

Are people with HIV an insurance liability? Combating discrimination of PLHIV seeking insurance through litigation and advocacy

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

BACKGROUND

Australia's discrimination legislation provides a mechanism whereby insurers can lawfully discriminate against people living with HIV (PLHIV) and others with disabilities where actuarial statistical data supports the denial of provision of insurance. The HIV/AIDS Legal Centre (HALC) endeavours to redress this outdated discriminatory provision through; direct legal representation to PLHIV who have been denied insurance and advocacy.

RELEVANT LAW AND HOW IT IS APPLIED TO PLHIV

The exemption contained at section 46 of the Disability Discrimination Act 1992 (DDA) relevantly states:

1. This Part does not render it unlawful for a person to discriminate against another person, on the ground of the other person's disability, by refusing to offer the other person:
 - (a) an annuity; or
 - (b) a life insurance policy; or
 - (c) a policy of insurance against accident or any other policy of insurance; or
 - (d) membership of a superannuation or provident fund; or
 - (e) membership of a superannuation or provident scheme;
- if:
 - (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
 - (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained--the discrimination is reasonable having regard to any other relevant factors.¹

Similarly, it is also not unlawful to discriminate against a person due to their disability in relation to the terms and conditions of the insurance offered for the same reason (such as by imposing higher insurance premiums).

PLHIV frequently contact HALC to seek redress upon being denied insurance cover, including total and permanent disability cover, income protection and life insurance. Insurers have asserted that their policies/data mean that they cannot provide insurance cover to PLHIV or that they only do so in circumstances such as where there is a CD4 count of <500 and no co-infections (and even then only for limited types of insurance).

The HIV Futures 9 report found that 25% of PLHIV had experienced discrimination by insurers in the last twelve months, with approximately 11% stating that it occurs 'often' or 'always'.²

The insurers typically rely upon the exemption under the DDA in relation to the actuarial statistical data. They also seek to rely upon the exemption to discrimination where the provision of a service would cause unjustifiable hardship.³

Relevant case law confirms that the onus is on the insurer to demonstrate that the defence exists. It also should be reasonable to rely upon such data having regard to the data and other relevant factors. Despite the limitations on the use of the exemption, the exemption is still widely, and in our view inappropriately, used.

REPORTS FROM CLIENTS ON THE IMPACT OF DISCRIMINATION

I feel stressed, anxious, hurt and offended that I was excluded from their services by the Respondents on the discriminatory basis of my HIV and Hepatitis B positive status.

I have always worked and I wanted this coverage to ensure that I am protected in the event that I cannot continue to work and support myself due to unforeseen reasons. As a hairdresser my hands are my life, and if something were to happen to my hands I would not be able to earn a living and support myself.

Another client states:

I have always been of good health as advised by my doctors. I never anticipated that I would need to use this insurance cover due to my HIV positive condition which is well managed on treatment.

WHAT CAN BE DONE ABOUT THIS OUTDATED APPLICATION OF THE LAW?

HALC engages in litigation to assist PLHIV by commencing proceedings in either the state or federal jurisdiction, depending upon the particulars of the case and the litigant. Proceedings are commenced based on the assertion that insurers are relying upon outdated or inappropriate actuarial statistical data and that the data no longer supports refusing cover or higher premiums. In short, due to advances in medicine and treatments, PLHIV are unlikely to need to call upon the provision of insurance as a result of their HIV condition. HALC represents clients in applications for compensation for the act of discrimination, and/or to obtain the insurance applied for.

Systemic change has been difficult to achieve due to:

1. PLHIV not wishing to apply for insurance due to fears around disclosure and discrimination.⁶
2. PLHIV not identifying that they have been discriminated against and accepting the decision of the insurer, such as by accepting the denial of insurance or being unaware that they are being charged higher premiums.
3. PLHIV being hesitant to engage in the litigation process due to stress and anxiety around the process, and in some instances, due to the risk of adverse cost orders where a case is commenced under the federal jurisdiction and does not resolve at conciliation in the first instance.
4. Insurers making the decision to resolve individual complaints through a conciliation process. The result of this is that no court or tribunal has had the opportunity to examine and determine whether the insurers are relying upon outdated data. Therefore, although individual litigants may achieve redress, overall systemic change has not yet been achieved.

At time of writing, HALC has eight active cases of this nature at various stages of proceedings, and countless other applicants who have been unwilling to progress their case.

WHERE TO FROM HERE?

It is clear that ongoing legal representation in insurance discrimination proceedings for PLHIV is necessary to restore dignity and respect to individuals, and to effect systemic change so that PLHIV have the same protections and safeguards as everyone else.

HALC needs to continue to actively assist PLHIV through litigation to combat this issue for the individuals and to force change. Steps also need to be taken in partnership with researchers to compile and consolidate the relevant data to ensure that PLHIV are not denied insurance or offered insurance with higher premiums. More broadly, HALC will mobilize with other HIV community organizations to report breaches of discrimination legislation to regulatory authorities and seek investigation through ongoing parliamentary inquires into the financial services sector.

¹ Note that broadly speaking, there are mirroring provisions under respective state and territory anti-discrimination legislation.

² Jennifer Power et al, 'HIV Futures 9: Quality of Life Among People living with HIV in Australia' (2019) 34.

³ Section 29A Disability Discrimination Act 1992 (Cth)

⁴ QBE Travel Insurance v Bassanelli (2004) 137 FCR 88, 96 [37].

⁵ Xiros v Fortis Life Assurance Ltd [2001] FMCA 15

⁶ Victorian Pride Lobby, 'Worth the Risk: LGBTIQ+ experiences with insurance providers' (2022) 16.