Dr Claire Brolan
Public Health, Health Equity & Rights Specialist
Brisbane, Queensland, Australia

Mr Scott MacDougall
Queensland Human Rights Commissioner
Queensland Human Rights Commission
Brisbane, Queensland

28 February 2022

Submission submitted online: adareview@qhrc.qld.gov.au

Dear Commissioner,

RE: REVIEW OF QUEENSLAND'S ANTI-DISCRIMINATION ACT 1991

From both a public health *and* human rights perspective, I am very pleased to learn that the *Anti-Discrimination Act 1991 (Qld)* is under Review.

For the reasons outlined below, it is respectfully submitted that:

1. **The content and language of the revised Anti-Discrimination Act should be consistent with the content and language proscribed in and by the UN Convention on the Rights of Persons with Disabilities 2006**

   AND

2. **The revised Anti-Discrimination Act should contain a new standalone "health status" attribute**

I understand written submissions are due on 1 March 2022, and I note that this submission has been lodged in time for full and due consideration by the Commission. The views expressed in this submission are mine alone and are not to be attributed or construed as the views of any other agency or entity, or those of my employer, The University of Queensland. However, I note the content of this submission has been endorsed by public health colleagues named on page 8.

A. Submission background

1. The content and language of the *Anti-Discrimination Act 1991 (Qld)* is a product of its time; a time some 31 years ago. By the end of 1991, Queensland continued to enjoy the Expo '88 high, the Soviet Union was dissolved and 14 new countries had declared independence, the World Wide Web was launched to the public and Microsoft.com went online, and I had completed my first year of high-school and had no idea what 'hand sanitiser' or 'social distancing' was, unlike my children.

2. Suffice to say, it is unsurprising that in the intervening 31 years since the *Anti-Discrimination Act 1991 (Qld)'s* introduction, a significant and important body of international, national and

subnational human rights law has emerged as our society has dynamically developed and the issues and complexities that countries, communities, and individuals face have evolved. For the purposes of this submission, I specifically refer to the emergence of three documents post-1991: (1) UN Committee on Economic, Social and Cultural Rights' General Comment No. 14 (2000), which explains what the right to the enjoyment of the highest attainable standard of physical and mental health ('right to health') *means* and how this right *conceptually* and *technically should be applied* to address health rights violations by States and key stakeholders;[1] (2) UN Convention on the Rights of Persons with Disabilities 2006;[2] and (3) *Human Rights Act 2019 (Qld)*.[3]

3. A fundamental aim of the body of human rights law that has emerged since the Queensland Parliament passed the Anti-Discrimination Act in 1991 is to protect and promote the human rights of people – especially the most marginalised and stigmatised in all countries, low and high-income countries alike – from unlawful and unconscionable discriminatory treatment. In terms of State Parties' human rights obligations, including those obligations and responsibilities that the Queensland Government and public entities hold under the new *Human Rights Act 2019 (Qld)*, the principle of non-discrimination must be treated as a *minimum core obligation* for economic, social and cultural rights, and is of immediate effect in the indivisible application of all civil, political, economic, social and cultural rights.[4] This includes the protection, promotion, and fulfilment of the human right to health by States Parties,[5] also relevant for interpretation and *immediate* application of section 37: right of everyone to access health services without discrimination, *Human Rights Act 2019 (Qld).*[6]

4. The content and language of Queensland's revised Anti-Discrimination Act should and must be consistent and compatible with other Queensland law, as well as reflect Australia's broader commitments under international human rights law – much of which has been domesticated in Queensland through the *Human Rights Act 2019 (Qld)*. As you are aware, Queensland is laudably the first Australian State/Territory to enshrine the right to health in international law into its human rights legislation: section 37, *Human Rights Act 2019 (Qld)*. Although the content of section 37 is not a full expression of the right to health as understood in international human rights law,[7] the protection and promotion of the underlying determinants of health that are also part of that right are located in other provisions of the Act (i.e., employment, housing, education).

B. Submissions

With paragraphs 1-4 above in mind, I respectfully make the following two submissions.

---

[1] https://www.refworld.org/pdfid/4538838d0.pdf

[2] https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx; please note Article 25 on the right to health of and for persons with disabilities.

[3] https://www.legislation.qld.gov.au/view/pdf/asmade/act-2019-005

[4] J Tasioulas (2017) Minimum Core Obligations: Human Rights in the Here and Now. Research Paper October. Nordic Trust Fund; World Bank. https://openknowledge.worldbank.org/handle/10986/29144

[5] L Forman et al (2013) What could a strengthened right to health bring to the post-2015 health development agenda?: interrogating the role of the minimum core concept in advancing essential global health needs. *BMC International Health and Human Rights* 13:48.

