



HIV/AIDS and the law in South Australia

A resource for workers

Developed by the Australian Institute of Social Relations, a division of Relationships Australia (SA)
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Relationships Australia
SOUTH AUSTRALIA



Government of South Australia
Department of Health



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1 Introduction

This guide has been written to help community sector workers who wish to understand and provide further information to clients about legal aspects of HIV/AIDS. It is a big topic and, rather than list pages of lengthy statutory provisions, much of the law has been summarised. When advising on a point of law, it is always desirable to check the full text of statutory provisions and cases. That is why the guide starts with a discussion on finding the law. It is important to check the statutory provisions and cases on the legal web sites even when the text of this guide covers a topic comprehensively. Laws change. A search of the internet should be done to check the law and find out if it has changed.

After the discussion on finding the law, the guide discusses a number of useful websites that may be referred to in conjunction with the guide. It then discusses many topics relating to the laws that are relevant to HIV/AIDS, in several instances using legal cases to illustrate the point.



2 Finding the law

The law in Australia derives either from legislation (called 'Acts' or 'statutes') or common law. Some legislation is enacted by the Commonwealth Parliament. This legislation applies to everyone in Australia. Federal legislation relevant to HIV/AIDS includes:

- *Disability Discrimination Act 1992* (Cwlth)
- *Social Security Act 1991* (Cwlth)
- *National Health Act 1953* (Cwlth)
- *Privacy (Private Sector) Amendment Act 2000* (Cwlth).

Other legislation is enacted by the parliaments of the Australian states and territories. Legislation enacted by the South Australian Parliament is concerned with the conduct and circumstances of people in South Australia. This legislation includes:

- *Adoption Act 1988* (SA)
- *Children's Protection Act 1993* (SA)
- *Consent to Medical Treatment and Palliative Care Act 1995* (SA)
- *Criminal Law Consolidation Act 1935* (SA)
- *Equal Opportunities Act 1984* (SA)
- *Family and Community Services Act 1972* (SA)
- *Guardianship and Administration Act 1993* (SA)
- *Public and Environmental Health Act 1987* (SA)
- *South Australian Health Commission Act 1976* (SA)
- *Superannuation Act 1988* (SA)
- *Transplantation and Anatomy Act 1983* (SA).

There is also delegated legislation. An Act of Parliament may provide that authorities have the power to make rules, regulations, by-laws and ordinances that will be binding in the same way as the Act. Usually this delegated legislation will be concerned with practical details under the Act. If, for example, an Act says that a document must be in a prescribed form, the prescribed form will be set out in a regulation.

The common law is law made by judges in courts. Much of it comprises the interpretation of statutes. Statute law overrides common law. However both common law and statute law are applied by the courts.



2.1 Law online

Most Australian law can be found on the internet. The following websites are very useful for finding statutes, regulations and cases:

- Australian Legal Information Institute (AustLII) – www.austlii.edu.au
- SCALEplus – www.scaleplus.law.gov.au.

Another useful website for finding South Australian statutes and regulations is:

- South Australian Legislation – Acts – www.parliament.sa.gov.au/dbsearch/acts-list.htm.

The AustLII and SCALEplus sites are particularly useful for finding cases and statutes in respect of all Australian jurisdictions, including the Commonwealth and South Australia. They can be read on-screen, and can also be downloaded.

If you want to download extracts from statutes, i.e. selected sections, go to AustLII.

If you want to download entire Acts, go to SCALEplus or the Parliament of South Australia website. The Parliament of South Australia website has the South Australian statutes on it and is very accessible. It is useful if you want to download a whole statute or the regulations to a statute.

Be careful; it is too easy when using the SCALEplus and Parliament of South Australia websites, to accidentally download the whole of a statute when all you want is just one section.

Some statutes, for example the *Consent to Medical Treatment and Palliative Care Act 1995* (SA), are short and all the sections are worth reading. It may be useful to download the whole lot. Others are very long – 100 or more pages – and only have a few relevant provisions. For these statutes, it is better to go to AustLII and to download only the sections that you need. Alternatively, if you want the whole statute, it can be purchased from the Australian Government Publications website or the Service SA online shop.

The information in this guide includes much discussion of statutory provisions and court cases. Most is in abbreviated form and you may wish to look at the fuller versions on the internet. You can do a simple case or statute query. You may also wish to do a search for further information, particularly recent developments. AustLII has a powerful search engine. You can enter keywords or phrases and specify the nature of your query. The search options are:

- Boolean query
- Any of these words
- This phrase
- This legislation name
- This case name
- This documentary title.

