8 July 2022

Mr Alex Greenwich, MP
Member for Sydney
Ground Floor
21 Oxford Street
Darlinghurst NSW 2010

Sent via email: sydney@parliament.nsw.gov.au

Dear Mr Greenwich,

RE: HALC Submissions to the Equality Bill

Thank you for the opportunity to make a submission to the planned Equality Bill. As an organisation with a large LGBTQI+ client base we appreciate that you have created a platform for organisations to provide input on how best to address discrimination against the LGBTQI+ community.

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

This financial year approximately 65% of our client base identify as a member of the LGBTQI+ community. Transgender, gender diverse people, gay men and other men who have sex with men have been identified as priority populations in the Eighth National HIV Strategy and law reform initiatives impacting these communities are key focus of our organisation.[1]

Our law reform work addresses barriers faced by priority populations in accessing testing and treatment for HIV and hepatitis. This includes advocating for a society where members of the LGBTQI+ community can engage in every aspect of their life equally, removing social, economic, and geographic barriers that deter members of the community from testing for HIV and hepatitis and their ability to access treatment.

These submissions will focus on areas of reform that intersect between achieving equality for LGBTQI+ communities and people living with HIV (PLHIV). Our submissions will often defer to submissions provided by other organisations, including Equality Australia, who have undertaken a comprehensive review of the *Anti-Discrimination Act 1977* (NSW) and have conducted wide consultation with LGBTQI+ organisations and communities.

We also wish to draw your attention to the need for reform beyond this private member bill. While our submissions will make specific recommendations to assist you in the development of your bill, it is important to recognise that the *Anti-Discrimination Act 1977* (NSW) (ADA) is in need of a comprehensive review. While we offer some recommendations to amend the ADA, we echo the concerns of the Public Interest Advocacy Centre and Equality Australia with the Act in its current form.

Thank you again for the opportunity to contribute to this process.

Kind Regards,

Alexandra Stratigos
Principal Solicitor

[1] Department of Health (2018) *'Eighth National HIV Strategy',* p. 18 https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/HIV-Eight-Nat-Strategy-2018-22.pdf

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1. Anti-Discrimination Act

1.1 Protected Attributes

The protected attributes currently contained in the ADA are too narrow and do not offer adequate protection to all members of the LGBTQI+ community. Currently, there are only protections on 'transgender grounds'[2] and 'on the ground of homosexuality,'[3] providing protection for only some members of the LGBTQI+ community from discrimination. To ensure protection for all LGBTQI+ people from discrimination, the ADA should include protections the grounds of:

- 'sexuality' – providing protection to not only homosexual identifying people, but also bisexual, asexual, pansexual and other sexualities; and
- 'gender diversity' – providing protection not only to people that identify as transgender, but also to people that do not identify exclusively as male or female.

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.[4] 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.[5]

HALC also supports the inclusion of additional attributes including:

- variation in sex characteristics;
- sex work;
- irrelevant medical record;
- irrelevant criminal record; and
- drug use.

We support the submissions and recommendations of Equality Australia[6] in expanding these protections to all LGBTQI+ community members and echo their concerns about the application of such amendments in the ADA in its current form due to the comparator test applied in NSW.

1.2 Language

Language is an important tool in helping tackle stigma and discrimination, and it is essential that the legislation protecting PLHIV against discrimination does not also use stigmatising language. Terms such as 'HIV-infected' reinforce the stigma and discrimination faced by PLHIV, putting the focus on a disease or illness and dehumanising the person. This can have a detrimental impact on their mental and physical health, and a person's willingness to seek HIV testing and treatment.

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[2] *Anti Discrimination Act 1977* (NSW), Part 3A
[3] Ibid, Part 4C
[4] *Kavanagh MM, Agbla SC, Joy M, et al.* 'Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response?' (2021) *BMJ Global Health;* 6:e006315.
[5] See '*U=U ASHM Guidance for Healthcare Professionals*' at https://ashm.org.au/wp-content/uploads/2022/04/Resource_ASHMuuguidancehandbookFAweb.pdf.
[6] Paragraph 2 and 9

Currently, the ADA protect 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)*.'[7] 'HIV/AIDS infected' is defined as '*infected by the Human Immunodeficiency Virus or having the medical condition known as Acquired Immunodeficiency Syndrome*.'[8] While we are pleased such protections exist in NSW, the language used within the legislation is extremely stigmatising.

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 ADA. 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.' The following sections should be amended to reflect this definition including:

- Section 49ZXA
- Section 49ZXB

1.3 Religious exemptions

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

- *'the appointment of any other person in any capacity by a body established to propagate religion'*;[9] and
- *'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.'*[10]

Our concerns for the broad application of the religious exemption 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:

> *'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.'*[11]

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

[7] *Anti Discrimination Act 1977* (NSW), s 49ZXB
[8] Ibid, s 49ZXA
[9] Ibid, s56(c).
[10] Ibid, s56(d).
[11] Eighth National HIV Strategy, p. 9.

services, including healthcare and aged-care services, should adhere to the same overarching principals.