[6] CE Brolan (2020) Queensland's new Human Rights Act and key issues in interpretation and application of the right to access health services. *Medical Journal of Australia* doi: 10.5694/mja2.50558.

[7] Please see General Comment No. 14 in reference 1 above; and CE Brolan (ibid).

Submission 1 – The content and language of the revised Anti-Discrimination Act should be consistent with the content and language proscribed in and by the UN Convention on the Rights of Persons with Disabilities 2006

5. From a public health and human rights perspective, the deficit language and framing of the "impairment" attribute in the current Act's section 7(h) is improper. It is incompatible and inconsistent with the content of the UN Convention on the Rights of Persons with Disabilities 2006, of which Australia is a ratifying party as highlighted in the Explanatory Note to the Queensland Human Rights Bill 2018.[8]

   Dictionary, Anti-Discrimination Act 1991 (Qld), p.131
   Impairment, in relation to a person, means—
   (a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or
   (b) the malfunction, malformation or disfigurement of a part of the person's body; or
   (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
   (d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
   (e) the presence in the body of organisms capable of causing illness or disease; or
   (f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—
   (g) presently exists; or
   (h) previously existed but no longer exists.

6. The definition of the impairment attribute is grounded in the disempowering biomedical model of health and disability. Both health rights law and disability rights law in the intervening 31 years since the Act's introduction have markedly shifted away from and have indeed explicitly sought to redress use of this model – as do people with disability and disability rights advocates in Queensland and around the world.[9]

7. Under the medical model, a health condition or disability is treated as a medical 'problem' within the individual – a "state of disease" or bodily "malformation" or "malfunction" or "reliance on a guide…" (para 5 above) – implicitly requiring medical intervention for so-called 'normalisation'. Under the medical model, the multi-dimensional causative factors that create or impact on poor health and on the lives of people with disability – such as the social determinants of health – are not recognised, nor are the insidious structural or environmental barriers that impede good health and wellbeing, as well as obstruct individual autonomy, agency, and realisation of fundamental human dignity.

8. The biomedical model framing of impairment in Queensland's current Anti-Discrimination Act is incompatible and inconsistent with the content of the UN Convention on the Rights of

[8] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-076
[9] CE Brolan et al (2011) The right to health of Australians with intellectual disability. **Australian Journal of Human Right**s 17(2):1-32; CE Brolan (2016) A Word of Caution: Human Rights, Disability, and Implementation of the Post-2015 Sustainable Development Goals. ***Laws*** 5:22.

Persons with Disabilities 2006, which promotes the social model of disability and an empowered rights-based approach to the framing and language with regard the health and wellbeing of people with disability. Therefore, the content and language of the "impairment" attribute should be considerably revised in the new Act to ensure compatibility with the language and spirit of the UN Convention on the Rights of Persons with Disabilities 2006.

9. In revising the language and content of the impairment attribute, Queenslanders with disability and their advocates should lead the drafting of the language, content and its new framing to support lawmakers. In this regard, respectfully ensuring people with disability lead the revision *to guide lawmakers* is consistent with the UN Convention on the Rights of Persons with Disabilities 2006, and Australia's obligations under that Convention. Although it is important that peak bodies representing interests of people with disability are instrumental in that discussion, it is imperative that it is people with disability from the Queensland community who lead it.

Submission 2 – The revised Anti-Discrimination Act should contain a new standalone "health status" attribute

10. Queensland's current Anti-Discrimination Act was introduced into law before the seminal World Conference on Human Rights in Vienna in June 1993,[10] and before the International Committee on Economic, Social and Cultural Rights (ICESCR) *finally* – after 30 years – issued an authoritative explanatory comment on the right to health in Article 12, International Covenant on Economic, Social and Cultural Rights 1966.[11] Also, at the time of the Act's introduction in 1991, the HIV/AIDS global advocacy movement was gaining momentum. That very successful advocacy movement – catalytic to the formation of UNAIDs as a standalone entity separate from the World Health Organization - was *strategically* and fundamentally anchored in human rights law and principle.[12] HIV/AIDS advocates argued (and continue to argue) that the discrimination of people living with HIV/AIDS – on account of their HIV/AIDS diagnosis (or imputed diagnosis) - was in clear violation of States Parties commitments and obligations under international human rights law.[13] These developments may provide some context for the inclusion in Queensland's current Anti-Discrimination Act's definition of impairment of *(e) the presence in the body of organisms capable of causing illness or disease*.

