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To the Commission

SUBMISSION TO THE REVIEW OF QUEENSLAND'S ANTI-DISCRIMINATION ACT: DISCUSSION PAPER

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to make the following submission in response to the Commission's November 2021 Discussion Paper *Review of Queensland's Anti-Discrimination Act*.

This submission expands on ALHR's submission to the recent Queensland Parliamentary Inquiry into Serious Vilification and Hate Crimes.[1]

Consistent with our initial submission, in this submission we will focus primarily on issues relevant to lesbian, gay, bisexual, transgender, intersex and queer (**LGBTIQ**) people and communities, both as an area of ALHR expertise, and also because we believe the LGBTIQ protections offered under the *Anti-Discrimination Act 1991* (Qld) (the **Act**) are in need of significant reform.

[1] ALHR, *Submission to the Inquiry into Serious Vilification and Hate Crimes*, 19 July 2021, available at: https://documents.parliament.qld.gov.au/com/LASC-C96E/I-20CA/submissions/00000069.pdf (Initial Submission).

In particular, we will address questions which relate to the following terms of reference from the scope of the Review:

'...

c) the attributes of discrimination, including:

i) whether the current definitions given to protected attributes best promote the rights to equality and non-discrimination; and

ii) whether additional attributes of discrimination should be introduced.

h) exemptions and other legislative barriers that apply to the prohibition on discrimination.'

Guiding Principles

This submission is written based on the principle that, as far as possible, all people should be able to live their lives free from discrimination. This includes freedom from discrimination on the basis of sexual orientation, gender identity and expression, and sex characteristics.

This principle derives from Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which provides that:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.'

And Article 2(1), which states:

'Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property birth or other status.'

In *Toonen v Australia*, the Human Rights Committee held that the reference to 'sex' in Articles 26 and 2 of the ICCPR includes sexual orientation. Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under the 'other status' grounds.

The Committee on the Elimination of Discrimination against Women (CEDAW), in document CEDAW/C/AUS/CO/8 dated 25 July 2018, positioned forced and coercive medical interventions on intersex children within its framework on harmful practices:

> 25. The Committee takes note of the State party's commitment to providing support for women who are victims of forced marriage, regardless of their cooperation with the prosecution authorities. It is concerned, however, about the following:
>
> …
>
> (c) **The conduct of medically unnecessary procedures on intersex infants and children before they reach an age when they are able to provide their free, prior and informed consent,** as well as inadequate

support and counselling for families of intersex children and inadequate remedies for victims

…

26. Recalling the joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices, the Committee recommends that the State party ensure adequate protection and support for victims of forced marriage, regardless of their collaboration with the prosecution authorities, and also recommends that the State party:

…

(c) Adopt clear legislative provisions **that explicitly prohibit the performance of unnecessary surgical or other medical procedures on intersex children before they reach the legal age of conse**nt, implement the recommendations made by the Senate in 2013 on the basis of its inquiry into the involuntary or coerced sterilization of intersex persons, provide adequate counselling and support for the families of intersex children and provide redress to intersex persons having undergone such medical procedures

…

The principle of non-discrimination is also reflected in Section 15 of the *Human Rights Act 2019* (Qld), which provides that:

(1) Every person has the right to enjoy the person's human rights without discrimination.
(2) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
(3) Every person has the right to equal and effective protection against discrimination.
(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

This submission is also informed by the *Yogyakarta Principles Plus 10: 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*, which was adopted on 10 November 2017.

In responding to questions which relate to the rights of LGBTIQ workers, we also consider *International Labour Organisation (ILO) Convention 111 – Discrimination (Employment and Occupation) Convention, 1958*, which was ratified by Australia in 1973, and in particular Article 2 which states:

'Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.'

Finally, and particularly in regards to our response to questions relating to religious exceptions, we are guided by Article 18 of the ICCPR, which provides:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and*

freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.*

Article 18(3) acts to limit the freedom to manifest religion where it is required to protect the 'fundamental rights and freedoms of others'. This includes freedom from discrimination (see, for example, Article 26), and therefore informs our view that religious exceptions under the Act should be narrowed, particularly where they currently allow for discrimination against employees and people accessing services on the grounds of their sexual orientation, gender identity and sex characteristics.

Issues affecting people with variations of sex characteristics

ALHR endorses the IHRA submission to the Queensland Human Rights Commission dated February 2022.

Background

People born with variations of sex characteristics, also called intersex people, experience stigmatisation, discrimination, bullying, body shaming and other forms of discrimination and harm because of their sex characteristics, and also assumptions about their identities.

