Joint Submissions to the Review of the Anti-Discrimination Act 1977 (NSW): First Consultation Paper, 'Unlawful Conduct'

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29 August 2025

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To the New South Wales Law Reform Commission,

Joint Submissions to the Review of the *Anti-Discrimination Act 1977* (NSW): First Consultation Paper, 'Unlawful Conduct'

Thank you for the opportunity to contribute to the review of the *Anti-Discrimination Act 1977* (NSW) ('the ADA'). We are a consortium of organisations representing people living with and affected by HIV and other bloodborne viruses (BBVs).

Together, we have reviewed the NSW Law Reform Commission's First Consultation Paper, 'Unlawful Conduct', including the Consultation Questions. Our submission focuses on the aspects of the ADA that most significantly impact the communities we serve.

ACON is NSW's leading health organisation specialising in community health, inclusion and HIV responses for people of diverse sexualities and genders.

The Bobby Goldsmith Foundation (BGF) is Australia's longest-running HIV charity, and provides practical, emotional and financial support to people living with HIV in New South Wales and South Australia.

The 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 and undertake community legal education and law reform activity in areas relating to HIV and hepatitis.

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 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.

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

The Anti-Discrimination Act 1977 (NSW) has been a vital piece of legislation in protecting and empowering the community of people living with HIV. However, there are areas where, in our view, reform is long overdue. We thank you for the opportunity to provide comments, and we are hopeful that meaningful reform will strengthen the protections available for those living with HIV who continue to experience stigma and discrimination.

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Additional Topics beyond the Consultation Questions

Before turning to the Consultation Questions, we consider it important to first discuss certain provisions of the ADA that fall outside the scope of the current questions.

Structure

The current structure of the ADA is outdated and confusing. The ADA establishes separate Parts for different attributes, and each Part sets out its own areas where discrimination is prohibited and its own exceptions. While many provisions are repetitive or similar across Parts, subtle differences and inconsistencies make the ADA difficult to interpret and apply. The incremental addition of new Parts over time has compounded these issues, leading to a fragmented and idiosyncratic framework, reflected even in the ADA's disjointed numbering system.

Recommendation: The ADA should adopt a structure consistent with modern anti-discrimination laws in almost all other Australian jurisdictions, that is, a structure to establish one list of protected attributes, and then set out the areas where discrimination is prohibited and the exceptions.

Language

We urge the NSW Government to remove stigmatising language from the ADA. Language is an important tool in helping tackle stigma and discrimination, and it is essential that the legislation protecting people against discrimination does not itself use stigmatising language.

a. 'HIV-infected'

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

The ADA is now out-of-step with other NSW laws with this stigmatising language. Amendments passed NSW Parliament in late-2024 replacing the term 'HIV-infected' with 'person living with HIV/AIDS' in several key NSW laws.[1]

Currently, the ADA protects people living with HIV against vilification on the ground 'that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected).'[2] 'HIV/AIDS infected' is defined as 'infected by

[1] These laws are: the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), *Drug Misuse and Trafficking Act 1985* (NSW), and *Workers Compensation Act 1987* (NSW).
[2] *Anti-Discrimination Act 1977* (NSW), s 49ZXB.

the Human Immunodeficiency Virus or having the medical condition known as Acquired Immunodeficiency Syndrome.'[3] While we are pleased such protections exist in NSW, the language used within the legislation is extremely stigmatising.

Vilification matters that are heard by Anti-Discrimination NSW, the NSW Civil and Administrative Tribunal (NCAT) or NSW Courts use this language in explaining the protections provided by the ADA. Therefore, people living with HIV 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.

'Person living with HIV' is our recommended language, rather than 'person living with HIV/AIDS'. This covers everyone living with HIV, whether it has progressed to AIDS. And helps move away from interchangeable use of 'HIV' and 'AIDS' in the public sphere.

Recommendation: The term 'HIV/AIDS infected' should be replaced throughout the ADA with 'Person living with HIV', defined as 'a person living with the Human Immunodeficiency Virus.'

b. 'Complaint' and 'Complainant'

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

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

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

[3] Ibid

Consultation Questions

Chapter 3. Tests for Discrimination

Question 3.1: Direct discrimination

Could the test for direct discrimination be improved or simplified? If so, how?

Benefits of the Unfavourable Treatment Test

Currently, a person discriminated against must satisfy the 'comparator test' – prove they were, or would have been, treated differently (as in, less favourably) compared to another person without that attribute.

There are strong benefits for an 'unfavourable treatment' test, as opposed to this 'comparator test'. An 'unfavourable treatment' test focuses on the consequences of the treatment, is better suited to dealing with intersectional discrimination, and is a simpler, more appropriately focused approach. This test has been implemented in Victoria and the ACT, and laws have passed QLD Parliament introducing it.

The exercise of comparing whether someone with a protected attribute was treated less favourably than another person without that attribute can be arbitrary, confusing and unhelpful in answering the ultimate question of whether someone was discriminated against based on their protected attribute. We agree with the points made in the Review Paper regarding the difficulties of developing hypotheticals that apply to the actual context of the treatment given or proposed to be given to a person.

A lot of the complexities and debates in this area of discrimination law are highlighted in the matter of *Purvis v New South Wales.*[4] The applicant was a student whose violent behaviour was linked to his disability. The High Court decided that the appropriate comparator was a person without a disability who behaved in the same violent manner as the applicant. That is, the manifestations of the disability were ascribed to the comparator. Because the applicant was treated the same as that person (the comparator), the Court found that no unlawful discrimination occurred. This reasoning effectively disregarded the role of the disability in the treatment received.

We believe that the comparator test continues to reduce the effectiveness of the ADA. 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 (for example, the stereotype that a male living with HIV is homosexual).

Recommendation: Replace the comparator test for direct discrimination with the unfavourable treatment test.

[4] *Purvis v New South Wales* (2003) 217 CLR 92.

Causation

We support the suggestion in the Review Paper to adopt the Victorian approach whereby it is made explicit that it is not relevant whether the respondent was aware of the discrimination or believed the treatment to be unfavourable.[5] Discrimination against people living with HIV is often based in stigma, misinformation, or unconscious bias. By shifting the focus from the discriminator's perceptions or motivations to the impact on the person who experienced the discrimination, the ADA can ensure that harmful conduct is addressed regardless of whether it stems from ignorance, fear or prejudice. It also ensures discriminatory conduct is addressed regardless of subjective awareness or situational justifications.

Recommendation: Make explicit that the Respondent's subjective awareness of the discrimination or opinion about whether the treatment was unfavourable is not relevant.

Question 3.2: The comparative disproportionate impact test

Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

We agree with the concerns raised in the Review Paper about the *comparative* disproportionate impact test for indirect discrimination.[6] Whilst people living with HIV are a population where an appropriate comparator group is not typically difficult to identify, the test remains unworkable in many situations, requiring unnecessarily technical or complex evidence and legal argument.

The *Discrimination Act 1991* (ACT) provides a simpler alternative, under which:

> *…a person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes.*[7]

Recommendation: Replace the comparative disproportionate impact test with a disadvantage test.

[5] See NSW Law Reform Commission (NSWLRC), Review of the Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct, (Report, May 2025) ('Review Paper') p. 26 [3.32]-[3.33], and sections 8(2)(a) and 10 of the *Equal Opportunity Act 2010* (Vic).
[6] See Review Paper (n 5) p. 28.
[7] *Anti-Discrimination Act 1991* (ACT) s 8(3).

Question 3.4: Indirect discrimination and the reasonableness standard

(1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?

If the reasonableness standard were replaced with a test that considers whether a condition or requirement is 'reasonable and proportionate,' the framework for assessing indirect discrimination in NSW would be strengthened. A 'reasonable and proportionate' test introduces a balancing exercise that provides clearer guidance than evaluating reasonableness alone. It allows for a more nuanced inquiry into the nature and extent of the impact on the affected group, and whether that impact is justified by a legitimate aim. This includes weighing the necessity and effectiveness of the condition against the harm it may cause.

For people living with HIV, policies that appear neutral, such as mandatory disclosure of bloodborne virus status on employment medical forms, can have a disproportionate impact, even if they might be considered 'reasonable' in a general sense. Introducing proportionality into the test would allow for consideration of whether such policies are likely to achieve their intended aim. For example, mandatory HIV disclosure is unlikely to deliver meaningful workplace health and safety benefits, given existing requirements to apply standard precautions universally, regardless of known HIV status, and from our experience, can cause significant unnecessary distress to people with HIV.

Recommendation: The test for indirect discrimination should consider how "reasonable and proportionate" the condition or requirement is, not just whether it was reasonable.

(2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

The existing 'reasonableness' test under NSW law is undefined and open to subjective interpretation, which can lead to inconsistent outcomes and insufficient protection for marginalised groups. This ambiguity is particularly problematic in the context of HIV-related stigma, where inaccurate assumptions about risk and safety can influence what is deemed 'reasonable' without proper scrutiny.

Outlining factors to be considered in determining reasonableness would:

- Promote predictable outcomes, including consistency with other jurisdictions (e.g. Victoria and the ACT).[8]
- Encourage duty-holders to proactively consider less discriminatory alternatives.
- Support fairer outcomes by requiring consideration of both the feasibility of overcoming the disadvantage for the affected person and the feasibility of

[8] *Equal Opportunity Act 2010* (Vic) s 9(3).

implementing alternatives, shifting the burden of problem-solving from the individual alone to both parties.
- Encourage consultation with affected communities.
- Provide clearer guidance to applicants, representatives, courts and tribunals, improving the accessibility and transparency of the ADA.