We support the recommendations of Equality Australia regarding the amendments to section 56(c) and (d) of the ADA.[12]

1.4 People living with HIV applying for Insurance and/or Superannuation

HALC has significant concerns about how the superannuation and insurance exemption contained in the ADA works in practice for PLHIV. Under the ADA, 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 on reasonable actuarial or statistical data from a source on which it is reasonable for the person to rely*.'[13]

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 9 report found that 25% of PLHIV had experienced discrimination by insurers in the last twelve months, with approximately 11% stating that it occurs 'often' or 'always.'[14] 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'[15]

These questions not only stigmatise PLHIV but also men who have sex with men, people who use drugs and sex workers. The survey also found that only 6% of respondents living with HIV felt comfortable disclosing their HIV status.[16]

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 NCAT can insurers be compelled to provide the data.

Although we support the recommendations of the 'Worth the Risk' report that insurers provide publicly available information about HIV and insurance policies developed in consultation with HIV

[12] Paragraph 4.
[13] Ibid, s 49Q (a)(i).
[14] *Jennifer Power et al,* 'HIV Futures 9: Quality of Life Among People living with HIV in Australia' (2019) 34.
[15] *Victorian Pride Lobby*, 'Worth the Risk: LGBTIQA+ experiences with insurance providers' (2022) 16.
[16] Ibid.

organisations, reforms to the ADA may also assist this recommendation. We recommend that the ADA 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 exemption, we also recommend that Anti-Discrimination NSW be provided powers to compel insurers to provide the data for conciliation purposes. This reform is currently being considered in the Australian Capital Territory.

2. Domestic and Personal Violence

The threat of having your sexual orientation or HIV/AIDS status 'outed' by someone without your consent can be a debilitating experience. Members of the LGBTQI+ community and PLHIV can feel vulnerable during these experiences, as the decision to disclose this information is taken away. Deciding to disclose this information can be a long and difficult process and often requires people to address their own internalised stigma. The disclosure of this information can also cause security concerns for people, as they may be concerned about the reaction of the person the information is being disclosed to.

HALC is aware of situations where people have threatened to disclose a person's HIV status to their family, employers and friends. The disclosure of this information without consent should be considered a threatening and intimidating action, and an act that could amount to coercive control. There are very limited legal remedies to the threat of, or actual 'outing' of, someone and while Domestic Violence Orders (DVO's) and Apprehended Violence Orders (AVO's) may be granted in some situations, often there are other factors such as threats of physical violence or verbal abuse. It is important that our justice system recognises that the threat of 'outing' someone is an intimidating act for the purposes of the *Crimes (Domestic and Personal Violence) Act 2007*.[17]

In Queensland, an example of 'emotional or psychological abuse' found within the legislation itself includes *'threatening to disclose a person's sexual orientation to the person's friends or family without the person's consent.'*[18] To assist guide courts in their decision to make a DVO or AVO, we believe similar examples, including threatening to disclose a person's sexual orientation and/or HIV status should be included.

We also propose that the *Crimes (Domestic and Personal Violence) Regulation 2019* be amended to include a proposed standard order addressing these concerns under Schedule 1 for both an application for AVO's and DVO's. We recommend an order that states '*the defendant must not disclose or disseminate personal health information about the protected person'* and *'the defendant must not disclose or disseminate information about the protected person's sexuality'* be included in the proforma found in Schedule 1 of the Regulations. This order can be implemented by the court under section 35(1) and (2)(f) of the *Crimes (Domestic and Personal Violence) Act 2007*.

3. Public Health Act

Under section 79 of the *Public Health Act 2010* (NSW), PLHIV must take reasonable precautions against spreading HIV, or will face a penalty. Although the section applies to any notifiable disease, or scheduled medical condition, that is sexually transmissible, HALC is only aware of PLHIV charged

[17] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s16 and 19.
[18] *Domestic and Family Violence Protection Act 2012* (QLD) s 11.

with an offence under section 79 to date. For this reason, HALC is of the view that section 79 is a HIV specific provision and should be repealed.

While the change in 2017 to the *Public Health Act 2010* (NSW) no longer required PLHIV to disclose their status to sexual partners, the penalties associated with the failure to take reasonable precautions ($11,000 fine or imprisonment for six months, or both) fail to recognise that more than 90% of PLHIV in NSW and Australia more broadly, are on treatment and have an undetectable viral load posing no risk of onward transmission. People who are unaware of their HIV status pose a greater risk to onward transmission, but under the act are not required to take reasonable precautions.

Punitive penalties under the section are currently excessive and have negative implications to public health, deterring people from HIV testing. There is no evidence the application of criminal law to HIV transmission achieve public health goals.[19]

We submit that a statement of principles, similar to other jurisdictions including Queensland[20], Victoria[21], Western Australia[22] and the Australian Capital Territory[23], outlining mutual responsibility of all persons without penalties would address issues surrounding the early stages of HIV transmission and other STIs which are generally asymptomatic.