You can then apply your search to all the AustLII databases or you can limit your search to case or legislation databases for all of Australia or for a selected jurisdiction, for example South Australia.



3 Useful websites

3.1 The HIV/AIDS Legal Centre (HALC) Inc

www.halc.org.au

Although based in New South Wales, this community legal centre's website has a section of useful online resources which include the *HIV/AIDS Sentencing Kit* and an immigration factsheet. Information is also provided under the heading 'How can HALC help?' on topics such as:

- Making a will
- Powers of attorney
- Enduring guardianship
- Medical treatment issues
- Discrimination and vilification
- Employment
- Immigration
- Superannuation and insurance
- Disclosure and confidentiality.

Whilst some of the above refers to the law in New South Wales, these sections do provide a general overview to the federal legal environment.

3.2 Human Rights and Equal Opportunity Commission (HREOC)

www.humanrights.gov.au

This website contains information which may be useful in the area of disability rights. The section on disability rights provides an introduction to HREOC's role on disability issues, information on rights and responsibilities under the *Disability Discrimination Act 1992* (Cwlth) and pages on disability and specific areas of life. Links are also provided to information on how to make complaints under the *Disability Discrimination Act 1992* (Cwlth) and other federal human rights and discrimination laws.

3.3 Equal Opportunity Commission (EOC) South Australia

www.eoc.sa.gov.au

This website contains information about understanding equal opportunity and has sections for workers/volunteers, customers, tenants, students, clubs, businesses and landlords. The website provides information about lodging a complaint and outlines the procedure undertaken once a complaint has been instigated. The website also features an 'Ask the Commission' link, which is a free, internet-based enquiries service.



3.4 Law Handbook Online

www.lawhandbook.sa.gov.au

This site is produced by the Legal Services Commission of South Australia. Whilst not dealing specifically with the law as it relates to HIV/AIDS, this website does provide an overview of the law in South Australia in simple English. The handbook outlines rights and responsibilities in a range of legal areas including:

- Assistance with legal problems
- Children's rights
- Complaints against government
- Discrimination
- Family relationships
- Guardianship and mental health
- Housing
- Insurance and superannuation
- Alternative dispute resolution
- Pensions, allowances and payments
- Privacy and freedom of information
- Wills, estates and funerals.

3.5 Welfare Rights Centre (SA)

www.wrcsa.org.au

The Welfare Rights Centre (SA) provides clear, simple, accessible information regarding entitlements to pensions, benefits and other welfare. The centre also provides advocacy for people affected by a Centrelink decision. Also available is:

- Information regarding telephone and written advice
- Advocacy and representation
- Lobbying for a fairer Social Security system
- Factsheets, pamphlets and booklets regarding welfare entitlements and Centrelink.

The website also contains an assistance request form which allows you to contact an advocate online.

Welfare Rights Centre (SA) is part of the National Welfare Rights Network – the national website is updated regularly and has links to factsheets and information (www.welfarerights.org.au).



3.6 AIDS Council of South Australia (ACSA)

www.acsa.org.au

This website provides information resources on living with HIV/AIDS including information about applying for permanent residence in Australia. It also includes a link to the article *HIV/AIDS and Your Rights*, which provides information on a range of legal issues such as discrimination, medical treatment, insurance and superannuation.

3.7 National Association of People Living with HIV/AIDS, Australia (NAPWA)

www.napwa.org.au

NAPWA is the national peak organisation representing people living with HIV/AIDS in Australia. The site contains sections on:

- Living with HIV
- Staying well
- Getting support
- Our rights
- Positive women
- Indigenous people
- Services in your area.

The section *Our Rights* provides information on legal developments across Australia including the text of the Declaration of Rights for People Living with HIV/AIDS.

3.8 Australian Federation of AIDS Organisations (AFAO)

www.afao.org.au

AFAO is the peak non-government organisation representing Australia's community based response to HIV/AIDS. From the website you can access *HIV Australia*, a journal which includes a legal section. Some of the topics covered include:

- Immigration law and HIV
- HIV testing and human rights
- Court decisions regarding confidentiality
- Privacy guidelines for health service providers
- The International Labour Organisation's code of practice on HIV.

