29 September 2023

NSW Law Reform Commission
BY EMAIL: nsw-lrc@dcj.nsw.gov.au

To the Law Reform Commission,

Preliminary Submissions into a review of the *Anti-Discrimination Act 1977* (NSW)

Thank you for the opportunity to provide preliminary submissions into a review on the *Anti-Discrimination Act 1977* (NSW). Together we have reviewed the terms of reference and responses to the issues raised have been addressed in tern below. We are:

The HIV/AIDS Legal Centre (HALC) is the only not-for-profit, specialist community legal centre of its kind in Australia. We provide free and comprehensive legal assistance to people in NSW with HIV or Hepatitis-related legal matters and undertake Community Legal Education and Law Reform activity in areas relating to HIV and Hepatitis.

Positive Life NSW (Positive Life) is the lead peer-based agency in NSW representing people living with and affected by HIV in NSW. We provide leadership and advocacy in advancing the human rights and quality of life of all people living with HIV (PLHIV), and to change systems and practices that discriminate against PLHIV, our friends, family, and carers in NSW.

Background
We note that the Attorney General has invited the Law Reform Cimmission to conduce a review of the Anti-Discrimantion Act. As organisations that represent people living with and affected by HIV and other BBVs we provide comments on the terms of reference focusing on the issues that acutely affect the communities we represent. We have also had the benefit of reviewing the submissions by ACON and Equity Australia and we support and endorse those submissions.

The *Anti-Discrimination Act* has been a vital piece of legislation in protecting and empowering the community of people living which HIV, however there are areas where reform is in our view long overdue and we thank you for the opportunity to provide comments.

1. whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

We submit that the Act could be modernised and simplified in terms of its structure, language, protected attributes, areas of public life, the test for discrimination, protections

against vilification, protections against sexual harassment, positive obligations to prevent discrimination and make reasonable adjustments, exceptions for discrimination and the adequacy and accessibility of complaints procedures and remedies. This part will address the structure and language of the Act and other issues will be addressed under corresponding questions below.

(1) Structure

The structure of the Act is outdated and confusing. The Act established separate Parts for different attributes and each Part sets out its own areas where discrimination is prohibited and its own exceptions. 'These are often repetitive across Parts, and many provisions are similar, but can also be subtly different, with each inconsistency making it more difficult to apply the [Act] in practice. The addition of each new Part over time has added to the complexity of its structure, its inconsistencies and idiosyncrasies, including its numbering.'[1]

We submit that the Act should adopt a structure that is adopted by the modern anti-discrimination laws in almost all other Australian jurisdictions, that is, a structure to establish one list of protected attributes, and then set out the areas where discrimination is prohibited and the exceptions.

(2) Language

Language is an important tool in helping tackle stigma and discrimination, and it is essential that the legislation protecting people against discrimination does not also use stigmatising language.

A. 'HIV-infected'

Terms such as 'HIV-infected' reinforces the stigma and discrimination faced by people living with HIV (PLHIV), focusing on the virus or illness and dehumanising the person. This has a detrimental impact on the mental and physical health of PLHIV, and reduces a person's willingness to seek HIV testing and treatment.

Currently, the Act protects PLHIV against vilification on the ground 'that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected).'[2] 'HIV/AIDS infected' is defined as 'infected by the Human Immunodeficiency Virus or having the medical condition known as Acquired Immunodeficiency Syndrome.'[3] While we are pleased such protections exist in NSW, the language used within the legislation is extremely stigmatising.

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[1] Public Interest Advocacy Centre, *Leader to Laggard: The Case for Modernising the NSW Anti-Discrimination Act* (Report, 2021) 14 <https://piac.asn.au/wp-content/uploads/2021/08/PIAC-Leader-to-Laggard-The-case-for-modernising-the-NSW-Anti-Discrimination-Act.pdf>.

[2] *Anti-Discrimination Act 1977* (NSW), s 49ZXB.

[3] Ibid

Vilification matters that are heard by Anti-Discrimination NSW, NSW Civil and Administrative Tribunal (NCAT) or NSW Courts use this language in explaining the protections provided by the Act. Therefore, PLHIV are subject to stigmatising language even when they are at their most vulnerable, having been subjected to vilification, and witness our judicial system reinforcing stigmatising language.

We recommend that the definition 'HIV/AIDS infected' be replaced with 'Person living with HIV/AIDS' and is defined as 'a person living with the Human Immunodeficiency Virus or Acquired Immunodeficiency Syndrome.' All related sections using this language should be amended to reflect this new definition.

B. 'Marital or domestic status'

The term 'marital or domestic status's is outdated and some people, especially members from the LGBTQIA+ community, might not feel that the Act includes or protects them. Instead, 'relationship status' is now the language used by the latest anti-discrimination laws in other Australian jurisdictions. We recommend that the term 'marital or domestic status' be replaced with 'relationship status'.

C. 'Complaint' and 'Complainant'

Terms such as 'complaint' and 'complainant' have negative connotations and may deter people from engaging in the conciliation process. PLHIV who bring a complaint to discrimination bodies often recognise that a discriminatory act has occurred due to a lack of understanding about HIV and how the condition is transmitted. Labelling them as a 'complainant' can be misleading, as they wish to educate employers or service providers, for example, on HIV and what it means to be living with HIV today in Australia.

Members of our community found the terms 'complaint' and 'complainant' to have negative connotations and could make a 'complainant' feel as though they were 'stirring up trouble.' Members agreed that this could deter people, particularly if they were already feeling vulnerable or isolated from seeking a resolution through the discrimination bodies.

