



Australian Federation of AIDS Organisations (AFAO)

**Exposure draft of Human Rights and
Anti-Discrimination Bill 2012**

**Submission to the Senate Legal and
Constitutional Affairs Committee**

19 December 2012

About AFAO

The Australian Federation of AIDS Organisations (AFAO) is the national federation for the HIV community response. AFAO's members are the AIDS Councils in each state and territory; the National Association of People with HIV Australia (NAPWHA); the Australian Injecting & Illicit Drug Users League (AIVL); the Anwernekenhe Aboriginal and Torres Strait Islander HIV/AIDS Alliance (ANA); and Scarlet Alliance, Australian Sex Workers Association. AFAO advocates for its member organisations, promotes medical and social research into HIV and its effects, develops and formulates policy on HIV issues, and provides HIV policy advice to Commonwealth, state and territory governments.

Our perspective on this Inquiry

AFAO is pleased to provide this submission on the Human Rights and Anti-Discrimination Bill 2012 (the Bill). Freedom from discrimination is a key attribute of any democratic society and pivotal to the wellbeing of all citizens. People with HIV who are vulnerable to discrimination and other forms of unequal treatment, prejudice and stigmatisation are in particular need of the essential legal protections that anti-discrimination laws can provide.

People with HIV are currently afforded protections under the *Disability Discrimination Act 1992* (DDA). As the definition of disability in the DDA has been carried across to the new legislation, we understand that people with HIV will continue to be protected under the consolidated law.

AFAO believes that this inquiry provides the opportunity not only to ensure that protections are maintained but also to identify and address Commonwealth policies that actively discriminate on the grounds of an attribute such as disability, race, or country of origin.

Currently there is a gap in coverage whereby migration legislation is exempted from the DDA. Disappointingly, this exemption has been transposed to the Bill. Since the Joint Standing Committee on Migration's inquiry into the *Migration Treatment of Disability* (Migration Disability Inquiry) in 2009-2010, AFAO has argued that Australia's migration regulations and associated policies regarding the intake of migrants and refugees with disability are unduly harsh in respect of HIV-positive people, most notably in respect of off-shore refugee applicants seeking humanitarian visas. The Government has announced some easing of the application of the migration Health Requirement but continued existence of the DDA migration exemption allows Australia to maintain a situation where discrimination against people with disability, including people living with HIV, is *facilitated* by the law. AFAO believes that there is no reasonable justification for this and we call for the removal of the exemption from the proposed consolidated anti-discrimination law.

AFAO also opposes the new Bill's general religious exemption. Any law that perpetuates discrimination against LGBTI Australians can have serious consequences for the physical, mental and sexual health of people among these communities. The exemption offends the principle of universal non-discrimination. The presumption should be against the inclusion of any exemption, with the onus on organisations that seek to discriminate to adequately justify their argument as to why. We do not believe that such a blanket justification has been provided and if the religious exemption was previously justifiable those arguments no longer apply. Religious organisations are now contracted

to administer government-funded services to the public, and so, like rest of Commonwealth services, should be bound by anti-discrimination laws. We therefore call for the removal of religious exemptions to anti-discrimination laws on the basis of sexuality.

We welcome the fact that the revised Bill somewhat limits the religious exemption in respect of provision of aged-care services. In respect of the remaining religious exemptions, however, we endorse the submissions of ACON that religious organisations be required to state in all public messaging that they are entitled to/intend to discriminate in their operations against people based on their sexual orientation and gender identity. If discrimination based on sexuality is to be enshrined in Commonwealth laws, this should at least be laid bare so that people among affected communities may understand the operation and impact of those laws and make appropriate choices as consumers of aged-care services.

Call to remove the Migration exemption in the new consolidated anti-discrimination law

We note that the *Migration Act 1958* will be exempted from the new Bill, as has been the case with the DDA. This exemption means that Australia's migration laws and associated policies can actively facilitate discrimination against people with disability, including HIV-positive people.

The rationale for exempting migration legislation from the *Disability Discrimination Act 1992* was that it was necessary in order to retain the migration Health Requirement, and so allow certain subclasses of visa applications to be refused if the main applicant, or a member of their family included in the application, has a "disease or condition" which constitutes a "disability" under the DDA (on the grounds of the costs associated with HIV treatment - with limited waiver of the Health Requirement in individual cases). For HIV-positive applicants, if not for the exemption of migration law from the DDA, the policy to test all permanent visa applicants for HIV and to generally refuse visas to people with HIV under the Health Requirement would be unlawful discrimination under this domestic law.

