AIVL Submission to the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (1 February 2012)

INTRODUCTION

This submission was prepared by the Australian Injecting & Illicit Drug Users League (AIVL). It has been informed by both the existing forms of Anti-Discrimination legislation in Australia, and by Australia's obligations under the seven core human rights treaties to which Australia is a party. It has also been informed by the work of AIVL and others on the various forms of stigma and discrimination people who use and inject drugs illicitly routinely experience[1].

The Australian Injecting & Illicit Drug Users League (AIVL) represents issues of national importance for people who use or have used illicit drugs including people currently in drug treatment and is the national peak organisation for state and territory drug user organisations. AIVL and its members are 'peer-based' organisations which mean they are run *by* and *for* people who use/have used illicit drugs. Although AIVL and its members provide a range of programs and services in relation to health, legal and social issues, unlike other non-government organisations, AIVL and its members have direct experiences of many of the issues we seek to represent and in this sense, act as a 'voice' for people who use and have used illicit drugs in Australia. In this context, AIVL and its member organisations represent the needs and issues for some of the most marginalised and socially excluded people in the community such as:

- people who inject drugs;
- people with drug dependencies;
- people on opioid substitution treatment (OST) and other forms of drug treatment; and
- people with drug-related comorbidities including hepatitis C, HIV/AIDS, mental health issues, etc.

The extreme levels of stigma and discrimination routinely experienced by people who use/have used illicit drugs is now well documented in the available literature.[2] Despite this broad and growing recognition of the problem, drug users remain vulnerable to unfair and poor treatment due to inadequate legal protections under current federal and state/territory discrimination law. This

[1] See, for example, *"Why wouldn't I discriminate against all of them?": A Report on Stigma and Discrimination towards the Injecting Drug User Community* (2011) Australian Injecting & Illicit Drug Users League: Canberra, Australia. This report was in part the product of a market research exercise undertaken on behalf of AIVL into community attitudes towards people who inject drugs.

[2] For an overview of some of the key available literature on the extent of stigma and discrimination among people who use/have used illicit drugs see, "Hepatitis C Models of Access and Service Delivery for People with a History of Injecting Drug Use" (2010) Australian Injecting & illicit Drug Users League: Canberra, Australia, pp.26-38.

situation is exacerbated by a criminal justice system that acts as a significant barrier to people who use/have used illicit drugs lodging formal complaints and availing themselves of any existing legal protections.

It is within this context, that AIVL welcomes this process to consolidate the Commonwealth Anti-Discrimination laws under Australia's Human Rights Framework, and welcomes the opportunity to make this submission on behalf of our community. Rather than opting to directly address each of the questions outlined in the discussion paper, we have, in the main, provided a submission that seeks to make the case for why people who use/have used illicit drugs must be more adequately protected within discrimination law. In presenting this argument, we have indirectly addressed some of the questions and issues raised within the discussion paper particularly from the perspective of achieving equality for people who use/have used illicit drugs, and most importantly, eliminating the high levels of existing discrimination routinely experienced by this group in society. Primarily however, we have sought to use the opportunity of the consolidation and submission processes to highlight the need to strengthen federal legal prohibitions against discrimination on the basis of actual or presumed illicit drug use.

Finally, it is also important to note that, unlike some other marginalised groups and individuals in society, people who use/have used illicit drugs are not a homogenous group (Cohen, 1986). Further, despite over two decades of social mobilisation through AIVL and its state and territory member organisations, people who use/have used illicit drugs remain a relatively disempowered group within the community with significantly less community support and political power than many other high profile marginalised communities. This is due in no small measure to the criminalisation of drug use and the risk 'speaking out' can and does pose for people who use/have used illicit drugs and those associated with them, such as family members, friends, colleagues, etc. While there are some very good representational bodies and networks both in Australia and internationally, the voices of people who use/have used illicit drugs are at best marginalised and most often silenced. It is with the intention of enabling those voices to be heard, that AIVL makes the following submission and associated recommendations in response to the Government's Discussion Paper.

DISCRIMINATION AND ILLICIT DRUG USERS – THE EXTENT OF THE ISSUE

Some may argue that the issue of discrimination against people who use/have used illicit drugs is relatively minor and that "drug users" are, in any event, protected under current Disability Discrimination laws[3]. There are a number of ways in which the current legislation is defective, however, providing a particularly narrow and limited form of protection that excludes the vast majority of people who use/have used illicit drugs. We raise this because, with the Australian Government's stated commitment to ensure "no reduction in existing protections in federal anti-discrimination legislation" (Discussion Paper p 6), we genuinely fear that the inadequacy of current provisions may well be overlooked. To ensure legislators are aware of the level of discrimination drug users routinely experience, this section sets out a number of areas in which discrimination against people who use/have used illicit drugs regularly occurs. The examples presented here are

[3] See for example *Marsden versus the Human Rights and Equal Opportunity Commission and Coffs Harbour Ex-Servicemen & Women's Memorial Club Ltd* (2000). Further information on this case can be found at http://www.hreoc.gov.au/disability_rights/decisions/comdec/1999/dd000110.htm

taken from real people's real lives, many collected in the process of research projects, and first-hand experiences of those AIVL comes into contact with, including AIVL's own staff and its state and territory member organisations' staff and clients. The effects of discrimination range from relatively monotonous, though irritating, indignities to actual death through the refusal of medical attention.

