QUEENSLAND POSITIVE PEOPLE

ABN 89 010 040 914
21 Manilla Street, East Brisbane
Queensland 4169 Australia
PO Box 7403 East Brisbane

Phone 07 3013 5555
Free Call 1800 636 241
Fax 07 3891 1830
Email info@qpp.org.au

Queensland Positive People
INCLUSIVE, INNOVATIVE HIV SERVICES

napwha national association of people with HIV australia

halc
HIV/AIDS Legal Centre
www.halc.org.au

3 March 2022

Queensland Human Rights Commission
City East post Shop
PO Box 15565
City east QLD 4002

Sent via email: adareview@qhrc.qld.gov.au

To the Queensland Human Rights Commission,

Thank you for the opportunity to make a submission to the Queensland Human Rights Commission (QHRC) into your review of the Queensland *Anti-Discrimination Act 1991* ('the Act').

About us

Queensland Positive People (QPP) is a state-wide organisation committed to improving the quality of life of people living with HIV (PLHIV) and helping reduce new infections of the HIV and STIs. Since its inception in 1989, QPP has grown from a community grass-roots organisation focused on peer-based advocacy and support, into an accredited multi-disciplinary health and social services provider. QPP employs 35 staff and delivers programs in areas that include peer led point of care HIV/STI testing; community development; peer navigation; case management, legal support and referral for HIV stigma and discrimination; emergency relief funding; research; advocacy and policy development. QPP's membership, Community Advisory Group and Board were consulted regarding certain questions in the discussion paper and have been included in this submissions.

HIV/AIDS Legal Centre (HALC) is the only not-for profit, specialist community legal centre of its kind in Australia. HALC provides free and comprehensive legal assistance to people in NSW with HIV or hepatitis-related legal matters. Free legal assistance is also provided to PLHIV in Queensland through a partnership arrangement between QPP and HALC. Community Legal education and Law Reform activities are also carried out in areas relating to HIV and hepatitis.

HALC has represented clients in discrimination matters nationwide. This has included representation at NSW anti-discrimination, the NSW Civil and Administrative Tribunal, the Queensland Human Rights Commission, the Equal Opportunity Commission –

Western Australia, the South Australian Civil and Administrative Tribunal, the full court of the Federal Court of Australia, the Supreme Court of NSW, the Fair Work Commission and the Australian Human Rights Commissions. HALC have represented clients who have been discriminated against by employers, health care workers and other service providers.

The National Association of People with HIV Australia (NAPWHA) is the national peak, non-government organisation representing community-based groups of people living with HIV (PLHIV) across Australia. NAPWHA's membership of national networks and state-based organisations reflects the diverse make-up of the HIV-positive community and enables NAPWHA to confidently represent the positive voice in Australia. NAPWHA's vision is of a world where people with HIV live their lives to their full potential, in good health and free from discrimination.

To assist us in these submissions, QPP and the Queensland Council for LGBTI Health conducted a community survey to gather stories of the lived experiences of PLHIV, lesbian, gay, bisexual, transgender, intersex, queer, sitstergirl and brotherboy communities. With a focus on PLHIV, these submissions will draw on the results of this survey. The Submissions from the Queensland Council for LBGTI Health will provide you with a deeper analysis of these results for the other communities surveyed. We would like to thank everyone that participated in the community survey and the PLHIV who have shared their stories with us.

On behalf of all those who have contributed to this submission, we commend the QHRC for your initiative and wish you all the best in your review of the act. We look forward to your recommendations and the potential to reduce discrimination for all PLHIV across Queensland.

Kind Regards,

Mark Counter QPP President

Melissa Warner QPP CEO

Submission for the review of the Anti-Discrimination Act 1991 (Qld)

February 2022

Background – People living with HIV and discrimination

It is estimated that there were approximately 5,800 people living with the human immunodeficiency virus (HIV) in Queensland in 2020 with approximately 50% of PLHIV in Queensland over the age of 50 years.[1]

The lives of PLHIV living in Queensland looks very different to when this act was first introduced in 1991. HIV is a virus that affects the immune system and without treatment, most individuals develop severe immune deficiency within 10 years. Combination antiretroviral therapy (ART) has transformed the course of the condition and the life expectancy of a PLHIV has significantly improved. Thanks to treatment advances, people with HIV now live lives of comparable length to the HIV negative population. It is generally recognised that the minimum level of adherence needed for HIV treatment to work properly is 95%. A lack of adherence to treatment significantly increases the chance of the virus changing and becoming resistant to the ART. Today, PLHIV who take ART for HIV daily as prescribed, and who achieve and maintain an undetectable viral load, cannot sexually transmit the virus.[2] HIV is now a chronic, manageable condition that does not pose a threat to public health. Stigma, discrimination and outdated understandings of HIV are now the main barrier to improved quality of life for PWHIV and elimination of HIV transmission in Australia.

