

Our ref: RH:EH

1 March 2022

Mr Scott McDougall  
Human Rights Commissioner  
Level 20  
53 Albert Street  
Brisbane QLD 4000

**By Email:** [adareview@qhrc.qld.gov.au](mailto:adareview@qhrc.qld.gov.au)

Dear Commissioner

**Re: Review of the Anti-Discrimination Act.**

The LGBTI Legal Service Inc. ('the Service') thanks the Queensland Human Rights Commission ('QHRC') for the opportunity to make a submission to the review of the Anti-Discrimination Act 1991 (Qld) ('ADA').

The Service is a non-for-profit community legal centre that began operation on 7 July 2010 and officially launched on 1 December 2010 by former Justice of the High Court of Australia, the Hon Michael Kirby AC CMG.

The Service recognises the difficulties faced by the LGBTQIA+ community and seeks to assist the Queensland and wider Australian community in their access to justice. The Service provides legal assistance across a broad range of legal areas such as criminal law, family law, domestic violence, employment and discrimination law. The Service also has an active law reform division that seeks to advocate for LGBTQIA+ inclusion and the protection of human rights in Australia.

This submission was compiled on the homelands of the Turrbal and Yuggera People. The Service accordingly acknowledges the Turrbal and Yuggera people as the Traditional Custodians of this land and recognises their ongoing connection to land, waters and community. This submission was prepared collaboratively by the Service's staff and volunteers all with diverse backgrounds.

**The Review**

In response to the review announced on May 2021, and with reference to the discussion paper published by the QHRC on November 2021, the Service has identified several relevant considerations given our knowledge of the unique experiences of the LGBTQIA+ community and the challenges they experience in striving for equality under the current mechanism of anti-discrimination laws. For the purposes of the review, the Service has focused on matters that principally effect the LGBTQIA+ community.

The Service is dedicated to ensuring that anti-discrimination laws promote fairness, equality and are accurately representative of the community as a whole. The Service makes this submission in solidarity with many other organisations and stakeholders who are committed

to the pursuit of equal treatment and recognition of the rights of LGBTQIA+ people to feel safe in the community. Specifically, the Service wishes to endorse and acknowledge the *'Ten-point plan for a fairer Queensland'* made in alliance with other community legal centres and academics who support the equal treatment and recognition of those who are the most marginalised and vulnerable within the community.

In review of the anti-discrimination laws the Service also wishes to highlight the necessity for the QHRC and the government to recognise that discrimination can be multifaceted. The LGBTQIA+ community is a diverse group that intersects with communities from culturally and linguistically diverse backgrounds, Indigenous and First Nation peoples as well as those with disabilities and impairments and they as a unified group are more likely to be subjected to acts of hate and discrimination.

## **Discussion**

### **1. Balancing human rights with the *Anti-Discrimination Act***

The wider Australian community has recently been made aware of the difficulties of balancing human rights law with anti-discrimination legislation in the wake of the criticism of the Religious Discrimination Bill. The Service has been committed to the position that any anti-discrimination legislation must protect all members of the community equally and should be accurately balanced against any human rights considerations. This is consistent with the rights established in the *Human Rights Act 2019* (Qld) that promote fairness and reasonable limitations.<sup>1</sup>

The Australian Human Rights Commission ('AHRC'), in their reform agenda position paper on federal discrimination law, highlighted that anti-discrimination law is a key mechanism for promoting equality and protecting vulnerable or marginalised groups in Australia and outlined the parliament must do its utmost to ensure that the law in this area is fair and balanced.<sup>2</sup>

The Service agrees with the QHRC's position that anti-discrimination law must be interpreted compatibly with human rights<sup>3</sup>, and with consideration of the review moving forward the Service is of the view that this should remain a point of focus for the consideration of any amendments made to the anti-discrimination legislation.

### **2. *Modernising the list of attributes***

#### **2.1. Current definitions affecting LGBTQIA+ people**

The LGBTQIA+ community has always been diverse and inclusive of various attributes that include forms of sexuality, gender identity, sexual characterises and gender expression. The definitions in the *Anti-Discrimination Act 1991* (Qld) currently do not accurately reflect the variable and emergent aspects of the LGBTQIA+ community. Specifically

- **Sexuality**, which is defined as heterosexuality, homosexuality or bisexuality and;
- **Gender identity** in relation to a person is defined as, a person who identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or is of indeterminate sex and seeks to live as a member of a particular sex.