The website also has a section, *Policy, Advocacy and Legal*, where information on issues such as changes to Medicare and reforms to the *Disability Discrimination Act 1992* (Cwlth) can be accessed.



3.9 GayLawNet

www.gaylawnet.com

This site provides legal information for people who are gay or lesbian, and anyone who is HIV positive. The section on HIV/AIDS covers topics such as:

- What is HIV/AIDS discrimination?
- Where is discrimination prohibited?
- Life insurance
- Superannuation
- Your will
- Money
- Medical treatment
- Doctors.

The website also provides links to legal resources in Australia and the Canadian HIV/AIDS Legal Network. This site also includes a directory of gay- and lesbian-friendly lawyers worldwide.

3.10 People Living with HIV/AIDS (South Australia) Inc

www.hivsa.org.au

This South Australian organisation provides individual and group advocacy as well as services for people who are HIV positive and those closely affected.

3.11 Australasian Society for HIV Medicine (ASHM)

www.ashm.org.au

ASHM is the peak Australasian organisation representing the medical and health sector in HIV, viral hepatitis and related areas. One of ASHM's many activities involves assisting community-based medical practitioners to gain and maintain an understanding of HIV medicine. ASHM publishes numerous resources on HIV and viral hepatitis, including the monograph *HIV and Hepatitis C: policy, discrimination, legal and ethical issues* and *HIV/Viral Hepatitis: a guide for primary care* (chapter 13 of which covers legal responsibilities). A two-page factsheet for newly diagnosed patients, *HIV Patient Factsheet*, is also available. These resources can be downloaded from the ASHM website.



4 Confidentiality

Community sector workers must be aware of confidentiality issues in respect of themselves and in respect of others, particularly health professionals, who owe a duty of confidentiality to clients. Much of the case law concerns medical practitioners. It is also relevant to community sector workers, who should always be aware that they have a duty of confidentiality to their clients but that in some rare circumstances they are entitled or obliged to breach this duty. The law and the ethical issues are not clear. Remember the following safeguards:

- Take contemporaneous notes. They will be useful evidence of what you did and why you did it. They will also provide guidance for others who have to follow up on your work. Notes written some time after the event are of little evidentiary value.
- Seek advice from someone you trust who has appropriate expertise. This may include a senior colleague or a lawyer.
- Talk to your client. Your client, not you, should disclose the information. But your client may need your help in understanding what has to be done and in having the courage to do it.

Confidentiality of medical information is desirable so that patients can disclose sensitive information that assists workers to provide the most appropriate treatment or support. A health professional who breaches the duty of confidentiality to a patient may be sued at common law. The health professional may also be liable to professional disciplinary proceedings. The duty of confidentiality is strongly entrenched in the codes of ethics of all health professionals. Thus, the Australian Medical Association's Code of Ethics 2004 states in paragraph 1.1–1:

Maintain your patient's confidentiality. Exceptions to this must be taken very seriously. They may include where there is a serious risk to the patient or another person, where required by law, where part of approved research, or where there are overwhelming societal interests.

The duty of confidentiality also applies to all persons and organisations that store bulk information about patients, including OASIS and other electronic patient management systems. However, there may be circumstances where de-identified information may be made available for research purposes.

4.1 Exceptions

4.1.1 Consent

It is permissible to disclose information about a person if that person has consented to the disclosure. This consent should be in writing. The person obtaining the consent should provide a full explanation of what the information is that is going to be disclosed, why she or he wants to disclose the information and to whom the information will be disclosed. The person disclosing the information must not disclose other information for which consent has not been given, and must not disclose it to persons who are not included in the consent.

The person giving the consent must be fully informed, must have the mental capacity to give consent and must not be giving consent because of undue influence.



If a person does not have the mental capacity to give consent or is a child, consent may have to be obtained from a parent or guardian.

4.1.2 Serious risk to the patient or another person

If a person is fully informed of a serious risk to her or himself and has the mental capacity to understand the consequences of that risk and insists that information not be disclosed about it, then that decision should be respected. This is particularly so because, if a person's instructions are disregarded and confidential information is revealed, then it is likely that she or he will no longer trust the person who breached confidence and will refuse to be helped by that person or by the persons to whom the information was revealed. A doctor may want to inform family or partner of a patient about the patient's HIV status but, if the doctor does so without consent, it is likely that the doctor will lose the patient and the patient may disassociate herself or himself from the family or partner.