We recommend that the term 'applicant' should replace 'complainant' to remove a negative connotation of bringing a matter before the discrimination bodies. Similarly, the term 'complaint' should be replaced with 'application' or a similar term.

2. whether the range of attributes protected against discrimination requires reform

(1) 'or other status'

We recommend that the Act should include a general prohibition of discrimination based on a non-exhaustive list of grounds or attributes. We recommend that the relevant section should be drafted as

> 'The Act prohibits discrimination on any ground such as (all specified grounds or attributes) or other status.'

We note that the current law only prohibits discrimination based on specified grounds or attributes. If a person is discriminated against on the basis of an attribute that is not listed in the legislation, the victim has no remedy under anti-discrimination law. Such a framework denies some victims of discrimination their right to equality and non-discrimination, and in fact can perpetuate stigma and discrimination.

We submit that international human rights law requires the State to prohibit discrimination based on a non-exhaustive list of grounds or attributes. The International Bill of Human Rights has adopted such a general clause and prohibits discrimination 'of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth ***or other status***.'[4] Some important regional human rights instruments have also adopted similar texts.[5]

Such a non-exhaustive list of grounds of discrimination will allow the court to deal with discrimination that hasn't been categorised at the moment and allow the law to keep pace with contemporary community standards and societal evolutions. For example, article 14 of the *European Convention on Human Rights*[6] has allowed the European Court of Human Rights to extend to and include grounds not expressly listed since 1953, including age, gender identity, sexual orientation, health and disability, parental and marital status, immigration status, occupation, status of imprisonment, place of residence, membership of an organisation etc.[7]

We submit that there is no substantial risk of misusing a non-exhaustive list with reasonable and fair exceptions in place such as an exception of unfavourable treatment based on the inherent requirements of the work. We note that 'several equality bodies [in Europe] whose mandate encompasses the open-ended clause have reported that this clause has value, is useful in practice, and does not raise any particular difficulties or entail an overwhelming additional workload.'[8] Even with some ill-founded applications on the

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[4] *Universal Declaration of Human Rights*, GA Res 183, UN Doc A/811 (10 December 1948) art 2 (emphasis added). See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

[5] See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 14; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 2.

[6] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[7] European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention* (31 August 2022) 36-45.

[8] Sarah Ganty and Juan Carlos Benito Sanchez, *Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU* (Equinet Report, 2021) 74. Note, Equinet stands for European Network of Equality Bodies. 'Equinet brings together 47 organisations from across Europe which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation': at ii.

basis of such a non-exhaustive list, 'this does not outweigh the positive impact and importance of having the mandate to examine any possible cases of discrimination as a result of a non-exhaustive list.'[9]

We submit that such a potential risk of misusing a non-exhaustive list could be addressed by a definition of 'other status'. We support a definition proposed by an Equinet Report: 'an objectively identifiable characteristic shared by others which serves as a basis for social prejudice and stigma, whether real or perceived, ingrained in social, political, or institutional practices.'[10]

(2) Gender identity

We submit that the Act should list 'gender identity' as a protected attribute. We support the recommendation by the Queensland Human Rights Commission in their report of review of Queensland's *Anti-Discrimination Act 1991*[11] (the 'QHRC Report') that the Act adopt the definition of 'gender identity' provided by the *Yogyakarta Principles*[12].[13]

The *Yogyakarta Principles* is 'a universal guide to human rights which affirm binding international legal standards with which all States must comply.'[14] It defines 'gender identity' as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.[15]

As stated by the *Yogyakarta Principles* principle 3 'the right to recognition before the law', '[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.'[16] It requires all States to '[t]ake all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity.'[17]

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[9] Ibid 73.
[10] Ibid 76.
[11] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) ('*QHRC Report*').
[12] *Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) <http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf> ('*Yogyakarta Principles*').
[13] *QHRC Report* (n 11) 281.
[14] *Yogyakarta Principles* (Web Page) <https://yogyakartaprinciples.org/>.
[15] *Yogyakarta Principles* (n 12) preamble.
[16] Ibid principle 3.
[17] Ibid.

We note that the current Act does not afford full protection of the right to self-identification according to a person's gender identity. It only protects a 'recognised transgender person'[18] from being treated 'as being of the person's former sex'.[19] To prescribe 'gender identity' as a protected attribute will be able to better protect transgender and gender diverse communities from discrimination.

To respect the right to self-identification according to a person's gender identity, we also support the recommendation by the QHRC Report that the Act should remove 'references to male and female in the Act, and replacing them with more neutral language such as "in relation to sex" or "a particular sex"' [20] and 'should clarify that all references to "sex", or a "particular sex" include both people of a sex that was assigned to them at birth, and people whose gender identity aligns with that sex.'[21]

(3) Sex characteristics

We support the recommendation by the QHRC Report that the Act 'should include a new attribute of sex characteristics, defined consistently with the *Yogyakarta Principles plus 10*[22]*.'*[23]

The *Yogyakarta Principles plus 10* defines 'sex characteristics' as 'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'.[24]

(4) Sexual Orientation

We note that the current Act only protects people from discrimination on the ground of homosexuality[25] but not on the ground of other sexual orientations, such as bisexuality, pansexuality and asexuality etc. We submit that the Act should list 'sexual orientation' as a protected attribute. We support the recommendation by the QHRC Report that the Act should adopt the definition of 'sexual orientation' provided by the *Yogyakarta Principles* and 'include a legislative note that explains that sexual orientation includes not having attraction to or intimate or sexual relations with a person.'[26]

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[18] *Anti-Discrimination Act 1977* (NSW) s 4 defines 'recognised transgender person' as 'a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* (NSW) or under the corresponding provisions of a law of another Australian jurisdiction.' Currently, section 32B of the *Births, Deaths and Marriages Registration Act 1995* (NSW) requires a person to undergo medical procedures before they can apply to alter their sex on the record.