4. Mandatory Disease Testing Act

HALC strongly opposes the recent introduction of the *Mandatory Disease Testing Act 2021* (NSW), due to commence this year. The legislation further stigmatises PLHIV and other Blood-Borne Viruses (BBV's), adopting the view that they are a 'threat' to frontline workers due to their HIV or BBV status. The legislation was introduced with little to no consideration of the medical evidence provided in submissions and public hearings.

The legislation does not provide any peace of mind to frontline workers, and continues to perpetuate false information about the transmission of HIV and BBV's. The legislation will also have a disproportionate impact on communities that interact with frontline workers, including police, at a higher rate. This includes people that use drugs, homeless people, First Nations people and people with mental health conditions – all communities that often identify as LGBTQI+.

We believe that this legislation should be repealed and will continue to advocate on behalf of PLHIV for action.

5. Drug law reform

HALC supports policies and legislation that recognise drug use as a health and social issue, not a criminal one. The decriminalisation of personal drug use, possession and equipment possession, as

[19] Sexual Health, Human Rights and the Law, *World Health Organisation 2015*. Full text available at http://www.who.int/reproductivehealth/publications/sexual_health/sexual-health-human-rights-law/en/.
[20] *Public Health Act 2005* (QLD) s62.
[21] *Public Health and Wellbeing Act 2008* (Vic) s111.
[22] *Public Health Act 2016* (WA) s88.
[23] *Public Health Act 1997* (Act) s99.

well as the adequate funding of public health and social measures, allow communities to address drug-related issues in a holistic manner.

The criminalisation of personal drug use and possession fuels stigma towards people who use drugs and communities that engage in personal drug use more frequently. Current strategies, the National Drug Strategy 2017 – 2026 and the National Ice Action Strategy 2015, are heavily focused on supply and demand reduction, to the detriment of harm reduction. Funding of health and community interventions that divert people from our justice system is beneficial to the individual, to public health and the communities we serve.

Substance use remains common among gay men and gay men living with HIV and other PLHIV in NSW. HIV-positive men are disproportionately more likely to report using crystal methamphetamine compared with HIV-negative men (27.4% vs. 8.7% in 2019) and any injecting drug use (15.4% vs. 2.5%).[24] People who inject drugs are identified as key populations in the HIV National Strategy, the National Hepatitis C Strategy, the NSW HIV Strategy and NSW Hepatitis C Strategy. All four strategies recognise the need for the continuous improvement of Needle and Syringe Programs that offer sterile injecting equipment, peer support, harm reduction education and healthcare navigation.

In 2019, HALC and Positive Life NSW made submissions to the *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* that can be found on our website.[25] We urge that the recommendations from the Inquiry be implemented in full and support:

- balanced harm reduction strategies (with adequate and proportionate funding) which aim to reduce drug related harm to individuals and communities as part of a comprehensive approach to both licit and illicit drugs, supported by the National Drug Strategy, within the context of decriminalisation of personal drug use, possession and equipment possession.
- PLHIV and other affected persons being informed about BBV transmission risk, poly substance use, safe injecting practices and other harm and risk reduction strategies in a culturally appropriate way;
- 24/7 access to sterile injecting equipment, broader access to Needle and Syringe Programs (NSP's) and Medically Supervised Injecting Centres as well as NSP's in incarceration settings.
- 24/7 access to support (by trained peers) for those with problematic use; and
- access to non-stigmatising and non-discriminatory clinical services, resources, campaigns and community messaging.

6. Support of other Submissions

Ensuring equality under the law for all members of our diverse society assists in creating an enabling legal environment for those most impacted by current discriminatory and stigmatising laws and policies. Our submissions have focused on areas of immediate action, and are only a start to ensuring our laws protect PLHIV and the LGBTQI+ communities equally with others.

[24] Broady, T., Mao, L., Lee, E., Bavinton, B., Keen, P., Bambridge, C., Mackie, B., Duck, T., Cooper, C., Prestage, G., & Holt, M., 2018, 'Gay Community Periodic Survey: Sydney 2018. Sydney: Centre for Social Research in Health', UNSW Sydney, p. 5.

[25] https://halc.org.au/wp-content/uploads/2021/05/2019-Submission-into-the-Special-Commission-of-Inquiry-into-the-Drug.pdf

While our submissions have focused on areas of reform that intersect between achieving equality for LGBTQI+ communities and PLHIV, we also support the recommendations of Equality Australia and ACON in the following areas:

- access to adoption services by same-sex and unmarried couples
- transgender inclusion in sport and superannuation
- inclusive sex discrimination provisions
- medical interventions on intersex people without personal consent
- ending conversion practises; and
- legal recognition of gender.