



AFAO Submission

31 August 2011

National Human Rights Action Plan

CONSULTATION ON DRAFT BASELINE STUDY

AFAO's comments:

Introduction:

No comment

Chapter 1: Protection and promotion of human rights in Australia

No comment

Chapter 2: Human rights concerns of the general community

No comment

Chapter 3: The human rights experience of specific groups in Australia

- Are there additional specific groups that could be included in this section?

The Australian Federation of AIDS Organisations (AFAO) is the national federation of the HIV community response. AFAO provides leadership, coordination and support for Australia's policy, advocacy and health promotion response to HIV/AIDS. For more information about AFAO and its membership, please see our website at www.afao.org.au

People living with HIV

AFAO welcomes the inclusion of people with disability. It is important to note that living with HIV can mean living with disability. HIV meets the definition of 'disability' under the *Disability Discrimination Act 1992* (DDA), 'disability' under the DDA being defined as including 'the presence in the body of organisms causing (or capable of causing) disease or illness'.

Beyond the general disability-related human rights issues faced by people living HIV, many people living with HIV experience HIV-specific discrimination and stigma in their interactions with family, friends, health service providers, government agencies and others. This stigma and discrimination can be compounded for people among communities most affected by HIV and other blood-borne viruses – namely gay men and people who use injecting drugs.

- What additional statistical data or research findings could be included to better paint the human rights picture for a specific group? (Please provide references)

Refugees, asylum-seekers and migrants

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.

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 generally, and particularly in respect of its application to people living with HIV. However, the *Migration Act 1958* continues to be exempt from the *Disability Discrimination Act 1992*. A

consequence of this is that Australia's migration Health Requirement continues to be applied so as to preclude people with HIV from migrating to Australia and from being accepted under Australia's humanitarian/refugee programs – unless they apply for and are granted a waiver. Applying for waiver can be complex and people without advocates and the means to pursue appeals are disadvantaged – particularly off-shore refugee applicants.

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 a refugee's claim for a permanent visa 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. People 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.

For further information about current Australian migration law and policy and how it discriminates against people living with HIV, see AFAO's

- (a) 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*, available at:

http://www.afao.org.au/library_docs/policy/DP020511_Migration_Law_and_HIV.pdf

- (b) Position paper *Call for reform of Australian migration policies affecting refugees living with HIV*, available at

http://www.afao.org.au/library_docs/policy/pp_may11_reform_of_migration_policies.pdf

Drug Use

Australian Injecting & Illicit Drug Users League (AIVL) has produced a discussion paper entitled "Older Injecting Opioid Users in Australia", available at:

<http://aivl.org.au/database/sites/default/files/resources/AIVL-Double-Jeopardy-WEBversion.pdf>

In this paper, AIVL identifies many of the human rights issues faced by older opioid users. They report:

In keeping with the fears of many of the respondents in the AIVL Study (2010), it seems unlikely that older injecting drug users will experience the dignity and respect traditionally afforded to people in our society as they age, although some may achieve elder status in the drug using community. Once identified as a drug

user, it seems that one is often pushed to the margins and denied full membership to civil society and that this sort of alienation is increased rather than diminished with age. Many respondents in the AIVL Study (2010) reported that their drug use cast a long shadow over the way they were viewed by the healthcare system and by society in general. By extension, respondents greatly feared that their entitlement to appropriate care and adequate pain relief in old age would also be diminished.

- Are there any additional human rights issues that could be added which affect the specific groups identified in this section? Limit: 500 words

Refugees, asylum-seekers and migrants

AFAO welcomes the identification of refugees, asylum-seekers and migrants in this consultation draft. Refugees, asylum-seekers and migrants living with HIV as well as their families face particular human rights challenges. As noted above, people with HIV are covered under the *Disability Discrimination Act 1992*. However, the *Migration Act 1958* is currently exempt from the *Disability Discrimination Act 1992*. This exemption facilitates explicit legal discrimination against people with disability, including those living with HIV. Such an exemption cannot be supported in a context of universal human rights and non-discrimination and thus, should be removed.

The requirement to be tested for HIV as part of the Health Requirement as part of the application by off-shore refugee for protection is clearly contrary to the Government's stated policy that consideration of a claim for Permanent Protection should involve no issues other than the person's need for protection. AFAO is strongly of the view that a person's disability is irrelevant to their claim for protection.

AFAO believes that there is a pressing need to reform Australia's migration policies. We propose that there is an urgent need to:

- make refugee and offshore humanitarian visa applications exempt from the operation of the Health Requirement, or in the alternative, a prima facie presumption in favour of the granting of Ministerial waivers for refugee and offshore humanitarian cases should be instituted;
- discontinue mandatory HIV testing as an element of medical screening of refugees prior to resettlement ; and
- extend Medicare, PBS and Social Security income support eligibility to people living in the community, and their families, while awaiting determination of a claim for permanent protection.

Gay, lesbian, bisexual or gender diverse

AFAO notes the Australian government's position is that marriage is between a man and a woman and that this definition is 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 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 key factor that impedes access to health care by communities most affected by HIV, including gay men and other MSM.

People in prisons

AFAO notes the reference to the ‘Right to highest attainable standard of health care’ for people in prisons, and we support the United National 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.

Issues that a National Action Plan could address:

No comment

Do you have any other comments or suggestions for improving this baseline study?

No comment