Intersex is not a gender identity, and it's conflation with gender identity in existing legislation is harmful and exclusionary. For example, the harms associated with assumptions about the identity of intersex people can arise from assumptions that they:

- have a nonbinary gender identity;
- are not female or male;
- are not female or male *enough*;
- are queer or heterosexual; or
- that being intersex means they are old enough to freely express an identity.

People with variations of sex characteristics are not an homogenous community, and misconceptions and stigma impact the language that individuals feel comfortable with.

Experiences of Discrimination by Intersex People

Intersex advocacy and human rights body, Intersex Human Rights Australia (**IHRA**) has gathered evidence through community consultation and support, for independent research. This evidence demonstrates that intersex people suffer discrimination and stigmatisation in healthcare, education, employment and access to other services. Experiences of discrimination can be exacerbated by the obviousness of any intersex variation.

A brief summary of the experiences of intersex people includes:

- Risk of forced and coercive medical practices that violate human rights.
- Many intersex people leave school early, without any qualifications. A 2015 sociological study found that 19% of people born with atypical sex characteristics failed to complete secondary school (Jones, 2016).[2] Reasons appear to include bullying on the basis of physical characteristics, developmental delays, the impact of medical interventions during puberty, and lack of inclusive curricula.
- That 2015 study also found very high rates of poverty.[3]
- Early exposures to general anaesthesia are now associated with developmental delays .[4]
- There is evidence of discrimination in healthcare, schools, workplaces, sport, and access to other services.
- Access to Medicare services has been determined by necessity and not restricted by sex or gender since July 2013, in consultation with IHRA. However, Medicare does not fund all procedures, nor does it fund many on-going or reparative treatments to manage the consequences of forced medical interventions.
- In healthcare, prior experience of trauma and stigmatisation may limit utilisation of necessary healthcare services. Schützmann and others (2009) reported an Australian study as showing rates of psychological distress similar to "a comparison group of chronic somatically ill persons", thus showing "markedly increased distress".[5]
- Intersex people also experience discrimination in being subjected to eugenic practices and restricted access to assisted reproductive technology.
- A key discrimination practice in sport is a disregard for the often lifelong legal and social status of women born with intersex variations seeking to compete as women.

Protect Attributes Response

Question 26: Should there be a new definition of gender identity, and if so, what definition should be included in the Act?

ALHR welcomes the acknowledgement in the Discussion Paper that the definition of gender identity in the Act 'excludes people who identify outside of the gender binary and does not incorporate a person's gender expression',[6] as well as that it 'conflates trans and gender diverse people and people born with variations of sex characteristics.'[7]

In terms of gender identity itself, we support an updated definition that is inclusive of people with nonbinary gender identities, so that they can access the protections against discrimination, and vilification, offered under the Act. This is particularly important given the

[2] Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016) 112.
[3] Ibid.
[4] Schneuer, Francisco J, Jason P Bentley, Andrew J Davidson, Andrew JA Holland, Nadia Badawi, Andrew J Martin, Justin Skowno, Samantha J Lain, and Natasha Nassar. 'The Impact of General Anesthesia on Child Development and School Performance: A Population-Based Study' (2018) April Pediatric Anesthesia.
[5] Schützmann, Karsten, Lisa Brinkmann, Melanie Schacht, and Hertha Richter-Appelt. 'Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development' (2009) 38 (1): Archives of Sexual Behavior 16–33.
[6] Discussion Paper, page 96.
[7] Discussion Paper, page 97.

growth in young people identifying their gender in a range of diverse ways beyond the binary.

We also support the explicit inclusion of gender expression as part of this protected attribute, given the expression of gender which does not correspond with stereotypical 'norms' is often the site of gender identity-related discrimination.

In this context, we support in principle the definition in section 213G of the *Public Health Act 2005* (Qld), which is included in page 97 of the Discussion Paper:

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

The *Equal Opportunity Act 2010* (Vic) adopts a similar, albeit somewhat abbreviated, approach, to this definition:

'gender identity means a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.'
Either definition would ensure a diverse range of gender identities, including people who are non binary or otherwise gender diverse, are protected under the Act.