In the case of *PD v Harvey*, the person at risk PD and her proposed partner FH, in anticipation of having unprotected sex, getting married and having children, together went to a medical centre for counselling and to be tested to see if they were HIV positive. They separately obtained their test results from the medical centre and then, in a telephone conversation, informed each other of the results. PD was negative and that is what she told FH. FH was positive but he told PD that he was negative and later forged and showed her a certificate to that effect. They married. They had a child. The child did not become HIV positive but PD did. She successfully sued the doctors in negligence.

In the New South Wales Court of Appeal, Chief Justice Spigelman said on page 14 that it was not the duty of doctors to tell a person at risk (PD), who happened to be their patient, that her partner or proposed partner (FH) was HIV positive. Nor was it their duty to convey to her by less direct or obvious means of communication the HIV status of FH.

However, Chief Justice Spigelman then said on page 62:

However, this did not have the consequence that there was nothing the Doctors could do to protect PD or at least to make her aware of the risks to which she was exposed. While the Doctors were not expected to guarantee that PD would not become infected, and were prohibited from giving her direct information, they were not prohibited from undertaking fairly obvious steps designed ultimately to make her aware of the danger she was in. ... They could have sought advice from the Medical Defence Union and they could have spoken to the Department of Health. In any case the result would have been advice that FH needed to be counselled to ensure that he made PD aware of his condition.

The judgment of the trial judge was upheld by the Court of Appeal. The Court of Appeal did not hold that the doctors should have breached their duty of confidence. It upheld the decision of the trial judge that, in nine other respects, the doctors had breached their duty of care. These are set out as follows:

- (i) by failing to discuss with PD and FH at the initial consultation the method by which they wanted to receive their results given the distinct possibility of a discordant result;
- (ii) by causing and/or permitting a receptionist in the practice, rather than a medical practitioner, to convey PD's results to her
- (iii) by failing to provide pre-test counselling to PD and FH according to the guidelines imposed by the Health Department;
- (iv) by conveying to FH his test results by telephone rather than in a face to face consultation with a medical practitioner;



- (v) by failing to provide adequate post-test counselling to FH, especially in relation to his obligation concerning disclosure to sexual partners;
- (vi) by failing to ask FH whether he intended informing PD of his condition;
- (vii) by failing to follow up on the referral of FH to the Royal Prince Alfred Hospital Immune clinic;
- (viii) by failing to record on the treatment record card of either PD or FH the fact of the joint consultation or that PD was about to enter a new relationship;
- (ix) by failing to take fairly obvious steps designed to make PD aware that she was exposed to the danger of infection at a time when the appellants knew or ought to have known such was the case.

The last point may seem contradictory in view of Chief Justice Spigelman's admonition against breach of confidence. However, there were two ways in which this could have been done without breaching confidence. The first is by giving FH proper counselling so that he would comply with his obligation to inform PD of his condition. However, in view of his subsequent conduct, there is an indication that this would not have happened. The second is by counselling of both PD and FH when they first went to the medical practice and by getting them to agree on receiving their test results together from a medical practitioner.

4.1.3 Where required by law

In South Australia, statutory provisions under which doctors must disclose information about patients or others to whom they might have a duty of confidentiality include:

- Section 49 of the *Medical Practice Act 2004 (SA)* provides that a medical practitioner (health professional) must notify the Medical Board if she or he is of the opinion that a patient who is a medical practitioner or medical student is medically unfit to provide medical treatment. Note also that, under section 77, a medical practitioner or student must notify the Medical Board of his or her own medical unfitness to provide medical treatment.
- Section 42 of the *Pharmacists Act 1991 (SA)*, section 39 of the *Chiropractors Act 1991 (SA)*, section 14b of the *Occupational Therapists Act 1974 (SA)*, section 40 of the *Physiotherapists Act 1991 (SA)* and section 43 of the *Nurse Act 1999 (SA)* are provisions in respect of pharmacists chiropractors, occupational therapists, physiotherapist and that are similar to section 49 of the *Medical Practice Act 2004 (SA)*.
- Section 54 of the *Dental Practitioners Act 2001 (SA)* provides that a medical practitioner must notify the Dental Board where she or he is treating a dentist or dental student and believes that the patient may be medically unfit to provide dental treatment or the patient has a prescribed communicable infection. This term is defined to include HIV. Note also that, under section 76, a dentist or dental student must notify the Dental Board if he or she has a prescribed communicable infection.
- Section 148 of the *Motor Vehicles Act 1959 (SA)* provides that a medical practitioner (health professional) must notify the Registrar of Motor Vehicles if she or he has reasonable cause to believe that a patient is unfit to drive a motor vehicle.
- Section 20A of the *Firearms Act 1977 (SA)* provides that a medical practitioner must notify the Registrar of Firearms if she or he believes that a patient who is applying for or intends to apply for a firearms licence or possesses or intends to possess a firearm is unsafe to possess a firearm.