Despite protections at state and federal levels under anti-discrimination legislation, people living with HIV continue to be negatively impacted by stigmatising and discriminatory conduct of individuals, employers and service providers. The latest HIV Futures 9 study conducted in 2018 and 2019, a study of the health and wellbeing of PLHIV, found that more than half of participants reported at least one experience of HIV-related stigma or discrimination in the past 12 months.[3]

Discriminatory actions against PLHIV can negatively impact their health outcomes and can lead to social isolation and poorer mental health. When faced by discrimination in the settings covered by the Act, PLHIV face a range of challenges. In employment settings, medical checks can lead to the unnecessary disclosure of a person's HIV status, subjecting them to potential discrimination by employers with a lack of understanding about HIV.

According to the HIV Futures 9 survey, approximately one third of participants reported that they had been treated differently by a healthcare worker due to their HIV status.[4] This is of particular concern as trust between PLHIV and their healthcare providers is essential to ensuring positive physical and mental health outcomes. Discrimination faced by PLHIV can have an impact on their adherence to treatment, particularly when faced by discriminatory actions in healthcare settings, and can deter priority populations from HIV

[1] https://www.health.qld.gov.au/__data/assets/pdf_file/0026/1140668/hiv-in-queensland-2020.pdf

[2]https://www.ashm.org.au/HIV/UequalsU/#:~:text='Undetectable%20equals%20untransmissible'%2C%20or,to%20an%20HIV%2Dnegative%20partner.

[3] HIV Futures 9, https://www.latrobe.edu.au/__data/assets/pdf_file/0007/1058614/HIV-Futures-9.pdf

[4] Ibid.

testing. Equitable access to healthcare services free of stigma and discrimination that PLHIV can trust is an important factor in improving adherence to treatment that provides improved health outcomes for PLHIV and can eliminate the risk of sexual transmission.

The impacts of stigma and discrimination of PLHIV also extends to Australia's public health response to HIV. In both the Eighth National HIV Strategy ('National Strategy') and the Queensland HIV Action Plan, reducing the stigma and discrimination faced by PLHIV is a key priority outcome. We acknowledge the role that anti-discrimination legislation nationwide has in attempting to redress the discrimination faced by PLHIV. Unfortunately, discrimination still remains a significant issue for PLHIV and we believe our discussions and recommendations below will assist in creating an effective preventative and reactive framework.

Priority Populations

Throughout our submissions we will also consider implications of the act on populations that are considered 'priority populations' in the National HIV Strategy. These include:

- Trans and gender diverse people
- People who inject drugs
- People living with HIV
- People in custodial settings
- Sex workers
- Gay men and other men who have sex with men
- Aboriginal and Torres Strait Islander People.

HIV has a disproportionate impact on these priority populations and these populations can face discrimination on multiple attributes. The community survey conducted by Queensland Council for LGBTI Health and QPP found that of the 74 respondents, 68% reported the had experienced discrimination in the past 5 years.

The HIV Futures 9 survey found that of their participants:

- 74.1% identified as gay/homosexual
- 5.4% identified as bisexual
- 2.7% identified as queer
- 1.1% identified as pansexual
- 0.7% used a different term to identify their sexuality
- Approximately 29% were born outside of Australia and 13% did not speak English at home
- 1.5% indicate that they were Aboriginal
- Approximately 21% resided in regional or rural areas[5].

As we can see from this data, a large proportion of PLHIV identify as members of the lesbian, gay, bisexual, transgender, intersex, queer and other sexuality and gender diverse

[5] Ibid.

communities (LGTIQ+). LGBTIQ+ Health Australia provide concerning statistics on the health outcomes of LGBTQI+ communities and report that these health outcomes are 'directly related to experiences of stigma, prejudice, discrimination and abuse on the basis of being LGBTIQ+.'[6] Below are some of the statistics found in the report from 2021.

