

# Consolidation of Commonwealth Discrimination Law

Submission from  
HIV/AIDS Legal Centre

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## **HIV/AIDS Legal Centre**

The HIV/AIDS Legal Centre (HALC) is a community legal centre that specialises in HIV related legal matters. HALC recognises that people living with and affected by HIV/AIDS and Hepatitis C have special legal needs.

HALC is the only legal service in Australia specifically focused on providing support for people living with and affected by HIV/AIDS and Hepatitis C.

Our service relies on funding from the Commonwealth and NSW Governments. We increasingly provide services to clients living in all states and territories in Australia.

Our legal services include administrative, consumer, criminal, employment, family, migration, property, succession and superannuation fields of law.

Discrimination laws are a constant focus of the solicitors and volunteers at HALC in relation to clients' employment and engagement with public and private services.

## **Introduction**

HALC welcomes the opportunity to participate in this public discussion acknowledging that significant social and legal change has occurred since the first anti-discrimination legislation was enacted.

Despite such change we are confronted daily by clients who have experienced discrimination in their work, education, transport, medical treatment, engagement with government services and private organisations. When these matters are pursued on their behalf the options are few and remedies minimal.

HALC's overall view of the current Anti-discrimination legislation, both Federal and in NSW, is that it is too technical and provides poor coverage. The technicality involved is not only an artefact of the drafting, but tribunal and judicial zealotry in favouring technical arguments from defendants to discrimination complaints. There is no doubt some element of institutional resistance to the direction and progress of anti-discrimination protections as instruments of public policy. Poor coverage comes often as a secondary result of the tendency toward technicality in interpretation and application favoured by the tribunals and judiciary.

There is insufficient disincentive to discriminate in Australia.

These submissions comment on many areas indicated in the discussion paper. Our overall view (above) is substantiated and explained via detail on the specific discussion points (below).

## **Summary**

This submission does not respond to all questions posed in the discussion paper.

Specific recommendations are provided in relation to the questions 1, 2, 6, 8, 9, 18, 20, 21, 22, 24, 25, 26, 27, 29, 30.

Brief argument in support is offered for questions 1, 2, 6, 8, 18, 21

### Question 1 – need for a uniform test

#### *Recommendation:*

*The current situation is too complex and varied, reducing comprehension by the general public. A uniform test is required. The nature of that test needs further public debate.*

### Question 2 – burden of proof

#### *Recommendation:*

*The respondent should carry the burden of proof. The consolidated bill should provide for the onus to be on any and all public instrumentality and all large private organisations.*

### Question 6 – harassment

#### *Recommendation:*

*Harassment should be brought within the meaning of discrimination. A specific focus on HIV harassment should be included.*

### Question 8 – associate protection

#### *Recommendation:*

*Extend coverage to associates of people with all protected attributes and ensure that the definition of associate includes past and present associations.*

### Question 9 – extension to provide for protections included in Fair Work Act

#### *Recommendation:*

*Protected attributes should be extended in line with the Fair Work Act.*

### Question 18 – discriminatory requests for information

#### *Recommendation:*

*HALC recommends the adoption of the Victorian approach as it does not suffer the issues noted in the report with generic requests for information; further, it would also serve an educative function in that employers and service providers would be forced*

*to reflect on the need and relevance of information sought rather than utilising proforma documents.*

**Question 20** – general limitations clause

*Recommendation:*

*Adopt a general limitations clause to ensure that any exemption is bona fide and for a clearly defined purpose*

**Question 21** – inherent requirement exception

*Recommendation:*

*It would provide clarity to business and empower individuals if the inherent requirements defence to the anti-discrimination legislation specifically noted that the onus of determining whether or not an applicant was fit to work is on the employer, and that the employer is required to take reasonable steps to ascertain this.*

**Question 22** – application of religious exemptions on grounds of sexual orientation or gender identity

*Recommendation:*

*Remove entirely any religious exemption to discrimination on the grounds of sexual orientation or gender identity.*

**Question 24** – mechanisms to provide greater certainty/guidance for duty holders in order to assist compliance

*Recommendation:*

*Provide for certification for specific purposes and for limited periods of time*

**Question 25** – Changes to the conciliation process

*Recommendation:*

*Broaden the range of ADR options available to AHRC and use current investigative powers more frequently*

**Question 26** – improvements to court processes

*Recommendation:*

*Provide for standing in the federal courts for representative bodies, for each party to bear their own costs and strengthen remedies for non-economic loss.*

**Question 27** – Changes to the role and function of AHRC

*Recommendation:*

*Provide for AHRC to have investigative and enforcement powers provided that an originating application can proceed to the Federal Court.*