In relation to the conflation of intersex with trans and gender diverse people, the attribute of gender identity is defined in the schedule dictionary to the Act as follows:

> ***"gender identity"*** *, in relation to a person, means that the person—*
> *(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or*
> *(b**) **is of indeterminate sex** and seeks to live as a member of a particular sex. (emphasis added)*[8]

The reference to a person 'of indeterminate sex' imports inaccuracy and confusion into the definition. It conflates biology and identity and hence wrongly purports to include people with variations of sex characteristics. This definition echoes a similar misunderstanding in the NSW *Antidiscrimination Act 1977* (NSW) s38A (c), which defines a transgender person inter alia as someone '*who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex…*'

The NSW Anti-discrimination Board has explicitly acknowledged that this definition fails to include intersex people ie people with variations of sex characteristics, despite apparently being designed to include intersex people.[9]

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[8] Schedule: Dictionary, *Anti-Discrimination Act 1991* (Qld).
[9] Anti-Discrimination Board of NSW, 2009, *2008-2009 Annual Report*, 27.

In addition, the current definition of gender identity assumes a rigid gender binary, thereby excluding those who have non-binary identities. Such an assumption also harms people with variations of sex characteristics by reinforcing notions of a natural and pre-cultural sex and gender binary. Such assumptions underlie the deep medicalisation of intersex variations and contribute to the harms associated with non-consensual medical interventions which breach human rights. Accordingly, the definition should be amended in line with the amended definitions in the Public Health Act, which are based on a more accurate and meaningful approach developed and disseminated in the Yogyakarta Principles +10.

Recommendation: There should be a new definition of gender identity, to ensure a diverse range of gender identities, including nonbinary, are protected under the Act. This definition could be modelled on the approaches under the *Public Health Act 2005* (Qld) or *Equal Opportunity Act 2010* (Vic).

Question 27: Should there be a new definition of sexuality, and if so, what definition should be included in the Act?

ALHR welcomes the acknowledgement in the Discussion Paper that '[t]he definition of sexuality is also narrow, and no longer reflects the range of ways people describe their sexuality in today's society.'[10]

In particular, the Act's current definition as meaning 'heterosexuality, homosexuality or bisexuality',[11] excludes other sexual orientations such as pansexuality, and people who may describe their sexual orientation using terms such as queer.

ALHR supports an inclusive definition of sexuality, which ensures that all relevant groups are included, and can therefore access the protections against discrimination, and vilification, provided under the Act.

In this context, we support, in principl, the definition in section 213E of the *Public Health Act 2005* (Qld), which is included on page 97 of the Discussion Paper:

'Sexual orientation, of a person, means the person's capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than 1 gender.'

The *Equal Opportunity Act 2010* (Vic) adopts a similarly-worded approach:

'sexual orientation means a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender.'
Either definition would ensure that a diverse range of sexual orientations, such as pansexual and queer, are protected under the Act.

Recommendation:There should be a new definition of sexuality, to ensure a diverse range of sexual orientations are protected under the Act (including pansexual and queer). This definition could be modelled on the approaches under the *Public Health Act 2005* (Qld) or *Equal Opportunity Act 2010* (Vic).

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[10] Discussion Paper, page 97.
[11] Schedule: Dictionary, *Anti-Discrimination Act 1991* (Qld).

Question 30: Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?

ALHR supports, in principle, the inclusion of 'expunged homosexual conviction' as a protected attribute under the Act.

People with expunged convictions in this area were the victims of Government homophobia and biphobia, and should never have been subject to criminal punishment in the first place.

The inclusion of this protected attribute would reinforce the strength of the historical convictions expungement scheme, introduced in Queensland in 2017, and follow the lead of other jurisdictions, including Victoria, that have also introduced protections against discrimination on the basis of expunged convictions.

ALHR is concerned that the Queensland expungement scheme remains incomplete and notes that people who were convicted due to the unequal age of consent for anal intercourse between 1991 and 2016 remain unable to apply for expungement of their records.

Question 36: Should an additional attribute of sex characteristics be introduced?

Intersex is a matter of biology, not gender identity. Its inclusion in the current legislation as a facet of gender identity is incorrect and has excluded intersex people from the protections afforded by the legislation. For example, the NSW Anti-Discrimination Board concluded, in their 2008-2009 Annual Report, that intersex people are not protected by Section 38A of the *NSW Anti-Discrimination Act 1977* No. 48, which echoes the provisions of the Qld Act. Apparently this conclusion was reached in part due to a number of attempted cases brought before the ADB, as well as case law. Page 27 of the 2008-2009 Annual Report of the NSWADB summarises the position: *'Intersex discrimination – intersex people are not protected against discrimination anywhere in Australia*.'[12]

As outlined above, Intersex people suffer discrimination and need explicit protection in human rights and anti-discrimination legislation. This can only be achieved by recognizing intersex as a biological state and by recognizing the diverse sex characteristics of intersex people. The definition of gender identity should be amended to remove reference to persons of 'indeterminate sex' and a distinct attribute of sex characteristics should be introduced.

