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AFAO and NAPWA Submission

Productivity Commission Inquiry into the *Disability Discrimination Act* 1992

1 About us

The Australian Federation of AIDS Organisations (AFAO) represents Australian HIV community based organisations at a national level. Our membership includes State and Territory AIDS Councils, the Australian Injecting and Illicit Drug Users League, the National Association of People Living with HIV/AIDS (NAPWA) and Scarlet Alliance, the national organisation representing sex workers. Amongst AFAO's activities is the provision of HIV policy advice to the Commonwealth government, advocating for our member organisations, developing and formulating policy on HIV/AIDS issues, and promotion of medical and social research into HIV/AIDS and its effects.

NAPWA is the peak national organisation representing state and territory organisations of people living with HIV in Australia, and conducts policy, advocacy and national health promotion programs on behalf of its members.

AFAO and NAPWA believe that there is a need to build a stronger national framework for protection of the human rights of people living with HIV and AIDS. Enhancing the role of the Human Rights and Equal Opportunities Commission and strengthening the accessibility, reach and enforceability of the Disability Discrimination Act (DDA) and other Commonwealth anti-discrimination laws is central to this task. The continued existence of the DDA is of crucial importance both for individuals seeking to access a remedy, and because it sends out a strong educational message to the community at large.

2 HIV/AIDS related discrimination is a continuing problem in Australian society

Discrimination experienced by people living with HIV in Australia is well documented. In 1992, the Anti-Discrimination Board of NSW (ADB) undertook an extensive study into HIV/AIDS-related discrimination and found that discrimination was widespread and pervasive in Australia (*Discrimination - The Other Epidemic: Report of the Inquiry into HIV/AIDS related discrimination*, ADB April 1992). Discrimination occurs most commonly in employment, and in the provision of services, such as accommodation and health care.

Despite increased understanding in the community of the nature of HIV and how it is transmitted, there is no evidence that levels of discrimination are reducing. The Anti-Discrimination Board's inquiry report observed that evidence from studies undertaken in Australia and throughout the world suggests that increases in knowledge about HIV and its means of transmission do not correlate with decreases in discriminatory attitudes, and observed that "indeed, there is evidence from surveys of health professionals that HIV-related discrimination can co-exist with high levels of knowledge" (*Discrimination: the Other Epidemic* p6).

Developments in HIV/AIDS treatments have seen growing numbers of people living with HIV/AIDS (PLWHA) experiencing better health. Combination antiretroviral therapy for HIV involves a demanding regimen of medication and requires strict compliance with complex dosing. Side effects from treatments are common and sometimes severe and even life threatening. There are difficulties with taking medication in the workplace, including the likelihood of unwanted disclosure of a person's HIV status, bringing with it the potential for discrimination.

The combined effect of increased life expectancy and continuing cases of newly acquired HIV means that the total number of people living with HIV in the community is increasing. Today in Australia there are over 12,000 people living with HIV/AIDS. People are living longer but with fluctuating health. Mental health issues are increasing for people with HIV and HIV related poverty is common place. Fear of discrimination is an additional factor which erodes the already compromised quality of life of people living with HIV. However, where people living with HIV are aware that they have legal protections from discrimination, they are likely to be able to more fully participate in community life through employment and other social endeavours.

Recommendation: that the beneficial individual and community impact of the DDA in contributing to the quality of life of people living with HIV and increasing their capacity to contribute fully to community life be recognised by the Commission.

Case study: promotion of workforce inclusion through use of the DDA

In 1993 the Commonwealth Employment Service issued guidelines for dealing with HIV positive job seekers. The guidelines required disclosure of an applicant's HIV status to prospective employers for a range of jobs, including hospital cleaning and laundry and cleaning staff, police and prison officers, beauty therapists who perform electrolysis, tattooers, sanitation workers and fire fighters. Where an HIV positive person seeking work in any of these occupations refused permission for their HIV status to be disclosed to a prospective employer, they would not be referred for a job interview.

Early in 1994 a jobseeker lodged a complaint with HREOC about the guidelines. The Minister for Employment initially defended the guidelines, but in response to a request from the Australian Federation of AIDS Organisations that they be immediately withdrawn, announced the guidelines would be reviewed. Following negotiations between representatives of the Minister's department, the complainant, and AFAO, the guidelines were withdrawn, and replaced by a non-discriminatory policy.

3 Public health benefits of human rights protections

Australia's national HIV/AIDS response is recognised internationally as representing a model public health response and has succeeded in keeping HIV incidence at lower levels than comparable OECD countries. This has resulted in significant savings to the public purse, particularly given the high costs of HIV treatment and care.