Question 29 – amendments to provisions governing interactions with other Commonwealth, State and Territory Laws –

*Recommendation:*

*Harmonise Commonwealth laws in line with progressive state laws on a cyclical basis. Provide for regular harmonisation that does not diminish but rather celebrates and applies progress made by states and territories.*

Question 30 – application of consolidation bill to State and Territory Governments and instrumentalities

*Recommendation:*

*Apply the consolidation bill to state and territory governments and instrumentalities.*

## Question 1

What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

### HALC Recommendation:

*The current situation is too complex and varied, reducing comprehension by the general public. A uniform test is required. The nature of that test needs further public debate.*

### Argument:

The overriding purpose of anti-discrimination legislation must be to enable access to justice, particularly for unrepresented litigants. To achieve this goal flexibility and minimal technicality should be the cornerstones. In NSW this was clearly the parliamentary intent, with the use of a Tribunal system to determine discrimination complaints. The degree of technicality of the NSW Anti-Discrimination Act precludes such access to justice.

In our experience, it is the nature of the jurisdiction that all aspects of a discrimination claim require detailed pleadings. This requires a high level of legal training and familiarity with the jurisdiction, particularly given the number of matters that have to be proven by an applicant.

*There are numerous technical defences*

While the number of defences *per se* available to a respondent is not that many, in effect, respondents can agitate numerous legal arguments. Applicants pressing a simple discrimination claim are required to prove differential treatment (including leading evidence on a comparator); causation on the grounds of a protected characteristic; and detriment. The matters in *Purvis* and the issues raised by an indirect discrimination claim cause further complexity. A failure in one link of the chain is fatal. This is prior to the respondent raising any of their statutorily available defences.

Unrepresented litigants are, in our view, extremely unlikely to succeed against any combative and adequately represented respondents.

These disadvantages of the current arrangements, at least in NSW, point to the need for greater simplification, transparency and flexibility, lending weight to the case for a uniform test.

## Question 2

How should the burden of proving discrimination be allocated?

### HALC Recommendation:

*The respondent should carry the burden of proof. The consolidated bill should provide for the onus to be on any and all public instrumentalities and all large private organisations.*

### Argument:

Frequently discrimination matters manifest in a very unequal balance of power between the applicant and the respondent.

Reversing the onus onto the respondents makes sense given the better record keeping of organisations, as well as their generally more sophisticated ability to access evidentiary material and interview relevant witnesses. Applicant employees for instance are unlikely to be able to obtain statements from colleagues or discover HR file notes until well into the matter. Investigations are also likely to be better resourced where conducted by an organisation or government department.

The other relevant factor is that in our experience, the discrimination jurisdiction is inherently poor in terms of documentary and corroborative evidence. For example, file notes of discriminatory conduct or independent witnesses are rarely available.

The positive burden of proof often means that even where an applicant can show that a chain of events was unusual, or contrary to policy, discrimination cannot be proved. Judicial members are often loath to draw inferences of discrimination. This can be seen in the frequent application of the *Briginshaw standard* in the discrimination jurisdiction (a principle born in the days when “adultery” was a crime) which is applicable to “serious” allegations which the judiciary should therefore be slow to find. Respondents can simply dismiss the aberrations as “one-off” incidents the result of mismanagement or circumstance, but **not** discrimination. Reversing the onus of proof lifts the opacity on what has come to be termed as the “incompetence defence” in our offices.

## Question 6

Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

### **HALC Recommendation:**

*Harassment should be brought within the meaning of discrimination. A specific focus on HIV harassment should be included.*

### **Argument:**

Anti-discrimination protections have focused on remedying tangible 'detriment' such as termination of employment or denial of service. This however often overlooks the lived experience of discrimination, which often presents as slow exclusion through subtle means. The tendency towards technicality favoured by tribunals and judiciary in interpreting and applying anti-discrimination provisions can sometimes mean that the mechanisms of discrimination or the effects of discrimination are invisible within the confines of the current provisions.

A recent case example is a finding against our client who, on disclosure of his illness, found himself treated differently and was excluded from tasks and usual work duties in the workplace. Despite numerous findings of 'unusual' treatment, one of the Tribunal's reasons for finding no discrimination was that there was no detriment. This was detailed as being no loss of income or loss of amenity of any service.

What was most distressing to the complainant was his specific treatment and exclusion from regular work by management, which effectively condoned stigmatisation. By bringing harassment into the purview of discriminatory conduct provides an opportunity to expand the scope of protections and therefore the visibility of discrimination as it is played out in more subtle forms.