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<sup>1</sup> s 13, 15.

<sup>2</sup> Australian Human Rights Commission, 'Free and equal: An Australian conversation on human rights Issues Paper' (December, 2021) 35 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws> >

<sup>3</sup> Queensland Human Rights Commission, 'Review of Queensland's Anti-Discrimination Act: Discussion Paper' (November, 2021) 130 < [https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf) >

The definition of sexuality is antiquated and limited in its scope. The federal *Sex Discrimination Act 1984* (Cth) already has a more suitable definition for sexuality in comparison to the Queensland ADA, defining it as 'A person's sexual orientation towards persons of either the same sex, or a different sex, or persons of the same sex or different sex'.<sup>4</sup> The choice to use unspecific terms offers a broader protection for different sexualities or relationships that might not encompass a specific term.

The AHRC in their consultation report on sexual orientation, gender identity & intersex rights defines sexuality more expansively as 'a person's emotional or sexual attraction to another person, including, amongst other, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted'.<sup>5</sup> This definition includes more contemporary labels, but also acknowledges that attraction comprises emotional and sexual elements.

The *Public Health Act 2005* (Qld) progresses further with the following definition: 'Sexual orientation, of a person, means the person's capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than 1 gender'.<sup>6</sup>

The Service is of the view that having broader terminology in the definition not only protects people more effectively from discrimination but brings the scope of the definition into a modern reflection of society. Additionally, inserting 'or lack thereof' into the phrasing of the *Public Health Act* definition would also encapsulate the asexual spectrum.

The QHRC have noted that the definition of gender identity in Queensland incorrectly conflates trans, gender diverse and intersex status with gender identity.<sup>7</sup> These attributes additionally should be covered with their own separate inclusion into the list of attributes rather than being inaccurately and unfairly blended together (this is discussed further at 2.2).

The Service agrees with the QHRC's determination that the definition is seated in a binary gender position, and is more accurately covered by the definition in the *Public Health Act 2005* (Qld) being:

Gender identity, of a person, is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth. (2) Without limiting subsection (1), the gender identity, of a person, includes—(a) the person's personal sense of the body; and (b) if freely chosen—modification of the person's bodily appearance or functions by medical, surgical or other means; and (c) other expressions of the person's gender, including name, dress, speech and behaviour.<sup>8</sup>

In light of the existing reference points in state legislation for more appropriate definitions, the Service recommends that the review consider updating sexuality and gender identity to the examples mentioned within the *Public Health Act 2005* (Qld).

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<sup>4</sup> *Sex Discrimination Act 1984* (Cth) s 4 (definition of 'sexual orientation').

<sup>5</sup> Australian Human Rights Commission, 'Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights' (Consultation Report, 2015) 5 <[https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015\\_Web\\_Version.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf)>

<sup>6</sup> *Public Health Act 2005* (Qld) s213E.

<sup>7</sup> Queensland Human Rights Commission, 'Review of Queensland's Anti-Discrimination Act: Discussion Paper' (November, 2021) 96-97 <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf)>

<sup>8</sup> *Public Health Act 2005* (Qld) s213G.

## 2.2. Expanding the list of attributes

The Australian Bureau of Statistics in their 2020 General Social Survey estimated as many as 773,000 Australians may identify as either gay, lesbian or bisexual.<sup>9</sup> Those who identified with these attributes were also more likely to have experienced discrimination.<sup>10</sup> Additionally, considering this survey did not consider metrics such as trans, non-binary and intersex status the prevalence of the LGBTQIA+ people in the community cannot be understated. In order for people to feel more protected it is important for their identities to be acknowledged and recognised.

In 2021, the Service made a submission to the inquiry into serious vilification and hate crimes held by the Legal Affairs and Safety Committee. The Service made specific recommendations to the inquiry for the inclusion of 'sex characteristics' and 'gender expression'. The report published by the committee earlier this year recommended that the Queensland government adopt the following attributes among others into the vilification provisions; gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status.<sup>11</sup> The inclusion of separate distinctions for gender expression, sex characteristics and intersex status protects not only the way people decide to express their gender identity but the inherent qualities that people who are intersex and endosex are born with.