As indicated, discrimination seeps into every aspect of a drug user's life, affecting health, education, housing, employment, insurance, travel, family relationships, etc. The examples provided here have been collected over many years, some dating to 1993-4, when the NSW Government initiated an enquiry into the issue of drugs and discrimination (Madden 1995). What we have learnt is that, despite the work of AIVL and its member organisations, the issues have not changed and indeed, have rather become even more entrenched and systemic, particular in relation to the provision of health care services (Hopwood and Treloar 2003), but also, as the following show, across most aspects of people's daily lives.

PEOPLE WHO USE ILLICIT DRUGS AND ANTI-DISCRIMINATION LAWS

Most incidents of discrimination against people who use/have used illicit drugs go either unreported or under-reported. This is, in part at least, because stigma and its associated discrimination becomes internalised, leaving many drug users believing they are not entitled to any better treatment, and that the discrimination they experience is, in fact, normal (Madden 1995; Treloar et al 2004). Before moving on to the examples, we briefly highlight why we believe current protections are not sufficient.

Currently, the only known way in which a person who uses or has used illicit drugs might bring a case of discrimination lies within the Disability Discrimination Act (1992). The relevant grounds for such a case lies within section 4 (g), which defines disability in relation to a person as, "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour". Such a case, however, relies on a person to be identified as a 'drug addict' or a person with a drug dependency who is probably seeking treatment for their disability. However, the majority of people who use drugs never develop a dependency (Warburton et al 2005), and certainly not in ways suggested by this definition. This form of protection, then, is too narrow and does nothing to protect, for example, people with a history of injecting drug use (such as former drug users), and people who are presumed to be/have been drug users due to some other attribute or illness (for example their appearance or having hepatitis C).

EXPERIENCES OF DISCRIMINATION

By way of introducing the different areas of life in which people who use/have used illicit drugs experience discrimination, it is sobering to note the following statistics in a series of HIV/AIDS needs assessments in which 300 Injecting Drug User (IDU) survey participants answered 'yes' to the question "have you ever experienced bad treatment from any of these services because you were a [drug] user?":

Police	80%
Hospital	60%

Doctor	57%	
Chemist	57%	
Employer	57%	
Dentist	33%	
Community Health	7%	
Methadone	33%	
Detoxification	33%	
Other	27%	(included family, friends, and prison)*

*NB multiple responses allowed (Madden 1995)

But with such high levels of experienced discrimination, why do we hear so little about these experiences? And if we don't hear of them, are we perhaps over-estimating their effects? Griffiths (1995) has argued:

> *"Experiences of discrimination are so common and relentless many* [drug] *users fail to then recognise they are being discriminated against it seems normal to be treated badly and vilified if you're a user."*

There are, furthermore, significant barriers to addressing discrimination, or even just making a complaint. Barriers to complaining include complexity of the process and the fragmentary nature of "complaints" mechanisms generally, where it is difficult to negotiate the different ways in which complaints will be accepted. This extends, it should be noted, to current discrimination legislation. Further, addressing discrimination through existing "complaints mechanisms" is exacerbated by virtue of the standing of the "people" complaining, ie people who use/have used illicit drugs are often discredited, disbelieved or ignored. And, when it comes to drug users, many are frankly unaware of their rights to complain. A further barrier for drug users generally is the very real power imbalances that exist – complaining can put at risk access to vital services, such as ongoing access to OST programs, and health services more generally. And, by no means least of all, drug users themselves have all too often internalised the stigma and shame of their drug use such that they believe it is deserved (AIVL 2011b).

Health Services Discrimination

This is arguably the most visible and notable area in which people who use/have used illicit drugs experience discrimination, sometimes with catastrophic results. A great deal of research has been

undertaken in relation to people's experiences with health services in relation to their hepatitis C and/or HIV/AIDS status[4] and their experiences with drug treatment services (AIVL 2008; AIVL 2010).

