

AFAO Briefing Paper

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Discrimination on the basis of HIV

Discrimination based on HIV status is unlawful throughout Australia. The table included in this document provides a guide to the anti-discrimination legislation currently in place around Australia.

HIV is covered by both federal and State/Territory legislation. Federal law (through the Disability Discrimination Act 1992) prohibits discrimination in the areas of employment, education, access to premises, the provision of goods, services and facilities, accommodation, buying or selling property, membership of clubs, sport and administration of Commonwealth programs. Harassment is also unlawful.

The Disability Discrimination Act protects not only people with HIV but also people who are believed to have HIV and people who associate with people with HIV or believed to have HIV. The history of the legislation's development makes it clear that the definition of "associate" is intended to include homosexual as well as heterosexual partners.

As well as legislation which prohibits discrimination against the individuals listed above, in the ACT and NSW it is also illegal to vilify a person with HIV. In Tasmania, it is illegal to incite hatred on the grounds of disability.

Anti-discrimination laws do not actually prohibit discrimination against people just because they are in a group which is thought to be at high risk of HIV infection (e.g. gay men), however indirect discrimination laws may apply. If the discrimination occurs because a person believes that an individual has HIV - even if they do not - then the individual is protected through federal law and by most state laws. Discrimination laws vary from state to state and Commonwealth law prevails where this differs from state law.

Discrimination against gay, lesbian, bisexual and transgendered people

In all States and Territories, it is unlawful to discriminate against a person because they are gay or lesbian. In New South Wales it is unlawful to discriminate on the grounds of homosexuality. In the ACT, Northern Territory, Queensland and South Australia it is unlawful to discriminate on the grounds of sexuality. And in Tasmania,

Victoria and Western Australia it is unlawful to discriminate on the grounds of sexual orientation.

It is unlawful to discriminate against people on the basis of transsexuality in South Australia, Tasmania, the ACT, while it is unlawful to discriminate on the basis of gender identity in Victoria and Queensland, 'transgender status' in New South Wales, and 'gender re-assignment' in Western Australia. The definitions of these terms also vary between States and Territories.

There is currently no federal legislation which prohibits discrimination on the grounds of sexuality or transsexuality. However, the federal Human Rights and Equal Opportunity Commission can investigate complaints about discrimination in employment on the grounds of sexual preference and complaints against the Commonwealth in relation to acts or practices based on sexual orientation. This is because Australia is a party to international treaties which apply to these matters.

Making Complaints

The process of making a complaint regarding discrimination differs slightly in each State and Territory. Generally the person making the complaint (the complainant) will ring the Human Rights and Equal Opportunity Commission or the relevant agency in their State or Territory. The Complaints Officer explains the legislation and the complaints process; it is not their role to take sides or determine whether discrimination occurred. In order for a formal complaint to be registered, the complaint must be put in writing. Most jurisdictions have a complaint form for this purpose, and they are usually available online as well.

If it is a valid complaint (that is, covered by the legislation), it is then forwarded to the respondent and they are provided with an opportunity to respond. Both parties are then required to attend a meeting to try and come to some form of agreement (conciliation). Conciliation is seen as the preferred outcome, as it is less time-consuming and expensive for everyone involved. Through conciliation complainants may receive an apology or some form of restoration (e.g. getting their job back).

If conciliation is not successful, the complaint may be referred to a Tribunal. This involves a formal hearing and the parties usually require legal representation. The tribunal then makes a finding: if it finds in favour of the complainant it may direct the respondent to apologise or pay compensation and ensure that the discrimination does not happen again.

Human rights agencies seek to ensure that all complaints are finalised, but finalising a complaint may involve a range of different outcomes. For example, in the ACT 111 complaints were finalised during 2004-2005. Of these, 40 were dismissed, 27 successfully conciliated, 19 withdrawn and 9 referred to a public hearing.

Commonwealth or State law?

If a person believes that they have been discriminated against, they can lodge a complaint with the federal Human Rights and Equal Opportunity Commission or the anti-discrimination agency in their state or territory. Where both State and federal laws apply (as with HIV-related discrimination) the person making the complaint can choose whether they want to pursue the matter under State or federal law. However, complaints cannot be pursued in more than one jurisdiction.

How many complaints are made?