The Service wishes to recommend that the same attributes be added into the wider set of attributes of the ADA. This will also provide for greater consistency between the discrimination and vilification provisions and align Queensland with other states who already have similar attributes in their own discrimination law.<sup>12</sup>

Further, the Service welcomes the inclusion of expunged homosexual convictions into the list of protected attributes<sup>13</sup>, as the law used at the time was discriminatory, people who have yet to have their record expunged in Queensland should be adequately afforded protection from potential discrimination.

## 2.3. Recognition of intersectional discrimination

The Service has assisted many clients who have experienced discrimination due to their identification with one or more attributes. These cases cause difficulty in the complaints process as there is no consideration under the ADA for circumstances where there are compounding factors for why the person was exposed to discriminatory conduct.

The LGBTQIA+ community encompasses a wide variety of attributes that often intersect with each other and under the current ADA mechanism it is necessary to establish a case of discrimination on a single factor rather than a multi-faceted one. For example, a trans woman who breastfeeds or a deaf gay man who faces discrimination may have several grounds to make a complaint but must focus on a single attribute. The law ignores that it is often the combination of one or more of the attributes that is the cause for the discrimination. Anti-discrimination law in both Canada and the United Kingdom feature wording that acknowledges

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<sup>9</sup> Australian Bureau of Statistics, General Social Survey: Summary Results, Australia (Catalogue No 4159.0, 29 June 2020) < <https://www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/latest-release> >

<sup>10</sup> Ibid.

<sup>11</sup> Legal Affairs and Safety Committee, Queensland Parliament, *Report No. 22 Inquiry into serious vilification and hate crimes* (2022) 45.

<sup>12</sup> See *Anti-Discrimination Act 1998* (Tas) s 3, 16(eb); *Equal Opportunity Act 2010* (Vic) s 6(oa).

<sup>13</sup> See also *Equal Opportunity Act 2010* (Vic) s 6(pa).

that discrimination can occur on one or more grounds or on the combination of protected attributes.<sup>14</sup> This is more accurate in addressing how discrimination occurs.

In recognition of the diverse nature of the LGBTQIA+ community the Service recommends the specific inclusion and acknowledgment of intersectional discrimination into the wording of the ADA and the addition of similar wording featured in Canada or the United Kingdom.

## **2.4. Areas of activity applicable to discrimination**

Although Part 4 of the ADA contains a comprehensive list of public areas where discrimination is prohibited, the existence of a defined list requires a complainant to prove discrimination occurred in one of the defined public areas. This creates uncertainty in situations where discrimination occurs in areas not defined in the list.<sup>15</sup>

A more effective approach would be to prohibit discrimination in all areas of public life with an appropriate exception for conduct occurring in private situations. Consider the wording in the *Racial Discrimination Act 1975* (Cth) for guidance where it is unlawful for a person to do;

any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>16</sup>

Appropriate adaptation of this provision into the ADA would remove inconsistency and uncertainty about where discrimination is unlawful. A defined list of areas could still be included into the ADA, however this should be only done in the form of examples to provide clarity to the QHRC and judicial decision makers.

The Service suggests removing the defined list of public areas in the ADA and adapting the wording featured in the *Racial Discrimination Act 1975* (Cth) so as to make discrimination prohibited in all areas of public life.

## **2.5. The positive duty obligation**

Victoria is unique being the only Australian jurisdiction featuring a positive obligation on businesses to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.<sup>17</sup> In practice, commentary on the positive duty from Victoria suggests that it is mostly used as an educational tool and doesn't go very far in its purpose due to its lack of enforceability.<sup>18</sup>

The ACT in the review of their discrimination laws in 2015 made a recommendation that a positive duty obligation should be implemented along with the empowerment of the commission to monitor, investigate and enforce compliance with the obligation.<sup>19</sup> The AHRC

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<sup>14</sup> *Canadian Human Rights Act*, R.S.C 1985, c H-6, s3.1; *Equality Act 2010* (UK) s14.

<sup>15</sup> See *Bakopoulos v Greek Orthodox Parish of Mildura (Human Rights)* [2014] VCAT 323, where the area on the basis of the claim (a parish) was not in the defined list.

<sup>16</sup> s9.

<sup>17</sup> *Equal Opportunity Act 2010* (Vic) s 15.