Recommendation: In evaluating how 'reasonable and proportionate' or, if no change is made to the standard, 'reasonable', any allegedly discriminatory conditions or requirements are, the test for indirect discrimination should require consideration of:

- The nature and extent of the disadvantage caused;
- The feasibility of overcoming or mitigating the disadvantage;
- The proportionately of the disadvantage relative to the objective of the condition or requirement;
- Whether the alleged discriminating party considered alternatives to the condition or requirement which is causing a disadvantage, either through consultation or on their own initiative;
- The feasibility and cost of alternative conditions or requirements;
- The financial circumstances of the duty-holder imposing, or proposing to impose, the condition or requirement; and
- Whether reasonable adjustments or reasonable accommodations could reduce the disadvantage.

Question 3.6: Proving indirect discrimination

(1) Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects?

Any approach which does not place the entire burden of proving direct discrimination on the applicant would be an improvement to the current test. The ADA should be amended to require respondents to prove that their conduct was not discriminatory, once the applicant has established a prima facie case of direct discrimination.

Queensland's approach offers useful guidance: the respondent will be taken to have unlawfully discriminated against the complainant if the complainant proves facts from which it could be decided, without any other explanation, that the respondent unlawfully discriminated against them.[9]

The difficulties of applicants proving all aspects of direct discrimination are well-established and have been acknowledged by the Federal Parliament. In the *Work Health and Safety Act 2011* (Cth), the prosecution must:

[9] *Anti-Discrimination Act 1991* (QLD) s 204.

- Prove that discriminatory conduct was engaged in,
- Prove that a circumstance existed at the time discriminatory conduct was engaged in, and
- Adduce evidence that the conduct was engaged in for a prohibited reason.

Once these standards have been met, discrimination is presumed to be the reason for the conduct, meaning the defendant then has the burden of proving their conduct was not discriminatory on the balance of probabilities.[10] Federal Parliament acknowledged in the explanatory memorandum for this Bill that in determining the reasons for allegedly discriminatory conduct, the persons conducting a business or undertaking (PCBUs) are in a stronger position to show that their action or omission was reasonable, and that it would be

> *'onerous to require the plaintiff in civil proceedings to prove that a refusal or failure to comply with... was unreasonable as they may not be privy to the reasons for that refusal or failure to comply.'*[11]

We agree with this reasoning, and believe it applies more broadly beyond business-owners or employers. We find it onerous to require our clients to prove the respondent's reasoning, especially when they are not privy to the respondent's decision-making processes. Requiring applicants to produce evidence of the respondent's intent or justification (and therefore that the less favourable conduct was because of a protected attribute) can place an unfair burden on individuals who have already experienced a disadvantage.

For example, HALC settled a discrimination matter where a homosexual person living with HIV and serious mental health concerns was removed from a venue. The client alleged this occurred because of his sexuality, as he claimed homophobic slurs were used when removing him from the venue. Yet, even after a settlement agreement was reached, the respondent maintained he was not discriminated against and only removed due to intoxication. This example illustrates the difficulty of proving discriminatory intent, even when the circumstances strongly suggest that a protected attribute played a role in the treatment.

Recommendation: An applicant should only have to establish a prima facie case of direct discrimination. The burden of proof should then shift to the respondent to prove, on the balance of probabilities, that their conduct was not discriminatory or was otherwise lawful.

[10] Ibid s 110.
[11] Explanatory Memorandum, *Work Health and Safety Bill 2011* (Cth) [408].

(2) Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

In proving indirect discrimination, the burden is on the applicant/complainant to show that the requirement is 'not reasonable having regard to the circumstances of the case'.[12] This contrasts anti-discrimination legislation in other jurisdictions, which generally places the onus on the respondent to allege that the requirements imposed were reasonable.[13]

The ADA should similarly require respondents to prove the reasonableness of the requirement, condition or practice they have imposed or intend to impose. This approach aligns with the burden of proof adopted in Victoria,[14] in response to criticism that the complaints-based system focused too heavily on the content of the complainant's claim and not as much on the defendant's action or omission.[15]

We agree with the reasoning provided by Victorian and Commonwealth legislators. People alleging that they were discriminated against are often not fully aware of the legal technicalities involving discrimination and find it difficult to prove. They are required to prove matters relating to the 'state of mind of the respondent', which they often have no way of knowing about.[16] The respondent is in a superior position to make submissions as to the justifications for a requirement, condition or practice. And since the respondent's actions may be discriminatory, it is more important that they are aware of the legal technicalities around discrimination than the complainant.

Recommendation: Respondents should have to prove reasonableness of the requirement or condition that they have imposed or propose to impose.

[12] *Anti-Discrimination Act 1977* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b), 39(1)(b) 49B(1)(b) 49T(1)(b) 49ZG(1)(b), 49ZYA(1)(b).
[13] See eg, *Age Discrimination Act 2004* (Cth) s 15(2); *Disability Discrimination Act 1992* (Cth) s 6(4); *Sex Discrimination Act 1984* (Cth) s 7C; *Discrimination Act 1991* (ACT) s 70; *Equal Opportunity Act 2010* (Vic) s 9(2); *Anti-Discrimination Act 1991* (Qld) s 205.
[14] *Equal Opportunity Act 2010* (Vic) s 9(2).
[15] Explanatory Memorandum, *Equal Opportunity Bill 2010* (Vic) 16.
[16] Justice and Equity Centre, *Preliminary Submission to the NSW Law Reform Commission: Review of the Anti-Discrimination Act 1977 (NSW)* (Submission, Justice and Equity Centre, 2024) https://jec.org.au/resources/preliminary-submission-to-the-nsw-law-reform-commission-review-of-the-anti-discrimination-act-1977-nsw/; See, generally Allen, Dominique 'Reducing the burden of proving discrimination in Australia', *Sydney Law Review* 31 (2009): 579

Question 3.7: Direct and indirect discrimination

(1) How should the relationship between different types of discrimination be recognised?

The ADA's rigid distinction between direct and indirect discrimination can be impractical and, in some cases, unhelpful. Applicants can experience conduct which constitutes both forms of discrimination or might allege one form of discrimination where the other may be more applicable or strengthen their case.

For example, people living with HIV might experience both forms of discrimination at a healthcare clinic:

- Direct discrimination: denied appropriate healthcare treatment due to HIV status, and
- Indirect discrimination: the healthcare clinic has a policy requiring disclosure of any infectious conditions to non-clinical staff, a policy that applies to everyone, but disproportionately affects people living with HIV who might fear for their privacy or fear stigma.

Recommendation: Acknowledge the overlap between direct and indirect discrimination through a flexible definition of discrimination, similar to that used in the *Discrimination Act 1991* (ACT), which states that discrimination occurs 'when a person discriminates either directly or indirectly, or both, against someone else' (s 8(1)).

(2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

If the above recommendation of acknowledging the potential for overlap between the forms of discrimination is adopted, we see no need to remove the distinction. In fact, as it helps identify different forms of harm, the distinction may be useful in circumstances where individuals or duty-holders might not recognise a condition or requirement as discrimination.

Examples of indirect discrimination experienced by people living with HIV, which might not otherwise be captured by direct discrimination, or in another reworked definition are:

- **Pre-employment health screenings** - If an employer requires mandatory disclosure of all chronic conditions, including HIV, and uses this to screen out candidates regardless of actual risk, it could disadvantage HIV-positive applicants.
- **Employment requirements to travel -** Some roles require international travel, but certain countries restrict entry for people living with HIV. Employers not

accommodating this limitation (e.g., by assigning different destinations) may be indirectly discriminating against an employee with HIV.

- **Rigid workplace attendance policies –** that fail to support any people living with HIV needing flexibility for treatment or medical appointments.

Recommendation: The distinction between direct and indirect discrimination should be retained, as long as its overlap is clarified.

Question 3.8: Intersectional discrimination

(1) Should the ADA protect against intersectional discrimination? Why or why not?

(2) If so, how should this be achieved?

The ADA should protect against intersectional discrimination, recognising the practical reality that discrimination can be based on a combination of protected attributes, rather than just one in isolation. In the ACT, discrimination is now defined as treating someone unfavourably because the person has one or more protected attributes.[17] NSW should adopt a comparable approach.

People living with HIV can face exclusion from cultural or religious communities, or from LGBTQIA+ communities because of their HIV status. To consider protected attributes in isolation from each other is to further entrench this exclusion which perpetuates stigma and discrimination. Without recognising intersectional discrimination, there is a risk of overlooking the unique and compounded forms of discrimination that can occur, and decision-makers may be unable to consider relevant evidence relating to protected attributes other than the one formally relied upon.

Recommendation: The ADA should expressly provide that discrimination can occur on the basis of one or more attributes or a combination of attributes.

[17] *Discrimination Act 1991* (ACT) s 8(2).

Question 3.9: Intended future discrimination

Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

Capturing intended future discrimination will provide protection for the potential applicant and the opportunity to intervene to prevent discrimination where a person has indicated that they will act in a discriminatory manner against the applicant.

To ensure the provision targets genuine risks without being overly broad or impractical, the ADA could exclude future conduct that is unlikely to eventuate or could not feasibly occur.

Recommendation: The ADA should include 'intended future conduct' within the definition of discrimination.

Chapter 4. Discrimination: Protected Attributes

Question 4.2 Discrimination based on carer's responsibilities

(1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "responsibilities as a carer"?

