset, given information is often held by the respondent and the respondent decides what evidence they will lead in defence; and
- a respondent can significantly increase the risks of an adverse costs order on the complainant, even if the complainant ultimately wins, by offering a relatively modest settlement offer.

We **recommend** adopting a costs regime similar to section 1317AH of the *Corporations Act 2001* (Cth) for federal discrimination proceedings.

RECOMMENDATION 14: LGBTIQ+ COMMISSIONER

LGBTIQ+ people are the only group protected under federal anti-discrimination law without a dedicated Commissioner at the AHRC, although it appears that the new Sex Discrimination Commissioner will now also have responsibility for LGBTIQ+ discrimination.

If the new Sex Discrimination Commissioner is to have an enlarged mandate, then she must be adequately resourced to support the broad constituencies falling under the protection of the SDA. In the past, the AHRC has not had the resources to adequately address the needs of LGBTIQ+ communities and the absence of a dedicated Commissioner has meant – with some notable exceptions⁴³ – less focus than has been needed on the issues facing LGBTIQ+ people during times of incredible discrimination and struggle, particularly for trans and gender diverse people.

We **recommend** confirming the broadened remit of the Sex Discrimination Commissioner’s functions to LGBTIQ+ discrimination by ensuring funding and policy expertise to support the enlarged mandate.

⁴³ Australian Human Rights Commission (2021) [Ensuring health and bodily integrity: Towards a human rights approach for people born with variations of sex characteristics](#); Australian Human Rights Commission (2019) [Guidelines for the inclusion of transgender and gender diverse people in sport](#); Australian Human Rights Commission (2015) [Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights, National Consultation Report](#); Australian Human Rights Commission (2011) [Addressing sexual orientation and sex and/or gender identity discrimination, Consultation Report](#); Australian Human Rights Commission (2009) [Sex Files: The sex and gender diversity project, Concluding paper](#).