- Section 47 I of the *Road Traffic Act 1961* (SA) provides that a medical practitioner must take a blood sample from any person who attends a hospital to receive treatment within eight hours of a motor vehicle accident.
- Section 74 of the *Harbours and Navigation Act 1993* (SA) provides that a medical practitioner must take a blood sample from any person who attends a hospital to receive treatment within eight hours of an accident involving a vessel.
- Section 14 of the *Boxing and Martial Arts Act 2000* (SA) provides that a medical practitioner who examines a contestant in a professional or public boxing or martial arts event and finds that the contestant is unfit to participate must declare that fact and notify the contestant, the promoter of the event and the Minister of that declaration and submit a written report to the Minister.
- Section 30 of the *Public and Environmental Health Act 1987* (SA) requires health professionals who suspect that a person is suffering from or has died from a notifiable disease to report the case to the Government of South Australia Department of Health and furnish the Department with such further information as the Department may require. Notifiable diseases are listed in Schedule 1. They include HIV infection.

4.1.4 Where part of approved research

This may affect a person with HIV who contracts an infectious disease as a result of participating in a drug trial. The researchers may be under a duty to disclose information on the ground that it is essential to monitor the incidence and spread of the disease. Otherwise, disclosure of information about participants in research studies must only be done with the consent of the participants.

4.1.5 Where there are overwhelming societal interests

This may be permitted by statute. There are two statutes in South Australia that permit disclosure where there are overwhelming societal interests. However, they are not concerned with HIV status. They are the *Children's Protection Act 1993* (SA) and the *Whistleblowers Protection Act 1993* (SA).

The *Whistleblowers Protection Act 1993* (SA) protects persons from civil and criminal liability if they make appropriate disclosure of public interest information. Public interest information includes information that an adult person is or has been engaged in an illegal activity or in conduct that causes a substantial risk to public health or safety.

Under the *Whistleblowers Protection Act 1993* (SA) it is not public interest information that a person has HIV.

Other states provide for offences where a person knowingly or recklessly causes another person to contract a grievous bodily disease. South Australia does not. Instead, section 29 of the *Criminal Law Consolidation Act 1935* (SA) provides that it is an offence to knowingly or recklessly do an act that endangers the life of another or is likely to cause grievous bodily harm to another. In January 2006, a man was convicted of endangering life contrary to section 29. He was HIV positive and had unprotected sex with two women without informing them of his condition. As a consequence, one of them became HIV positive.

The success of this prosecution is an indication that a person who disclosed information about such conduct to the police may be protected under the *Whistleblowers Protection Act 1993* (SA). However, this is not certain as it is anticipated that the conviction will be appealed on legal grounds.



Alternatively, such conduct may come under the heading of conduct that causes a substantial risk to public health or safety, in which case, it may be reported to the South Australian Health Commission.

A person who makes an appropriate disclosure of public interest information under the *Whistleblowers Protection Act 1993 (SA)* is only immune from liability if she or he:

- Believes on reasonable grounds that the information is true, or
- Believes on reasonable grounds that it may be true and it is of sufficient significance to justify its disclosure so that its truth may be investigated.

It would not be an appropriate disclosure to tell friends and neighbours or the media. Also, there will only be immunity from liability if the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure. Usually this person will be the police (if it is a criminal offence) or an officer of the South Australian Health Commission (if it relates to public health).

Disclosure where there are overwhelming societal interests may also be permitted at common law. This might apply where there is an imminent and serious threat to the life, health or safety of an individual. This is discussed in 4.1.2 Serious risk to the patient or another person.

4.1.6 Duty to disclose in court proceedings

A person may be compelled to disclose HIV status in court if it is material to the issue in the case.

4.1.7 Confidentiality of medical records

Generally, a person's medical records are confidential. They must not be disclosed by health professionals and others who have access to them unless the disclosure is in the form of de-identified information to research.