AFAO believes that the exemption of the *Migration Act 1958* from anti-discrimination legislation undermines Australia's credibility in its promotion of the human rights of people with disability – both domestically and internationally. The exemption conveys a strong stigmatising message regarding disability, and regarding HIV in particular, which is at odds with the principle of non-discrimination and Australia's commitments under the UN Convention on Rights of People with Disabilities and the 2011 United Nations Political Declaration on HIV/AIDS¹.

AFAO believes that there is no reasonable justification for continuing the Migration Act exemption. Although there has been some reform of the migration Health Requirement as it applies in respect of people with disability so as to take into account potential economic contributions an applicant with disability may make, the policy will remain fundamentally discriminatory while the exemption

¹ United Nations Joint Programme on HIV/AIDS (UNAIDS). (2011). *2011 Political Declaration on HIV/AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS*. UNAIDS, Geneva. Available at: www.unaids.org

remains in place². AFAO's policy position has been endorsed by its Member Organisations and by the following organisations:

- Refugee Council of Australia
- People with Disability Australia
- National Ethnic Disability Alliance
- Australian Federation of Disability Organisations
- Federation of Ethnic Communities Councils.

We note that Uniting Justice Australia also opposes the exemption of the Migration Act from the anti-discrimination laws, stating that "The Migration Act 1958 (Cth) should not be exempt from non-discrimination protections in the consolidated act."³

Given the Australian Government's ratification of the Convention on Rights of People with Disabilities and the global effort in recent years to further the human rights of people with disability, this review and consolidation represents a timely opportunity to examine the ongoing validity of the rationale for providing this exemption. Reform by way of removing the exemption would benefit a country like Australia, which generally is a strong defender of the key democratic principles of equality and fairness. It would send a very positive message in the lead up to the International AIDS Conference 2014 to be held Melbourne. The new consolidated discrimination laws should abandon the current discriminatory exemption, thus allowing anti-discrimination laws to have the optimal effect of expanding the circle of human rights and enfranchisement.

Recommendation:

- *AFAO calls for the removal of the migration exemption from the Bill*

Insurance and health legislation

There is currently a gap in coverage whereby insurance and health legislation is exempted from the DDA⁴ and this, disappointingly, has been transposed to the Bill.

² As argued in the AFAO discussion paper Migration Law and HIV - The case for reform of Australian migration law and policy to ensure that the human rights of people living with HIV are respected and protected and in the position statement Call for reform of Australian migration policies affecting refugees living with HIV Available at:

http://www.afao.org.au/__data/assets/pdf_file/0020/5555/DP020511_Migration_Law_and_HIV.pdf and
http://www.afao.org.au/__data/assets/pdf_file/0006/5559/pp_may11_reform_of_migration_policies.pdf

³ UnitingJustice Australia (2011), *The consolidation of Australia's anti-discrimination legislation – comments to the Attorney General's Department*, UnitingJustice Australia, Sydney, 7, available at: http://www.unitingjustice.org.au/images/stories/PDFs/1103_AntiDiscriminationConsolidation_UnitingJusticeAustralia.pdf

⁴ *Health Insurance Act 1973; National Health Act 1953; Private Health Insurance Act 2007; Therapeutic Goods Act 1989*

Australia will be before the 9th session of the Committee on the Rights of Persons with Disabilities in April 2013⁵. At this time, Australia's compliance with its compliance with the Convention on the Rights of Persons with Disabilities will be under scrutiny. The 2009 *Convention on the Rights of Persons with Disabilities - NGO Shadow Report* usefully identifies the extent to which Australia has implemented its obligations under the CRPD and provides recommendations for future action by the Australian Government. The insurance and health legislation exemption clearly falls foul of recommendations in the NGO Shadow Report, it having called on state parties to:

"Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted under national law, which shall be provided in a fair and reasonable manner;"⁶

Recommendation:

- *AFAO calls for the removal of the health and insurance exemptions from the Bill*

Community Engagement and Equitable Access

Community engagement with anti-discrimination protections and equitable access to complaint processes are essential to ensuring that the new can Bill provide the maximum protection possible for the community. Community legal centres play a critical role in providing community education about legal protections and remedies, as well as supporting equitable access to the complaints process by assisting individuals, where appropriate, to pursue complaints. Specialist community legal services such as the HIV/AIDS Legal Centre, NSW (HALC) and the Australian Centre for Disability Law, are particularly well positioned to connect with communities who may be most likely to engage with and affected by the new laws.