Examples of discrimination in these settings run from the relatively minor (perhaps) experience of people on OST who must receive supervised dosing in community pharmacies being made to wait for long periods of time irrespective of where in the "queue" for service they might be. Whilst seemingly minor from an outside perspective, such treatment would not occur for any other pharmacy customers waiting for service. Nor is there any other area of scripted pharmacy servicing in which the person must be observed (ie supervised), except perhaps in hospital. Further, the clients of these dispensing outlets are required to sign often offensive, or at best insensitive, 'contracts' regarding appropriate behaviour, as if they are somehow devoid of common attributes such as courtesy or a basic knowledge of how people in society act and behave. This form of treatment is standard, and is based purely and solely on the basis of the customer's 'drug use' – whether past or present - in which they are not afforded equal treatment, despite being fee paying customers of the service. And, far from being a minor irritant, for some people who need to get to their place of employment, being kept waiting at the pharmacy in this way could actually have much broader implications.

On 15 July 2011 *The Sydney Morning Herald* reported how a "gravely ill man, wrongly assumed to be an addict craving strong drugs died in agony hours after being discharged from a NSW country hospital"(AIVL 2011b). You would like to think the denial of treatment in such circumstances is a rarity. Unfortunately, for people with a history of drug use, denial of appropriate medical treatment is commonplace. It is particularly salient in relation to pain management and the management of comorbid mental health problems, such as anxiety, for example. People who use/have used illicit drugs routinely find it impossible to get appropriate pain relief irrespective of the symptoms they present with. Furthermore, anyone with a history of illicit drug use, no matter how long ago that might be, will find it virtually impossible to be prescribed adequate pain medication or medication for symptoms of anxiety. There is a growing body of evidence in the medical literature on this subject, and has led some medical researchers to increasingly search for ways to distinguish between those experiencing 'genuine' pain and those who are "addicts exhibiting drug seeking behaviour" (Bell & Salmon, 2009). To suggest that people who use/have used illicit drugs do not experience pain, or suffer from illnesses requiring appropriate medical interventions, and to thus deny them such treatment, amounts to cruel and inhuman treatment. And yet this is what people with a history of illicit drug use regularly experience. And it is not just the denial of treatment, but at times the very public way in which that treatment is refused:

> *"I went to the doctor for antibiotics for an infected and really badly swollen arm. He came out into the waiting room, took one look at me, told me 'I don't treat scum like you', and then picked up my bag and threw it out on the footpath"*
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> (Madden 1995: 8)

[4] See, for example, two recent AIVL publications: '"Why wouldn't I discriminate against them all?" A Report on Stigma and Discrimination towards the Injecting Drug User Community' (2011b); and "Hepatitis C Models of Access and Service Delivery for People with a History of Injecting Drug Use' (2011a).

AIVL, with the assistance of its state/territory members, has collected a wealth of information on the subject of drug users and pain management, in particular, but on general health services as well. Some of this has been documented in the report titled *Double Jeopardy: Older Injecting Opioid Users in Australia* (2011c). As the overall population ages, so too does the population of people who use/have used illicit drugs, with an increasing demand for complex health services, as people present with complications from chronic hepatitis C, increasing mental health issues, and a desperate need for dental treatment. In line with the usual social determinants of health, some drug users may also experience extreme poverty, housing problems, and little or no access to education and employment opportunities:

> *"A woman called [the Hepatitis C Helpline] asking if she was obliged to tell a dentist that she had hepatitis C…. [The counselor] began to explain that the practice of universal precautions in infection control meant that it was not necessary to disclose one's status to one's treating dentist and the woman began to sob. For two months she had been left with unfinished dental work, with a hole in her gum with a peg in it, and on prophylactic antibiotics. The local public dentist who began the dental work failed to complete it after cutting his finger while working in her mouth… [She] said, 'I told him I was hepatitis C positive because I thought it was the right thing to do. But when he cut his finger he flew into a panic and didn't finish the job…'"*
>
> (AIVL 2011b)

> *"I broke my leg in three places after a motor bike accident. At the hospital they wouldn't give me anything other than Panedol® even though the bone was sticking out through the skin."* (Verbal communication)

Disclosing One's Injecting Drug Use (IDU) Status

Both hepatitis C and HIV positive people *and* non-positive injecting drug users regularly experience discrimination if they disclose their drug use status to providers of goods and services within the medical and healthcare professions. It is not uncommon, especially in the medical profession, for people who use/have used illicit drugs to be told that treating their medical conditions is a waste of time, or worse, that their medical condition *cannot* be treated until cessation of their drug use (Rance, in Madden 1995). Accordingly, fear of discrimination results in many HIV and hepatitis C positive drug users failing to disclose their drug use to health professionals. Consequently the potential conditions to be misdiagnosed, misinterpreted or go untreated remains high. Many will simply choose to not access health services in order to avoid discrimination and abhorrent interactions with health services. Pre and post counselling opportunities, free from judgment and contempt are high on the list of unsatisfactory interactions with the health system for many people who use/have used illicit drugs. The result is lost opportunities to access early intervention, health maintenance monitoring and prophylaxis information.