We agree with the QHRC Report which recently outlined how a narrow definition of responsibilities as a carer that includes only immediate family does not reflect diverse contemporary family structures, cultural practices, especially for Aboriginal and Torres Strait Islander families, and contemporary family arrangements.[18]

R**ecommendation:** The current attribute of carer responsibilities should be renamed 'family, carer, or kinship responsibilities'.

Question 4.3: Disability discrimination

(3) What changes, if any, should be made to the public health exception?

Currently, it is not unlawful to discriminate against a person based on their disability if the disability is an infectious disease and the discrimination is reasonably necessary to protect public health.[19]

[18] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) ('QHRC Report').
[19] *Anti-Discrimination Act 1977* (NSW) s 49P.

While this provision may have been introduced with public safety in mind, we are concerned that it contributes to a broader legislative trend that disproportionately targets stigmatised infectious diseases, particularly HIV and hepatitis B and C.[20]

In practice, this exception risks reinforcing inaccurate stereotypes about people living with these conditions and exaggerated misconceptions about transmissibility. It implies that individuals with infectious diseases are inherently a public health risk, despite overwhelming evidence to the contrary. For example, at the end of 2023, the Kirby Institute estimates 87% of people living with HIV in Australia had a suppressed viral load which means HIV cannot be transmitted.[21] Similarly, hepatitis C is now curable in most cases, and hepatitis B is manageable with treatment.

Importantly, we submit that this exception does not resolve any real 'mischief'. Existing legal frameworks combine to provide adequate mechanisms where there are risks of infectious disease transmission:

- The ADA already allows for discrimination where a person cannot perform the inherent requirements of a role due to a disability, including an infectious disease.
- The *Public Health Act 2010* (NSW) requires people to take reasonable precautions to prevent the spread of notifiable diseases.[22]
- *The Work, Health and Safety Act 2011* (NSW) has comprehensive requirements to ensure businesses and workers do not harm the health and safety of others,[23] and in practice require universal precautions; standard infectious control measures like the use of PPE and safe handling of bodily fluids where infection is a concern.
- Circumstances where people intentionally or recklessly spread an infectious disease are exceedingly rare. Where this does occur, the criminal law addresses the reckless or intentional transmission of infectious diseases. [24]

We therefore see no practical justification for retaining this public health exception. Its presence risks contributing to stigma, which itself undermines public health by discouraging testing, treatment and disclosure due to fear of discrimination.

Recommendation: The ADA should not include a public health exception specific to infectious diseases.

[20] See, for example, NSW Ombudsman (2025), *Mandatory Disease Testing in NSW: Monitoring the Operation and Administration of the Mandatory Disease Testing Act 2021*, Report to Parliament, February 2025.
[21] King, J, Kwon, J, McManus, H, Gray, R & McGregor, S 2024, HIV, viral hepatitis and sexually transmissible infections in Australia: Annual surveillance report 2024, The Kirby Institute, UNSW Sydney, Sydney, p. 6.
[22] *Public Health Act 2010* (NSW) s 79. These are category 1 or 2 notifiable diseases, and can be updated as needed through statutory instruments.
[23] *Work, Health and Safety Act 2011* (NSW) ss 19, 28, 17, 19.
[24] See, for example, *Crimes Act 1900* (NSW) s 35.

Question 4.4: Discrimination based on homosexuality

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "homosexuality"?

The ADA currently only protects people from discrimination on the ground of homosexuality but not on the ground of other sexual orientations, such as bisexuality, pansexuality, and asexuality. [25] The protected attribute of 'sexual orientation' would better capture diverse sexualities and the reality of sexuality-based discrimination.

Sexual orientation, as defined by the *Yogyakarta Principles,* is a 'person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender'.[26]

There is bountiful evidence that demonstrates that people with diverse sexualities (beyond homosexuality) experience unique barriers in Australian society. In the most recent periodic survey of quality of life among people living with HIV in Australia, HIV Futures 10, bisexual men with HIV were less likely than gay or heterosexual men to report that, in the last 12 months they had 'never' or 'rarely' experienced stigma and discrimination, and the most likely to report that they 'always' did.[27] Additionally, bisexual men with HIV were most likely to report that they 'often' or 'always' experienced discrimination in the last 12 months, compared to heterosexual and homosexual men. [28]

Expanding existing protections for the LGBTIQA+ 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 being aware of their HIV status (as they have been tested) and higher viral suppression among those who do have HIV.[29] Viral suppression of HIV allows for immune system recovery, prevents complications and stops HIV transmission.[30]

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[25] *Anti-Discrimination Act 1977* (NSW) Pt 4c.

[26] International Commission of Jurists, *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (10 November 2017) https://yogyakartaprinciples.org/principles-en/yp10/ ('*Yogyakarta Principles*').

[27] Norman, T., Power, J., Rule, J., Chen, J. Y.-H., and Bourne, A. (2022) *HIV Futures 10: Quality of life among people living with HIV in Australia* La Trobe University, Australian Research Centre in Sex, Health and Society, available at: https://www.latrobe.edu.au/arcshs/publications/hiv-futures-publications, P 35.

[28] Ibid, P 35.

[29] Matthew M Kavanagh et al, 'Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response>' (2021) 6(8) *BMJ Global Health* e006315:1-8, 7 <https://gh.bmj.com/content/bmjgh/6/8/e006315.full.pdf>.

[30] See Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine, *ASHM Guidance for Health Professionals* (October 2020) <https://ashm.org.au/wp-content/uploads/2022/04/Resource_ASHMuuguidancehandbookFAweb.pdf>

Recommendation: The ADA should list 'sexual orientation' as a protected attribute.

Recommendation: The ADA should adopt the definition of sexual orientation provided by the *Yogyakarta Principles,* whilst noting that sexual orientation includes not having attraction to or intimate and sexual relations with a person.

Question 4.6: Racial discrimination

(1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "race"?

(2) Are any new attributes required to address potential gaps in the ADA's protections against racial discrimination?

People discriminated against based on their caste and language (including their accent) may not be adequately protected under the current definition of race, which only includes colour, nationality, descent, ethnic origin, ethno-religious origin, and national origin.[31] Including caste and language is a clearer acknowledgement of these forms of discrimination and a vital reform in a multicultural society like Australia, modernising cultural and ethnic classifications.

In Australia, linguistic diversity is significant. Over 300 languages are spoken at home across Australia, and 23% of Australians speak a language other than English.[32]

R**ecommendation:** The definition of race should be expanded to include caste and language (including accent).

[31] *Anti-Discrimination Act 1977* (NSW) s 4(1) .

[32] Australian Bureau of Statistics (2022) *Cultural Diversity of Australia*. https://www.abs.gov.au/articles/cultural-diversity-australia

Question 4.8: Discrimination on transgender grounds

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "transgender grounds"?

The protected attribute currently defined as 'transgender grounds' should instead reflect gender identity or expression. This terminology better aligns with the Yogyakarta Principles,[33] with how LGBTQIA+ people self-identity, and is consistent with anti-discrimination legislation in other Australian jurisdictions.[34]

Recommendation: The ADA should be updated to include 'gender identity or expression' as a protected attribute, rather than 'transgender grounds'.

Chapter 5. Discrimination: Potential New Protected Attributes

Question 5.1: Guiding principles

What principles should guide decisions about what, if any, new attributes should be added to the ADA?

The Commission drafted possible criteria for including new attributes, and questions to guide assessment of these criteria. We suggest some minor amendments would improve two of the questions used to assess the criterion of 'whether there is a gap in protection'. The amendments are outlined in bold below:

1. *Is there sufficient information, **credible concern, or indicative patterns,** to show that people with a particular characteristic need the protection of the ADA?*

   This would account for situations where individuals with a protected attribute would benefit from the ADA's protection, but where meeting the ambiguous criterion of 'sufficient information' may be challenging. This may occur when the group is small in number, and experiences of discrimination are underreported or go unrecognised; as is the case for people living with HIV.

2. *Are they already **appropriately** protected under an existing attribute?*

   This would address situations where individuals are currently protected under one attribute but would be more appropriately covered by another, or where they experience discrimination based on multiple protected attributes, and

[33] *Yogyakarta Principles* (n 26).
[34] *Discrimination Act 1991* (ACT) s 7(1)(g),(v),(w); *Equal Opportunity Act 2010* (Vic) s 6(d),(oa),(p); *Anti-Discrimination Act 1992* (NT) s 19(1)(ba),(c),(ca); *Anti-Discrimination Act 1991* (Qld) s 7(m),(n),(o); *Anti-Discrimination Act 1998* (Tas) s 16(c),(ea),(eb).

existing attributes do not cover this intersectional discrimination. For example, while people living with HIV are presently covered under the attribute of disability, this classification is not suitable for their inclusion, as outlined below in response to question 5.2.

Question 5.2: Potential new attributes

(1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why?

(2) How should each of the new attributes that you have identified above be defined and expressed?

(3) If any of new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?

Medical Condition or Health Status

Discrimination against people living with HIV and others with stigmatised health conditions is often socially driven, rooted not in the medical realities of the condition but in moral judgments, stigma, and misinformation. This type of discrimination is distinct from that experienced by people with disabilities and is not appropriately or adequately addressed under the protected attribute of disability.

We propose the introduction of either medical condition or, in the alternative, health status as a standalone protected attribute. This should encompass:

- Mental health conditions
- Bloodborne viruses, including HIV, hepatitis B and C.
- Sexually transmissible infections (STIs), and
- Use or past use of alcohol and other drugs irrespective of their level of use.

