

# Is lawful discrimination against illicit drug users acceptable?

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IN DECEMBER 2003, the Federal Government tabled legislation to make it legal to discriminate against people addicted to a prohibited drug unless they are undergoing treatment for their addiction. If enacted, the Disability Discrimination Amendment Bill 2003 (Cwlth) (DDAB) would legitimise discrimination against illicit drug users in diverse areas, including employment, accommodation, education, club membership, sport, the administration of federal government programs, and access to goods and services. Under the DDAB, discrimination against people using a drug authorised by a federal, state or territory law would remain unlawful. Also, people addicted to legal drugs (such as alcohol or tobacco) would be excluded from the effect of the new provisions. After debate in the Senate, the DDAB was referred to the Senate Legal and Constitutional Committee for inquiry and report by 7 April 2004. At this stage, it appears likely that the DDAB will be reintroduced to parliament to form part of the Federal Government's "Tough on Drugs" electoral platform.<sup>1</sup>

On the face of it, the DDAB might seem reasonable. Why should people who break the law by consuming illicit drugs be entitled to protection from discrimination?

However, the Bill is based on false premises, abrogates important human rights, may result in costly and lengthy litigation, and is likely to worsen outcomes from illicit drug use by deterring drug users from entering treatment and reducing their ability to secure employment and housing.

## Rationale for the Bill

The rationale for the DDAB is not clear to us. A November 2000 decision of the Federal Court held that, because "drug addiction" may be characterised 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", it may constitute a "disability" for the purposes of the *Disability Discrimination Act 1992* (Cwlth) (Box).<sup>2</sup>

The effect of this decision is that people may be protected from "less favourable treatment" on the ground of drug

## ABSTRACT

- A Bill currently being considered by the Australian Parliament (the Disability Discrimination Amendment Bill 2003 [Cwlth]) would, if enacted, make discrimination lawful against people who are currently addicted to prohibited drugs and not currently in drug treatment.
- The Government argues that the Bill is needed to keep the work and social environment safe, respond to community concerns, provide certainty to individuals and organisations, and force drug users into treatment.
- If enacted, we believe the Bill will
  - infringe several national commitments to human rights, damage the wellbeing of family and other associates, and generate expensive litigation because of the difficulty of proving current addiction and current drug treatment;
  - risk deterring drug users from seeking drug treatment and impair their ability to obtain employment and accommodation;
  - represent a further attempt to reduce drug use by increasing the health, social and other costs of using illegal drugs, rather than assisting drug users to deal with their problem through health and social interventions that are less expensive, more effective and less counterproductive.

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addiction in areas such as employment, accommodation and education. The decision does not, in any way, require that drug users be treated "more favourably" and does not impinge on the capacity of a business or landlord to make decisions based on reasonable and objective criteria. In fact, notwithstanding the decision, "less favourable treatment" of drug users remains lawful if they cannot perform the inherent requirements of their job<sup>3</sup> or do not pay their rent,<sup>4</sup> or if it is in the interests of community and workplace safety.<sup>5</sup> The Bill is not needed to stem a potential flood of litigation: there are only two reported cases in which illicit drug users have pursued complaints about allegedly discriminatory treatment.<sup>2,6</sup>

One of the Government's main arguments for the proposed legislation is that the DDAB will coerce drug users into seeking treatment by denying them the protection of antidiscrimination legislation if they do not.<sup>1,7</sup> If the Government is right, then the DDAB could benefit drugs users, their families and their communities because there is abundant high quality evidence that drug treatment achieves substantial health, social and economic gains for these groups.<sup>8</sup>

The Government also contends that the DDAB is necessary to "keep the work and social environment safe from

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### The Marsden case

In the case *Marsden v Human Rights and Equal Opportunity Commission and Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd*,<sup>2</sup> the applicant, Mr Marsden, alleged that he was refused service and expelled from a club on the basis of his "disability", namely his opioid dependence. The applicant had been in methadone treatment for some years for heroin dependence. At first instance, the Human Rights and Equal Opportunity Commission (HREOC) dismissed Mr Marsden's complaint on the basis that it did not consider "opioid dependency" to be a "disability" within the meaning of the *Disability Discrimination Act 1992* (Cth). On appeal, Branson J of the Federal Court held that the Inquiry Commissioner had erred and that "opioid dependency" could constitute an "illness, disorder or disease" and therefore a "disability" within the meaning of the Act. The complaint was remitted to the HREOC but was settled prior to rehearing.

other people's behaviour", to respond to "community concerns" and "to give certainty to individuals and organisations covered by the *Disability Discrimination Act*".<sup>1,7</sup> (Ironically, the case that provoked this Bill would have been exempt from new provisions, as the applicant was agreed to be currently undergoing drug treatment at the time of the alleged discrimination).

### Public health implications of the Bill

Despite the stated rationale for the DDAB, the Government has not advanced any evidence that the legislation will encourage more drug users to seek treatment. As demand for drug treatment in Australia already far outstrips supply,<sup>9</sup> it is hard to see how further purported stimulation of demand by the DDAB could be of benefit.