Fear of disclosure is of continuing concern in rural areas. During 1993 NUAA conducted four rural injector projects in four health regions of NSW over a period of 22 weeks (Gore, 1993). One area surveyed revealed that 61% of respondents did not talk to their doctor about their drug use, due to:

• fear of disclosure (to others in the community) of medical records

• fear of discrimination

• fear of confidentiality breaches

The level of discrimination in rural areas is of particular concern. Whilst more up to date figures are not included with this submission, rural health in general remains a key area in which the effects of discrimination can be exacerbated through limited resources and a lack of practitioners who are qualified in areas associated with illicit drug use..

These are far from isolated cases within the medical and health profession, yet they serve to highlight the scope and range of discrimination people that who use/have used illicit drugs encounter.

Employment Discrimination

One of the objectives of opioid substitution treatment (OST) such as methadone is to improve an individual's opportunity for employment. However, this aim is often not matched by employers' willingness to participate. Being on an OST program such as methadone often leads to an individual's identification as an injecting drug user and this is regarded as sufficient reason for their employment to be terminated. The following statements are all taken from Madden (1995 p 4-6):

> *"Ever since I have been on the methadone, people still treat me like a junkie and pass you up when it comes to employment."* (NUAA News 1995)
>
> *"A friend was seen by a co-worker from [major department store] as she was leaving the methadone clinic. The co-worker informed the boss at work: from that day on her work was criticised, she was accused in a roundabout way of fiddling the till and stealing stock… she eventually left the job because of the discrimination she experienced."* (Verbal communication to NUAA)
>
> *"I was working with the State Rail Authority of NSW, for four years. At the time I was on the methadone program… just before the Christmas break (1993) I was told by the divisional engineer ... that I would not be able to continue working whilst on the methadone program."* (Written communication to NUAA)
>
> *Methadone prescriber contacted the client's workplace to confirm his employment record. (This procedure was regarded as necessary by the then draft policy of the Drug & Alcohol Directorate in order for clients to obtain take away methadone doses.) When the employer asked who wanted to know and why, the prescriber stated that he was the client's methadone prescriber. The client subsequently lost his job.* (Morgan 1993)

Discrimination in the Provision of Financial and Insurance Services

AIVL – The Australian Injecting and Illicit Drug Users League Incorporated has, as an organisation, itself occasionally been the subject of discriminatory actions and decisions not because the organisation posed any financial risk or liability, but simply on the basis of its name. In 2002 the Australian Securities and Investment Commission (ASIC) refused AIVL's change of name – from the Australian Intravenous League to its current form – on the basis that the name might cause offence to the community. This decision was successfully challenged and the name change duly took effect. In maintaining the necessary insurances to remain a going concern and secure funding, AIVL on one occasion was asked by an insurance broker would it consider "changing its name" in order to secure public liability insurance, as it was feared insurance companies might be "put off". Consequently, AIVL was required to pay a higher than expected insurance premium, which has, nevertheless decreased over the last 7 years. AIVL has also been asked to provide security against a bank account in which cash was held and it was once denied an operating lease by a large IT leasing company without explanation and after AIVL had over 2 previous operating leases never defaulted on a payment and had followed all leasing obligations. When challenged, the leasing company reversed its decision and AIVL continues to this date to hold operating leases with the same company. These examples serve to remind us that the very terms "illicit drug users" and "injecting" prompt reactionary and discriminatory responses irrespective of any evidence of wrong doing.

More concerning however are the individual cases of discrimination that people who use/have used illicit drugs encounter, many of whom lack the resources with which to challenge such decisions:

> *A Contract worker was unable to obtain any type of personal insurance due to disclosing a past history of drug use.* (NUAA client contact 1995)

Communication with several large insurance companies confirmed that industry prejudice exists towards any individual with a history of drug use, regardless of the "degree of drug use" (their words). All underwriters spoken to, stated that the risk involved in offering insurance to a former, current or occasional drug user would be too high and the concept of disease was too nebulous (Madden 1995: p 5). Such a position has serious implications for people who are required to have insurance coverage for employment purposes. It is particularly problematic for people on OST. Any disclosure of drug use (past or present), or implied drug use (such that being on methadone would represent) precludes many forms of insurance being granted, including life insurance. This is also true of certain 'communicable diseases' such as HIV/AIDS and hepatitis C. Especially those individuals who are on methadone programs. Currently disclosing drug use would prohibit an individual obtaining insurance. Employment requirements that include a medical check for insurance place those employees in an untenable position – disclosure prohibits the required insurance and it further jeopardises the employee's employment through either direct or indirect discrimination. Employees find they must either omit information (which in all likelihood would invalidate the insurance policy if discovered) or risk discrimination in the workplace with diminished opportunities for advancement and even can result in constructive dismissal, where the workplace environment is made so unpleasant as to cause the employee to resign. For many people who use/have used illicit drugs, any further potential exposure of their drug use history is too high a price to pay, and so this form of discrimination goes unreported.