[19] Ibid s 48B(1)(c).

[20] *QHRC Report* (n 11) 280.

[21] Ibid 281.

[22] *Yogyakarta Principles plus 10: additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (November 2017) <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> ('*Yogyakarta Principles plus 10*').

[23] *QHRC Report* (n 11) 315.

[24] *Yogyakarta Principles plus 10* (n 24) preamble.

[25] *Anti-Discrimination Act 1977* (NSW), pt 4C.

[26] *QHRC Report* (n 11) 285.

The *Yogyakarta Principles* defines 'sexual orientation' as 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.[27]

Expanding protections for the LGBTQI+ community not only improves access to essential services and mental health outcomes, but also acts as an important public health response. Research shows that countries with protections against discrimination on the grounds of sexuality, gender and other attributes have significantly higher rates of people knowing their HIV status and higher viral suppression among PLHIV.[28] Viral suppression of HIV allows for immune recovery, prevents complications and stops HIV transmission to sexual partners, again not only improving the health of PLHIV but improving Australia's public health response to HIV.[29]

(5) Disability

We support the recommendation by the QHRC Report that the 'definition of disability should be aligned with the Disability Discrimination Act 1992 (Cth) but should remove references to outdated or inappropriate language such as "disfigurement", "malformation" or "malfunction".'[30] We also recommend that the definition of disability includes a specific reference to 'neurodiversity', 'which is often considered a difference rather than a "disorder or malfunction"'.[31]

The new definition expands coverage to disability that 'may exist in the future (including because of a genetic predisposition to that disability)',[32] and consistency between the state and federal anti-discrimination laws makes it easier for duty holders to comply with the law.

We support the recommendation by the QHRC Report that the Act should 'should provide express protection for assistance animals, not limited to dogs, using a model that is consistent with the Disability Discrimination Act.'[33] We recommend such a protection be provided by a positive duty to make reasonable adjustments. See below our submissions to question 7.

(6) Health Status

We submit that the Act should list 'health status' as a protected attribute and clarify that 'health status' includes a person's mental health status, Blood Borne Virus (BBV) status,

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[27] *Yogyakarta Principles* (n 12) preamble.
[28] Matthew M Kavanagh et al, 'Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response?' (2021) 6(8) *BMJ Global Health* e006315:1-8, 7 <https://gh.bmj.com/content/bmjgh/6/8/e006315.full.pdf>.
[29] See Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, *ASHM Guidance for Health Professionals* (October 2020) <https://ashm.org.au/wp-content/uploads/2022/04/Resource_ASHMuuguidancehandbookFAweb.pdf>.
[30] *QHRC Report* (n 11) 272.
[31] Ibid 265.
[32] *Disability Discrimination Act 1992* (Cth) s 4 (definition of 'diability').
[33] *QHRC Report* (n 11) 272.

Sexual Transmissible Infection (STI) status, use or past use of alcohol and other drugs irrespective of their level of use.

There are various advantages of such a new protected attribute:

- Under international human rights law, health status is a protected attribute of discrimination in its own right,[34] which includes mental health status.
- '[P]eople who are experiencing mental health issues but do not meet diagnostic criteria, or which are only episodic in nature, might not be protected'[35] under the current definition of 'disability' of the Act. In addition, many people experiencing mental health issues do not identify with the language of 'disability'.
- A lot of PLHIV would not deem their HIV status a 'disability' because their status has very little impact on their ability to live day to day life.
- It is not clear whether substance abuse is covered by the current definition of 'disability' of the Act. In addition, people who do not experience problematic use of alcohol or drugs are also often subject to discrimination because of their use of alcohol or drugs and it does not make sense to define non-problematic use of alcohol or drugs as a 'disability'.

We submit that the advantages of introducing this new protected attribute overweigh the disadvantages. While there might be some overlap of the attribute of 'disability' and 'health status', it is quite common that discrimination occurs on the basis of more than one attributes.

(7) Lawful Sexual Activity

We submit that the Act should list 'lawful sexual activity' as a protected attribute. This attribute can protect:[36]

- Those who are or have been sex workers operating within the law;
- Those who are diverse in their sexual expression, such as people who have multiple partners;
- Those who are discriminated against in pre-employment situations where there is sexual content of them in the public domain;
- Those who are asked to leave workplaces after ending consensual sexual relationship with colleagues etc.

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[34] Dr Claire Brolan, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* (28 February 2022) 5, citing Commission for Human Rights resolutions 1994/49, 1995/44, 1996/43, 1999/49, 2001/51; and UN Special Rapporteur of the Right to Health reports to the Commission on Human Rights of 2003 (E/CN.4/2003/58) and UN General Assembly in 2016 at page 25 para (k) <https://www.ohchr.org/EN/Issues/Health/Pages/Agenda2030.aspx>.

[35] *QHRC Report* (n 11) 267, citing Queensland Mental Health Commission, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*, 7.