- 'LGBTIQ people are two and a half times more likely to have been diagnosed or treated for a medical health condition in the past 12 months'
- 'LGBTI people are over three times as likely to report having an anxiety-related condition'
- 'LGBTI people are nearly six times more likely' to experience and be diagnosed with depression
- '32.6% of LGBTI+ people aged 16 to 27 who had not used a crisis support service during their most recent personal or mental health crisis indicated that their decision was due to anticipated discrimination' [7].

The report also considers how intersections with other identities, such as identifying as having a disability or being culturally and linguistically diverse, can impact an individual's wellbeing. The report notes that:

- '28.6% of LGBTI people aged 16-27 report a racial or ethnic background other than Anglo-Celtic.'
- '18% report having experienced a conflict between their cultural background and their sexuality or gender identity'
- '39% of LGBTQA+ people aged 14 to 21 identify as having a disability or long-term health condition'[8].

While these statistics do not reflect specific data regarding PLHIV who identify as LGBTQI+, we can consider them in conjunction with the data available from the HIV Futures 9 report and can see how intersection of other identities can impact the mental and physical wellbeing of PLHIV.

As these populations are diverse, each population have unique risk factors that need to be considered in Australia's response to HIV. Stigma and discrimination faced by these populations on a range of protected attributes can have a seriously detrimental impact on their health-seeking behaviors and overall wellbeing.

---

6 https://d3n8a8pro7vhmx.cloudfront.net/lgbtihealth/pages/549/attachments/original/1620871703/2021_Snapshot_of_Mental_Health2.pdf?1620871703, p 2

7 Ibid.

8 Ibid.

Question 2 – Direct discrimination test

We agree with the comments in the discussion paper that the current 'less favourable treatment test' for direct discrimination in Queensland can be problematic. In the majority of cases a hypothetical comparator is required and we agree with the QHRC's comment that 'this can take the focus away from the impact of discrimination on the affected person.'[9]

A lot of the complexities and debates in the area of discrimination law is highlighted in the matter of *Purvis v New South Wales*[10], and while the matter of *Woodforth v State of Queensland*[11] notes the different application due to section 8 of the act, we believe that the comparator test continues to reduce the effectiveness of the act for people living with an impairment. 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 (e.g. the stereotype that a male living with HIV is homosexual.)

We recommend the replacement of the 'less favourable treatment test' to a test of 'unfavourable treatment' as adopted in the Australian Capital Territory and Victoria. The legislation should acknowledge that the application of the test does not require a 'hypothetical' comparator where an actual comparator does not exist.

Question 7 – Discrimination on combined grounds

We support the introduction of protections for people who experience intersectional discrimination. As we have discussed above, the community of PLHIV in Australia is very diverse and includes people from Culturally and Linguistically Diverse (CALD) communities, homosexual and heterosexual identifying peoples, transgender and other gender identifying peoples, people who use and/or inject drugs and people who identify as Aboriginal and/or Torres Strait Islander.[12] It is also important to recognise the changing demographic of PLHIV over time with around half of all PLHIV in Australia now over 50 years of age.

A lack of understanding about the prevalence of HIV in certain communities in Australia and how HIV is transmitted can cause individuals, employers, educators and service providers to make discriminatory assumptions about PLHIV. Due to the history of HIV in Australia and media coverage of the epidemic over time, gay men, sex workers and people

[9] Discussion paper, p32
[10] (2003) 217 CLR 92
[11] [2018] 1 Qd R 289
[12] HIV, viral hepatitis and sexually transmissible infections in Australia, Annual surveillance report 2018 https://kirby.unsw.edu.au/sites/default/files/kirby/report/KI_Annual-Surveillance-Report-2018.pdf

who inject drugs continue to face stigmatising messaging about HIV. Our organisations have witnessed how this messaging has impacted both PLHIV and LGBTQI communities. Take for example the matter of *Menzies v Owen*[13] where vilifying statements made about homosexual communities were closely linked with HIV/AIDS.

Question 11 – Terminology

Our organisations support a change to the terminology used under the Act and by the QHRC. We agree with the QHRC's Discussion Paper that terms such as 'complaint' and 'complainant' have negative connotations and may deter people from engaging in the conciliation process. PLHIV that 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 QPP's Community Advisory Group and board 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 QHRC.