Recommendation: The attribute of sex characteristics should be introduced.

Should it be defined, and if so, how?

In 2012-2013, Intersex advocacy organisation IHRA (then **OII**) actively supported the inclusion of "intersex status" in the S*ex Discrimination Act 1984* (Cth). This was a major and welcome advance, and followed lobbying to ensure that intersex was not inappropriately included within a definition of gender identity.

"Intersex status" was added to anti-discrimination law, independently of sex, gender identity, and sexual orientation, in 2013. This followed advocacy by us and others, and it

[12] Anti-Discrimination Board of NSW, 2009, *2008-2009 Annual Report*, 27.

opportunistically used an attribute developed in Tasmania for a bill that was then before the State parliament. The attribute is defined in the Act as follows:

> ***intersex status*** *means the status of having physical, hormonal or genetic features that are:*
> *(a) neither wholly female nor wholly male; or*
> *(b) a combination of female and male; or*
> *(c) neither female nor male.*[13]

The legislative changes resolved many of the issues with failed previous attempts to include protections for intersex people within attributes protecting on grounds of gender identity, however, the approach taken in Federal law has had three predominant shortcomings, as outlined below.

Firstly, it is based on a model of deficit: it makes statements about what intersex people lack in relation to typical females and males. Secondly, it has been imputed to mean something about the identity of intersex people, even though the legal attribute refers to physical features. Thirdly, the definition needed to be imprecise to protect people who are perceived to have an intersex variation; for this reason, it is not limited to people born with particular characteristics.

IHRA's position has changed in response to international and local developments since the passing of legislation in 2013. ALHR also supports a change in the definition.

In Malta a new attribute, introduced in 2015, called "sex characteristics" protects people with intersex variations from discrimination and non-consensual medical interventions. Unlike the Australian attribute of intersex status, this attribute is universal; it deliberately includes everyone.

The attribute reads:

> *"sex characteristics" refers to the chromosomal, gondal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.*[14]

This approach is recommended by the Council of Europe and a growing number of institutions.[15] A version of this definition has been adopted into the Yogyakarta Principles plus 10. The YP+10 define sex characteristics in the following way:

> *UNDERSTANDING 'sex characteristics' as 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*

The 2017 Yogyakarta Principles plus 10 reflect an understanding of the differing situations of differing populations:

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[13] Sex Discrimination Act 1984 (Cth) s 5C.
[14] The Gender Identity, Gender Expression and Sex Characteristics Act (Malta) s2.
[15] Council of Europe Commissioner for Human Rights, (2017) Human Rights and Intersex People (Council of Europe, 2017).

RECOGNISING that the needs, characteristics and human rights situations of persons and populations of diverse sexual orientations, gender identities, gender expressions and sex characteristics are distinct from each other;

NOTING that sexual orientation, gender identity, gender expression and sex characteristics are each distinct and intersectional grounds of discrimination, and that they may be, and commonly are, compounded by discrimination on other grounds including race, ethnicity, indigeneity, sex, gender, language, religion, belief, political or other opinion, nationality, national or social origin, economic and social situation, birth, age, disability, health (including HIV status), migration, marital or family status, being a human rights defender or other status.

ALHR support the inclusion of an attribute of 'sex characteristics' as outlined in the YP+10.

In its submission, IHRA supports the following definition of sex characteristics:

1. *sex characteristics means a person's physical features relating to sex, and includes:*
    a. *the person's genitalia and other sexual and reproductive parts of the person's anatomy; and*
    b. *the person's chromosomes; and*
    c. *the person's hormones; and*
    d. *secondary features emerging as a result of puberty.*[16]

Recommendation: Sex characteristics should be defined in line with the Yogyakarta Principles +10 and the Malta legislation. ALHR supports the definition proposed by IHRA as above.

Question 40: Should the sport exemption be retained, amended, or repealed?

Intersex people suffer exclusion and stigmatisation in sport.[17] This takes multiple forms. On a day-to-day level, the most significant issue faced by intersex people in sport settings is body shaming, and the idea that their bodies are too masculine or too feminine.

Intersex people who change legal sex classification may face some of the same challenges that face transgender people. This unfortunately is also the case for intersex people who have non-binary, alternative and multiple sex markers. Women born with intersex variations face additional issues, including the idea that, even observed, assigned and raised as girls, with a lifelong social and legal status as women, they should not be permitted to compete as women. This is a distinct issue from participation by transgender women, as women with intersex variations who are targeted by exclusions have never sought to transition or change sex classification; they seek to compete in their birth-observed classification.