11. Following the issuance of General Comment No 14 on the human right to health in 2000, and the appointment of the UN Special Rapporteur on the Right to Health in 2002, high-level guidance has emerged unequivocally stating that people living with HIV/AIDS who experience discriminatory treatment, are experiencing that discriminatory treatment on the

[10] https://www.ohchr.org/en/aboutus/pages/viennawc.aspx
[11] Please see General Comment No. 14 in reference 1 above.
[12] UNAIDS. COVID-19 and HIV: 1. Moment 2. Epidemics 3. Opportunities; How to seize the moment to learn, leverage and build a new way forward for everyone's health and rights. Geneva: UNAIDS, 2020. https://www.unaids.org/sites/default/files/media_asset/20200909_Lessons-HIV-COVID19.pdf
[13] B Mason Meier et al (2017) Advancing the Right to Health in the AIDS response: AN Evolving Movement and an Uncertain Future. *Health and Human Rights Journal* (November 30) https://www.hhrjournal.org/2017/11/advancing-the-right-to-health-in-the-aids-response-an-evolving-movement-and-an-uncertain-future/

grounds of (*or attributed to*) their *health status*.[14] More international human rights legal guidance has subsequently emerged in the 2000s – notably released by the UN Special Rapporteur on the Right to Health – reinforcing that people can experience discrimination on account of health status, which confirms that health status is an attribute of discrimination in its own right.[15] This includes people who are discriminated against on account of their *mental health* status.[16]

12. Worldwide, many public health scholars and practitioners are engaged in important research, and health promotion and health advocacy that identifies and aims to address health inequities for marginalised populations in health and related cross-sectoral services and health systems, which are the direct result of discriminatory treatment on account of an individual's health status, or intersectional discrimination. For example, the public health community in Queensland and broader Australia frequently witness unlawful intersectional discrimination among Aboriginal and Torres Strait Islander peoples, people with disability, women, and the LGBTQI community members on account of their Indigenous, disability, sex or gender status (attribute) *and* intertwined health status (attribute).

13. In the COVID-19 era, public health practitioners have particularly witnessed the discrimination of members of our Queensland community who – similarly to people living with HIV/AIDS – may not identify with or 'fit' another proscribed 'attribute' under the current section 7(h) *Anti-Discrimination Act 1991 (Qld)*, but who are nonetheless experiencing unlawful discrimination solely on account of their COVID-19 diagnosis (health status) or imputed COVID-19 diagnosis (i.e.: imputed health status). In a recent case study undertaken by a Master of Public Health student at the School of Public Health (The University of Queensland) that I have supervised, a number of cases of discriminatory treatment of people in southeast Queensland on account of their COVID-19 diagnosis – particularly by employers – have been documented. Discrimination on account of health status (i.e.: COVID-19 diagnosis) is not confined to southeast Queensland but is a wider Australian and international concern. This has been made very clear, again by the UN Special Rapporteur on the Right to Health in a 2020 report to the UN General Assembly on the

[14] Article 2(2) International Covenant on Economic, Social and Cultural Rights 1966 and Article 2(1) UN Convention on the Rights of the Child 1989, for example, identify the following non-exhaustive grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status. According to the Committee on Economic, Social and Cultural Rights, "other status" may include health status (e.g., HIV/AIDS): https://www.ohchr.org/documents/publications/factsheet31.pdf; see General Comment No. 14, reference 1 above.

[15] For example, see 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 @ page 25 para (k) (https://www.ohchr.org/EN/Issues/Health/Pages/Agenda2030.aspx).

[16] See the UN Special Rapporteur on the Right to Health's 2020 report to the UN General Assembly, "A human rights-based global agenda for mental health and human rights" https://www.ohchr.org/EN/Issues/Health/Pages/GlobalAgendaMentalHealth.aspx; and the UN Special Rapporteur on the Right to Health's 2016 report to the UN General Assembly, "Report on the right to mental health of people on the move" https://www.ohchr.org/EN/Issues/Health/Pages/peopleonthemove.aspx.

COVID-19 pandemic.[17] Certainly, we are again seeing intersectional discrimination occur on account of a COVID-19 diagnosis and other discriminatory attributes, such as gender.[18]

14. Queensland lawmakers would likely argue that it is incorrect to state that Queensland's current Anti-Discrimination Act does not capture persons who are discriminated on the grounds of their physical and/or mental health status. For such lawmakers and legal practitioners, the argument is that people who are discriminated on account of their health status – such as Queenslanders living with HIV/AIDS – can find inclusion and remedy through their meeting the elements of the impairment attribute, as set out in that Act's dictionary, that an impairment can mean –

> (d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
> (e) the presence in the body of organisms capable of causing illness or disease.

