

# COMBATTING STIGMA AND DISCRIMINATION TOWARDS PEOPLE WITH HIV THROUGH STRATEGIC LITIGATION

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The HIV/AIDS Legal Centre Inc (HALC) is a specialist legal centre in Sydney, Australia that provides a free legal service for people with HIV related legal matters.

The number of new HIV diagnoses in Australia has remained relatively stable over the past decade. Currently the percentage of all people over the age of 15 in Australia who are living with HIV is 0.14%.<sup>1</sup> People living with HIV infection in Australia now have close to the same life expectancy as someone without HIV infection. Further, the corresponding increase in the proportion of people on treatment with a suppressed viral load has reduced the risk of onward transmission to zero. Despite these rapid developments in HIV testing, treatment and prevention, people with HIV continue to face stigma and discrimination. The HIV/AIDS Legal Centre (HALC) consistently has clients contacting the service seeking legal advice and redress due to being victims of HIV related stigma, discrimination and vilification. In the past decade, HALC has been involved in approximately 900 discrimination matters – this represents a significant number given the relatively low number of people living with HIV in the country.

Australia's *Disability Discrimination Act (Commonwealth) 1992* contains provisions that prohibit discrimination against people with HIV; there is also similar legislation in most states. HALC utilizes these laws to engage in strategic litigation, including against government bodies, private employers, medical/dental and personal service providers, educational institutions and insurers. The goal of the litigation is to not only achieve a desirable outcome for the individual client but to also affect systemic change.

## HOW DOES HALC COMMENCE STRATEGIC LITIGATION TO ATTACK STIGMA AND DISCRIMINATION TOWARDS PLHIV?

People with HIV contact HALC seeking assistance in discrimination proceedings. Proceedings are commenced in the appropriate jurisdiction and then progressed through the relevant court or tribunal as necessary. HALC ensures that HIV partner organisations are aware of the services HALC provides to PLHIV to ensure that they refer clients/patients who have faced discrimination or vilification. Remedies sought include compensation for economic and non-economic loss, amendments to policies or procedures, a commitment to education and training around issues affecting people with HIV and, if relevant, the person's return to employment or the provision of the service originally requested.

## IN WHAT CIRCUMSTANCES HAVE BEEN DISCRIMINATED AGAINST?

HALC has represented clients in hundreds of cases, those of note include cases involving: the removal of a

discriminatory policy preventing health care workers with HIV from performing exposure prone procedures; the removal of a discriminatory policy preventing the post mortem reconstruction of the body of a person with HIV following autopsy; lifting of restrictions on people with HIV working in the Defence Force; and refusal of certain types of insurance to people with HIV.

Case studies reveal that perpetrators of discrimination directed at people with HIV often felt justified in their actions and attempted to rely, usually with little basis, upon other legislation such work place health and safety laws, public health laws and, in the case of insurers and the Defence Force, provisions under the Disability Discrimination Act which allow discrimination in certain circumstances.

## A SNAPSHOT OF THE REASONS PERPETRATORS OF DISCRIMINATION GIVE FOR THEIR ACTIONS:

A woman who recently gave birth had her HIV status publicly disclosed on a public maternity ward and further, nurses wore mask, gloves and goggles prior to weighing and changing the baby's nappy out of fear of the baby being HIV positive and perceived risk to the nurses.

A woman was denied access to affordable IVF services and was told:

*"sorry we can't treat you as we don't treat patients with HIV here.... a HIV positive patient falls outside the low-cost standardised treatment model because of the requirement for specialised, individualised care"*.

No specialised treatment was in fact required, only the standard precautions that must be adhered to when treating any patient. The client was turned away from two fertility clinics for this reason.

A patient denied access to a cosmetic medical procedure was told:

*"the doctor is apprehensive about treating HIV positive patients .... the risk is too high"*.

A nurse with HIV was refused employment as their HIV status would allegedly:

*"limit the scope of work you could perform"*.

At law there was no obligation on this nurse to have disclosed their HIV status and in any case, they could perform all duties required despite their HIV status.

A hospitality worker was told that their HIV status *"posed a risk to yourself and others"*.

Multiple clients were denied insurance cover including death cover and income protection due to the outdated

actuarial statistical data relied upon by insurers to lawfully discriminate. Legislation allows insurers to lawfully discriminate based on actuarial statistical data combined with a claim of unjustifiable hardship.<sup>2</sup>

## RESOLUTIONS

The discrimination against these individuals has been addressed through robust and strategic litigation. Many cases settle prior to a final hearing before a Court and therefore opportunities for setting precedents through judgements are removed. It is therefore important to provide extensive and robust representation to all who have faced discrimination and ensure that partner organisations are aware of HALC's services so that opportunities to address systemic problems are not missed.

In the case of employers and many service providers, particularly those for medical services, final resolutions have included financial compensation for non-economic loss such as pain, suffering, distress and humiliation, and economic loss, particularly in employment matters.

Resolutions reached through mediation also often include a commitment to ongoing education and training to ensure that all members of the discriminating service/ employer are aware of their duty not to discriminate, duties around standard precautions and the lack of risk of transmission of HIV that a person with HIV poses in an everyday setting.

In the case of insurance, unfortunately from a strategic litigation perspective, many insurers have settled matters by offering to provide appropriate cover to the individual and thus litigation to dispute the data relied upon has not yet been challenged in a Court as the individual no longer needed to continue with the case. This is a challenge with any litigation as in Australia such actions in discrimination require a complainant to agitate the proceedings.

## WHERE TO FROM HERE?

The type and volume of ongoing complaints received demonstrates that ignorance around HIV remains prevalent in the Australian community. It is clear that ongoing legal representation in discrimination proceedings for people with HIV is necessary to restore dignity and respect to individuals who have been wronged and also to effect systemic change so that people with HIV can participate in the community on an equal basis with others.

<sup>1</sup> <https://data.kirby.unsw.edu.au/hiv>

<sup>2</sup> Section 46 of the Disability Discrimination Act 1992a

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