Providing community education about the operation of the new laws including any exemptions, and on rights of redress where a breach is believed to have occurred, is fundamental to the success of achieving the aims of anti-discrimination laws. Apart from remedies for individual complainants, the bringing of representative complaints can be effective way of addressing systemic discrimination. Community legal centres including specialist centres are well placed to monitor any such systemic issues and to facilitate the bringing of a representative complaint.

Additional funding to community legal centres is required to ensure that they are adequately resourced to educate the community regarding anti-discrimination protections and complaints processes. Likewise, the Australian Human Rights Commission as the regulator of the legislation, must be assured of adequate funding to undertake the significant task of applying the new legislation, engaging with and educating stakeholders, as well as dealing with complaints in a timely manner.

⁵Committee on the Rights of Persons with Disabilities
<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session9.aspx>

⁶ Human Rights for People With Disability website: accessed 11 December 2012,
<http://www.disabilityrightsnow.org.au/node/49>

Recommendations:

- AFAO calls for substantial additional funding to community legal centres, including specialist centres such as the HIV AIDS Legal Centre

- AFAO calls for substantial additional funding to the Australian Human Rights Commission

Discrimination based on sexual orientation or gender identity

We welcome the inclusion of sexual orientation and gender identity as protected attributes in the Bill. Discrimination on the basis of sexual orientation and sex and/or gender identity is a major human rights issue with serious implications for individual health and wellbeing. For gay men living with HIV, homophobic discrimination can be a significant issue overlaying and complicating discrimination relating to actual or perceived HIV-positive status.

Freedom from discrimination is essential to the development among same-sex and gender-diverse people of strong self-esteem, self-respect and respect for others. Developing and maintaining these qualities can be challenging, or impossible, for same-sex attracted and gender-diverse people living in a society where there is both implicit and explicit homophobia and transphobia - including as manifested in legally sanctioned discrimination. Such discrimination can have a direct and long-term effect on a person's health (physical, mental and emotional) and sense of security.

We do not support any religious exemptions in the new anti-discrimination laws. AFAO echoes the position of the ACON, in calling for the removal of the other exemptions allowing discrimination on the basis of sexual orientation and gender identity in the Bill.

We welcome the fact that under the Bill no provider of aged care services with Commonwealth funding will be permitted to discriminate on the basis of sexual orientation or gender identity. Given that other exemptions allowing religious discrimination remain, we propose that counter-veiling obligations be imposed on organisations which choose to exercise these religious exemptions. For example, as proposed by ACON and the LGBTI Health Alliance in earlier submissions, religious organisations such as schools seeking to discriminate against GLBTI students should be required to register this intent with the Australian Human Rights Commission, stating the grounds/doctrines justifying the proposed discrimination. Secondly, any religious organisation that has so registered should be required to state in all public messaging that they, in their operations, are entitled to and intend to discriminate against people based on their sexual orientation and gender identity. This should include messaging on any websites, and in general advertising materials regarding services, products and job recruitment. What is currently covert, yet legally-sanctioned discrimination will be explicit - thereby raising awareness of the legal basis of this discrimination and facilitate community discussion about its appropriateness.

Recommendations:

- AFAO proposes that there be no religious exemptions in the new consolidated anti-discrimination law

- If any religious exemptions are to remain in place, we propose that religious organisations be required to register their intent to discriminate with the Australian

Human Rights Commission, and to publicly declare that intent in public messaging and advertising.

Conclusion

The principle of non-discrimination is at the core of democracy, where all citizens can legitimately expect fair treatment before the law and at a broader level, in society generally. HIV falls within the protections of the *Disability Discrimination Act 1992*, and should, as we expect, continue to be covered under the new Bill.

AFAO believes that the proposed exemption of the *Migration Act 1958* from the new consolidated anti-discrimination legislation should be dropped. This exemption is based on out-dated notions of disability and fails to take into account the significant cultural, social and economic contributions that people with disability make to society. It also can have devastating consequences on individual lives. In the case of people living with stigmatising conditions such as HIV, this exemption constitutes bad law from a public health and human rights perspective and should be removed.

We commend the Government for its addition of sexual orientation and gender identity as protected attributes and the incorporation of these attributes into the new Bill. We oppose, however, the Government's proposal to allow religious organisations to generally discriminate against individuals on the grounds of sexual orientation and gender identity in relation to, *inter alia*, employment. This exemption has become particularly inappropriate now that many religious organisations are contracted to provide services previously provided by Commonwealth agencies. Religious organisations, like their Commonwealth agency counterparts, should be prohibited from discriminating on the basis of sexual orientation and gender identity.