There are various advantages of such a new protected attribute:

- Under international human rights law, health status is a protected attribute of discrimination in its own right,[35] which includes mental health status.
- A lot of people living with HIV would not deem their HIV status a 'disability' because their status has very little impact on their ability to live day to day life.
- Many people experiencing mental health issues or who are discriminated against based on alcohol and other drug use do not identify with the language of 'disability'. They may not meet diagnostic criteria or have experiences which are episodic by

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

nature and therefore not be protected under the current definition of disability in the ADA. [36]

- It is not clear whether substance use (or 'abuse') is covered by the current definition of 'disability' of the ADA. In addition, people who do not experience problematic use of alcohol or drugs are also often subject to discrimination because of their use of alcohol or drugs and it does not make sense to define non-problematic use of alcohol or drugs as a 'disability'.

We submit that the advantages of introducing this new protected attribute outweigh any perceived disadvantages. While there might be some overlap of the attribute of 'disability' and 'medical condition', it is quite common that discrimination occurs on the basis of more than one attribute.

Our organisations have heard directly from many people living with HIV themselves who do not identify as having a disability. This perspective reflects that the lived experience of managing a stigmatised medical condition does not necessarily align with conceptions of disability. In recognition of these views and the evolving realities of living with HIV after treatments became widely available, the national peak body, NAPWHA, withdrew from the Australian Federation of Disability Organisations (AFDO) in 2012. This withdrawal underscores the importance of respecting and accurately representing the self-identification of people living with HIV and other stigmatised medical conditions.

It is inappropriate for people living with HIV and others with stigmatised health conditions to be protected only under the attribute of disability. The discrimination they face is often moralised, based on assumptions about personal behaviour, sexuality, or drug use, not on impairment or functional limitation. The disability framework relies on deficit-based, biomedical models that do not reflect the lived experience of many affected individuals.

Given the Commission's intention to enhance community understandings and the accessibility of the ADA, we submit that the inclusion of a new attribute, 'medical condition' better aligns with general community understandings of the definitions of disability versus medical condition. Clients and people working in the HIV sector generally are often surprised to hear that people living with HIV are conceived of as having a 'disability' in anti-discrimination legislation.

Recommendation: We submit that the ADA should list 'medical condition' or, in the alternative, 'health status' as a protected attribute.

[36] *QHRC Report* (n 18) 267, citing Queensland Mental Health Commission, Submission to Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991*, 7.

Irrelevant Medical Condition or Irrelevant Medical Record

There is concern in community about including 'irrelevant medical record' or 'irrelevant medical condition' as a protected attribute instead of 'health status' or medical condition'. This attribute was added in reforms that passed Queensland Parliament recently.

We believe adopting the term irrelevant medical condition or irrelevant medical record would undermine the objectives of the ADA.

The term irrelevant

The use of the term 'irrelevant' could inadvertently promote HIV-related stigma, as well as stigma based on other medical conditions, like mental health conditions. The ambiguity of what constitutes 'relevance' when the general public interprets the ADA's requirements could lead third parties, such as employers or service providers, to interpret what is 'relevant' based on stigmatised views or scientific misconceptions, like exaggerated understandings of HIV transmission risks.

In HALC's experience, employers or service providers that discriminate against a person based on HIV status, for example, often do so because they falsely believe that person poses a risk of onward transmission. These parties may view HIV status as 'relevant' to workplace safety, despite scientific evidence to the contrary. This undermines the intent of the legislation to protect against discrimination and allows stigma to masquerade as risk management, reducing the ADA's effectiveness for people living with HIV.

The term 'irrelevant medical record' only refers to past medical history and does not adequately cover current health attributes which are often the basis of discrimination, like perceived risk of disease transmission, or visible symptoms of a health condition.

An unnecessary inclusion

The term 'irrelevant' does not exist in relation to any other protected attribute and it would be confusing and inconsistent for it to be included in relation to medical condition or medical record without any tangible need. With that in mind, the ADA's existing exceptions to discrimination eliminate the need for the term 'irrelevant'.

The ADA already includes exceptions that allow for discrimination where a person cannot perform the inherent requirements of a job due to a health condition or disability. This ensures that legitimate concerns about relevance are addressed without needing to qualify the protected attribute itself.

If a health condition or disability *is* relevant, it can already be considered as appropriate.

An excessive onus of proof on the applicant/complainant

The inclusion of the term 'irrelevant' imposes an undue burden on individuals who experience discrimination based on their medical condition or health status. Unlike other

protected attributes, these individuals would be required to prove that their condition was irrelevant to the discriminatory action, a potentially complex and onerous task. This would create an inequitable standard of protection, effectively establishing a tiered system where some forms of discrimination are harder to challenge than others. As a result, the new attribute may become functionally redundant, forcing individuals to rely on disability protections,[37] even when they do not identify as having a disability, thereby undermining the intent and effectiveness of the reform.

Recommendation: The ADA should not include irrelevant medical condition or irrelevant medical record as protected attributes.

Sex Work Activity

We endorse the recommendation of the Scarlet Alliance and SWOP NSW to include 'sex work activity' as a new protected attribute. These reforms would align with Queensland's anti-discrimination legislation.[38] Anti-discrimination protections are critical to ensuring that all sex workers can access the benefits of sex work discrimination, and a specific protected attribute is the only way to achieve this.

Recommendation: The ADA should include sex work activity as a protected attribute.

Sex Characteristics

People with innate variations of sex characteristics, commonly known as people who are intersex, are not currently protected against discrimination in NSW, unlike almost every other jurisdiction in Australia.[39] 'Sex characteristics' should be the descriptor for this protected attribute, aligned with the *Yogyakarta Principles plus 10*,[40] as well as the views of Intersex Human Rights Australia.

Recommendation: The ADA should also include a new protected attribute of sex characteristics, defined in accordance with the *Yogyakarta Principles plus 10*:

> *'Each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'*

[37] A person may have to alternatively rely on other protected attributes, like race or gender identity, in circumstances where discrimination has been intersectional.
[38] *Anti-Discrimination Act 1991* (Qld) s7(l).
[39] Only Western Australia also does not have an equivalent protected attribute.
[40] International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, *https://yogyakartaprinciples.org/principles-en/yp10/* preamble.

Chapter 6. Discrimination: Areas of Public Life

Question 6.1: Discrimination at work — coverage

(1) Should the definition of employment include voluntary workers? Why or why not?

Yes – including voluntary workers would capture many vulnerable populations – interns and students, retirees, non-executive board members and people in other governance positions, as well as possibly religious lay people.

Volunteers are recognised as workers in NSW's *Work Health and Safety Act*.[41] Despite the declining number of volunteers in Australia,[42] there is growing demand from organisations for volunteer work.[43] Volunteers have been shown to directly contribute to the Australian economy, with volunteers filling the gap in sectors which are not well-funded publicly or privately.[44] Volunteers contribute significantly to the work of our organisations. Including volunteers in anti-discrimination legislation is a signal of recognising the importance of their work and will help protect rights when engaging in voluntary work.

Recommendation: The definition of employment should include voluntary workers.

(2) Should the ADA adopt a broader approach to discrimination in work, like the way the Sex Discrimination Act 1984 (Cth) approaches harassment? Why or why not?

The ADA does cover a wide range of employment relationships. However, it is critical that all people in the workplace are protected from discrimination, and a broader approach to discrimination at work would achieve that.

One gap in coverage we wish to draw the Commission's attention to is the anti-discrimination obligations imposed on qualifying bodies, who are currently prevented from discriminating against someone with a disability (and several other attributes):

> *'(a) by refusing or failing to confer, renew or extend the authorisation or qualification, or*
>
> *(b) in the terms on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification, or*

[41] *Work Health and Safety Act 2011* (NSW) s 7(h).
[42] Nicholas Biddle and Matthew Gray, *Ongoing trends in volunteering in Australia* (Report, Volunteering Australia, 30 October 2023), 4.
[43] Ibid.
[44] Darja Kragt and Djurre Holtrop, 'Volunteering research in Australia: A narrative review' (2019) 71(4) *Australian Journal of Psychology* 342, 349-350 < https://www-tandfonline-com.virtual.anu.edu.au/doi/epdf/10.1111/ajpy.12251?needAccess=true>.

(c) by withdrawing the authorisation or qualification or varying the terms or conditions upon which it is held.'[45]

In *FBY v Secretary, NSW Ministry of Health* [2023] NSWCATAD 83 (4 April 2023), the case hinged on whether the respondent was a qualifying body. The applicant, a HALC client who was a healthcare worker living with HIV, had been restricted from working in a private healthcare facility because of their HIV status, despite not posing any risk of transmitting HIV. At the time, the Secretary of the Ministry of Health was implementing the outdated national guidelines in private healthcare facilities (which prevented people with HIV performing exposure prone procedures), as opposed to Interim Guidelines it had developed (which permitted people with HIV to perform exposure prone procedures, and which were implemented in NSW Health facilities).

HALC argued that the Ministry of Health, by enforcing the outdated national guidelines in private facilities, had discriminated against the applicant. However, the Tribunal dismissed the case: it found that the Secretary of the Ministry of Health was not a "qualifying body" for private hospitals under the ADA. This meant the Tribunal had no jurisdiction to hear the complaint, even though the Ministry had significant regulatory control over private health facilities, like approving, suspending or cancelling licenses, and issuing regulatory standards and policy directives.

If a broader approach to discrimination at work were adopted, one of many benefits would be that individuals affected by discriminatory decisions made by regulatory authorities like NSW Health would have greater access to legal remedies under the ADA.