15. From a public health and human rights perspective, the language and content of (d) and (e) above to *define* and *describe* discrimination on account of a medical diagnosis (or imputed diagnosis) is improper, inconsistent and incompatible with current health and human rights law as set out above. Again, the content of (d) and (e) is very telling of the era in which the current Anti-Discrimination Act was made off the back of the 1960s-1980s - and before the HIV/AIDS health and human rights movement took flight in the 1990s - wherein public health discourse, policy and practice was grounded in the biomedical model of health, and which today's public health practitioners and scholars view as outdated and disempowering to the people who present with potentially discriminatory health conditions (such as people living with HIV/AIDS). The lack of embrace and rejection of the biomedical model of health (and associated biomedical model narratives, which underpin the content of much public health and anti-discrimination law) by today's public health scholars, practitioners and educators is evident around the world. At a local level, The University of Queensland's School of Public Health, a leading international School of Public Health in Australia and internationally, does not ascribe to this model, as per the content of the School's core course for Master of Public Health students, Social Perspectives in Public Health (PUBH7620).[19]

16. Thus, for public health and human rights practitioners, when a person who is experiencing unlawful discrimination because of a medical or health condition or is experiencing discrimination by persons or public agencies because they are imputed to have that medical diagnosis or health condition, that individual is not being discriminated against because of "an impairment". Nor is that individual experiencing discrimination (or imputed discrimination) due to a 'diseased' condition, or from the "presence in the body of organisms" capable of causing illness and disease, or "disturbed behaviour". For public health and human rights practitioners today, that individual is being discriminated on account of their real (or imputed) *health status*.

---

[17] https://www.ohchr.org/EN/Issues/Health/Pages/COVID19Commentary.aspx

[18] B Bennett & CE Brolan (2021) Gender and COVID-19: An Australian Perspective IN B Bennett & I Freckelton QC (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law*. Melbourne: Federation Press; 278-293.

[19] Please see: https://my.uq.edu.au/programs-courses/course.html?course_code=PUBH7620

17. Therefore, the content and language of the "impairment" attribute should be considerably revised in the new Act, and a standalone health status attribute introduced. It is inadequate and arguably improper that the discrimination of members of the Queensland community on account of their health status be framed as, and thus 'tacked on' or under an impairment provision that uses deficit-based and outdated bio-medical framings of disease and ill-health to define and describe discrimination on account of physical and mental health status. To ensure consistency and compatibility with modern international human rights law, the attribute of health status should be a standalone attribute in and of itself, and thereby given proper and full recognition and profile in Queensland law. For example, a person living with HIV/AIDS – who aims to be seen and treated with fundamental human dignity as an empowered individual and with equal rights to everyone else in society – does not, respectfully, view themselves as 'diseased' for the purposes of the impairment attribute. This biomedical of framing of health (or ill-health) is, indeed, incompatible and inconsistent with the *Queensland Human Rights Act 2019 (Qld)*.

In summary, it is submitted that -

3. **The content and language of the revised Anti-Discrimination Act should be consistent with the content and language proscribed in and by the UN Convention on the Rights of Persons with Disabilities 2006**

4. **The revised Anti-Discrimination Act should contain a new standalone "health status" attribute**

Thankyou for your consideration.

Yours sincerely,

Dr Claire E Brolan
PhD (Public Health), MA, LLB (Hons) BA, Grad Dip Legal Practice

Honorary Advisor & Thematic Expert for SDG 3 (Health & Wellbeing), Legal & Economic Empowerment Global Network (LEEG-NET) high-level human rights & SDG advisory board to the United Nations

THIS SUBMISSION IS ENDORSED BY:

Name	Position
Sheleigh Lawler	Associate Professor, Public Health
Emma Harriman	Master of Public Health student, University of Queensland
Lisa Fitzgerald	Associate Professor, Public Health
Nina Lansbury	Senior Lecturer in Planetary Health, School of Public Health at The University of Queensland Lead Author, Intergovernmental Panel on Climate Change (AR6 WGII Australasia chapter) Associate editor, Nature Partner Journal (NPJ) Clean Water
Lisa Hall	Associate Professor, Public Health
Katie Brooker	Postdoctoral Research Fellow, University of Queensland
Judith Dean	Senior Research Fellow, Public Health
Carla Del Carpio	Research Fellow, Public Health
Grazia Catalano	Consultant disability quality auditor and researcher