Welfare and Discrimination

> *A single parent accessed a non-government welfare service for financial assistance and counseling. She noticed that written across the cover of her file was the word 'methadone'. She questioned the need for this information to be written on her file in that manner and was told if she was not happy with the service to go elsewhere.* (Madden 1995)

Unauthorised access to client sensitive, private and personal information of this nature is today restricted under various provisions within Australia's privacy legislation. It is, however, quite common for workers within a service to discuss client confidential information which is counter to the protections under privacy legislation. AIVL and its member organisations are often contacted in relation to a person's rights in relation to their personal information. The above situation, where information about a client's health 'status' is visible on the cover of a file, is prejudicial to say the least, and can influence how various workers interact with and interpret the client's motivations. It is in all likelihood also irrelevant in terms of the particular type of service provision. Value laden attitudes and assumptions about a person on methadone can also hinder that client's right to fair and equitable treatment. AIVL member organisations with client complaints/liaison workers (eg at NUAA, Harm Reduction Victoria and WASUA) have been able to work at a policy level with government health departments with some measure of success, however addressing discrimination within non-government community based organisations and charities is often more difficult where stereotypical viewpoints are held in relation to people with a history of drug use and these views are communicated to clients in the form of discriminatory treatment. It is a reality that people accessing services often do so when they are in crisis. Being confronted with discriminatory attitudes and beliefs about them based on the attribute of their drug use (whether known or simply presumed) can lead to less than positive outcomes. The most likely outcome, in our experience, is that people so treated will avoid further contact with the service. They are also less likely to complain if they feel they have been treated in a discriminatory manner.

> *HIV positive drug users are consistently refused financial assistance from AIDS charities on the basis that such assistance will only go towards furthering that individual's drug use.* (Madden 1995)

In the above case an individual's drug use becomes the only criteria by which the need for assistance is measured. On numerous occasions, this particular charity was approached and questioned about its practices in refusing to provide or offer assistance to HIV positive injecting drug users. The organisation as a whole could present policies which did not discriminate against drug users. However, individuals accessing the services found the opposite to be the cases. Formal approaches to the agency often resulted in blame being attributed to individual staff attitudes, but there was no process in place to deal with such systemic discrimination within the work environment.

Motherhood, Drugs and Discrimination

> *"She (Doctor) made it quite clear without actually saying it that she thought both me and my partner were being irresponsible Shiites (sic) for having the audacity to get pregnant while on the methadone program."* (BL 1995)

> *"A woman user faces discrimination, but the **mother** who uses is openly reviled as an anathema to the institution of motherhood and automatically relinquishes her right to that function...and [they] are often bullied into termination and sterilisation."* (Byrne, 1991)

> *"The drug using pregnant woman is possibly the most stigmatised person in our society."* (Fiona 1995)

> *It was prior to our discharge that the resident welfare officer as well as a worker from an inner city community health service had somehow been notified '"and asked to call upon our new little family....I didn't see either of these people visiting the dozens of other mothers who'd just given birth".* (BL 1995*)*

Women drug users who have given birth often describe how differently they are treated in relation to 'others' whilst in maternity wards of hospitals. Comments range from noticing that all conversation would cease on their entry to the nursery to their baby being separated from other babies in the nursery. More seriously, nursing staff have been reported as informing other women in the maternity ward that "MS"… was on methadone and her baby was in withdrawal. There have also been incidences where women have described the difficulty in attempting to care for their baby whilst under the intense scrutiny of nursing staff. The scrutiny implied (and sometimes was made explicitly clear, that a mother who has used drugs cannot be trusted to care for her child.

Mothers face other barriers in terms of their drug use and discrimination. There are very real fears that the act of seeking assistance from child health care nursing staff might bring the mother to the attention of child protection authorities. Rather than applauding a mother's courage in seeking help to do the best for her baby, a judgement can be arbitrarily made that because a mother has been a drug user (irrespective of her present circumstances), she will be 'naturally' unfit for parenting and will therefore warrant interventions, or at least be brought to the attention of children's services. Suspicion alone is grounds for a Department of Community Services contact.