Commonwealth policy on HIV/AIDS has been stated in four successive *National HIV/AIDS Strategies* which have been in place since 1989. A common theme of these strategies has been recognition of the need to provide for an enabling legal and policy environment for health measures to address the epidemic. Discrimination protections have provided an enabling environment for health promotion programs targeting people living with HIV or at risk of HIV, complementing other policy measures such as introduction of harm reduction strategies to address injecting drug use, and introduction of new laws governing the occupational health and safety of sex workers.

The effect of discrimination is to alienate people living with HIV or at risk of HIV from services. Fear of discrimination is a significant impediment to people coming forward for counselling, testing, support and treatment. Australia's HIV response has acknowledged that the most effective way to reduce HIV transmissions is to ensure people have access to appropriate prevention information, the means of prevention and health promotion programs.

Increasingly, there is an understanding that the same is true of the challenge of preventing Hepatitis C (HCV) transmission, as indicated in the Department of Health and Ageing's *National Hepatitis C Strategy* 1999–2003 ("Dismantling discrimination isolation and stigma is critical to achieving the aims of this Strategy" p47)

Laws which prohibit discrimination against people living with HCV and HIV also play an educative role, by virtue of their status as the state's articulation of the unacceptability of certain types of conduct.

Recommendation: That the economic and public health benefits of DDA protections be noted by the Commission, given the important contribution that these provisions have made to Australia's successful policy response to HIV.

4 DDA Coverage

The DDA's provision of remedies for people who are 'associates' of people with a disability have been particularly beneficial in relation to HIV discrimination, given the impact of HIV stigma on friends, family members and service providers for people living with HIV (see case studies below).

Case studies: DDA claims of discrimination by 'associates' of people with HIV

Viewing of body of HIV positive man

An associate of a man who died of an AIDS related illness and also had hepatitis C complained that she had not been permitted to dress his body or have the body viewed at the funeral. The complaint was settled when the union concerned advised that it had changed its policy so that members would handle, dress and allow viewing of HIV or hepatitis C positive people, and that further discussions would be held with health authorities regarding other procedures.

HIV support group granted lease

A support organisation for people who are HIV positive complained that they were being discriminated against on the basis of the disability of their members and associates when they were refused a lease on premises. The lessor had expressed concern that people in the support group who might have acquired HIV through drug use could pose insurance problems. The complaint was settled with the group being allowed the lease.

Some aspects of HIV related discrimination may be difficult to disentangle from discriminatory responses to a person's actual or assumed sexuality. In Australia, gay and homosexually active men have been, and continue to be, the most affected by HIV. It is estimated that 85% of people with HIV in NSW are gay men. State and territory anti-discrimination laws provide that it is unlawful to discriminate on grounds of homosexuality or on the basis of lawful sexual activity. Commonwealth law does not prohibit discrimination on the ground of sexuality. This should be changed so as to bring the Commonwealth in line with state and territory jurisdictions, in recognition of the negative social impact of discrimination against gay and lesbian Australians and in order to provide more comprehensive human rights protections for gay men at risk of HIV.

Recommendation: the Commonwealth should legislate to make discrimination on the grounds of sexuality unlawful.

5 Barriers to accessing rights under the DDA

Ready access to laws which are easy to enforce, particularly by those most directly affected by a breach of the law, must be provided for. Despite high levels of discrimination against people living with HIV and HCV and the existence of laws which provide for redress, few complaints of HIV/AIDS discrimination are lodged. Indeed, it is clear that complaints under the DDA are declining as a result of barriers to accessing the law.

To be effective, individual complaints systems and remedies need to be accessible, affordable, enforceable and timely. HREOC must be supported by adequate resources to ensure that those charged with responsibility for administering the DDA and for supporting access to the DDA's remedies.

Complaint remedies place a significant burden on individuals to enforce their rights. Individual solutions have a part to play in a human rights system. Our human rights system needs to empower individuals and communities to use anti-discrimination laws, and it must also be pro-active in addressing systemic

discrimination beyond the narrow framework of individual complaints. HREOC has developed a strong focus on individual complaint mechanisms and this aspect of their work consumes a large portion of their resources. There is a need to examine whether human rights protection could be better achieved with a greater use of mechanisms such as conduct of public inquiries, educational activities and the initiation of complaints by HREOC itself. This raises the need to examine the distribution of resources between individual complaint mechanisms and mechanisms that may better address systemic discrimination and the adequacy of current resources to achieve individual and systemic responses to discrimination.

