Australian Federation of AIDS Organisations (AFAO)

Exposure Draft of the Australia’s National Human Rights Action Plan

Submission to the Attorney General’s Department

5 March 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 exposure draft of Australia’s National Human Rights Action Plan (NHRAP). Providing such a framework is essential to Australia realising its international human rights responsibilities.

Our comments are in two parts. The first highlights key gaps in human rights coverage that the NHRAP fails to address. These comments are drawn from AFAO’s August 2011 submission on the Baseline Study. The other comments are in response to issues raised in the NHRAP.

The NHRAP notes that all issues identified in the Baseline Study cannot be addressed in the NHRAP. AFAO is disappointed by the exclusion of core human rights issues raised in the Baseline Study. This is a missed opportunity to address significant community human rights concerns. It is particularly disappointing as it seems that some key issues were not addressed due to time constraints.

**Issues unaddressed**

In our comments on the draft Baseline Study, AFAO identified HIV-related issues relating to gaps in its coverage including in relation to:

- people living with HIV, and their experience of disability;
- migration policies; and
- marriage laws prohibiting same-sex marriage.

**Refugees, asylum-seekers and migrants with HIV**

Current Australian migration law and policy discriminates against people with disability generally, and the Migration Health Requirement pointedly discriminates against people with HIV. Reform of Australian migration law and policy to remove mandatory HIV testing is required to bring Australia into line with international human rights standards and public health best practice.

In AFAO’s view, Australia’s ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) should have driven reform of Australia’s migration law and policy in respect of the Health Requirement. However, Australia’s migration Health Requirement continues to be applied so as to preclude people with disability from migrating to Australia and from being accepted under Australia’s humanitarian/refugee programs – unless they apply for and are granted waiver of the Health Requirement waiver. Applying for waiver can be complex, given considerations taken into account regarding HIV. People without advocates – including off-shore refugee applicants – are at a
particular disadvantage in pursuing appeals.

AFAO believes that this active and intentional discrimination against people with HIV is not supportable. Given the highly selective and category-based nature of Australia’s migration program, there should be no Health Requirement except the Public Health Criteria restricting the entry of people with active TB and other highly infectious diseases (or conditions that otherwise pose a threat to public health).

AFAO is particularly concerned that no regard should be had to disability or chronic illness in the determination of visa applications lodged by refugees under Australia’s humanitarian/refugee programs. Disability – including HIV-positive status - should not in itself affect whether a refugee is to be offered a place under Australia’s humanitarian program. HIV-positive status should be solely relevant to the settlement process once a refugee arrives in Australia; referral to culturally appropriate treatment, care, support and counselling services should be a central part of the settlement process for refugees living with HIV.

People living with HIV on most classes of temporary visa are ineligible for Medicare, the Pharmaceutical Benefits Scheme (PBS) and Social Security income support. This makes accessing treatment and care/support services impossible for many PLHIV. The effect is to undermine Australia’s generally laudable public health response to HIV. AFAO further believes that to maximise the public health response, people in Australia on temporary visas who have applied for permanent residence should be eligible for Medicare, the PBS and Social Security income support while they await the determination of their substantive claim.

Recommendation: The NHRAP creates an action under People With Disability and/or Refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds, which prioritises the review of the Migration Act exemption from the Disability Discrimination Act, toward ensuring that Australia meets fully its international human rights obligations under the CPRD, and its obligations under the United Nations Convention Relating to the Status of Refugees.

**Discriminatory marriage laws for GLBTI**

AFAO notes the Australian government’s position that marriage is by definition between a man and a woman, and the government’s view that this definition remains appropriate. AFAO does not support this position. AFAO believes that marriage laws should not discriminate against people due to their sexuality or gender.

Australia’s perspective on same-sex marriage is informed by, among other things, the fact that gay men, and other men who have sex with men (MSM), are the population most affected by HIV in the Australian community. Laws which discriminate on the basis of sexuality, such as the Marriage Act 1961 (Cth), entrench and perpetuate stigma in relation to sexual orientation, compounding HIV-related stigma. Stigma is recognised as a key factor that impedes access to health care by communities most affected by HIV, including gay men and other MSM - particularly regarding sexual health, including HIV testing.

Recommendation: The NHRAP creates an action under Gay, lesbian, bisexual and/or gender diverse people for the Australian Government to remove all legislative discrimination against GLBTI Australians, including amending the Marriage Act 1961 to allow same-sex marriages.
National Disability Insurance Scheme NDIS
AFAO appreciates that funding and delivery of NDIS is currently the subject of political discussion. We note, nevertheless, the need to develop actions around the NDIS immediately it is introduced.

Responses to issues raised in NHRAP
AFAO notes the references to people with disability and in particular issues regarding the Disability Support Pension, as well as to people in prisons.

Disability Support Pension
AFAO is concerned that the introduction of revised Impairment Tables for assessing eligibility for Disability Support Pension (DSP) will have unintended consequences for DSP claimants and recipients living with HIV or other chronic illnesses. Although HIV is now generally a manageable health condition, people who have lived long-term with HIV can be severely debilitated or generally frail due to the compound effect of managing multiple chronic conditions. HIV co-morbidities can be ongoing and degenerative - such as heart disease and HIV-related dementia, with episodic and unpredictable flare-up of symptoms that make sustaining ongoing employment impossible. Some people with severe HIV-related impairments are on DSP; others are still in work but approaching the point where they cannot reasonably sustain ongoing employment. Those in their fifties are many years away from Age Pension age and if refused DSP must rely on other social security payments that are subject to payment penalties if rigorous job search requirements are not complied with.

AFAO believes that the previous DSP Impairment Tables, in place until 1 January 2012, provided a better DSP assessment process for people with severe HIV-related disability, especially for people whose general frailty is a product of the compound effects of multiple conditions.

Recommendation: The NHRAP creates an action under People With Disability requiring FaHCSIA to report to Senate Standing Committee on Community Affairs on the effects of the revision on people with disability, including data on how many people with HIV have been refused or taken off DSP due to inadequate impairment ratings under the new Tables.

Prisoner rights – access to Needle and Syringe Programs
We welcome the recognition of people in prisons in the NHRAP. AFAO noted the reference to the ‘Right to highest attainable standard of health care’ for people in prisons in the Baseline Study, and we support the United Nation General Assembly resolution on the Basic Principles for the Treatment of Prisoners, principle 9. The resolution states that ‘Prisoners should have access to the health services available in the country without discrimination on the grounds of their legal status’.

AFAO endorses the position expressed in the Australian Injecting & Illicit & Drug Users League’s (AIVL) ‘Policy Position – Prisons’, advocating for Prison Syringe Exchange (PSE) programs. Needle-syringe exchange programs currently exist in community settings across Australia, and consistent with human rights principles of non-discrimination, such programs should be made available in prisons. For these reasons AFAO has supported the introduction of a needle and syringe program (NSP) at the Alexander Maconochie Centre, ACT. The ACT government is currently deliberating about how to proceed.
Recommendation: The NHRAP creates an action under the Health, which prioritises exploration of NSP programs in Australian prisons

**Conclusion**

AFAO welcomes the development of the National Human Rights Action Plan. We believe that it can be significantly enhanced through creation of specific actions aimed at redressing continuing human rights violations. The NHRAP presents a golden opportunity to comprehensively address such gaps in the Australia human rights landscape – and to reinforce the enabling legal environment on which Australia’s success in responding to HIV has been based.