Historically, testing to ensure that women competitors are women has arisen because of a view that mixed-sex competition would adversely impact the inclusion of women in sport, and that women's sport needs to be protected from participation by men (Padawer, 2016).[18]

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[16] Intersex Human Rights Australia (IHRA) *Submission on reform of the Anti-Discrimination Act 1991* (IHRA 2022), 27.

[17] Morgan Carpenter, 'Sport', Intersex Human Rights Australia (Web Page) < https://ihra.org.au/sport/. Much of the discussion in this section of the submission is summarised from IHRA's webpage regarding discrimination in sports, authored by Morgan Carpenter.

[18] Padawer, Ruth. 2016. 'The Humiliating Practice of Sex-Testing Female Athletes' The New York Times, 28 June 2016.

It has arisen, then, in a climate of hostility towards perceived masculinity in women's sport, and fear of perceived deviance. These rationales persist (Jordan-Young and others, 2014; Karkazis and Carpenter, 2018).[19]

Initially, sex testing of women athletes involved examinations of women's genitals and other sex characteristics. Chromosomal analysis was later introduced. Both tests have been discontinued, but subsequent guidelines have drawn an arbitrary line between acceptable and unacceptable levels of testosterone in women athletes. Late in 2021 the IOC released a new framework for participation by transgender and intersex athletes which has abandoned the focus on testosterone levels.[20]

In the years since 2015, there is no evidence of women's sport suffering from the inclusion of women with intersex variations.

While attempts have been made to survey the experience of intersex people in sport, as part of studies on LGBTI people[21] (ACT Human Rights Commission and others, 2014) or transgender and intersex people (AHRC, 2015),[22] their framing has failed to be relevant to the needs of intersex people, and low sample sizes mean that the data are not representative. Anecdotally, and in research on educational needs (Jones, 2016),[23] we are aware of multiple people who avoid participation in sport because of experiences of body shaming and developmental delays.

Guidance on including intersex people in sport should state that any women and men can always play or compete if that is their birth-assigned legal sex.

The position of intersex advocacy groups such as IHRA is set out in the 2017 Darlington Statement, an Australian – Aotearoa/New Zealand intersex community declaration, where:

> 35. We call for **access to sport** at all levels of competition by all intersex persons, including for all intersex women to be permitted to compete as women, without restrictions or discriminatory medical investigations.[24]

It is essential that *the Antidiscrimination Act 1977* (QLD) enable all intersex people to compete as they are born and raised, in their legal gender, without being obliged to undertake hormonal or surgical intervention to be able to compete.

Recommendation: Exemptions should not be used to exclude intersex athletes from competing. A blanket exemption applying to intersex people is disproportionate, and

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[19] Jordan-Young, R. M., P. H. Sonksen, and K. Karkazis.. 'Sex, Health, and Athletes' (2014) (apr28) 9 British Medical Journal 348 g2926–g2926; Karkazis, Katrina, and Morgan Carpenter 'Impossible "Choices": The Inherent Harms of Regulating Women's Testosterone in Sport' (2018) 15 (4) Journal of Bioethical Inquiry 579–87.

[20] IOC, Consensus Meeting on Sex Reassignment and Hyperandrogenism, November 2015.

[21] ACT Human Rights Commission, A Gender Agenda, AIDS Action Council, and Play by the Rules, Inclusive Sport Survey The Sport Experiences of Lesbian, Gay, Bisexual, Transgender and Intersex People in the Australian Capital Territory, (ACT Government, 2014).

[22] Australian Human Rights Commission, Trans, Gender Diverse & Intersex Participation in Australian Sports (AHRC, 20 August 2015).

[23] Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016).

[24] Androgen Insensitivity Syndrome Support Group Australia, Intersex Trust Aotearoa New Zealand, Organisation Intersex International Australia, Eve Black, Kylie Bond, Tony Briffa, Morgan Carpenter, et al.. Darlington Statement (2017, Sydney) < https://darlington.org.au/statement/>.

might broadly limit their access to sporting activities, with adverse consequences for health and well-being.

We endorse the recommendation by IHRA that 'Regulations and guidance on including people with innate variations of sex characteristics in sport should always state that women and men with innate variations of sex characteristics can play or compete in their birth-observed/birth-assigned sex.'

No sport exemptions should be available in relation to the attribute of 'sex characteristics'

Is strength, stamina or physique the appropriate consideration when restricting access to competitive sporting activity based on sex, gender identity, and sex characteristics? If not, what would be an alternative test to ensure fairness and inclusion in sporting activities?

Recommendation: This is not an appropriate criteria for inclusion or exclusion. The most appropriate test is the person's birth-observed or birth-assigned sex.