The most effective way of increasing drug user involvement in treatment would be to substantially increase the present, arguably paltry, level of government funding, particularly in light of the high return on investment in drug treatment relative to the low return on supply- or demand-reduction strategies.<sup>10</sup> Funding for drug treatment is always scant, especially when funding is lavished on supply control. According to the most recent data available,<sup>11</sup> federal and state governments in 1992 allocated 84% of expenditure in response to illicit drugs to supply control, 6% to treatment, and 10% to prevention and research. Enhanced funding of drug treatment is needed to increase capacity, expand options and improve quality.

If the primary purpose of the DDAB is to encourage drug users to seek treatment, it also seems curious, on public health and economic grounds, that people addicted to alcohol and tobacco are excluded from the effect of the new provisions, as these legal drugs are responsible for 96% of drug-related mortality in Australia<sup>12</sup> and 83% of the estimated cost of mood-altering drugs to the Australian economy.<sup>13</sup>

A note appended to the Bill states that the proposed reforms do not affect existing protections from discrimination on the basis of medical conditions (such as HIV or hepatitis C virus infection) that may be related to drug addiction. It is difficult to see why this is only "noted" rather than legislated, as it is clear that "notes to an Act are not

taken to be a part of that Act" (*Acts Interpretation Act 1901* [Cwlth]). Regardless, defendants could easily argue that their discriminatory treatment was prompted only by the complainant's drug addiction, while denying that a medical condition caused by drug use was ever considered. Under these circumstances, how could courts ever determine that discrimination was unlawful?

Drug use is already highly stigmatised. Further entrenching prejudices by making discrimination against drug users lawful is unlikely to increase demand for treatment and far more likely to deter drug users from entering treatment.<sup>14</sup> Most drug users know that even treatment that is eventually successful is often interrupted by episodes of relapse. Drug users will be reluctant to seek treatment if they are aware that this may provide evidence of "addiction", thereby satisfying one of the criteria for subsequent lawful discrimination under the DDAB.

### Legal and human rights implications of the Bill

The DDAB is irreconcilable with some important human rights commitments to which Australia is bound,<sup>15</sup> including agreements relating to the right to equality and to freedom from discrimination. The Bill is also inconsistent with the United Nations *Guiding principles of drug demand reduction*,<sup>16</sup> which require that policies or programs directed towards reducing the consumer demand for illicit drugs respect human rights and promote social integration.

Likely operational problems abound. Several critical terms used in the DDAB are exceedingly difficult to define, including "addiction" and "undergoing a program or receiving services to treat the addiction". The standard definitions of "drug dependence" contained in the *International classification of diseases and related health problems*<sup>17</sup> and the *Diagnostic and statistical manual of mental disorders*<sup>18</sup> imply an entity that is present *in degree* rather than being either present or absent — an approach in keeping with contemporary scientific conceptions. Arguments about addiction are likely to produce lengthy and expensive debates in court. A judgment about whether a person has an addiction can only be made on the basis of self-reported symptoms. Is it likely that people contesting discrimination made lawful by the DDAB would accurately describe their symptoms of addiction?

Judgments about whether a person is or was "undergoing treatment" will be almost as difficult. Drug users enrolled in methadone treatment or residential rehabilitation can easily be categorised as undergoing treatment. But this judgment is far more difficult when drug users are attending outpatient counselling or on a treatment waiting list. How frequent or recent does outpatient counselling have to be to prove that a person is "undergoing treatment"? Will regular and frequent attendance at Narcotics Anonymous meetings be accepted as constituting current treatment? If so, how can these attendances be documented? Litigation about whether drug users were undergoing treatment at a particular time will be time-consuming, expensive and often irresolvable.

The Attorney-General has stated that, under the Bill, "the associate [of a drug addicted person] retains any rights they

may presently have to protection from unfair discrimination".<sup>8</sup> But damage to family members and other associates of drug users will be virtually impossible to quarantine. How can the Government guarantee that family members or other associates of a drug user who has been lawfully discriminated against could not also be penalised, for example, when the drug user loses a job or home as a result of lawful discrimination? In the United States, where discrimination against illicit drug users is lawful, there is considerable evidence of associated people being inadvertently damaged as a result. For example, in a decision supported by the US Supreme Court, an elderly grandmother who accepted responsibility for her grandchild lost her public housing when that grandchild was found to have smoked cannabis.<sup>19</sup>

## Conclusion

The DDAB ignores two fundamental principles that should be of great concern to the medical profession. First, the HIV/AIDS epidemic is a reminder that discriminating against marginalised groups in our community carries a high public health risk. Australia's much acclaimed, successful response to HIV/AIDS was predicated on the full acceptance of several marginalised groups as part of the community. Second, during the past 50 years, Australia's drug policy has been founded on treating drug use primarily as a criminal justice problem rather than as a health and social issue. Although this has had considerable political benefits for some, there is increasing recognition that this approach is expensive, relatively ineffective and often accompanied by serious unintended negative consequences. Experience has shown that attempting to help drug users out of their plight using drug treatment and social programs is much more effective and less costly than attempting to magnify the costs to drug users of continued drug consumption.

Advancing a Bill with such weak justification in an election year inevitably invites speculation that the major rationale is political positioning. Parliament would be wise to reject the Bill.

## Competing interests

None identified.

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