These experiences of discrimination faced by female drug users and women with children who seek to access drug and alcohol services, are regrettably not just 'old news'. Current examples proliferate in the states and territories in which rather than helping parents with a history of drug use, services appear (on the face of it and from the perspective of their targets) to exist to punish and further alienate these parents, extremely affecting their chances of social inclusion. The issue of motherhood and discrimination in relation to a person's history of drug use is in dire need of attention. Whilst law alone cannot address hidden discrimination – how do you legislate attitudes? – the law can address the many areas in which discrimination arises on the basis of a person's history of drug use.

> *"I was told by staff at the detox centre that my baby would be better off dead than have me as a mother"* (verbal communicating to NUAA)

Drug Use and Other Forms of Discrimination

From the perspective of AIVL and the voices it has sought to bring out in this response to the Discussion Paper, we feel we have really only touched the surface. For every example we have given, we have left several out. We did not touch on housing and accommodation, nor prisons and the experiences of people who use or have used illicit drugs are also dealt with in the legal system. We hope, nevertheless, that the examples cited give legislators pause for thought when it comes to defining discrimination and the ways in which consolidated Commonwealth legislation might better encompass the rights of the marginalised, the so called disreputable members of society, those for whom no voice is often the only voice heard.

MEANING OF DISCRIMINATION

Discrimination can be thought as any act, word, deed or thought that results in harm to the target of such acts (words, deeds, thoughts). Such harm can be physical, emotional, mental or social, harm ultimately that contravenes the human rights of a person or group of people as covered by the Discrimination Act.

RECOMMENDATION 1: The list of protected attributes in the consolidated definition of discrimination must recognise the attribute of "drug use". Whilst this is a very broad category, its scope should capture the various ways in which discrimination occurs on the basis of this attribute, whether direct or indirect. Whilst the purpose is to protect against discrimination on the basis of a person's "illicit drug use" broadly, this could refer to both current and past drug use, and should cover people on pharmacotherapy (or Opioid Substitution) Treatment or on other forms of drug treatment.

As the Discussion Paper has noted, current definitions of direct and indirect discrimination in Federal legislation are inconsistent, complex and uncertain. AIVL supports the Government's intention to simplify the definition of discrimination, and with it a commitment to ensuring current protections are maintained. There are however gaps in these protections (as the Government's own commitment to include gender identity and sexual orientation in the consolidated Act attest). This means, then, that the current definition(s) of 'discrimination' must be broadened, in simple terms, to encompass a range of attributes that are not presently protected, but which affect people who are socially and economically marginalised, isolated and excluded from participating in meaningful ways in society. People who use/have used illicit drugs are discriminated against directly and indirectly and legislation is required to offer some form of protection for people with this attribute.

The prohibition of discrimination at Commonwealth discrimination law is limited to a number of specific protected attributes. These are: race, sex, marital status, that a person is an immigrant, disability, pregnancy or potential pregnancy, breastfeeding, family responsibilities and age. The debate about whether anti-discrimination legislation should only cover grounds that are immutable, such as race, sex and disability rather than grounds that are more status oriented such as marital status, sexual orientation, political and religious conviction, etc has a great deal of relevance to the discussion about drug users and discrimination. Theorising drug use as a valid protected attribute under discrimination legislation is a conceptually complex exercise. The main issue that arises from

AIVL's perspective is whether drug use should be more adequately covered within one of the existing protected attributes or, whether drug use as a status needs to be covered as a separate protected attribute under Commonwealth discrimination legislation.

The only existing attribute within current discrimination legislation that can be argued or has been shown at Commonwealth law to cover drug use is that of disability.[5] It has been argued that the definition of illness and impairment associated with this attribute, is wide enough to cover disorders arising from "self-induced" conditions such as chronic alcoholism and drug dependency (Thornton, 1990). In line with this, others have argued that drug use is "implicitly" covered in the context of disability within existing anti-discrimination legislation at both a state and national level. Both the NSW Anti-Discrimination Act 1977 and the Commonwealth Disability Discrimination Act ·1992 define disability in the following way; "total or partial loss of a person's bodily or mental functions..." and, "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour."

While it could be argued that drug users who are dependent, and in a state of acute detoxification, could be classified within the definition of disability outlined above, the majority of drug users in Australia are not drug dependent and therefore, are unlikely to ever experience a physical or mental condition associated directly with their drug use that would give them coverage under the definition of disability within the legislation. Indeed, the Disability Legislation Committee of the Commonwealth Act has specifically made comment on the need to exclude terms from within the definition of disability that are "broad enough to cover people who are temporarily affected by alcohol or drugs." This would suggest that while people who were 'permanently affected' (although it is unclear what this might mean in relation to drug dependency) might be considered to be covered within disability discrimination definitions, even drug users who were experiencing acute detoxification would be excluded.