Religious Exceptions Response

[Questions 41 and 42 considered together]

Question 41: Should the scope of the religious bodies' exemption be retained or changed? In what areas should exemptions for religious bodies apply, and in relation to which attributes?

Question 42: Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?

ALHR does not oppose current section 109(1)(a)-(c) of the Act, which allows religious organisations to discriminate, on any ground, in relation to:

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice…

ALHR submits that these activities are closely tied to the enjoyment of and participation in religious celebrations, and therefore justify broad exclusion from the operation of the Act's prohibition on discrimination.

Discrimination against students by religious schools

ALHR also strongly welcomes the Act's current approach to the treatment of students in religious educational institutions (including faith-based schools, colleges and universities)

which is best practice within Australia (alongside equivalent laws in Tasmania, the ACT, and Northern Territory).

In particular, ALHR welcomes the Act's protection for students against discrimination on the basis of sexuality and gender identity, in all circumstances.[25]

Importantly, this protection is supplemented by section 41, which only allows religious educational institutions to discriminate against students on the basis of religious belief at the point of application, and not beyond.[26]

This safeguard means that religious schools are not allowed to discriminate against existing LGBTQ students 'under the guise of religious views', rather than on the basis of sexuality or gender identity directly.

For example, the combination of the Act's general protection for LGBTQ students, and the limited exception in section 41, mean religious schools cannot punish existing students for refusing to publicly affirm statements like 'homosexuality is intrinsically disordered' or that 'god created man and woman, and therefore transgender people do not exist.'

This view was reinforced by the recent controversy surrounding the actions of Citipointe Christian College, and the strength of the Act's protections in this area were highlighted by Queensland Human Rights Commissioner Scott McDougall on 31 January 2022:[27]

'The Queensland Anti-Discrimination Act has not permitted religious schools to discriminate against currently enrolled students because of their sexuality or gender identity for 20 years. Expelling, disciplining or otherwise treating a student unfavourably because of these characteristics is unlawful discrimination in Queensland.

'A school policy that requires a trans or gender diverse young person to be treated as their sex assigned at birth, or that requires a young person to hide or deny their sexuality, is likely to amount to unlawful discrimination…

'While there is an exemption in Queensland that allows for a school to operate as a single sex or a religious school, this applies only to prospective students, and does not allow a school to refuse enrolment based on gender identity or sexuality.'

We therefore submit that no changes are required in relation to the treatment of students by religious educational institutions.

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[25] Given section 109(2) of the Act provides that the general religious exception in 109(1)(d) 'does not apply… in the education area', and there are no other specific exceptions allowing such discrimination.

[26] 'An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment may exclude-

(a) applicants who are not of the particular sex or religion; or

(b) applicants who do not have a general, or the specific, impairment.'

[27] Queensland Human Rights Commission, Media Statement, 'Queensland laws have prohibited discrimination against LGBTIQ+ students for 20 years,' 31 January 2022, available at: https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/37589/2022.01.31-Media-statement-religious-educational-institutions.pdf.

Discrimination by religious organisations in other areas of service delivery

ALHR submits that the religious exceptions in section 109(1)(d) of the Act are too broad.

Currently, this section provides that:

This Act does not apply in relation to-

(d) unless section 90 (Accommodation with religious purposes) applies-an act by a body established for religious purposes if the act is-

(i) in accordance with the doctrine of the religion concerned; and

(ii) necessary to avoid offending the religious sensitivities of people of the religion.

Significantly, this exception applies to all protected attributes under the Act, including sexuality and gender identity (and, if sex characteristics and expunged homosexual convictions are added in the future, it would apply to those grounds too).

While ALHR acknowledges there may be circumstances in which religious organisations may wish to provide their services to people who are members of the same religion – and therefore be able to discriminate in service provision on the basis of religious belief – we do not support the ability of religious service providers to discriminate *against* people on the grounds of other attributes, including LGBTIQ people.

This is exacerbated where, as noted on page 115 of the Discussion Paper, religious organisations operate a range of essential services (such as aged care, hospitals, and other community services) to the public and these services often rely on significant amounts of public expenditure and funding.

We highlight that the approach in the *Anti-Discrimination Act 1998* (Tas), which has, for decades, restricted the ability of religious organisations to discriminate on the basis of religious belief or affiliation or religious activity only.[28]

Further, recently-passed amendments to the Victorian *Equal Opportunity Act 2010*, which have not yet commenced, adopt a similar approach with respect to the provision of Government-funded services. This being the restriction of discrimination to the grounds of religious belief or activity, as well as a requirement that the discrimination be reasonable and proportionate in the circumstances.