Recommendation: The ADA should adopt a broader approach to discrimination at work, ensuring discrimination in connection with work is captured.

[45] See, e.g., *Anti-Discrimination Act 1977* (NSW) s 49J(1).

Question 6.2: Discrimination in work — exceptions

What changes, if any, should be made to the exceptions to discrimination in work?

Inherent Requirements and Unjustifiable Hardship Exception

The ADA allows some duty-holders to discriminate against someone who is unable to carry out the inherent requirements of a job because of their disability or carer's responsibilities.

The inherent requirements exception also applies if:

1. Someone requires reasonable adjustments ('services, facilities or arrangements') to carry out the inherent requirements of the job, which people without that attribute do not require, and
2. It would cause the duty holder 'unjustifiable hardship' to provide them.

At present, determining what constitutes unjustifiable hardship in relation to a person with a disability requires considering all relevant circumstances, including:

- The nature of the likely benefit/detriment,
- The effect of the disability of the person, and
- The financial circumstances of the employer and the estimated expenditure required.

There are improvements that could be made to these circumstances which would more appropriately balance the needs of an employer and a person who was potentially discriminated against. Often, we find discrimination has occurred against our clients due to ignorance or a lack of proper consultation.

Recommendation: As recommended by the Disability Royal Commission, the inherent requirements/unjustifiable hardship exemption should explicitly require consideration of:

1. The nature and extent of any adjustments made; and
2. The extent of consultation with the person with disability.

Small Businesses and Small Partnerships

In our experience, discrimination at work can have significant flow-on effects for people, affecting their mental health, financial security, housing stability, and overall wellbeing. These harms occur irrespective of the size of the employer. It is at odds with principles of human rights and equality to allow vulnerable groups to be lawfully treated unfavourably at work because of the nature or scale of the business they are employed by.

Recommendation: Remove the exception for discrimination at work by small businesses and small partnerships.

Question 6.4: The provision of goods and services — coverage

What changes, if any, should be made to the definition and coverage of the protected area of "the provision of goods and services"?

In NSW, the ADA prohibits discrimination in the provision of goods or services. This covers:

- refusing to provide goods or services; and
- discriminating in the terms on which goods or services are provided.[46]

It does not, however, cover the manner in which goods or services are provided. This narrow scope limits the law's ability to effectively cover this area of discrimination.

NSW's approach is narrower than that taken in other Australian jurisdictions. For example, in Queensland, a person who supplies goods or services (whether or not for profit or reward) must not discriminate against another person:

> (a) by failing to supply the goods or services; or
>
> (b) in the terms on which goods or services are supplied; or
>
> (c) in the way in which goods or services are supplied; or
>
> (d) by treating the other person unfavourably in any way in connection with the supply of goods and services. [47]

These wider protections capture how a person is treated in the supply of goods and services. They are a more realistic understanding of how discrimination can occur, like through dismissive treatment, interpersonal conduct, lower quality service or other exclusionary practices which might not be explicitly stated in terms or conditions.

HALC has, for example, advised clients who have experienced dismissive or stigmatising treatment from healthcare practitioners during appointments after disclosing their HIV status. Because the service was formally provided and the stated terms and conditions were not different from those offered to other patients, HALC must advise such clients that a discrimination complaint under current legislation is unlikely to have reasonable prospects of success.

Similarly, an ACON client from regional NSW was left hurt and disrespected when she asked for her GP's referral to an endocrinologist for Gender Affirming Hormone Therapy. Although the referral was not denied, the GP made inappropriate remarks by labelling her as a difficult patient and dismissing her needs and concerns. She is still experiencing severe distrust in the medical system as a result of undesirable treatment from her GP. Yet current NSW law

[46] *Anti-Discrimination Act 1977* (NSW) ss 19, 33, 49M,

[47] *Anti-Discrimination Act 1991* (QLD) s 46(1). See also *Anti-Discrimination Act 1991* (QLD) ss 23, 53 and 67 for similar provisions in relation to services of employment agencies and the provision of insurance and superannuation.

will often not cover such conduct. Stigma and misunderstandings surrounding gender diverse patients in the healthcare sector may delay or restrict them from accessing medical services.

In another instance demonstrating this gap in coverage, a HALC staff member dining at a restaurant returned to retrieve a forgotten bag. Restaurant staff made a racist joke insinuating the bag was a bomb. As the service had already been provided, the discriminatory conduct occurred in connection with the service and would not be captured under NSW's current provisions.

Any concerns about the workability of this amendment, such as for small businesses, can be allayed through the unjustifiable hardship defence.[48]

Recommendation: Adopt the same approach as set out in the *Anti-Discrimination Act 1991 (QLD)*, wherein discrimination in the provision of goods and services includes the way in which goods or services are supplied and the terms on which they are supplied.

Question 6.5: Superannuation services and insurance exceptions

What changes, if any, should be made to the exceptions applying to insurance and superannuation?

Insurance Discrimination against People Living with HIV

We have significant concerns about how the superannuation and insurance exceptions contained in the ADA work in practice for people living with HIV. The ADA permits insurers and superannuation providers to discriminate on the basis of disability if the discriminatory term or condition is

> *'based upon actuarial or statistical data on which it is reasonable to rely and [is] reasonable having regard to the data and any other relevant factors'*.[49]

Since the *Xiros* case over 25 years ago, when prognoses for HIV were poor, no court or tribunal decisions- whether involving HALC representatives or in any other publicly available cases - have provided legal clarity on how this exception applies to people living with HIV.[50] In the absence of this clarity, and given the ongoing difficulties people with HIV face in accessing life insurance products, legislative reform is critical.

HALC has noticed a wide range of approaches undertaken by insurers when people living with HIV seek out cover. This includes:

- Instant refusal of coverage after disclosure of a person's HIV status; or

[48] Currently contained in s 49M of the *Anti-Discrimination Act 1977* (NSW).
[49] *Anti-Discrimination Act 1997* (NSW) s 49Q(a).
[50] *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [17]

- Refusal after the disclosure of further medical information related to a person's HIV status; or
- Increased premiums, added exclusions or reduced benefits after disclosure of a person's HIV status.[51]

The HIV Futures 10 report found that 14.5% of people living with HIV had experienced discrimination by insurers in the last twelve months.[52] A report by the Victorian Pride Lobby 'Worth the Risk' found that questions asked by insurers about HIV can be stigmatising and confronting, such as questions about:

- Engagement in anal sex without a condom outside a monogamous relationship;
- 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 countries.[53]

These questions not only stigmatise people living with HIV but also men who have sex with men, people who use drugs and sex workers. HALC clients have been asked similarly stigmatising questions that are irrelevant to the assessment of insurance risk, like how they acquired HIV.

Evaluating the Reasonableness of the Data

While the ADA 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 people living with HIV, 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 people living with HIV to seek second opinions on the data to determine whether insurance companies are complying with the legislation. As a result, it becomes difficult to investigate whether insurance decisions are in fact based actuarial or statistical data, let alone the reasonableness on relying on such data.

This lack of transparency stands in contrast to the *Sex Discrimination Act 1984* (Cth), which similarly only permits sex-based discrimination in the provision of insurance if the decision is based on actuarial or statistical data from a source on which it is reasonable to rely. That Act

[51] Whilst HALC has not assisted anyone with hepatitis C who has experienced insurance discrimination, there is evidence of such discrimination occurring: Sean Mulcahy et al. 'Insurance Discrimination and Hepatitis C: Recent Developments and the Need for Reforms' (2022) 32(2) *Insurance Law Journal* 93.
[52] Thomas Norman et al, *HIV Futures 10: Quality of Life among People Living with HIV in Australia* (Report, December 2022) 34 <https://www.latrobe.edu.au/arcshs/work/hiv-futures-10>.
[53] Victorian Pride Lobby, *Worth the Risk: LGBTIQA+ experiences with insurance providers* (Report, 2022) 16.

requires that a provider gives the client a document containing the data or makes it available for inspection at the client's request.[54]

HALC undertakes strategic litigation to challenge insurers' reliance on the statutory exception. 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 on less favourable terms. Only when matters progress beyond Anti-Discrimination NSW (ADNSW) to the NSW Civil and Administrative Tribunal (NCAT) can insurers be compelled to provide the data.

In HALC's experience, when this data is provided, it often suffers from significant limitations - such as being outdated, based on flawed methodology, or lacking relevance to the client's specific circumstances and the terms of the insurance coverage they have applied for.

The insurance discrimination matters where HALC has represented clients have had very limited success in mediation at ADNSW. Insurance companies are often unwilling to engage in meaningful settlement negotiations until the matter reaches NCAT.

Recommendation: The ADA be amended to allow proceedings involving insurance and superannuation exemptions to be commenced either in the NSW Civil and Administrative Tribunal (NCAT) or directly in a Court.

Recommendation: Legislate a requirement for insurers to provide detailed reasons when insurance is denied or offered on less favourable terms because of a medical condition.

Recommendation: Empower Anti-Discrimination NSW to compel insurers to disclose the data they relied on for conciliations related to insurance discrimination.

[54] *Sex Discrimination Act 1984* (Cth) s 41.

Recommendation: The insurance and superannuation exception should be amended to include a non-exhaustive list of factors which provide guidance on whether it is reasonable to reply on actuarial or statistical data and other relevant factors. The list should require consideration of:

- Whether the data is relevant to the type and terms of conditions of the policy, including its applicability to the applicant's circumstances;
- Whether the data is up to date;
- Whether the data reliably indicates that the person poses an unacceptable risk to insure; and
- Whether the insurance or superannuation company has collected sufficient information to reliably assess the person's risk.