In the specific context of HIV, NSW currently has anti-vilification provisions which provide some modicum of protection against vilification based on HIV status. Again the provisions are treated with undue technicality and do not in reality provide effective protections for the actual vilifying conduct that PLHIV face in their daily lives. The provisions only cover 'public conduct' which excludes much conduct, and complaints are very difficult to prove.

Most complaints we have cause to advise clients on would not meet the narrow terms of protection currently offered under the NSW or Federal Acts. Nonetheless, there is need for and merit in provisions specifically protecting against harassment and vilification based on HIV, and HCV (Hepatitis C). Such protections bear a salutary effect on much conduct, even without providing an effective remedy in specific instances.

Expansion of provisions to include harassment as discrimination may help to alleviate these problems in current protections.

## Question 8

How should discrimination against a person based on the attribute of an associate be protected?

### Recommendation:

*Extend coverage to associates of people with all protected attributes and ensure that the definition of associate includes past and present associations.*

### Argument:

HALC is currently involved in an appeal to the High Court on the meaning of the terms “person”, “associate” and “relative”.

This matter is an excellent example of our criticisms.

The Department of Forensic Medicine (DFM), part of NSW Health, operates a policy that we strongly argue believe is obviously discriminatory.

For four years we have unsuccessfully sought to access the merits of the DFM policy. The respondent retained counsel at an early stage of the matter (indeed, at one stage, there were two barristers and four solicitors representing the State) and pursued a jurisdictional argument. In effect, the respondent argues that the Act does not proscribe discriminatory actions taken against relatives or associates with a deceased relative with a protected attribute. The Supreme Court of Appeal accepted this argument in part.

The current wording of the Act thus results in the bizarre situation where a clearly unlawful action (for instance, the banning of a person from entry to a pub on the basis that they have an Aboriginal partner) becomes lawful on the Aboriginal partner’s death.

## Question 18

How should the consolidation bill prohibit discriminatory requests for information?

### Recommendation:

HALC recommends the adoption of the Victorian approach as it does not suffer the issues noted in the report with generic requests for information; further, it would also serve an educative function in that employers and service providers would be forced to reflect on the need and relevance of information sought rather than utilising pro forma documents.

### Argument:

HALC has had numerous matters wherein generic requests for information place people living with HIV and/or Hep C at specific disadvantage.

There remains in our community significant stigma associated with both these medical conditions. There is also a significant knowledge gap in our community over the actual work restrictions resultant from suffering from either one (or both) these conditions. At law, restrictions can only be imposed on surgeons performing highly invasive procedures, and on members of the armed forces. In practice, people living with HIV are regularly discriminated against in a wide variety of occupations and industries. It is unsurprising to find therefore, that a number of clients chose not to proceed with a particular occupation simply because the initial process appears to require disclosure of their status.

In our experience, there also remains significant discrimination against people living with HIV in the insurance sector. While remedies exist against discriminatory insurance policies, pursuing these are expensive, stressful and rarely lead to sectoral change. As the discrimination against people living with HIV starts at point of disclosure, it is essential to limit the release of such sensitive information where it is irrelevant to the position or service in question. It is also important to note here that, practically, discrimination actions based on a refusal to employ a person on the basis of a protected characteristic are very difficult to prove due to general paucity of evidence and the lack of any employer-employee history.

## Question 21

How should a single inherent requirements/genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

### *Recommendation:*

*It would provide clarity to business and empower individuals if the inherent requirements defence to the anti-discrimination legislation specifically noted that the onus of determining whether or not an applicant was fit to work is on the employer, and that the employer is required to take reasonable steps to ascertain this.*

### **Argument:**

As noted in the submissions above, regarding *requests for information*, there remains a significant knowledge gap in the community as to the work restrictions required by law on persons living with HIV or Hepatitis C.

We have had two instances in recent history where persons living with hepatitis C were suspended from work duties. In both instances, they were returned to active duties after we supplied the employers with medical certificates confirming their fitness to work. However, one was suspended for a month without pay (while on interferon treatment for hepatitis C) while the other was suspended for some two months from a range of regular duties including off-site visits and first aid duties.

In both instances, the employer arguably acted unlawfully by suspending the employees, but appeared to be motivated by a genuine (if entirely misplaced) belief as to their inherent fitness to perform the role and shifted the burden of determining whether or not the restrictions were necessary onto the employees themselves. While these employees chose to obtain legal advice and were ultimately successful in reverting to their original positions, other employees may chose not too for a variety of reasons including embarrassment and a desire not to be involved in legal process.