[36] *QHRC Report* (n 11) 284.

(8) Profession, Trade, Occupation or Calling

We submit that the Act should list 'profession, trade, occupation or calling, including past engagement with a profession, trade, occupation or calling' as a protected attribute and the Act should clarify that sex work is an 'occupation'.

The attribute of 'lawful sexual activity' can only extend so far to protect sex workers operating within the law. However, we agree with the QHRC Report that the lawfulness of the sex work should not define whether or not sex workers should be protected by the Act.[37]

There are 3 approaches to fully protect sex workers under anti-discrimination laws:

- Establishing a specific and separate attribute of 'sex work' and 'sex workers', which is the approach of the Northern Territory (NT); or
- Protecting sex workers under the attribute of 'profession, trade, occupation or calling', which is the approach of the Australian Capital Territory (ACT); or
- Protecting sex workers under the attribute of 'profession, trade, occupation or calling' while retaining the attribute of 'lawful sexual activity', which is the approach of Victoria.

We recommend the Victorian approach for 3 reasons. First, it embodies the spirit of sex workers community's demand that 'sex work is work'. Second, the broad attribute of 'profession, trade, occupation or calling' affords better protection of the right to equality and non-discrimination. For example, it can also protect a cleaner who is refused an opportunity to apply for an internal position within a non-cleaning company business, even though the person had the relevant experience and qualifications for the role.[38] Third, it is quite common that discrimination occurs on the basis of more than one attributes.

We also submit that the Act should not provide any exceptions from the Act which are particular to sex work.

(9) Immigration Status

People who are not Australian citizens, particularly refugees, asylum seekers and temporary visa holders, are a marginalised group in the Australian society and often suffer from intersectional discrimination based on their immigration status and other protected attributes.[39] In particular, refugees, asylum seekers and temporary visa holders are regularly 'subjected to exploitative working conditions, discrimination, or harassment on the assumption they won't take any action because of a "precarious" visa.'[40] We submit

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[37] Ibid 286, 288.
[38] 'Profession, trade or occupation', *Victorian Equal Opportunity & Human Rights Commission* (Web Page) <https://www.humanrights.vic.gov.au/for-individuals/profession-trade-occupation/>.
[39] *QHRC Report* (n 11) 298-9.
[40] Ibid 298, citing Multicultural Australia, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*, 10.

that the Act should list 'immigration status' as a protected attribute. This is the approach adopted by the *Discrimination Act 1991* (ACT).

(10) Family, Carer, or Kinship Responsibilities

We agree with the QHCR Report that:

- 'International human rights law has broadly interpreted what family and caring relationships include, extending its meaning beyond a traditional family unit that has been based on biological connections or marriage';[41]
- 'The concept of "family" and the expectations placed on members of First Nations people and some culturally and linguistically diverse communities in relation to caring responsibilities are beyond the scope of the current definition';[42]
- A narrow definition of responsibilities as a carer that includes only immediate family does not reflect diverse contemporary family structures, cultural practices and family arrangements.[43]

We support the recommendation of the QHCR Report that:

- the current attribute of carer responsibilities should be renamed 'family, carer, or kinship responsibilities';[44] and
- this attribute should be interpreted consistently with international human rights law.

(11) Irrelevant Criminal Record

We support the recommendation by the QHRC Report that the Act should list 'irrelevant criminal record' as a protected attribute and clarify that it includes a record relating to arrest, interrogation or criminal proceedings of any sort, criminal infringement notices and convictions (including spent convictions and expunged homosexual convictions).[45]

We note the complicated history of over-policing, surveillance, persecution and prosecution of the communities we work with and all other marginalised communities by the State. In particular we note that in the past queer people in NSW were unjustly convicted of criminal offences and imprisoned simply for being themselves. This dark history per se means that it is important that the Act specifically prohibits discrimination on the basis of irrelevant criminal records.

In addition, certain 'risk factors' such as identifying as LGBTQI+ and having been victimised, stigmatized and/or discriminated against due to a certain attribute can lead people, specifically young LGBTQI+ people to be involved in risk-taking behaviours and

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[41] *QHRC Report* (n 11) 307.
[42] Ibid.
[43] Ibid 306.
[44] Ibid 308.
[45] Ibid 323

'make them more likely than heterosexual young people to come into contact with police, a pattern noted about young people more broadline in Australian research.'[46]

Further, all the evidence shows that the best protection against recidivism is rapid and supportive reintegration into society. Irrelevant criminal records, such as one-off minor drug possession charges, can hinder people's ability to enter or re-enter the workforce, particularly young people. It can also impact future employment prospects when attempting to seek a higher position with a different organisation. With access to better financial and social circumstances, young people in particular are less likely to be involved in risk-taking behaviours and engage with support services to resolve issues that may emerge.