With regard to the term 'conciliation' the Community Advisory Group and board noted that the term could seem intimidating but is a term that is generally well understood with other state agencies and organisations using this term. They noted that terms such as 'dispute resolution' and 'conflict resolution' implied that the process is aggressive and argumentative.

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

Question 16 – Organisation complaints

As organisations that represent the interests of PLHIV, community organisations should be able to bring a complaint to the QHRC and the Queensland Civil and Administrative Tribunal (QCAT) in relation to discrimination and sexual harassment complaints, as well as vilification. We believe that organisations such as QPP and NAPWHA are in the best position to represent their client base in matters that their clients do not feel comfortable participating in.

Fear of further disclosure of a person's HIV status and the possibility of being subjected to further stigmatising and discriminatory actions acts as a significant barrier to a PLHIV lodging a complaint. Allowing organisations that represent PLHIV to make a complaint on behalf of a PLHIV will assist in mitigating this concern.

[13] [2014] QCAT 661

Furthermore, organisations that wish to represent persons that have been discriminated against often wish to do so where there is a power imbalance between the complainant and respondent. Allowing organisations to make an application on behalf of a named person or persons, with their consent, can provide a greater balance of power between the complainant and respondent. Organisations are also best placed to advocate through this process for systemic changes and work with the respondent in developing best practices for their organisation.

If, during the complaint process, a complainant wishes to participate in some or all of the proceedings with support from the organisation, provisions should allow for the complainant to be able to do so.

Question 21 – Positive duty

We strongly support the introduction of a positive duty for organisations to take reasonable and proportionate measures to eliminate discrimination and sexual harassment, as well as vilification. As acknowledged in the discussion paper, current mechanisms are reactive to acts of discrimination and sexual harassment through the complaints process. While this is an important and necessary function of the Commission, we believe that the role of the Commission should be extended to mitigate factors that allow for discriminatory and sexually harassing behaviour within organisations.

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 (e.g. employment, healthcare).

Current Work Health and Safety (WHS) legislation nationally and in Queensland 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[14], 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 duty within the Act will provide an opportunity for employers and service providers to educate themselves about impairment discrimination within their organisations. We believe that this obligation should be reasonable and proportionate to each organisation taking into similar considerations found in Victoria's Equal Opportunity

[14] *Work Health and Safety Act 2011* (Qld) s 17,

Act. This duty should also require the QHRC to take on an educational role so that organisations understand their obligations under such a duty.

If a positive duty were to be included in the Act, our organisations believe that certain organisations should 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 impact on PLHIV who face discrimination in these settings, particularly on their physical and mental health.

Question 22 – A regulatory approach

The ability for the QHRC to implement the regulatory hierarchy briefly outlined in the Discussion Paper should be introduced into the Act. As we have previously noted, while the current legislative framework can be effective in reacting to acts of discrimination, in order address systemic issues, a preventative framework should be introduced.

An example where this framework may assist is where employers 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 (e.g. healthcare workers performing exposure prone procedures). While our organisations 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.

We acknowledge that under section 124 of the Act, that a person 'must not ask another person, whether orally or in writing, to supply information on which unlawful discrimination might be based.' Due to WHS requirements above, employers may try to justify these lines of questioning stating that it is necessary to ensure the health and safety of the employee and their staff. A reactive framework is not suitable in addressing this issue as it is difficult to establish that an employer has discriminated against PLHIV through the line of questioning. PLHIV may simply choose not to apply for certain jobs if they are aware a pre-employment medical check would be required due to the stress the process can create, and the fear that such information might later be inadvertently disclosed.

Unnecessary disclosure in healthcare settings can also create the potential of discrimination against PLHIV. Some health care providers 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, our organisations 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.

The proactive regulatory framework outlined in the Discussion Paper would be best suited to deal with these types of issues. Education, research and recommendations powers would be an effective measure in educating employers on appropriate questioning during pre-employment checks. These powers should also provide the QHRC with an opportunity to engage with relevant community organisations who represent people with an attribute and/or combined attributes when developing recommendations, guidelines or undertaking own motion inquiries.

While we have outlined one example where regulatory powers would provide greater justice for PLHIV, this could be extended to a range of employers and service providers. This could include insurance where PLHIV continue to struggle to find coverage for Total and Permanent Disability, Income Protection and Life Insurance despite the continuing medical advancements in HIV treatment. Under current legislation, while insurers are only exempt from discrimination legislation where their decision is based on reasonable actuarial or statistical data, obtaining this data is difficult without furthering a complaint past the QHRC.[15]

We submit that the Act should provide mechanisms for PLHIV who have been the subject of such a decision to easily access the reasons for such a decision, the evidence upon which the decision was based and be given an opportunity to be heard in challenges to these decisions.