As well as these difficulties, there are also a number of major problems associated with attempting to define drug use and/or people who use them including drug dependency or those who are drug dependent purely in terms of addiction, disease and illness. As outlined above, the majority of drug users do not experience their drug using behaviour as problematic in either physical or emotional terms and/or do not wish to classify their drug use as a 'disability' or 'illness'. It is also important to acknowledge that whether a drug user is dependent or not will not prevent them from experiencing stigma and discrimination in many areas of their lives based on presumed or actual drug use history. It is therefore inappropriate to base a person's access to recourse on the existence or absence disease or illness alone.

[5] Marsden v Human Rights and Equal Opportunity Commission and Coffs Harbour & District

Current thinking about drug use suggests there are biological, psychological and social factors which contribute to patterns of drug use. Drug taking behaviour is learned behaviour which can be changed and developed with access to appropriate information, support and education. While not all drug use results in problems, where drug-related problems do develop, they occur along a continuum, with a far greater proportion of the population experiencing no or low level problems rather than severe problems. Within this context, it is possible to consider the inclusion of drug use as a either as a separate and new attribute within the legislation or to review and revise the narrow approach to drug use within the current provisions. This would provide protection from discriminatory attitudes and behaviours, in legal terms at least, for all drug users rather than a few exceptions who are judged as 'ill', 'diseased' or 'disabled'.

The fact that drug use is a choice has been raised as an argument for excluding drug use from anti-discrimination legislation. Many of the existing protected attributes currently covered within the legislation, however, are also based on characteristics or a status that can be changed either at will, or over time and, can be said to involve a reasonable degree of choice. Attributes such as political and religious convictions, marital status and pregnancy are all open to change and theoretically at least, involve a level of free choice. Whether a person chooses to use drugs, or, can in theory, choose to stop using drugs, should not impact on whether that person has the right to be protected from discrimination. The fact that drug use is a conscious and directed behaviour, in fact further supports the need for its comprehensive inclusion in Commonwealth and state anti- discrimination legislation.

As the first section of this paper outlines, drug users experience discrimination in all areas of their lives. Unfortunately, the experience of discrimination is so common, and the stereotypes so entrenched, that most drug users do not recognise many of their everyday experiences as discrimination. For those users who do recognise discrimination, lack of information, the complexity and restrictive nature of existing protections and poor access to support can often work as powerful barriers to bringing a complaint. Further, many drug users do not feel confident in making a complaint due to feelings of internalised stigma stemming from years of poor treatment and vilification. Ensuring that drug use as an attribute or status is adequately protected within anti-discrimination legislation would have the effect of beginning to breakdown the systemic nature of the discrimination that drug users experience. While such legislation will not change attitudes and values towards drug users overnight, it will provide a legal basis from which individual drug users can challenge discrimination in key areas of their lives.

There is ample evidence that people who use/have used illicit drugs routinely experience discrimination solely on the basis of their drug use, both real and assumed (Madden 1995; AIVL 2004; Wodak et al 2004; AIVL 2011 a). This is, perhaps, most visible in healthcare settings, where people with hepatitis C, for example, experience discrimination on the basis of a presumed history of injecting drug use (Anti-Discrimination Board of NSW, 2001). While protections do exist in relation to discrimination on the basis of illness or disability, AIVL would argue that it is a person's 'drug use'

(presumed or otherwise) that is most often at the core of such discrimination, rather than the presence of the hepatitis C virus or illness. The importance of this distinction cannot be underestimated, and many documented incidences of discrimination exist against people who are presumed to be drug users based on their hepatitis C status and the associated presumption about their drug use or drug use history (AIVL 2011: 68-71). Current legislation does not adequately cover these people, as they take on and internalise the stigma and discrimination they encounter. It is only through recognising 'drug use' as a protected attribute that such discrimination can be properly and adequately addressed.

As outlined in the previous section, discrimination has been shown to permeate every aspect of a drug user's life, including access to employment, welfare, housing, education, health and financial services to name a few (Madden, 1995). In this respect, people who use/have used illicit drugs, suffer from social exclusion which is particularly difficult to address and has not, to date, been a major priority for successive Federal Governments. In terms of discrimination on the basis of drug use, an anti-discrimination case was successfully upheld by Australia's Federal Court in 2000[6], whereby it was proven someone had been discriminated against by a NSW Central Coast RSL on the basis of his treatment for heroin dependency, which was deemed by the Federal Court as a disability, thereby breaching the Disability Discrimination Act.