(12) Physical Features

We submit that the Act should list 'physical features' as a protected feature and we support the approach adopted by the ACT that 'physical features' means 'a person's height, weight, size or other bodily features',[47] which may include chosen features such as 'piercings, tattoos or body modifications'.[48]

We agree with the ACT Law Reform Advisory Council that it is 'difficult to define what physical features are chosen, such as a person's weight'[49] and that protecting chosen features is protecting freedom of choice and freedom of expression.[50]

Further, we submit that the Act should protect chosen features for 2 reasons:

A. Chosen personal appearance is an important human right recognised under international human rights law. Since 2003, the European Court of Human Rights has extended article 8 of the *European Convention on Human Rights*[51] 'right to respect for private and family life' to protect a person's desired appearance.[52] 'The Court has established that personal choices as to an individual's desired appearance, *whether in public or in private*, relate to the expression of his or her personality and thus fall within the notion of private life.'[53] In particular, for many members of the LGBTQIA+ community, non-mainstream personal appearance including piercings, tattoos, flamboyant hair style and hair colours is an expression

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[46] Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender Young People: a Gap in the Research Literature' (2011) 22(3) *Current Issues in Criminal Justice* 415, 419.
[47] *Discrimination Act 1991* (ACT) Dictionary (definition of 'physical features').
[48] 'Physical Feature', *ACT Human Rights Commission* (Web Page) <https://hrc.act.gov.au/discrimination/physical-feature-discrimination/>.
[49] Australian Capital Territory Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final report, 18 March 2015) 83.
[50] Ibid.
[51] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
[52] European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights* (31 August 2022) 70 (emphasis added).
[53] Ibid.

of the profound identity and pride of the community, which is a great illustration of the relationship between chosen personal appearance and identity and dignity.

B. The argument that chosen personal appearance should not be protected because it is a matter of choice is counterproductive to the protection of human rights. Such an argument essentially denies people's right to equality and non-discrimination as it puts emphasis on a person's 'choice'/ability to avoid discrimination rather than the duty holder's duty to treat others with dignity. For example, while gender identity might be considered challenging to change, such an argument could potentially extend to require people to conceal their gender expressions to avoid discrimination because they can 'choose' not to express their true gender identity. Engagement in sex work might also be considered as a matter of 'choice' thus does not warrant protection. Relationship status and pregnancy etc might be considered as a matter of 'choice' as well. Above all, an individual is entitled to make any choice they like under the rule of law and all of those choices should be protected by anti-discrimination laws under the same rule of law.

(13) Subjection to Domestic or Family Violence

We support the recommendation of the QHRC Report that the Act should list 'subjection to domestic or family violence' as a new protected attribute.[54]

(14) Socio-economic Status

We agree with the Australian Discrimination Law Experts Group, Life Without Barriers, Caxton Legal Centre and the Queensland Council of Social Service that the Act should list 'socio-economic status' as a protected attribute.[55]

3. whether the areas of public life in which discrimination is unlawful should be reformed

We support agree with the Public Interest Advocacy Centre (PIAC) that the Act should adopt the approach taken by the *Racial Discrimination Act 1975* (Cth) which has discrimination provisions of general application in public life.[56]

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[54] *QHRC Report* (n 11) 333.

[55] See Australian Discrimination Law Experts Group, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*; Life Without Barriers, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*; Caxton Legal Centre, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*; Queensland Council of Social Service, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*.

[56] Public Interest Advocacy Centre (n 1) 7.

4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

(1) Unfavourable Treatment Test

We agree with PIAC that the comparator test ('less favourable treatment') for direct discrimination should be replaced by an 'unfavourable treatment' test as adopted in the ACT and Victoria.[57]

A lot of the complexities and debates in the area of discrimination law is highlighted in the matter of *Purvis v New South Wales*[58] where it was held that the comparator with the complainant who acted violently due to his disability was a person who was without disability but acted in the same violent manner as the applicant and where the applicant's appeal was dismissed. We believe that the comparator test continues to reduce the effectiveness of the Act for people living with disability. This is highlighted further in matters where a person has been discriminated against on combined grounds and where certain 'characteristics' may be connected with an attribute (eg the stereotype that a male living with HIV is homosexual.)

(2) Intersectional Discrimination

We agree with PIAC that the Act should expressly provide that discrimination can occur on the basis of one or more attributes or a combination of attributes.[59]

(3) One of the Reasons

We agree with the recommendation of the QHCR Report that the Act 'that the protected attribute or combination of attributes need only be one of the reasons, rather than a substantial reason, for the [unfavourable] treatment.'[60]

(4) Future Discrimination

We agree with PIAC that the Act should include 'intended future conduct' within the definition of discrimination. This will provide protection for the potential applicant and the opportunity to intervene to prevent discrimination where a person has indicated that they will act in a discriminatory manner against the applicant.[61]

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[57] Ibid 5.
[58] (2003) 217 CLR 92.
[59] Public Interest Advocacy Centre (n 1) 5.
[60] *QHRC Report* (n 11) 110.
[61] Public Interest Advocacy Centre (n 1) 5.

5. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

(1) Harmonising Vilification Protections

We submit that the anti-vilification provisions under anti-discrimination law and criminal law should be harmonised. Anti-discrimination law and criminal law should both protect people from vilifications based on all protected attributes provided by anti-discrimination law, respectively imposing civil liability and criminal liability on the vilifier. Anti-discrimination law and criminal law should cover the same attributes and adopt the same language.

(2) Expanding Vilification

We suggest that vilification provisions be expanded to include threats of vilification. A common complaint we have noted is the threat by others to publicly disclose their HIV condition to others. We have observed that sometimes these threats are made in an attempt to blackmail the person and sometimes with the misguided view that the community at large should be made aware of a person's HIV status. Whilst we note that the former (blackmail) may have redress under criminal laws, we have noted that police often do not view this as an offence and are reluctant to act. We also recommend that vilification provisions under section 49ZXB be expanded to include unwanted disclosure of a person's HIV condition. We note that although disclosing a person's HIV condition may fall within the existing definition, we understand that "mere" disclosure is often considered gossip rather than vilification. We note that PLHIV may choose to disclose their HIV status to sexual partners or in other personal interactions, such as confiding in friends, and that when relationships dissolve the other party may use their HIV condition as leverage to harm the other. We suggest that the expansion of the definition to expressly mention 'unwanted disclosure of a person's HIV condition' would not only give redress for PLHIV who have had their personal health information disclosed to others, but also be a useful educational tool and give comfort to PLHIV that they have redress if they wish to discuss their health status with others such as friends, family or sexual partners.