The regulatory framework could also assist in educating health care settings and aged care settings in their policy development to reduce the negative health impacts of stigma and discrimination on PLHIV.

Question 23 – Tribunals

Although open justice is an important principle it is important to balance this principle with the right to privacy of PLHIV. The disclosure of ones HIV status in a Tribunal setting can place them at risk of violence, stigma, harassment and further discrimination, particularly if they live in rural or remote settings. Current provisions under the act and the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* allow the tribunal to make an order that a hearing be private, and/or an order prohibiting the publication of information that may enable a person to be identified.

Stigma is widely recognised as the most significant barrier to an effective HIV response in Australia and the development of an enabling legal environment for PLHIV. Granting of automatic suppression for all matters before the tribunal which expose the HIV status of any person is necessary to prevent prejudice to the proper administration of justice. For example, in *'E' v Australian Red Cross Society*[16], orders of non-publication and de-

[15] *Anti-Discrimination Act 1991* (Qld) s 74(a)
[16] (1991) 27 FCR 310

identification were sought on the basis of the stigma attached to PLHIV. The orders were granted, and following this, a further 42 applicants came forward to make complaints.

The automatic suppression of the identity of parties to tribunal proceedings where their HIV status is a material factor is consistent with the existing provisions in the *Queensland Civil and Administrative Tribunal Act 2009 (Qld).*[17] Automatic suppression in these circumstances is in the public interests as it assists governments work towards a common goal of ending HIV transmission.

Question 25 – Grounds of discrimination

In our discussion with the QPP's Community Advisory Group and board, neither the term impairment nor disability was deemed appropriate for PLHIV. The term 'disability' in particular was found to be very stigmatising. 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. The group noted that the term 'disability' was only appropriate where co-morbidities may cause a person to deem themselves as 'disabled.'

Terms that are more appropriate for PLHIV include: 'a person living with HIV'; 'a person living with a Blood Borne Virus (BBV)'; and 'a person living with a chronic health condition.'

We recommend that if the term 'impairment' is replaced with 'disability' that HIV be categorised under a separate attribute such as those recommended above. Alternatively, if the term 'impairment' is to remain, that the definition of impairment includes 'a person living with HIV' or 'a person living with a BBV'.

We also support the inclusion of a specific reference within the 'impairment' attribute to cover people who experience addiction to substances. As the discussion paper notes, further clarity is required as the issue of whether it is currently covered by the act has not been considered by a court or tribunal in Queensland. Outside of anti-discrimination legislation, federal legislation such as the *Social Security Act 1991 (Cth)* recognises substance addiction as an impairment in the 'Tables for the Assessment of Work-related Impairment for Disability Support Pension.' To remove any doubt about the act covering discrimination against people with a substance addiction, we recommend it's inclusion under the protected attribute of 'impairment.'

Question 26 – Gender identity

We support the recommendation of Intersex Human Rights Australia (IHRA) found at section 4.4 of their submissions. The definition should be amended and in line with the Yogyakarta Principles.

[17] Section 66 (2)(d) and (e)

Question 27 – Sexuality

We support the recommendations of the Queensland Council for LGBTI Health submission relevant to this section.

Question 28 – Lawful sexual activity

We support the submissions of Respect QLD and their recommendations to ensure that all sex workers are protected under the act, with clearly defined attributes that cover both sex workers status and engagement in sex work. Protections for sex workers against discrimination, particularly in health care settings, is essential to Australia's world leading response to HIV.

Question 30 – Specific attributes

We support the inclusion of protections against discrimination on the grounds of irrelevant criminal record, spent criminal record and expunged homosexual convictions.

Certain 'risk factors' such as identifying as LGBTQI+, having been victimised due to a certain attribute or stigmatized and discriminated against can lead people, specifically young LGBTQI+ people to be involved in risk-taking behaviours and '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.'[18]

Discrimination in employment settings can be a particular issue for people who identify as having one or more of these attributes. Irrelevant criminal records, such as one-off minor drug possession charges, can hinder people's ability to enter the workforce, particularly young people. It can also impact future employment prospects when attempting to seek a higher position with a different organisation.