ALHR outlines that proposed the section 82B of that Act will read:

Religious bodies – provision of government funded services

(1) A person may discriminate against another person if the discrimination is constituted by, or relates to, one of the following0

(a) a religious body refusing to provide government funded goods or services to a person on the basis of the person's religious belief or activity;

[28] Section 52(d) *Anti-Discrimination Act 1998* (Tas): 'A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to (d) any other act that – (i) is carried out in accordance with the doctrine of a particular religion; and (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.'

(b) a religious body determining the terms on which government funded goods or services are provided to a person on the basis of the person's religious belief or activity;

(c) a religious body subjecting a person to any detriment, in connection with the body's provision of government funded goods or services to the person, on the basis of the person's religious belief or activity;

where-

(d) the refusal, the terms or subjecting the person to the detriment, as the case requires, is in conformity with the doctrines, beliefs or principles of the religious body's religion or is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and

(e) the discrimination is reasonable and proportionate in the circumstances.

ALHR believes that the approach adopted in Tasmania, and soon-to-commence in Victoria, offer the way forward for reform of exceptions in the Act. In particular, to allow discrimination by religious organisations in service delivery on the basis of religious belief only, and the consideration of additional requirements, including that any discrimination is 'reasonable and proportionate in the circumstances' where the service delivery uses public funds.

Recommendation: That the religious exceptions in s109(d) of the Act be reformed, to ensure that discrimination is only permitted on the basis of religious belief and not other attributes like sexual orientation, gender identity or sex characteristics, and that where the service delivery involves the expenditure of public funds, such discrimination must also be 'reasonable and proportionate in the circumstances'. These reforms should be informed by existing exceptions in Tasmania, and soon-to-commence provisions in Victoria.

Discrimination by religious organisations in employment

Question 44: Should the religious educational institutions and other bodies exemption be retained, changed or repealed? If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

ALHR supports significant amendments to the religious educational institutions and other bodies exemption, currently found in section 25 of the Act.

While there are some elements of this exception which reflect contemporary standards – for example, references to 'genuine occupational requirements' (section 25(3)(b)) and consideration of 'whether the action take or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions' (section 25(5)(a)) – in other respects, this provision permits more discrimination than is necessary.

This includes the fact that, while age, race or impairment are excluded from this exception, it nevertheless applies to a wide range of other attributes, including sexuality and gender identity (and sex characteristics if it is added in the future). As with service delivery (described above), we submit that discrimination should only be allowed on the ground of religious belief, and not other attributes.

In terms of religious schools specifically, the approach in section 25 falls short of the existing approach in jurisdictions like Tasmania[29] and the ACT,[30] which only allow discrimination against teachers and other workers on the ground of religious belief.

Indeed, Tasmania adopts a similar approach with respect to all employees of religious organisations, with section 51(1) of the *Anti-Discrimination Act 1998* (Tas) applying to religious employers other than schools:

'A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.'

The recently-passed reforms to the Victorian *Equal Opportunity Act 2010* build on the approach in Tasmania and would, in our view, constitute best practice once they take effect.

Specifically, they adopt essentially the same approach to both religious educational institutions (proposed section 83A) and other religious employers (proposed section 82A), with the latter providing:

Religious bodies-employment

(1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a religious body if-
  (a) conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position; and
  (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
  (c) the discrimination is reasonable and proportionate in the circumstances.
(2) The nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (10(a).
(3) This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).

ALHR would support adoption of similar provisions in the Queensland Act, including that discrimination is only permitted on the basis of religious belief, is a genuine occupational requirement or inherent requirement of the role, and is reasonable and necessary in the circumstances.

Finally, we note that adoption of a similar approach in the Act would also remove one of the most harmful parts of section 25, which is the 'Don't Ask, Don't Tell' approach to LGBTQ teachers and other employees in religious schools.[31]

While in theory this is supposed to be an additional safeguard to the other elements of section 25, in practice asking teachers and other workers to essentially remain in the closet – to hide their sexual orientations and/or gender identities, including their relationships – is

[29] Section 51(2), *Anti-Discrimination Act 1998* (Tas).
[30] Section 46, *Discrimination Act 1991* (ACT).
[31] Section 25(4) *Anti-Discrimination Act 1991* (Qld): Subsection (3) does not authorise the seeking of information contrary to section 124'.

deeply harmful to their own mental health, as well as likely causing them to be less effective in their roles, because of their fear of being outed and losing their employment.