The following analysis and conclusions are drawn from the report Barriers to access and effective use of anti-discrimination remedies for people living with HIV and HCV (Australian National Council on AIDS, Hepatitis C and Related Diseases (ANCAHRD) Occasional paper No 1, May 2001). This report analysed the numbers of HIV/AIDS complaints lodged in the period 1994/95 -1997/98. There was an across-the-board reduction in the number of discrimination complaints lodged with HREOC in this period and numbers of complaints fell by between 20 and 30 per cent each year over the period.

There was a decline in the number of complaints of HIV/AIDS related discrimination lodged with the HREOC in the period, from 28 per year to 2 per year. By comparison, the numbers of HIV/AIDS complaints lodged with the NSW Anti-Discrimination Board, although low, were generally stable across the same period.

Disability complaints under the NSW Anti-Discrimination Act were trending upward and disability complaints increased as a proportion of total complaints lodged under the ADA in the relevant period.

Comparisons between the upward trend in disability complaints under the NSW Anti-Discrimination Act with the significant decline in complaints under the DDA, do not support the view that the decline in the number of complaints to HREOC is the result of a reduced incidence of discrimination in society. All available evidence suggests that the diminishing rate at which people make disability complaints to HREOC under the DDA is the result of barriers which have arisen to the effective use of remedies under the DDA. The barriers which the ANCARHD report identified were:

- the lack of enforceable remedies;
- costs disincentives to proceedings in the Federal Court arising from court fees and the risk of costs awards against unsuccessful complainants;

- greater use of the power to decline complaints by HREOC, compared with State jurisdictions. In recent years HREOC has exercised the power to decline complaints to a greater extent than has occurred in the NSW ADB. In 1997/98 HREOC declined 25 per cent of complaints received, compared with the NSW ADB which declined six per cent in the same period.

Consistent with the barriers identified above, complainants are increasingly likely to lodge disability complaints under State and Territory anti-discrimination laws rather than under the DDA.

The *Human Rights Legislation Amendment Act 1999* did not adequately resolve the lack of enforceable remedies, nor costs disincentives inherent in Federal Court proceedings.

There are a number of factors which act as disincentives to the use of anti-discrimination remedies in both State/Territory and Commonwealth jurisdictions. These include:

- individual complaints remedies place significant burdens on complainants compared with respondents;

- delays in the handling of discrimination complaints discourage people from lodging complaints;

- delays in complaints handling increases the likelihood that complainants will withdraw their complaints prior to resolution;

- the lack of adequate access to legal advice and representation can result in people accepting less satisfactory offers at the conciliation stage, and it also acts as an impediment to respondents being prepared to settle cases, because they know that most complainants cannot afford to go to a hearing;

- the lack of capacity on the part of potential complainants to identify their experiences as legally actionable instances of discrimination, and a consequent failure to use anti-discrimination remedies.

Recommendations

Enforceable determinations

Determinations in DDA matters should be enforceable. The current system whereby matters may be decided by a registrar of the Federal Court does not

provide for automatic enforcement, as the matter needs to be heard before a Judge before an enforceable order can be made.

Remove costs disincentives

DDA matters in the Federal Court should be exempt from court fees. Costs should not be awarded unless there are exceptional circumstances.

Resource complaint handling functions

Funding to the HREOC must be adequate to enable performance of complaints handling functions in a timely fashion. The amount of time required to deal with a complaint should be significantly reduced, so delays do not continue to present a barrier to complainants. Funding levels should not be so low as to encourage overuse of the power to decline complaints as a means of managing limited resources.

Increase legal aid funding

Commonwealth funding for legal aid must be increased so complaints under the DDA which have merit can be pursued and complainants who cannot afford the cost of legal representation in such matters are not denied access to a remedy.

Resource community legal education

HREOC, State and Territory anti-discrimination bodies and Disability Discrimination Legal and Advocacy Centres need adequate resources to promote awareness of anti-discrimination legislation and of legal remedies for discrimination. Effective partnerships need to be established between HREOC and community organisations to better meet the legal information and education needs of people living with HIV.

Actively promote human rights

The current over-reliance on individual complaints as a means of addressing societal levels of discrimination needs to be balanced by Commonwealth bodies such as HREOC playing a greater pro-active role in promoting human rights and addressing systemic discrimination.

Case study: Practical difficulties in pursuing a DDA case

X v. Department of Defence

The experience of people with HIV in using the DDA illustrates the difficulties that a complainant faces in seeing through the complaints process to a conclusion.