Employment is important to a lot of people and can provide a better standard of living due to financial and mental health advantages. 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.

Expunged homosexual convictions remains a burden on many people in the LGBTQI+ communities and their families. Although this information may not be accessible through an employment police check, concerns remain about the possibility of being discriminated against on this ground. 84% of respondents in the survey conducted by QPP and the Queensland Council for LGBTI Health agreed that expunged homosexual convictions should be protected under the act.

[18] Dwyer, A. 'Policing Lesbian, Gay, Bisexual and Transgender Young People: a Gap in the Research Literature' (2011) *Current Issues in Criminal Justice,* Volume 22(3), p 419

We note the complicated history of over-policing, surveillance, persecution and prosecution of the communities we work with by the State. In particular we note that in the past homosexual people in Queensland were unjustly convicted of criminal offences and imprisoned simply for being themselves. This dark history means that it is important that the Act specifically prohibits discrimination on the basis of irrelevant criminal records or expunged homosexual convictions. Further, all the evidence shows that the best protection against recidivism is rapid and supportive reintegration into society. Therefore we also submit that the Act should prohibit discrimination based on spent criminal records or any criminal record that is not directly relevant to, say, the employment sought.

Question 36 – Sex characteristics

We fully support the recommendation of Intersex Human Rights Australia (IHRA) found at section 6.1 of their submissions.

Question 42 – Religious bodies

Religious bodies should not be permitted to discriminate when providing services on behalf of the state, particularly in the areas raised by the Discussion Paper. We are deeply concerned that an introduction of such a provision would have a detrimental impact on the physical and mental health of PLHIV, particularly where there are combined attributes (e.g. sexuality and gender identity). We are concerned that outsourcing of state services to organisations that discriminate in the delivery of services that are contracted to provide undermines value for money and reinforces the very problems of societal discrimination and exclusion that such services are often commissioned to address.

One of the guiding principles of the National Strategy is access and equity to health and community care. The National Strategy states:

> *'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'*[19]

This approach is based on a high-quality, evidence-based response to HIV and other blood borne viruses. Allowing religious bodies to discriminate against people accessing their services would undermine Australia's world leading response to HIV. Experiences of discrimination by an organisation, after disclosure of a person's HIV status, can impact future health-seeking behaviours due to the fear of further stigmatisation and discrimination.

Essential services providers, including religious organisations that provide these services, should be subject to the same overarching principal that their services should be

[19] Eighth National HIV Strategy, p. 9

accessible to all and based on need and provided in non-judgmental, supportive and understanding ways. This is particularly relevant in rural and remote communities where options for care may be limited and PLHIV are reliant on such services. Without them, PLHIV may be required to undertake significant travel to other surrounding facilities incurring expenses that many on low incomes may not be able to afford.

Question 44 – Work exemptions

Our organisations do not support the inclusion of the exemption under section 25 of the Act for educational institutions or other bodies established for religious purposes. While the specific provision does not authorise employers to seek information from an employee on which unlawful discrimination might be based, disclosure by the employee may still result in discrimination, undermining the very principle of the Act.

Under the current provision, allowing religious bodies to discriminate against employees will further entrench institutionalised discrimination against marginalised communities including people who identify as LGBTQI+ and women. The current approach in Tasmanian discrimination legislation should be adopted, whereby religious institutions cannot discriminate on any ground except for religious belief, affiliation, or activity in the area of employment where the 'observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.'[20] This approach recognises the diversity within religious communities in Australia and provides the employer with an opportunity to reflect this diversity, while minimising the potential for unjust discrimination in relation to positions that require no religious belief of affiliation.

Question 45 – Working with children

We support the submissions of Respect QLD and their recommendation to remove the exemption allowing employers to discriminate on the basis of lawful sexual activity or gender identity in work involving the care or instruction of minors. As the only jurisdiction with such an exemption, we agree that the exemption is discriminatory and serves only to entrench inaccurate stereotypes. Current legislations already ensures that a risk management and screening process is undertaken to address concerns to children's safety.

Question 47 – Accommodation exemptions

We support the submissions of Respect QLD and their recommendation to repeal the exemption.

