



Australian Federation of AIDS Organisations (AFAO)

Discussion Paper on Consolidation of Commonwealth Anti-Discrimination Laws

Submission to the Attorney General's Department

27 January 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 Living with HIV/AIDS (NAPWA); 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 comments on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (the Discussion Paper). Freedom from discrimination is a key attribute of any democratic society and pivotal to the wellbeing of all citizens. People living 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 living with HIV are generally afforded protections under the *Disability Discrimination Act 1992* (DDA). The Discussion Paper states that there will be no diminution of protections with the introduction of the proposed consolidated anti-discrimination laws¹. Thus we expect people living with HIV will continue to be provided with at least the same level of protection under the consolidated law.

AFAO believes that this consolidation process provides the opportunity not only to ensure that protections are maintained but also to identify and redress 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. The Joint Standing Committee on Migration conducted an inquiry into the *Migration Treatment of Disability*, in 2009-2010. In a range of submissions to the Inquiry AFAO and others raised the issue of whether the exemption should remain. AFAO submitted 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 exemption allows Australia to have the 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 DDA's 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 also offends the principle of universal non-

¹Attorney General's Department (2011). *the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*. Australian Government, Canberra, 6.

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 that 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 - particularly in relation to employment, and the provision of health and community services, including aged-care.

We understand from the Discussion Paper that the Government intends to retain the religious exemption². In this scenario, we endorse the submissions of ACON and the National LGBTI Health Alliance 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.

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

We note that the Discussion Paper fails to acknowledge in the 'Exceptions and Exemptions' section that the *Migration Act 1958* is currently exempt from the DDA, despite the significant part that this exemption plays in Australia's migration policies. 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 sub-classes 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. In respect of 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 (on the grounds of the costs associated with HIV treatment - with limited waiver of the Health Requirement in individual cases), would be unlawful discrimination under this domestic law.

The exemption of the *Migration Act 1958* from the DDA speaks volumes on how Australia treats its commitments to people with disability. It conveys a strong stigmatising message regarding disability generally, 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. The exemption can also have devastating consequences for those individuals who discover their HIV positive status as a result of testing associated with health requirement, often occurring in

²Attorney General's Department (2011). *the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*. Australian Government, Canberra, 40.

environments, including refugee camps, in which culturally-appropriate care and support services are absent.

AFAO believes that there is no reasonable justification for the Migration Act exemption, 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*³ and in the position statement *Call for reform of Australian migration policies affecting refugees living with HIV*⁴. AFAO's policy position has been endorsed by its Member Organisations and also 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 have had the opportunity to review UnitingJustice Australia's comments on the discussion paper. We note UnitingJustice 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."⁵

AFAO asks that the removal of the *Migration Act* exemption from the proposed consolidated anti-discrimination law be considered as a part of this Inquiry. 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. 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 DDA's migration exemption in the new consolidated anti-discrimination laws.*

³Available at:

http://www.afao.org.au/_data/assets/pdf_file/0020/5555/DP020511_Migration_Law_and_HIV.pdf

⁴Available at:

http://www.afao.org.au/_data/assets/pdf_file/0006/5559/pp_may11_reform_of_migration_policies.pdf

⁵ 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

Discrimination based on sexual orientation or gender identity

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 homo-phobia and trans-phobia, 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 understand from Question 22, "How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?", that current exemptions enjoyed by religious organisations at state/territory levels to allow discrimination against people on the basis of sexual orientation or gender identity, are proposed to be replicated in the new consolidated federal anti-discrimination laws.

We do not support any exemptions from the new anti-discrimination laws. If, however, the religious exemptions are to stand, as suggested by question 22, we believe that the exemptions should be qualified by policy reforms that would ameliorate the impact on affected communities.

First, as proposed by ACON and the LGBTI Health Alliance in their submissions, religious organisations seeking to discriminate should be required to register this intent with the Australian Human Rights Commission, stating the grounds/doctrines justifying the proposed discrimination. Second, 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.

Recommendation:

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

Incorporation of certain state/territory protections

We note that while this consultation process primarily relates to consolidating current Commonwealth anti-discrimination protections, the religious exemptions discussed above are drawn from current state and territory exemptions. Given that this consultation has had regard to some state/territory anti-discrimination provisions, it would seem appropriate that regard be had to state/territory provisions that enhance protections. For example, we understand that in West Australia, the Minister for Mental Health has made public for consultation a Consumer Rights Charter which has as among its aims 'to strive for dignity, equality, compassion and freedom from discrimination'. AFAO is keen to see that any anti-discrimination provisions in state/territory laws which enhance protections are considered for inclusion in the consolidated law.

Not only would this better support the harmonisation of anti-discrimination protections across Australia throughout the population, it would support the aim of reducing legal complexity for organisations that may be subject to varying anti-discrimination laws operating around the country. It would also benefit individual citizens who reside in different jurisdictions to better understand their rights, and thus be better able to exercise them.

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 proposed consolidated anti-discrimination law.

AFAO proposes that the current exemption of the *Migration Act 1958* from the application of the DDA should not form part of the new law. 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 introduction of a sexual orientation and gender identity as protected attributes and the incorporation of these attributes in the consolidated anti-discrimination law. We oppose, however, the Government's proposal to allow religious organisations to discriminate against individuals on the grounds of sexual orientation and gender identity in relation to, *inter alia*, employment and the provision of services. 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.