<sup>18</sup> Dominique Allen, 'Thou shalt not discriminate: moving from a negative prohibition to a positive obligation on business to tackle discrimination' (2020) 26(1) *Australian Journal of Human Rights* 110, 120.

<sup>19</sup> ACT Law Reform Advisory Council, 'Review of the Discrimination Act 1991 (ACT) Final Report' (March, 2015) 49 <<https://justice.act.gov.au/sites/default/files/2021-01/Report%20-%20%20LRAC%20Report%20-%20Review%20of%20the%20Discrimination%20Act.pdf>>

in their *Respect@Work* report made an analogous recommendation in relation to their own powers in order to manage compliance.<sup>20</sup>

Northern Ireland goes even further in their legislation by requiring public bodies to have a plan in place to address their compliance of their positive duty where failure to meet this requirement can be addressed by the regulator.<sup>21</sup> In a similar manner to corporate and financial requirements, the duty can be measured and adapted depending on the size and nature of the business. Victoria already provides examples for how the positive duty could look practically depending on the size, resources and nature of an organisation.<sup>22</sup>

Implementing a positive duty obligation in addition to empowering the QHRC would also make it easier for complainants to receive justice and support as it does not solely rely on a complaints led process. For example, a trans employee who is in the process of their transition is being discriminated against and unsupported by their workplace could make a report to the QHRC for investigation and enforcement. This would essentially shift onus from the individual to the larger entity to prove they have met their positive duty obligations.

The Service recommends the implementation of a positive duty into the ADA along with appropriate powers for the QHRC to manage compliance with the duty. For guidance similar wording in the Irish mechanism should be considered. In management of this obligation the Service wishes to support the QHRC's proposal in their discussion paper for a stronger compliance framework as a regulator, particularly with the focus on developing enforcement mechanisms.<sup>23</sup> This would allow the QHRC to issue enforceable undertakings, compliance notices and injunctions in order to enforce the positive duty.

## **2.6. Addressing discriminatory exemptions**

### **2.6.1. Section 25: General occupational requirement**

The Service has identified several exemptions in the ADA that currently do not promote the fair and equal treatment of LGBTQIA+ people. The genuine occupational requirement exemption at section 25 of the ADA states that an employer under a religious body can impose a genuine occupational requirement for the employee to act in accordance with the employer's religious beliefs. It further lists an example stating that discrimination on this ground is appropriate for a situation such as employing a person of a particular religion to teach at a school established for students of that religion. Many LGBTQIA+ teachers and employees fear termination as it has often been the case that their identity or connection with their LGBTQIA+ status is inconsistent with certain religious beliefs or practices. Religious freedoms must be appropriately balanced with other human rights, including the rights to non-discrimination and equality.<sup>24</sup> This religious exemption in particular is far too broad and discriminatory. Therefore, the Service recommends that this exemption be removed from the genuine occupational requirement provision.

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<sup>20</sup> Australian Human Rights Commission, 'Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces' (Report, 2020) see 'Recommendation 18'.

<sup>21</sup> *Irish Human Rights and Equality Commission Act 2014* (UK) s42.

<sup>22</sup> *Equal Opportunity Act 2010* (Vic) s 15, see Examples 1 & 2.

<sup>23</sup> Queensland Human Rights Commission, 'Review of Queensland's Anti-Discrimination Act: Discussion Paper' (November, 2021) 78-87 < [https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf) >

<sup>24</sup> Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 115

### **2.6.2. Section 28: Working with children**

This section only features two attributes for the basis of the exemption, that being gender identity and lawful sexual activity. The Service agrees with the QHRC in their determination that the existence of this exemption is redundant and only continues to perpetuate an idea that trans, gender diverse or intersex people are unsuitable to work with children or pose them a potential risk to them.<sup>25</sup> This is both harmful and blatantly discriminatory. Accordingly, the Service recommends that this section be deleted from the ADA.

### **2.6.3. Section 45A: Assisted reproductive technology**

Section 45A concerns an exemption surrounding the provision of services related to assisted reproductive technology (ART) and fertility.<sup>26</sup> A person's relationship status, gender identity or sexual relationship should not be a consideration in the provision of these services. As the need for trans, intersex and gender diverse people to engage ART treatment grows, s45A only exists as a remnant of discriminatory practices and ideals around relationships and gender identity.<sup>27</sup>

The Service recommends its removal from the ADA. It is necessary for human rights law to promote systematic equality and non-discrimination and keeping outdated sections such as 45A only impact the wider purpose of the ADA in achieving equality and fairness.