(3) Clarifying Religious Vilification

We note that the Anti-Discrimination Amendment (Religious Vilification) Bill 2023 (NSW) has passed the NSW Parliament, which prohibits vilification against a person or a group of persons on the ground of the person's or the group members' religious belief, affiliation or religious activity.[62]

We echo the concerns raised by PIAC, the New South Wales Council for Civil Liberties and Australian Lawyers for Human Rights that:

[62] Anti-Discrimination Amendment (Religious Vilification) Bill 2023 (NSW) sch 1.

- 'this Bill does not sufficiently distinguish between freedom of expression directed against the ideas and tenets of a religion, and vilification against persons or groups because they hold or express religious beliefs';[63]
- 'the Bill could create a situation in which severe ridicule or vilification of institutions such as, for example, the Catholic Church, Hillsong, the Church of Scientology or the Anglican Church may be taken to constitute severe ridicule or vilification of persons who belong to those organisations, and thus made unlawful';[64]
- 'protected religious activity is not restricted to activities that are lawful';[65] and
- '[t]he scope of these proposed reforms is broader than most other Australian jurisdictions, including Victoria and Queensland'.[66]

We submit that:

- the Act should only protect lawful religious activities;
- the Act should only protect individuals and groups of individuals rather than organisations;
- the Act should strike a balance between the right to freedom of expression and the right to freedom of religion by distinguishing between freedom of expression directed against the ideas and tenets of a religion, and vilification against persons or groups because they hold or express religious beliefs.

6. the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

(1) Sexual Harassment

We agree with PIAC that:[67]

- the definition of sexual harassment should include sex-based harassment and creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex; and
- sexual harassment should be prohibited in all areas of public life.

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[63] 'Human rights lawyers highlight flaws in NSW Government's approach to Religious Vilification', *Australian Lawyers for Human Rights* (Web Page, 29 June 2023) <https://alhr.org.au/human-rights-lawyers-criticise-nsw-governments-anti-discrimination-amendment-religious-vilification-bill-2023/>.
[64] Anne Charlton, 'Media Statement: Introduction of the Anti-Discrimination Amendment (Religious Vilification) Bill 2023 – What on earth is driving this nonsense?', *New South Wales Council for Civil Liberties* (Media Statement, 28 June 2023) <https://www.nswccl.org.au/media_statement>.
[65] 'NSW religious vilification reforms "too broad and need further amendment"', Public Interest Advocacy Centre (Media Release, 28 June 2023) <https://piac.asn.au/2023/06/28/nsw-religious-vilification-reforms-too-broad-and-need-further-amendment/>.
[66] Ibid.
[67] Public Interest Advocacy Centre (n 1) 9.

(2) Harassment based on other protected attributes

We submit that the Act should provide protections against harassment based on all protected attributes.

7. whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

(1) Positive obligation to make Reasonable Adjustments

We submit that the Act should provide a standalone positive obligation to make Reasonable Adjustments in relation to all protected attributes in all areas of public life and that the concept of unjustifiable hardship be retained as a factor to determine whether reasonable adjustments are reasonable rather than exceptions to discrimination. This is the approach under the *Anti-Discrimination Act 1992* (NT).[68] However, we submit that the Act should not refer to the needs in relation to a protected attribute as 'special needs'. Our submission aligns with the requirements, framework and language of the *Convention on the Rights of Persons with Disabilities* (CRPD).[69]

In particular, the Act should clarify that the positive obligation to make reasonable adjustments includes the positive obligation to make reasonable adjustments for the reliance of a person with disability on a carer, assistant, assistance animal, companion animal or disability aid.

We recommend that the Act adopt a similar model to the *Disability Discrimination Act 1992* (Cth) to protect reliance on a carer, assistant, assistance animal, companion animal or disability aid. We submit that the Act should extend protection to reliance on companion animals while based on the model of the *Disability Discrimination Act 1992* (Cth). 'Dealing with [companion animals] separately might reduce the burden on users of assistance animals who find their needs are taken less seriously when pets are inappropriately asserted to be assistance animals.'[70] We also support the recommendation by the QHRC Report that '[a]ssistance animals "in training" should be protected, to recognise that part of the training of an assistance animals may be to stay with the person, both inside and outside of their home.'[71]

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[68] *Anti-Discrimination Act 1992* (NT) s 24.
[69] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[70] *QHRC Report* (n 11) 270, citing Caxton Legal Centre, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*, 22-3; Fibromyalgia ME/CFS Gold Coast Support Group, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*, 11.
[71] *QHRC Report* (n 11) 270-1.