Recommendation: Legislate a requirement for insurers to provide individuals that are denied life insurance coverage based on a medical condition with the option to access the actuarial and statistical data upon which the insurer is relying.

- This could be in similar terms to what the European Court of Justice has held is required under article 22 of the *European Union's General Data Protection Regulation (GDPR)*: meaningful information about the logic involved in the decision-making. The amendment would not require the disclosure of complex algorithms or protected intellectual property of the insurance company or underwriter.

Recommendation: Task Anti-Discrimination NSW with developing guidance materials about the application of insurance exceptions for people living with HIV, in collaboration with insurance industry representatives and community organisations. The materials should specify that insurance companies must:

- Maintain records of all data relied upon in decision-making;
- Collect adequate and relevant information from the applicants, including viral load, CD4 count, and treatment adherence;
- Use data that is:
    - Scientifically valid, including ensuring, insofar as possible, that samples are equivalent to the applicant, in terms of age, gender, treatment status and other relevant factors.
    - Drawn from populations with similar healthcare systems, and
    - Based on adequate sample sizes; and
- Seek and use independent professional opinions where reasonable actuarial and statistical data are not available in relation to a specific applicant.

Question 6.12: Additional areas of public life

(3) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

Government functions and the administration of laws

Discrimination in the administration of state laws and programs is only unlawful where these can be classified as a 'service'. This narrow interpretation creates a significant gap in protection. Government actions are not always a 'service' in the traditional sense; in government-citizen interactions, many decisions and actions are not optional, commercial or beneficial to the user.

Relying on the distinction of whether the government was or was not providing a 'service' is an arbitrary and unjust way to determine whether discrimination has occurred. Many government functions, such as policing, prosecution, parole, and corrections, are compulsory and coercive, yet have profound implications for people's fundamental rights and dignity.

As noted in the Review Paper, some decisions by bodies such as the NSW Police Force or the Director of Public Prosecutions, like whether to arrest or prosecute, may fall outside the definition of a 'service'. This leaves individuals vulnerable to discriminatory treatment in some of the most consequential areas of public life, such as after having been a victim of crime.

For example, a transgender client sought support from ACON after experiencing a series of hate crimes. Due to prior negative experiences with police, the client was reluctant to engage with police to explore potential solutions. These past interactions included conduct that may not have been covered under the ADA even if the client had chosen to pursue protections through that avenue. The police conduct included:

- Use of violence by police officers.
- Strip searches conducted during welfare checks.
- Failure to act on reports of violence, including death threats, unless video evidence was provided.

Another compelling illustration of the risks of excluding certain government functions from anti-discrimination protections is found in the South Australian case of *McDonald v The State of SA* [2019] SAET 33.[55] In that case, HALC represented a client in contesting a decision of the Parole Board to require him to disclose his HIV status to potential or actual employers as a condition of parole. The requirement was imposed despite expert medical advice confirming there was no relevant public health concern or risk of HIV transmission. The condition

[55] *McDonald v The State of SA* [2019] SAET 33 (28 February 2019), available here: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SAET/2019/33.html?context=1;query=McDonald;mask_path=au/cases/sa/SAET

appeared to be based on stigma and discriminatory assumptions. The condition had devastating consequences for the client including being immediately rejected from at least nine jobs.

This case underscores the urgent need to ensure that all government functions, not just those deemed 'services', are subject to anti-discrimination protections. The matter was summarily dismissed as the Parole Board's behaviour was not deemed a service.

People living with HIV, and others from marginalised communities, must be protected from discriminatory treatment in all aspects of their interactions with the state, including in the criminal justice and corrections systems.

Recommendation: The ADA should apply to government functions and the administration of laws.

Discriminatory requests for information

Discriminatory requests for information have been made unlawful in other Australian jurisdictions, including the ACT, NT, QLD, Victoria and WA, as well as federally.[56] We submit that similar protections should be introduced in NSW.

We recommend adopting QLD's approach, enshrined in section 124 of the Anti-Discrimination Act 1991 (QLD). That section provides that, subject to certain exceptions,

> *'a person must not ask another person…to supply information on which unlawful discrimination must be based'.*

It is a defence if the respondent proves on the balance of probabilities that the information was reasonably required for a non-discriminatory purpose. This is an appropriate and practical onus of proof, as respondents are typically best placed to explain the purpose and necessity of the information requested.

Introducing this provision in NSW would close a significant gap in anti-discrimination protections and help prevent intrusive or prejudicial questioning. Fear around HIV disclosure is prevalent. Disclosure can be complex and often confronting for people with HIV. [57] Employers often request medical information during pre-employment medical checks. When undertaking pre-employment medical checks, questions can be broad including questions that ask about 'any' medical conditions and can also specifically ask about HIV as well as hepatitis status.

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[56] Sex Discrimination Act 1984 (Cth) s 27, Discrimination Act 1991 (ACT) s 23, Anti-Discrimination Act 1991 (NT) s 26, Equal Opportunity Act 2010 (Vic) ss 107-108, Anti-Discrimination Act 1991 (Qld) s 124, Equal Opportunity Act 1984 (WA) s 23.

[57] For some accounts of these experiences from people with HIV, see pages 47-49 of Australian Research Centre in Sex, Health and Society (2022) *HIV Futures 10: The health and wellbeing of people living with HIV in Australia*. La Trobe University. Retrieved from https://www.latrobe.edu.au/arcshs/work/hiv-futures-10

There are very few employment settings where a person's bloodborne virus status is relevant to their work (e.g. healthcare workers performing exposure prone procedures). While each of our organisations provide legal information on disclosure in employment settings, broad and irrelevant questions can cause unnecessary stress in deciding whether to disclose or even deter people from completing the pre-employment medical checks and thus cause them to lose job opportunities.

If the medical form is a statutory declaration, it is unlawful to make a false declaration about your status on such a form. In situations like these, HALC advises clients they can ask to provide a medical letter noting they have no medical conditions that prevent them from performing the inherent requirements on their role. However, providing a medical letter can, in essence, mean disclosing that you have a stigmatised medical condition without directly doing so.

Similar issues arise in healthcare settings. 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, we are aware of dentists, physiotherapists and general practitioners that ask a patient to disclose this information on their registration forms. A person's HIV status is not typically relevant to the care being sought in these settings and can have negative consequences for people living with HIV, particularly in rural or remote communities.

Disclosure should be at the discretion of a person with HIV with guidance from their treating doctor who can inform them when it may be necessary to disclose for medical purposes. This also allows a people living with HIV to establish trust with the healthcare provider prior to disclosure to ensure they are receiving appropriate care.

Recommendation: The ADA should prohibit discriminatory requests for information, adopting the approach taken in the Anti-Discrimination Act 1991 (QLD) s 124.

Chapter 7. Wider Exceptions

Question 7.1 Religious personnel exceptions

Should the ADA provide exceptions for (b) "the appointment of any other person in any capacity by a body established to propagate religion"?

And Question 7.2 Other acts and practices of religious bodies

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

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

- '(c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrine of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'[58]

Our concerns for the broad application of the religious exception relate specifically to religious organisations that provide services on behalf of the state. A guiding principle of the National HIV Strategy is access and equity to health and community care stating:[59]

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

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

Recommendation: The exceptions provided by sections 56(c) and (d) should be removed.

[58] *Anti-Discrimination Act 1977* (NSW) s 56(c), (d).
[59] Department of Health and Aged Care (Cth), *Ninth National HIV Strategy* (2024) 14 < https://www.health.gov.au/sites/default/files/2024-12/ninth-national-hiv-strategy-2024-2030.pdf>.

Question 7.5: Private educational authorities employment exceptions

(1) Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?

And Question 7.6: Discrimination against students and prospective students

(1) Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?

The ADA has more comprehensive exceptions for non-government educational institutions than any jurisdiction in Australia. [60] Private educational institutions are allowed to discriminate against students, teachers and other staff on the basis of sex, transgender status, marital or domestic status, disability and homosexuality.[61] We are concerned that these exceptions unjustifiably undermine inclusivity and enforce inequality. Educational institutions should be open, welcoming environments to people of diverse backgrounds.

Recommendation: The exceptions provided to private educational institutions in relation to both employment, students and prospective students should be removed.

Question 7.10: Aged care accommodation providers exception

Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?

We strongly oppose the continuation of this exception. The NSW Law Reform Commission recommended its repeal over 25 years ago.[62] This reform is long overdue.

It is deeply concerning that the current exception allows aged care providers to arbitrarily restrict admission based on sex, marital or domestic status, and race; potentially restricting critical access to care. As the population of people living with HIV ages, they face increasing vulnerability to discrimination in aged care settings. Many individuals living with HIV are also members of the LGBTQIA+ community and/or from culturally and linguistically diverse backgrounds, compounding their risk of exclusion.

[60] Justice and Equity Centre. (2021). *Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act*. Public Interest Advocacy Centre. Retrieved from https://jec.org.au/wp-content/uploads/2021/08/PIAC-Leader-to-Laggard-The-case-for-modernising-the-NSW-Anti-Discrimination-Act.pdf
[61] Ibid.
[62] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 48, [6.93]–[6.96].

Rather than maintaining a broad exception, the ADA should rely on the existing mechanisms under sections 126 and 126A, which allow providers to apply for exemptions or certifications through Anti-Discrimination NSW. These provisions enable services to lawfully favour specific groups where there is a demonstrated need - for example, offering specialist aged care accommodation exclusively for women, LGBTQIA+ people, religious minorities, or people living with HIV.