### **2.6.4. Section 90: Accommodation with religious purposes**

It is always difficult in striking the correct balance between the right to practice religion and its impact on other core human rights. It is the position of the Service that Section 90 goes too far in its operation. It is given a wide exemption to discriminate against all attributes. Like the general occupational requirement exemption, this religious based exemption is not in cohesion with the rights of equality and non-discrimination.<sup>28</sup> The wording of this provision would suggest it is appropriate for accommodation established for religious purposes could deny services to any person regardless of attribute. The Service is against any religious exemption in the ADA that would put preferential treatment over others in accessing a service like accommodation and therefore recommends its deletion from the ADA.

### **2.6.5. Stakeholder engagement for grant of exemptions**

The ADA provides for the grant of exemptions on application to a Tribunal.<sup>29</sup> In the case of *Re The Women's Legal Service Inc*<sup>30</sup> the Women's Legal Service (WLS) was granted an exemption for their hiring practices to discriminate on the basis of gender and sex. This was to ensure that their clients who are often victims of domestic or sexual violence feel they are in a safe space. It was their contention that it was crucial that their staff need to present and identify as women.<sup>31</sup>

The Service is of the view that exemption decisions that may have an impact on a particular identified group of people such as the above decision would benefit from the requirement to

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<sup>25</sup> Queensland Human Rights Commission, 'Review of Queensland's Anti-Discrimination Act: Discussion Paper' (November, 2021) 19 < [https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0004/36706/Review-of-Queenslands-Anti-Discrimination-Act-Discussion-Paper-amended-21.12.2021.pdf) >

<sup>26</sup> *Anti-Discrimination Act 1991 (Qld)*

<sup>27</sup> See *JM v QFG* [1998] QCA 228.

<sup>28</sup> Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 115.

<sup>29</sup> *Anti-Discrimination Act 1991 (Qld)* s113.

<sup>30</sup> [2019] QIRC 060.

<sup>31</sup> *Ibid* [11].

engage with a relevant stakeholder group or organisation for an independent report. Ideally this could be facilitated through the QHRC who can perform investigatory measures and make recommendations on the basis of consultations with an appropriate organisation. This would provide greater clarity to exemption decisions made by Tribunals via the ADA in addition to providing preventative measures against discrimination.

The Service recommends that in the process of exemption applications for a particular attribute, a requirement for proper consultation with a relevant stakeholder group or organisation facilitated by the QHRC be added into the ADA.

## **2.7. The use of the comparator test**

Establishing direct discrimination under the ADA currently requires the use of the comparator test, which as follows: 'Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different'.<sup>32</sup>

This reliance on the experience of another individual which is usually a hypothetical comparator without the attribute is problematic and often leads to confusing and inconsistent results in judicial analysis.<sup>33</sup> Difficulties also arise from the use of the comparator test when there are questions around the experience of discrimination concerning one or more attributes.

ACT and Victoria differ to other jurisdictions through the use of the 'unfavourable treatment test' where the impact of the discriminatory conduct on the complainant is considered.<sup>34</sup> Regarding the test, the *Prezzi*<sup>35</sup> decision from the ACT stated that:

It does not require a comparison between the treatment of a person who has the relevant attribute with a person who lacks that treatment, but simply a consideration of whether the person has been treated unfavourably because of the relevant attribute.

Further In *Slattery v Manningham CC (Human Rights)*<sup>36</sup> it was stated that the concept of 'unfavourable' requires simply 'an analysis of the impact of treatment on the person complaining of it'.<sup>37</sup>

Although there are still elements of comparison in the unfavourable treatment test, it does not require creation of hypothetical comparators. The Service recommends the removal of the comparator test and the adoption of the unfavourable treatment test. Using the unfavourable treatment test will foster more accurate decisions and will put the focus on the impact that discrimination has on the individual.

## **2.8. Improving the role and functions of the QHRC.**

The Service has identified that with the difficulty and complexity surrounding the administration of anti-discrimination and human rights law, updating and modernising the ADA must also occur with the improvement of the role and functions of the QHRC. This would allow the commission to take a more proactive role in addressing contraventions of the act and improve their ability to engage with the community in education around discrimination. The QHRC currently takes a predominantly neutral investigatory role whereby the process is engaged by

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<sup>32</sup> *Anti-Discrimination Act 1991 (Qld)* s10.