(2) Positive obligation to prevent discrimination, harassment and vilification

We strongly support the introduction of a positive obligation to take reasonable and proportionate measures to eliminate discrimination, harassment and vilification based on all protected attributed. We note that the current mechanisms are reactive to acts of discrimination and sexual harassment through the complaint/application process. The introduction of a positive obligation to prevent discrimination 'has the ability to reorientate the Act towards prevention and to extend responsibility for enforcement to duty holders, rather than that responsibility resting solely with individuals who experience discrimination and sexual harassment.'[72]

HALC has represented PLHIV nationwide in discrimination matters and have found that most matters occur due to a misunderstanding about HIV and transmission risks. Employers and service providers often lack the knowledge base to understand what living with HIV in Australia today looks like. In our discussion with clients about what they wish to gain from the conciliation process, as well as an apology, clients often request that the organisation undertake training about HIV and Blood Borne Viruses and their management within the organisations setting (eg employment, healthcare).

Current Work Health and Safety (WHS) legislation nationally and in New South Wales are limited in scope and, when misinterpreted by employers, can have a negative impact on PLHIV. While the legislation does include a positive duty to eliminate or minimise risks arising from work that may affect the physical and psychological health or safety of employees,[73] some employers mistakenly believe that HIV may pose a risk to their employees. This can occur where employers have a lack of understanding about HIV and the actual risk of transmission and attempt to justify their actions on this ground. WHS legislation also only applies to employers and does not extend this obligation to other settings.

The inclusion of a positive obligation within the Act will provide an opportunity for employers and service providers to educate themselves about discrimination on the ground of HIV/AIDS within their organisations. We believe that this obligation should be reasonable and proportionate to each organisation taking into similar considerations found in the *Equal Opportunity Act 2010* (Vic).[74] This obligation should also require Anti-Discrimination NSW (ADNSW) to take on an educational role regarding what the duty holders are required to do under this positive obligation.

We believe that such a positive obligation will require certain organisations to be trained specifically on their obligations under the Act regarding Blood Borne Viruses, including HIV. Specifically, this should be targeted towards public and private healthcare settings and given the rapidly ageing PLHIV population, aged care settings where exposure to PLHIV so far remains limited. These organisations are most likely to have a lasting negative

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[72] Ibid 230.
[73] Work Health and Safety Act 2011 (NSW) s 19.
[74] *Equal Opportunity Act 2010* (Vic) s 15.

impact on PLHIV who face discrimination in these settings, particularly on their physical and mental health.

8. exceptions, special measures and exception processes

(1) Religious Exceptions

The current Act contains some of Australia's broadest exceptions for religious bodies including sections 56(c) and (d). This section applies to:

- '(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 doctrine of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'[75]

Our concerns for the broad application of the religious exception relate specifically to religious organisations that provide services on behalf of the state. A guiding principle of the HIV National strategy is access and equity to health and community care stating:[76]

> *Health and community care in Australia should be accessible to all, based on need. The multiple dimensions of inequality should be addressed, whether related to gender, sexuality, disease status, drug use, occupation, socio-economic status, migration status, language, religion, culture or geographic location, including custodial settings.*

Australia's world leading response to HIV is based on a high-quality, evidence-based approach and its success relies on equitable access to services by all. Religious organisations providing essential services, including healthcare and aged-care services, should adhere to the same overarching principals.

We submit that the exceptions provided by sections 56(c) and (d) should be removed.

(2) Private School Exceptions

The Act has 'the broadest exceptions in Australia for non-government educational institutions.'[77] Under the current Act, private educational institutions are allowed to discriminate against students, teachers and other staff on the basis of sex, transgender status, marital or domestic status, disability and homosexuality.[78] We submit that the exceptions provided to private educational institutions should be removed.

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[75] *Anti-Discrimination Act 1977* (NSW) s 56(c), (d).
[76] Department of Health (Cth), *Eighth National HIV Strategy* (2018) 9 <https://www.health.gov.au/sites/default/files/documents/2022/06/eighth-national-hiv-strategy-2018-2022.pdf>.
[77] Public Interest Advocacy Centre (n 1) 10.
[78] Ibid.

(3) Insurance and/or Superannuation Exceptions

HALC has significant concerns about how the superannuation and insurance exceptions contained in the Act work in practice for PLHIV. Under the Act, an insurance and/or superannuation service provider may discriminate on the basis of disability in providing superannuation or insurance where the discriminatory term or condition is 'based upon actuarial or statistical data on which it is reasonable to rely and [is] reasonable having regard to the data and any other relevant factors'.[79]

In HALC's experience in this area we have noticed a wide range of approaches undertaken by insurers when PLHIV seek out cover. This includes:

- instant refusal of coverage after disclosure of a person's HIV status; or
- refusal after the disclosure of further medical information related to a person's HIV status; or
- increased premiums after disclosure of a person's HIV status.

The HIV Futures 10 report found that 14.5% of PLHIV had experienced discrimination by insurers in the last twelve months.[80] A report by the Victorian Pride Lobby 'Worth the Risk' found that questions asked by insurers about HIV can be stigmatising and confronting, and includes questions about:

- 'anal sexual activity without a condom outside a monogamous relationship for a period of time;
- Sex with or as a sex worker;
- Sex (without a condom) with a person who uses recreational injected drugs; and
- Travel to high-risk countries or sexual relations with persons who have recently come from high-risk'.[81]

These questions not only stigmatise PLHIV but also men who have sex with men, people who use drugs and sex workers. The 'Worth the Risk' report also found that only 6% of respondents living with HIV felt comfortable disclosing their HIV status.[82]

HALC undertakes strategic litigation to challenge the reliance of insurers on this exemption. This can be a near impossible task as insurers are not compelled to provide the data relied upon when initially refusing coverage, or in offering insurance with higher premiums. Only when matters progress beyond Anti-Discrimination NSW to NSW Civil and Administrative Tribunal (NCAT) can insurers be compelled to provide the data.