This approach balances the need for inclusive, culturally safe services with the imperative to prevent discrimination. It ensures that aged care providers can respond to community needs without undermining the rights of individuals to access care without prejudice.

The reform would also align with federal legislation which makes it unlawful to discriminate against someone in the provision of accommodation based on various protected attributes, including sex, gender identity, sexual orientation, intersex status, and marital or relationship status.[63]

Recommendation: The exception permitting aged care accommodation providers to impose rules or practices that restrict admission based on sex, marital or domestic status, and race should be repealed.

Chapter 8. Civil Protections Against Vilification

Question 8.1: Protected attributes

(2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

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

This would give people the option of pursuing civil or criminal resolutions to vilification. As ACON and HALC have made clear in a previous joint submission, people living with HIV and LGBTQ+ people have a complicated history with policing and the criminal justice system. Civil protection applying consistently alongside criminal offences would allow different avenues for those who have experienced vilification to seek justice outside the criminal justice

[63] *Sex Discrimination Act 1984* (Cth) s 23. Note that there is an exception for accommodation provided by religious bodies which are not Commonwealth-funded. See also *Race Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) in relation to other protected attributes.

system if desired. This is especially important for those seeking justice in relation to family or domestic settings.[64]

Recommendation: Expand vilification protections to cover all attributes recognised under the ADA.

Question 8.2: The test for vilification

Should NSW adopt a "harm-based" test for civil vilification? If so, should this replace or supplement the existing "incitement-based" test?

Under the current ADA, vilification is defined as a public act that 'incites hatred towards, serious contempt for, or severe ridicule of a person or group because they have a protected attribute.' This is an 'incitement-based' test.

Whilst this test targets conduct that encourages broader social hostility, it is restrictive, and fails to properly account for the harm experienced by those who are vilified. The test places a high evidentiary burden on those who are vilified, requiring proof that others were incited,[65] rather than focusing on the harm caused to the person or group targeted.

The lived experience of the groups protected by vilification provisions should be adequately captured in the legislative test for vilification.

HALC commonly assists people living with HIV whose HIV status has been disclosed without consent by service providers, employers, government entities, family members and the community at large. These disclosures often result in ongoing consequences for people's privacy, wellbeing and safety. HALC also acts for people living with HIV seeking asylum in Australia due to a fear of persecution and/or discrimination based on their HIV status, sexual orientation and gender identity. Assessing whether these people, who belong to communities with long histories of being disproportionately impacted by stigma, harassment, vilification and other associated harms, should require consideration of the very real impact of vilification on these groups.

HALC has acted for clients in harassment and vilification matters where intersecting forms of identity interact with their HIV status to create a unique form of vilification. One notable example of such a case was that of *JM and JN v QL and QM* [2010] NSWADT 66. A gay couple from a rural NSW town was found by the NSW Administrative Decisions Tribunal (as it then was) to have been vilified when former friends threatened them with violence at the pub

[64] ACON and HALC, *Submission to the NSW Law Reform Commission's review of the effectiveness of section 93Z of the Crimes Act 1900* (Submission No SV08, NSW Law Reform Commission, 2024) https://lawreform.nsw.gov.au/documents/Current-projects/s93z/prelim-subs/SV08_-_ACON_and_HALC.pdf/.
[65] Although proof of actual incitement in the relevant audience is not necessary.

and began telling town members that they had HIV and referred to them using homophobic slurs.

The consequences of HIV vilification and a failure to address it include increased stigma and discrimination for key populations and flow on effects for HIV testing and treatment uptake which severely undermine public health efforts.[66] Effectively, tackling HIV vilification is therefore crucial to Australia achieving its goal of virtually ending HIV transmission in Australia by 2030.

Reforming the test for civil vilification to include a harm-based assessment would shift the focus to the impact of the conduct on the targeted individual or group. It could assess whether the conduct:

- Is reasonably likely to offend, insult, humiliate, intimidate or ridicule a person with a protected attribute;[67]or
- Would be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful, seriously contemptuous, or reviling or seriously ridiculing the targeted person or group.[68]

A harm-based test would better reflect how members of the community understand and experience vilification,[69] and reduce the burden on applicants by removing the need to prove a hypothetical third-party audience's reaction to the conduct.[70] Its inclusion would also align with civil vilification laws in the NT, Tasmania, Victoria, and under the *Racial Discrimination Act 1975* (Cth).[71]

We submit that if only one test were considered appropriate, a harm-based test is most suitable. However, we recommend a dual test like that recently adopted in Victoria, where the amendments will, upon commencement, provide for a harm-based test in addition to a separate incitement-based test, with both covering the same attributes.

The Victorian vilification test will make it unlawful to engage in public conduct either:

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[66] Iott, B. D, Loveluck, J., Benton, A., Golson, L., Kahle, E., Lam, J., Bauermeister, J. A. & Veinot, T. C. (2022). The impact of stigma on HIV testing decisions for gay, bisexual, queer and other men who have sex with men: a qualitative study. *BMC Public Health*, 22.

[67] See e.g., *Racial Discrimination Act 1975* (Cth) s 18(1)(a); *Anti-Discrimination Act 1988* (Tas) s 17(1).

[68] See, e.g., Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, Inquiry into Anti–Vilification Protections (2021) rec 10; *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(1)(b) (uncommenced).

[69] Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 9, 119.

[70] Ibid; Explanatory Notes, Respect at Work and Other Matters Amendment Bill 2024 (Qld) 11; Queensland Parliament Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report No 22 (2022) 45.

[71] *Racial Discrimination Act 1975* (Cth) s 18C(1)(a); *Anti-Discrimination Act 1992* (NT) s 20A(1)(a); *Anti-Discrimination Act 1998* (Tas) s 17(1); *Equal Opportunity Act 2010* (Vic) s 102D(1)(b) (not yet commenced).

- Because of a protected attribute of another person or group of persons where the conduct would, in all the circumstances, be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful or seriously contemptuous of, or reviling or severely ridiculing, the other person or group of persons (**the 'harm-based' test**);[72] or
- Where the conduct 'is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons on the ground of a protected attribute of that other person or group of persons (**the 'incitement-based test'**). [73]

A dual test will ensure that both the societal impact and personal harms caused by vilification are recognised and addressed. The vilification framework would better protect vulnerable communities and reflect contemporary understandings of the lived experiences of minority groups.

Recommendation: NSW should adopt a dual incitement and harm-based test for vilification.

(2) What, if any, other changes should be made to the incitement-based test for civil vilification?

Multiple Reasons for Vilification

NSW should amend its anti-discrimination legislation to ensure that vilification is recognised even when a protected attribute is not the sole or dominant reason for the conduct. Such an approach reflects the reality that vilification can be layered, or intersectional, and should be unlawful even if partially motivated by other situational factors.

Recent Victorian amendments are a useful guideline. When these amendments become operational, they will cover conduct that is engaged in for two or more reasons: where one of the reasons is a protected attribute, the conduct is taken to have been engaged in because of a protected attribute. This will apply even if the protected attribute is not the dominant or substantial reason for the conduct.[74]

Recommendation: Conduct should be considered to be engaged in 'because of' a protected attribute if that attribute is one of multiple reasons for the conduct.

[72] *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(1) (uncommenced).
[73] *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102E (uncommenced).
[74] Ibid.

Question 8.3: The definition of "public act"

What changes, if any, should be made to the definition of "public act" in the test for vilification in the ADA?

Harmony with the Crimes Act

The ADA's definition of public act should be harmonised with that in section 93Z of the *Crimes Act 1900* (NSW). We recognise that these amendments may largely reflect existing judicial interpretations of the ADA. However, we submit that express clarification would enhance the accessibility of the ADA to the general public, who may not be across these judicial interpretations.

The amendment would also remove the risk that certain online behaviours would not be interpreted by the courts as public acts. People living with HIV, LGBTQ+ people and other marginalised communities increasingly face vilification through digital channels.[75] Given that social media and electronic platforms are now primary venues for public discourse, the definition of 'public act' must evolve to reflect these realities and provide meaningful protection for vulnerable communities in digital spaces. Under the current definition and its interpretation by Tribunals, for example, social media posts directed at smaller, private audiences may not be public acts,[76] despite the very real risk, which is difficult to monitor, that the posts be screenshotted and disseminated outside the group.

Another instance of behaviour that HALC has seen several times in the past year alone that could be captured through this expanded definition is grossly offensive and harmful graffiti on private land targeting people for their HIV status, such as on their front door, visible to the public and/or neighbours. It is critical that there are civil routes for acting against such demeaning and derogatory behaviour.

Recommendation: The ADA's definition of public act should be harmonised with the definition in section 93Z of the *Crimes Act 1900* (NSW), expressly clarifying that public acts can include:

- Communicating through social media and other electronic means;
- Graffiti; and
- Acts that occur on private land.

[75] E-Safety Commission (2020) *Online Hate Speech: Finding from Australia, New Zealand and Europe*. E-Safety Commission.
[76] *Burns v McKee* [2017] NSWCATAD 66 [62].

Knowledge Requirement

Removing the requirement that the 'knowledge' requirement would further harmonise the ADA with section 93Z. It is an unfortunate reality that people often vilify other groups without fully discerning or analysing the nature of their behaviour. The requirement to prove 'knowledge' can be unnecessarily onerous. This should not bar victims from seeking redress.