<sup>33</sup> See *Woodforth v State of Queensland* [2017] QCA 100

<sup>34</sup> *Equal Opportunity Act 2010* (Vic) s8; *Discrimination Act 1991* (ACT) s8(2).

<sup>35</sup> *Re Prezzi v Discrimination Commissioner and Quest Group* (1996) 39 ALD 729.

<sup>36</sup> [2013] VCAT 1869.

<sup>37</sup> *Ibid* [53].



the complainant. What follows involves an investigation stage proceeding to a conciliation stage if required and potentially the necessity of a tribunal application if it is not resolved in conciliation.

From the experience of assisting clients with the QHRC complaints process, the Service is of the view that the Commission should adopt an enforcement role similar to federal bodies such as the Australian Competition and Consumer Commission ('ACCC'), Australian Securities and Investments Commission ('ASIC') or the Fair Work Ombudsman ('FWO'). The FWO has the power to investigate, issue compliance notices and commence litigation.<sup>38</sup> The ACCC via their section 155 powers can require a party to provide information, produce documents or attend an examination.<sup>39</sup> This isn't far off from existing powers held by a state commission as the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') already have a provision affording them the power to compel a person to produce information or documents.<sup>40</sup> Similar powers held by the ACCC or FWO can be implemented thereby empowering the QHRC with a stronger enforcement model. It is the view of the Service that It is important that complainants feel that their concerns are being appropriately acknowledged and investigated. Empowering the QHRC in this way alleviates some of the difficulties that arise from the individual complainant model as the commission could gather information more effectively from respondents in addition to enforcing engagement with the conciliation process. For more serious breaches the commission could also pursue litigation out of public interest or to address significant contraventions of the ADA. In cohesion with the above recommendations, the commission should see adequate increase in resources in order to operate and manage the introduction of new enforcement powers.

### 3. Recommendations

The following is a summary of the Service's recommendations for consideration:

<ul style="list-style-type: none"> <li>• <b>Recommendation 1:</b> The review should consider updating the definitions of 'sexuality' and 'gender identity' in the list of attributes using the <i>Public Health Act 2005</i> (Qld) as a guide.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Recommendation 2:</b> The ADA should widen the list of protected attributes to include 'gender and/or sex', 'gender expression', 'sex characteristics and/or intersex status' and 'expunged homosexual convictions'.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Recommendation 3:</b> The ADA should have wording acknowledging intersectional discrimination and should include wording similar to Canadian the Human Rights Act 1985 s3.1 and the Equality Act 2010 (UK) s14 that allows complaints to be made on one or more attributes to be considered.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Recommendation 4:</b> Having a defined list of public areas should be removed from the ADA. Wording featured in the Racial Discrimination Act 1975 (Cth) should be adopt so as to make discrimination prohibited in all areas of public life.</li> </ul>

<sup>38</sup> *Fair Work Act 2009* (Cth) ss 706-17.

<sup>39</sup> *Competition and Consumer Act 2010* (Cth)

<sup>40</sup> *Equal Opportunity Act 2010* (Vic) s134.

<ul style="list-style-type: none"> <li>• <b>Recommendation 6:</b> Sections 25, 28, 45A and 90 should be removed from the ADA.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Recommendation 7:</b> Establish a mechanism facilitated by the QHRC for appropriate stakeholder engagement in exemption applications.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Recommendation 8:</b> The use of the comparator test should be discontinued in favour of the unfavourable treatment test.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Recommendation 9:</b> The QHRC should be empowered via stronger enforcement mechanisms, this would include the power to investigate, issue compliance notices commence litigation against significant contraveners, or out of public interest.</li> </ul>

## Our Clients

The Service continues to assist clients who have been the target of hateful and discriminatory conduct. The Service will continue to advocate for changes to the law that promote principles of equality, fairness and non-discrimination.

This submission was prepared by Ellie Hansson with assistance of volunteers and staff within the Service.

We consent to this submissions being made available to the public.

Please, if you have any queries regarding the submissions outlined in this correspondence we encourage you to contact our office.

Yours faithfully



## Renea Hart

Director and Principal Solicitor | LGBTI Legal Service Inc.

T (07) 3124 7160 | E renea.hart@lgbtilegalservice.org