We recommend that the Act be amended to include a provision to allow people seeking cover to obtain a copy of the actuarial or statistical data upon which the insurer is relying upon. Given that the onus is on insurers to demonstrate reliance upon the exceptions, we

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[79] *Anti-Discrimination Act 1977* (NSW) s 49Q(a).
[80] Thomas Norman et al, *HIV Futures 10: Quality of Life among People Living with HIV in Australia* (Report, December 2022) 34 <https://www.latrobe.edu.au/arcshs/work/hiv-futures-10>.
[81] Victorian Pride Lobby, *Worth the Risk: LGBTIQA+ experiences with insurance providers* (Report, 2022) 16.
[82] Ibid.

also recommend that Anti-Discrimination NSW be provided powers to compel insurers to provide the data for conciliation purposes.

9. the adequacy and accessibility of complaints procedures and remedies

The current Act allows NCAT to award 'damages not exceeding $100,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct'[83] but there is no definition of 'loss or damage'. We submit that the Act should clarify that 'loss or damage' includes 'the offence, embarrassment, humiliation, and intimidation'[84] and other psychological impacts suffered by the person. This is to ensure that damages of any psychological nature, such as damages for anxiety and/or depression, can be ordered by NCAT.

We also recommend that ADNSW provide information to applicants on what evidence may be necessary to collect if an application is to proceed to NCAT. Clients are often unaware of the fact that they will need to provide letters from doctors, counsellors, or other support workers about the impact of the discrimination on their physical and mental health. This information should also include guidance on collecting evidence about other impacts, such as taking time off work. We recommend that this information should be provided as early as possible to allow applicants to collect the necessary documentation.

We also strongly recommend that the range of damages not be capped at $100,000. We suggest that historically awards for damages in discrimination proceedings have been historically low, the consequence of this is that many people choose not to make a complaint as the outcome is potentially of limited utility. We also note that the cap on damages means that it is not cost effective to engage legal representation as funds spent on legal fees by a person bringing a complaint could likely exceed the damages potentially awarded (given it is a no costs jurisdiction). The limited damages also means that it is less likely for solicitors to assist on a contingency basis. We suggest that the increase in damages means that applicants of limited means are not 'litigated out' of proceedings by respondents who may be better resourced and have access to legal representation.

We also strongly recommend that there be powers to award punitive damages, particularly in the context of discrimination of bodies/companies/organisation with annual turnover above a certain threshold and government bodies.

10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

We note the powers of the President under section 90B of the Act and support its ongoing inclusion; however we suggest that this section is rarely utilised. We suggest that matters could more equitably be resolved in the first instances if there is full disclosure when a

[83] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a).
[84] *Anti-Discrimination Act 1992* (NT) s 88(3); *Anti-Discrimination Act 1992* (Qld) s 209(5).

matter is before the ADNSW. To that end we recommend that inclusion of a provision for parties to a proceeding to request the use of powers under section 90B and for rejection of any such request to be a reviewable decision.

11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

We note under the *Fair Work Act* that the onus is on employer where are complaint has been brought; we support this reverse of onus and recommend similarly the onus be on those who a complaint has been brought against.

We also note under the *Fair Work Act* that proceedings before both Fair Work and the federal courts costs can only be awarded where the proceedings were brought "*vexatiously or without reasonable cause",* if an unreasonable act or omission caused the costs to arise. We suggest that a similar test should apply to matters stemming from a complaint under the ADA including to proceedings which progress to the Supreme Court or the High Court. We suggest that removal of risk of costs jeopardy ensures that matters of significant public interest can be appropriately agitated.

We also endorse Equality Australia's submission regarding the applicability of other jurisdictional protections in NSW.

12. the interaction between the Act and Commonwealth anti-discrimination laws

For the reasons outlined above we recommend that the Act be aligned with Commonwealth anti-discrimination legislation, in this regard we again note and support the inclusion of provisions for 'reasonable adjustments'.

13. any other matters the Commission considers relevant to these Terms of Reference

We submit that the Act should prohibit discriminatory requests for information. This protection has been protected by other Australian jurisdictions, including ATC, NT, Queensland and Victoria.

Employers often request medical information during a pre-employment medical check. When undertaking pre-employment medical checks, questions can be broad including questions that ask about 'any' medical conditions. There are very few employment settings where a person's HIV status is relevant to their work (eg healthcare workers performing exposure prone procedures). While we provide information to PLHIV on disclosure in employment settings, broad and irrelevant questions can cause unnecessary stress for PLHIV in deciding whether to disclose, or even deter people from completing the pre-employment medical checks.

Some health care providers also ask about a person's HIV status on new patient registration forms. In a large range of settings this is not appropriate or relevant to the health service being provided. For example, we are aware of dentists, physiotherapists and general practitioners that ask a patient to disclose this information on their registration forms. A person's HIV status is not relevant to the care being sought in these settings and can have negative consequences for PLHIV, particularly in rural or remote communities. Disclosure should be at the discretion of a PLHIV with guidance from their treating doctor who can inform them when it may be necessary to disclose for medical purposes. This also allows a PLHIV to establish trust with the healthcare provider prior to disclosure to ensure they are receiving appropriate care.

We again thank you for your time and invitation to comment on this important piece of legislation. If additional information or citations in relation to this submission are required, please feel free to contact Jane or Alexandra .

Yours sincerely,

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