Following the outcome in *Marsden*, in 2003, the Commonwealth Government attempted to bring an amendment to the Disability Discrimination Act (the Disability Discrimination Amendment Bill 2003) in which it would be lawful to discriminate against a person on the basis of a drug addiction, except where that person was undergoing an approved form of 'treatment'. While the Bill was referred to the Senate Legal and Constitutional Legislation Committee and did not ultimately proceed to a vote in the Houses of Parliament, it highlighted for many, the lack of protections that exist for people who use/have used illicit drugs. This particular legislation, had it succeeded, would have had far reaching consequences in which a person 'suspected' of drug use could be denied housing, employment and education opportunities to name just three areas in which such discrimination would have been made lawful. AIVL believes, however, that such protection as outlined in *Marsden* is not enough and that a consolidated Discrimination Act must take into account the impact that the lack of more general protections has on people who use/have used illicit drugs.

RECOMMENDATION 2: The unified test for unlawful discrimination should be based on the detriment test, as currently used within the ACT and Victoria.

Direct discrimination might be thought of as more easily identified and therefore easier to protect against. However, discrimination often expresses itself in indirect ways. Indeed, discrimination in relation to people who use/have used illicit drugs is most often accompanied by a complex set of behavioural attitudes towards the person *based* on their purported drug use, which may nevertheless be expressed in ways as to disguise the indirect discrimination at work. This is similar to the employer who indirectly discriminates against people with family responsibilities, or (as has been reported) against women who "may" decide to start a family in the medium term – rather than overt discrimination which is clearly unlawful, the employer (possibly subconsciously) seeks to employ the candidate who does not pose such a 'risk' to the business. Complex laws that are

[6] Marsden v Human Rights and Equal Opportunity Commission and Coffs Harbour & District

designed to protect the vulnerable in society often fail before they even begin to have a chance to be tested. For both business and those with protected attributes, a simplified definition and test for direct and indirect discrimination is essential.

Furthermore, it is far more difficult and poses a far greater risk to the individual to disclose 'drug use' in many settings, not just employment. In particular, 'drug histories' have a way of encouraging medical practitioners to discriminate against a patient on the basis of what may be 'past behaviour', leading to denial of pain and other treatment which is put down to 'drug seeking behaviour'. This form of discrimination is particularly salient in older people who use/have used illicit drugs (AIVL 2011) and is an area where protective provisions must be included as part of the consolidation of federal discrimination legislation. This is becoming increasingly urgent as the population ages and the demand for services and treatment for age-related illnesses increase (AIVL, 2011a). The denial of pain medication in particular is a clear breach of human rights, cutting across several of the core human rights treaties to which Australia is a signatory.

There presently exists an almost blanket refusal of adequate pain management for people who are on OST. This refusal also extends to those with a past 'history' of illicit drug use. A person who has ever been treated for an opiate dependency is frequently automatically denied opiate-based analgesic treatment irrespective of the length of time since cessation of OST and/or whether there is presence of genuine need. Not only is this grossly unfair to individuals, it is deeply humiliating and, it must be acknowledged, is at odds with the Convention Against Torture and Other Cruel, Inhuman or *Degrading* Treatment or Punishment (emphasis added) to which Australia is a signatory.

CONCLUSION

Although a person's status as a drug user is not currently covered under any existing Commonwealth or State Anti-Discrimination or Equal Opportunity legislation, debate about whether a person's drug use should be considered an irrelevant characteristic is increasing. In particular, the work of drug user organisations and researchers has contributed to raising the profile and extent of unfair and unfavourable treatment often experienced by people who use/have used illicit drugs in regard to the delivery of services and in employment and education environments. The significant issue in almost all of these cases is that the discrimination people are experiencing is because they are known or presumed to be drug users. It is not because their drug use has affected their ability to do their job, receive goods or services or take part in an educational program. Therefore, the stigma and stereotypes attached to being a drug user become the focus, rather than the person's actual behaviour or abilities within a specific context. This means for example, that if a theft occurs within the workplace, the employee who is a known drug user will automatically be blamed or at least under suspicion, regardless of their employment record of honest and trustworthy behaviour in the past The stereotype that all drug users or "junkies" are thieves will prevail rather than their actual track record or reputation.

A range of arguments have been put forward against drug use being included as a protected attribute or status under anti-discrimination law. One of the most common arguments is the fact that the use of prohibited substances is illegal and therefore people who

use them deserve poor treatment and little or no protection under the law. The fact that some drugs, and some forms of drug use are illegal, is in AIVL's view an irrelevant argument to raise against drug users being covered by anti-discrimination legislation. The fact that some drug use is illegal, does not and should not mean that it is acceptable for individual drug users to be treated in an inhuman or discriminatory manner. Further, there legal precents in the development of both Commonwealth and State anti-discrimination law whereby the act of discriminating against a particular group of people was outlawed, despite the fact that the identity and behaviours of that same group of people remained illegal under a different body of legislation. For this reason, AIVL believes it is crucial that a distinction is made between the right of individual drug users to live free from discrimination and society's desire to regulate the use of drugs through the law.

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