Australian Defence Forces policy on HIV requires all new recruits to the Australian Regular Army to be tested for HIV. Those who test positive are discharged. The Australian High Court recently heard an appeal from a man who was discharged under this policy. The man, known in proceedings as "X", applied to join the army in November 1993. At the time of applying, X was a serving member of the Army Reserves, a part-time force trained for deployment in times of war.

X successfully argued before the Human Rights and Equal Opportunity Commission that the Australian Defence Forces policy contravened the DDA. The Commonwealth conceded it had discriminated against X in discharging him, but asserted the discrimination was not prohibited by the Act, which exempts discrimination in employment where the employee is unable to fulfil the "inherent requirements" of the job.1 The ADF said the inherent requirements of the job of soldier include being capable of deployment in combat and combat-related duties, without undue risk of HIV transmission to other soldiers. The Human Rights and Equal Opportunity Commissioner who heard the case took a narrower view of the meaning of "inherent requirements", and ruled the phrase did not encompass the issue of the potential risk of HIV transmission from X to another person during deployment.

The Commonwealth successfully appealed the case to the Federal Court, and from there X appealed to the High Court. The High Court dismissed X's appeal, and ruled that the case be reheard by a different Commissioner of the Human Rights and Equal opportunity Commission. The majority of the High Court ruled that the term "inherent requirements" encompasses the question of whether X can be deployed as required in combat and combat-related duties, and ordered the Commission to consider and determine this question.

This case was sent back to HREOC for re-hearing, but the complainant abandoned the case before the re-hearing. As a result, the questions it might have settled were not dealt with: Can an HIV positive person perform the job of soldier? Can a soldier with HIV "bleed safely" (that is, without risk to other soldiers), when deployed in combat? Should the "ability to bleed safely" be a requirement of employment as a soldier?

One Australian newspaper editorialised that the Australian Defence Forces should at least be expected to "debate the matter and decide whether service requirements appropriate to the pre-HIV, pre-antibiotic era of bayonets and

trench warfare are appropriate to the era when the next war could well be waged by computer hackers".

6 HIV/AIDS and Insurance

Discrimination in provision of insurance is one of the most common types of HIV related discrimination. There have been many complaints brought under the DDA, but only a few have had notably successful outcomes. AFAO and NAPWA are concerned that the broad actuarial defence available to insurers under the DDA does not take adequate account of the social costs of discriminatory practices.

In 1996 the Life, Investment and Superannuation Association (LISA) met with the then Disability Discrimination Commissioner Elizabeth Hastings to discuss her concern over the number of complaints the Commissioner was receiving about disability discrimination by the life insurance industry. It was agreed to form a working group to discuss the development of guidelines for insurers. AFAO was invited to participate and negotiations between these parties continued until mid-1998, but ultimately were not pursued by AFAO because of a perceived lack of commitment to change by the industry.

AFAO's experience of this process was that they had to battle against a rich and powerful opponent, and were left to their own devices in doing so. The issues in dispute involved conflicting interpretations of section 46 of the Act, which deals with discrimination in insurance and superannuation, and there were no reported decisions on this section at the time. In this case, HREOC's decision to leave the two parties to negotiate an acceptable outcome did not produce any advances for the rights of HIV positive people.

Recommendations

That the Commission recommend a review of the effectiveness of the DDA in preventing discriminatory practices by the insurance industry, and that disability groups be supported by the Commonwealth in representing their position to the industry.

Case studies: DDA claims of HIV related discrimination in insurance

In 1994, a complainant received payment of $150,000 after settlement of a complaint against an insurer. The complainant had been refused payment under the death and permanent disability policy attached to his superannuation fund membership, on the ground of his HIV status. Following settlement of this

complaint, the insurer involved and two other large insurance companies changed their practice to remove clauses in their insurance policies which discriminated against people with HIV. A group of people with HIV complained that they had been discriminated against by an insurer because of the exclusion of HIV-related claims under a consumer credit insurance policy. The insurer agreed to pay compensation and to remove the discriminatory clause from its policy.

A gay man complained he had been discriminated against on the basis of an imputed future disability (that is, the risk that he might become HIV positive) when an insurance company refused to give him income protection insurance, even with an HIV exclusion clause (which the complainant was prepared to accept), for longer than a two year period. The matter was settled when the insurer advised that it was prepared to remove the two year limitation and issue the policy as requested.

In another case, a man complained that he had been refused income protection insurance after disclosing that he was homosexual and had been in a relationship with a HIV positive man, although he himself was HIV negative. The matter was settled with an apology, compensation of $8500 and insurance being issued subject to an HIV exclusion clause.

Thank you for the opportunity to provide this submission.

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