Around Australia, disability discrimination is one of the most common grounds for complaint. For instance, the New South Wales Anti-Discrimination Board received 10,317 enquiries during 2004-2005, which resulted in 1,052 formal complaints being made. Of these complaints, 214 (20%) related to disability (including HIV), while 31 (2.9%) related to homosexuality and 17 to transgender (1.6%). Proportions in other states were similar, though numbers differed. For example, in Queensland 1,118 complaints were made, of which 303 (27%) related to 'impairment', 24 to sexuality and 6 to gender identity.

It is difficult to determine how many complaints relate to HIV, as data from most state is not broken down. However, the federal Human Rights and Equal Opportunity Commission (HREOC) reported receiving 1,241 complaints during 2004-2005, of which 42% related to disability discrimination but only a small number (1%) to HIV. Overall, HREOC received 23 enquiries about HIV-related discrimination and nine formal complaints were subsequently made. If proportions in other jurisdictions are similar, it is likely that numbers of complaints about discrimination relating to HIV status are quite small.

Guide to Anti-Discrimination Legislation Australia-wide

| | Discrimination |
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| ACT | <p>It is illegal to discriminate against a person on the grounds of sexuality, transsexuality or disability (HIV). It is also illegal to vilify someone on the grounds of sexuality, transsexuality or HIV/AIDS status.</p> <ul style="list-style-type: none">• For enquiries contact the ACT Human Rights Office |
| NSW | <p>It is illegal to discriminate against person on the grounds of homosexuality, being transgender or having a disability (HIV). There is no specific reference to bisexuality in NSW anti-discrimination legislation.</p> <p>It is illegal to vilify someone on the grounds of homosexuality, being transgender or having HIV.</p> <ul style="list-style-type: none">• For enquiries contact the Anti-Discrimination Board of New South Wales. |
| NT | <p>It is illegal to discriminate against a person on the grounds of sexuality (heterosexuality, homosexuality, bisexuality or transsexuality) or having an impairment (HIV). There are no anti-vilification laws.</p> <ul style="list-style-type: none">• For enquiries contact the Northern Territory Anti-Discrimination Commission |
| Qld | <p>It is illegal to discriminate against a person on the grounds of sexuality, gender identity or impairment (HIV). It is illegal to vilify someone on the</p> |

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| | <p>grounds of sexuality or gender identity.</p> <ul style="list-style-type: none"> For enquiries contact the Anti-Discrimination Commission of Queensland. |
| SA | <p>It is illegal to discriminate against a person on the grounds of sexuality (heterosexuality, homosexuality, bisexuality, transsexuality) or impairment (HIV). There are no anti-vilification laws.</p> <ul style="list-style-type: none"> For enquiries contact the Equal Opportunity Commission of South Australia |
| Tas | <p>It is illegal to discriminate against a person on the grounds of sexual orientation (heterosexuality, homosexuality, bisexuality, transsexuality) or disability (HIV). It is illegal to incite hatred on the grounds of sexual orientation or disability.</p> <ul style="list-style-type: none"> For enquiries contact the Anti-Discrimination Commission of Tasmania. |
| Vic | <p>It is illegal to discriminate against a person on the grounds of sexual orientation (homosexuality [including lesbianism], bisexuality, heterosexuality), gender identity or impairment (HIV). There are no anti-vilification laws.</p> <ul style="list-style-type: none"> For enquiries contact the Equal Opportunity Commission of Victoria. |
| WA | <p>It is illegal to discriminate against a person on the grounds of sexual orientation (heterosexuality, homosexuality, lesbianism, bisexuality), being a gender reassigned person or having an impairment (HIV). There are no anti-vilification laws.</p> <ul style="list-style-type: none"> For enquiries contact the Western Australia Equal Opportunity Commission. |
| Federal law | <p>The Disability Discrimination Act 1992 makes it unlawful to discriminate against someone because of ‘the presence in the body of organisms causing disease or illness; or the presence in the body of organisms capable of causing illness’. This clearly includes HIV, although discrimination which is considered necessary to protect public health is exempt.</p> <p>There is currently no federal legislation that makes discrimination on the basis of sexuality or transsexuality unlawful. There are no federal laws against vilification.</p> <p>For more information, contact the Human Rights and Equal Opportunity Commission.</p> |