By removing the ability of religious schools and other employers to discriminate on the basis of sexual orientation or gender identity, it also removes the justification for including a provision such as 'Don't Ask, Don't Tell' in the Act.

Recommendation: Religious educational institutions and other religious employers should only be allowed to discriminate on the basis of religious belief and not other attributes like sexual orientation or gender identity. Such discrimination should also be a genuine occupational requirement of the position, as well as being reasonable and proportionate in the circumstances. The drafting of a new provision should be informed by the recently-passed but yet to commence sections 82A and 83A of the *Equal Opportunity Act 2010* (Vic).

Response to other exceptions

Question 45: Are there reasons why the work with children exemption should not be repealed?

ALHR strongly supports the repeal of section 28(1) of the Act, which is headed 'Work with children' and which currently provides:

'It is not unlawful to discriminate on the basis of lawful sexual activity or gender identity against a person with respect to a matter that is otherwise prohibited under subdivision 1 if-

(a) the work involves the care or instruction of minors; and

(b) the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person's actions.'

There can be no policy justification for allowing discrimination against trans and gender diverse people in accordance with this section, or against people with innate variations of sex characteristics (intersex variations) who are currently included in this provision because of the inappropriate definition of gender identity (see response to Question 26, above).

The drafting of this section 28 frames intersex, trans and gender diverse people as a 'threat' to children, and contributes to societal transphobia and intolerance against them. This section also acts to undermine the right to work for trans and gender diverse people in Queensland.

Section 28 is likely in contravention of the *International Labour Organisation (ILO) Convention 111 – Discrimination (Employment and Occupation) Convention, 1958*, ratified by Australia in 1973, and in particular Article 2 which states:

'Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.'

ALHR submits that allowing discrimination against intersex, trans and gender diverse workers in a large section of the modern workforce – for example, all jobs which involve 'the

care or instruction of minors' – likely exacerbates the already high rates of unemployment amongst this community. This provision should be repealed. We support IHRA's call for a formal apology to anyone impacted by this exemption.

Recommendation: Section 28(1) of the Act should be repealed, to ensure intersex, trans and gender diverse people are protected against discrimination where their employment involves 'the care or instruction of minors', and to address the stigma and transphobia which this provision causes.

Question 46: Are there reasons why the Act should not apply to provision of assisted reproductive technology services?

ALHR also strongly supports the repeal of section 45A of the Act, which currently allows discrimination in the provision of assisted reproductive technology services on the basis of relationship status and sexuality.

There can be no policy justification for allowing discrimination against same-gender couples, and single parents, who simply wish to have children, especially given the growing evidence that children born into rainbow families (being families where parents are members of the LGBTIQ communities) develop equally as well as children born to cisgender, mixed-gender couples. ALHR also call for access to reproductive services and fertility counselling for all intersex people, with protection of their reproductive autonomy, regardless of whether or not their capacity for fertility is considered to be in line with their legal sex.

This provision should be repealed.

IVF and other forms of genetic screening may eliminate sex chromosome variations. As IHRA comment in their submission, Intersex traits are considered suitable for elimination from the gene pool, and they may be offered to families and siblings of individuals with an identified intersex trait. This discriminatory and stigmatising, particularly in relation to non-syndromic intersex traits, where there is an absence of serious clinical features.

In clauses 25 and 26, the Darlington Statement provides the following:

'We call for an end to the use of IVF and other forms of genetic selection to de-select variations of sex characteristics.'[32]

Recommendation: Section 45A of the Act should be repealed, to remove lawful discrimination against rainbow families and single parents who wish to have children, as well as against people with variations of innate sex characteristics who may wish to access forms of reproductive technology not stereotypically associated with members of their legal sex.

Recommendation: The Queensland Anti-discrimination Act should introduce a prohibition on the use of assisted reproductive technology processes to select against variations of sex characteristics.

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[32] Androgen Insensitivity Syndrome Support Group Australia, Intersex Trust Aotearoa New Zealand, Organisation Intersex International Australia, Eve Black, Kylie Bond, Tony Briffa, Morgan Carpenter, et al.. *Darlington Statement* (2017, Sydney) < https://darlington.org.au/statement/>.

Thank you in advance for your consideration of this submission and the recommendations ALHR has made.

If you would like to discuss any aspect of the submission with us, please do not hesitate to contact us.

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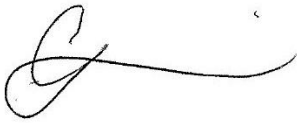

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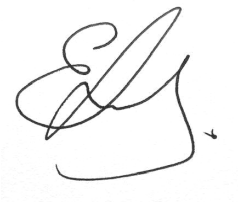

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