For example, in relation to online vilification, modern digital communication patterns involve the rapid distribution of 'memes', viral content, and medical disinformation, which can cause significant damage to vulnerable communities regardless of the perpetrator's knowledge or intention. The removal of the knowledge requirement would ensure that victims of electronic vilification can access meaningful legal remedies without the substantial evidentiary burden of proving the perpetrator's state of mind.

Recommendation: The requirement for the distribution or dissemination of matter to the public to be done with knowledge that the matter promotes or expresses vilification should be removed.

Question 8.4: Exceptions

What changes, if any, should be made to the exceptions to the vilification protections in the ADA?

The exceptions for vilification based on HIV/AIDS apply too broadly.[77] Currently, it is not unlawful vilification if HIV-related vilification is done reasonably and in good faith for:

- For academic, artistic, scientific, research, and religious discussion or instruction purposes, and
- For other purposes in the public interest, including 'discussion or debate about and expositions of any act or matter'.

Once the question of exceptions arises, the Act has (under the current law) already met the standard of inciting hatred, serious contempt, or severe ridicule. We are concerned about the implication that behaviour which has met the relatively high standard required to constitute vilification could be exempt from protections because it is for the purposes of 'discussion or debate'.

This exemption may inadvertently shield harmful or stigmatising speech that perpetuates misinformation or prejudice against people living with HIV. The vague terms 'reasonably' and 'in good faith' lack clear legal standards, making enforcement inconsistent and potentially ineffective. The application of this exemption to online content is concerning given the

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

significant potential reach, and therefore harm, associated with such content.

Recommendation: The exceptions for vilification should:

1. Be refined to Acts which demonstrably contribute to public understandings or public welfare;
2. Not apply in circumstances where the public act has caused demonstrable harm, including psychological distress or social exclusion; and
3. Not apply to online content or media publications.

Chapter 9. Harassment

Question 9.7: Attribute-based harassment

If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?

Attributes

If the ADA were to prohibit attribute-based harassment, protection should extend to all protected attributes, ensuring coverage of groups most likely to experience such harassment.

Recommendation: The ADA should provide protections against harassment based on all protected attributes, including:

- Sexual orientation;
- Medical condition (if medical condition is added as a protected attribute);
- Disability;
- Gender identity or expression;
- Race; and
- Sex work activity

Unwanted Disclosure

A common complaint we have noted from people with HIV is another person publicly disclosing their HIV condition to others or threatening to do so.

We have observed that sometimes these threats are made in an attempt to coerce or blackmail the person, and sometimes with the misguided view that the community at large should be made aware of a person's HIV status. Whilst we note that the former conduct (blackmail) may have redress under criminal laws, police often do not view this as an offence and are reluctant to act.

Although such disclosure may fall within the current definition of vilification, 'mere' disclosure is often considered gossip rather than vilification, despite having similarly harmful

impacts. It can be difficult for unwanted disclosure and associated behaviours to meet the threshold of vilification.

We therefore recommend that harassment provisions be expanded to explicitly include unwanted disclosure of a person's HIV condition or threats to disclose. This could be in the form of a legislative note with unwanted disclosure of someone's HIV condition being provided as an example of harassment based on a medical condition.

People living with HIV may choose to disclose their HIV status to sexual partners or in other personal interactions, such as confiding in friends. However, when relationships dissolve, the other party may use their HIV condition as leverage to harm the other.

Recognising unwanted disclosure or threats to disclose as a form of harassment would align with recent reforms to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) which recognised certain forms of 'outing' as constituting intimidation: intentionally disclosing or threatening to disclose a person's HIV status, sexual orientation, gender history, variations of sex characteristics, and whether they are or have been a sex worker. [78] These reforms mean such conduct may now be more likely to be subject to certain apprehensive violence orders and offences like stalking and intimidation.

Expanding the ADA in this way would provide civil remedies for people affected by unwanted disclosure, offering an alternative pathway where criminal proceedings may not be appropriate. It would also serve as a valuable educational tool, reinforcing the importance of privacy and consent, and reassuring people living with HIV that they have legal protections if they wish to discuss their health status with others such as friends, family or sexual partners

Recommendation: Harassment provisions should be expanded to include threats of disclosing someone's HIV status and unwanted disclosure of someone's HIV status.

Chapter 11. Promoting Substantive Equality

Question 11.1: Adjustments

(1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?

(2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?

(3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?

[78] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1)(a).

We submit that the ADA should provide a standalone positive obligation to make reasonable adjustments in relation to all protected attributes in all areas of public life and that the concept of unjustifiable hardship be retained as a factor to determine whether reasonable adjustments are reasonable. This is the approach under the *Anti-Discrimination Act 1992* (NT).[79] Our submission aligns with the requirements, framework and language of the *Convention on the Rights of Persons with Disabilities* (*CRPD*).[80]

Recommendation: The ADA should include a positive duty to provide reasonable adjustments.

Question 11.3: A positive duty to prevent or eliminate unlawful conduct

Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

The current framework is largely reactive, relying on individuals to initiate complaints before instances of discrimination and harassment are responded to. This limits the ADA's capacity to drive systematic change. A positive obligation would shift responsibility towards duty holders and encourage proactive prevention of unlawful conduct.

We see the need for a proactive duty in clients that come to us with issues that mirror the experiences of previous clients. For example, HALC reached settlement with one client who was refused a beauty service due to their HIV status, and the following year was contacted by a separate client who was refused a service by the same beauty service at the same location. If a proactive duty existed, the subsequent client may not have had to go through the difficult and lengthy complaints process.

HALC has represented people living with HIV 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 bloodborne virus and their management within the organisations setting (e.g. employment, healthcare).

Current Work Health and Safety (WHS) legislation nationally and in New South Wales are limited in scope and, when misinterpreted by employers, can have a negative impact on

[79] *Anti-Discrimination Act 1992* (NT) s 24.
[80] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008)

people living with HIV. 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,[81] some employers mistakenly believe that HIV may pose a risk to their employees. This can occur where employers have a lack of understanding about HIV and the actual risk of transmission and attempt to justify their actions on this ground. WHS legislation also only applies to employers and does not extend this obligation to other settings.

The inclusion of a positive obligation within the ADA will provide an opportunity for employers and service providers to educate themselves about discrimination on the ground of HIV/AIDS within their organisations. We believe that this obligation should be reasonable and proportionate to each organisation taking into similar considerations found in the *Equal Opportunity Act 2010* (Vic).[82] This obligation should also require ADNSW to take on an educational role regarding what the duty holders are required to do under this positive obligation.

We believe that such a positive obligation will require certain organisations to be trained specifically on their obligations under the ADA regarding bloodborne viruses, including HIV. Specifically, this should be targeted towards public and private healthcare settings and given the rapidly ageing population of people living with HIV, aged care settings where exposure to people with HIV so far remains limited. These organisations are most likely to have a lasting negative impact on people with HIV who face discrimination in these settings, particularly on their physical and mental health.

Recommendation: A positive obligation should be introduced to take reasonable and proportionate measures to eliminate discrimination, harassment and vilification based on all protected attributes.

(2) If so:

(a) What should duty holders be required to do to comply with the duty?

Recommendation: At law, duty holders should be required to:

1. Take **reasonable and proportionate steps** to prevent discrimination, harassment, and vilification; and
2. Make **reasonable adjustments** for people with disabilities, including those who rely on carers, assistance animals, companion animals, or disability aids.

[81] *Work Health and Safety Act 2011* (NSW) s 19.
[82] *Equal Opportunity Act 2010* (Vic) s 15.

Reasonable and proportionate steps could include implementing policies, training, and education programs tailored to their context. Duty holders should be encouraged to engage with ADNSW for guidance and support in fulfilling their obligations.

We also submit that the ADA should provide a standalone positive obligation to make 'reasonable adjustments' in relation to all protected attributes in all areas of public life and that the concept of unjustifiable hardship be retained as a factor to determine whether reasonable adjustments are in fact reasonable rather than as an exception to discrimination. This is the approach under the *Anti-Discrimination Act 1992* (NT).[83] Such an approach allows for the duty to be tailored to the size, resources and context of each organisation.

However, we submit that the NSW Act, unlike the NT approach, should not refer to the needs in relation to a protected attribute as 'special needs'. This approach aligns with the requirements, framework and language of the *Convention on the Rights of Persons with Disabilities* (CRPD).[84]

The ADA should clarify that the positive obligation to make reasonable adjustments includes the positive obligation to make reasonable adjustments for the reliance of a person with disability on a carer or other support person, assistance animal, companion animal or disability aid; a similar model to the *Disability Discrimination Act 1992* (Cth).

(b) What types of unlawful conduct should the duty cover?

Recommendation: The positive duty should cover:

- Discrimination (direct and indirect);
- Vilification;
- Victimisation; and
- Harassment.

[83] *Anti-Discrimination Act 1992* (NT) s 24.

[84] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

(c) Who should the duty holders be? These are the settings where, in our experience, discrimination is most likely to occur and where proactive measures can have the greatest impact.

Recommendation: Duty holders should include:

- Employers (public and private);
- Service providers;
- Educational institutions;
- Government agencies; and
- Aged care and healthcare providers.

(d) What attributes and areas should the duty apply to?

Recommendation: The duty should apply to:

- All protected attributes under the ADA; and
- All areas of public life, including employment, education, healthcare, aged care, accommodation, and the provision of goods and services.

We again thank you for your time and invitation to comment on this important piece of legislation. If additional information or citations in relation to this submission are required, please feel free to contact Bethany Rodgers, Strategic Policy Lawyer at the HIV/AIDS Legal Centre on 02 9492 6540 or beth@halc.org.au.

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