[20] *Anti-Discrimination Act 1998* (Tas)

Question 50 – Superannuation and insurance exemption

We have significant concerns with regard to how the superannuation and insurance exemption works in practice for PLHIV. Currently under the act, a service provider may discriminate on the basis of age or impairment in providing superannuation or insurance where the discrimination is 'based on reasonable actuarial or statistical data from a source on which it is reasonable for the person to rely.'[21]

We are aware of a range of different approaches undertaken by insurers when PLHIV seek cover. This can include: an instant refusal of coverage after disclosure of a person's HIV status; refusal after the disclosure of further medical information related to a person's HIV status; and increased premiums after disclosure of a person's HIV status.

While the act refers to relying on 'reasonable actuarial or statistical data,' when clients ask to see what data has been relied upon, they have been denied this request. It is therefore difficult to determine why insurance companies take vastly different approaches in their assessment of insurance for PLHIV, and how much of the data informing their decisions may now be out of date and based on health statistics that predate the introduction of advanced treatment options. It also does not allow clients or community organisations advocating on behalf of PLHIV to seek second opinions on the data to determine whether insurance companies are complying with the legislation. It is therefore impossible to hold insurers to account for their compliance with their duty to base their decisions on reasonable data.

Insurers are currently not compelled to provide the data relied upon to refuse of coverage, or during the conciliation process at the QHRC. Where insurers refuse to provide the data, clients must commence proceedings at the Queensland Civil and Administrative Tribunal to compel the insurer to produce the documents. The complexity of this process adds further weight to the arguments raised at Q16.

We recommend that the act 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. We also recommend that the QHRC be provided powers to compel insurers to provide the data for conciliation purposes.

Other issues

We commend the QHRC's in depth review of the act and the range of considerations discussed within the discussion paper. During our conversations with QPP's Community Advisory Group and a broad range of other issues were discussed and are outlined below.

[21] *Anti-Discrimination Act 1991* (Qld) s 61 and 74

Internal complaint and feedback mechanisms

PLHIV who have been discriminated against in healthcare settings have had varying experiences when attempting to deal with their matter internally. Some healthcare providers have explained their organisation complaint/feedback policy coherently and have supported PLHIV in engaging with the process. Other organisations have often simply provided a 'one-pager' explanation without offering any further support, leaving PLHIV feeling as though these organisations don't want to hear their feedback about how these issues could be dealt with in future. We recommend that any QHRC educational frameworks established under this act should provide support to essential service organisations including health-care, aged-care and disability services.

Stigmatising or discriminatory acts and policies that are dealt with internally by organisations can offer a good outcome for clients without breaking down trust between the parties. This process also allows clients to seek a positive outcome without the client being forced to repeatedly re-live the experience (seeking advice from a lawyer, completing a QHRC complaint form, tribunal hearings etc.). We recommend that the positive duty powers and regulatory powers focus their work in promoting internal feedback/complaint procedures that can provide a supportive framework for clients.

Unwanted Disclosure of HIV Status

Impacts of further disclosure of a person's HIV status can be a deterrent to PLHIV from bringing a complaint to QHRC. PLHIV are often exposed to stigmatising headlines and news articles about HIV including articles about criminal transmission of HIV, PLHIV being discriminated against and negative stereotyping of particular communities impacted by HIV. Exposure to this can cause hesitation to bring a complaint forward out of fear of their name or address being leaked. While the conciliation process is confidential, lack of trust in the other party can cause people to decide not to take a complaint further.

We acknowledge the QHRC is limited in its capabilities of protecting the privacy of complainants prior to brining a complaint. As privacy concerns acts as a major deterrence for PLHIV brining forward a complaint we recommend that the QHRC highlight the importance of the privacy of the complainant at each stage of the process.

Limitations of Current Remedies

The current definition of damages under the act includes 'the offence, embarrassment, humiliation, and intimidation suffered by the person.' Although this definition recognises some of the psychological impacts of discrimination, we recommend that damages expressly include 'psychological' damage. This is to ensure that damages of a any psychological nature, such as anxiety and/or depression, can be ordered by the Tribunal.

We also recommend that QHRC provide information to complainants on what evidence may be necessary to collect if a complaint was to proceed to the tribunal. 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 complainants to collect the necessary documentation.

We thank you once again for the opportunity to provide a submission to the QHRC. If additional information or citations in relation to this submission are required, please feel free to contact Rhys Evans at rhys@halc.org.au.

Alexandra Stratigos	Aaron Cogle	Melissa Warner
Principal Solicitor	Executive Director	CEO
HIV/AIDS Legal Centre	NAPWHA	QPP