Section 64 of the *South Australian Health Commission Act 1976 (SA)* provides:

- (1) Subject to subsection (2), an officer or employee of the Department, an incorporated hospital or an incorporated health centre must not divulge any personal information, relating to any patient, obtained in the course of employment otherwise than as he or she may be authorised or required to divulge that information by law or by his or her employer.
- (2) This section does not prevent a person from divulging statistical or other information that could not reasonably be expected to lead to identification of patients to whom it relates.

See also:

- *Public and Environmental Health Act 1987 (SA)*
- *Privacy (Private Sector) Amendment Act 2000 (Cwlth)*
- *Code of Fair Information Practice (SA)* – www.health.sa.gov.au/Default.aspx?tabid=57.

4.1.8 Restraints under the *Public and Environmental Health Act 1987 (SA)*

HIV is both a notifiable disease and a controlled notifiable disease under the *Public and Environmental Health Act 1987 (SA)*. It is not apparent from the Act that it is a controlled notifiable disease as it is not listed as such in Schedule 2. However, it was added to the list by Regulation No 198 of 1991.



The sections that apply to HIV are as follows:

- Section 30 *Notification of notifiable diseases*.
 - Sub-section (1) provides that where a medical practitioner or person of a class prescribed by regulation suspects that a person is suffering from or has died from a notifiable disease, she or he must:
 - (a) as soon as practicable and, in any event, within three days of forming that suspicion, report the case to the Health Department; and
 - (b) provide the Department with any further information that it requires.
 - Sub-section (3) requires the Department, in cases where there is an immediate threat to public health in a local government area, to inform the local council of the contents of the medical practitioner's report. Generally, this provision should not apply to persons with HIV. However, there has been speculation in other jurisdictions that similar provisions might be acted upon in cases where there is a risk of a person with HIV communicating it to other persons.
- Section 31 (1) *Power of Commission to require a person to undergo an examination*. If the Commissioner has reasonable grounds to suspect that a person is suffering from a controlled notifiable disease (including HIV), the Commissioner may require that person to submit to a medical examination
- Section 32 *Detention*. If the Commissioner is of the opinion that, 'in the interests of public health', a person who has a controlled notifiable disease (including HIV) should be kept 'at a suitable place for quarantine', the Commissioner may have that person detained in such a 'suitable place'.
- Section 33 *Power of Commission to give directions*. The Commissioner has power to give directions to a person with a controlled notifiable disease (including HIV) on a number of matters, including:
 - Where that person lives
 - Supervision of that person
 - Submission to medical examinations
 - Restrictions on work that that person may do.
- Section 35 *Reporting to local councils*. The Department is required on a monthly basis to provide each local council with a report on the occurrence of notifiable diseases in its area and any problems caused by such diseases that may exist in the area. The Department is also required to inform a local council of the occurrence of any notifiable disease in its area that constitutes, or may constitute, a threat to local health.
- Section 36 *Action to prevent the spread of infection*. Where there is a danger to public health from the possible spread of a notifiable disease an officer of the South Australian Health Commission may give directions and take such action as may be appropriate to avert that danger. This could include a restriction of movement into and out of any place or premises. Under this provision, a person could be prevented from leaving her or his home.



- Section 37 *Must not transmit HIV to others*. A person with a controlled notifiable disease (including HIV) must 'take all reasonable measures to prevent transmission of the disease to others'. Breach of this section may result in a fine of up to \$30 000.
- Section 38 *Power of inspection and interrogation*. South Australian Health Commission Officers have wide powers of inspection of premises and vehicle including the use of force. They may also require any person to answer any questions that may be relevant to ascertaining whether she or he is suffering from a notifiable disease.
- Section 40 *Immunity from liability*. Individual officers who act in good faith in the performance of their duties are immune from personal liability. However, proceedings may instead be brought against the Crown.
- Section 41 *Power to require information*. The Minister, the Commission or a local council may require a person to furnish such information relating to public or environmental health as may be reasonably required for the purpose of the Act.
- Section 42 *Confidentiality*. Medical information and information relating to a person's personal affairs that is obtained in the course of performing duties under the Act is confidential and must not be intentionally disclosed unless disclosure is in the course of official duties, is with consent of that person or is required by a court or tribunal.



5 Medical treatment

5.1 Entitlement to treatment

Doctors, dentists, hospitals and other health care providers must not refuse treatment because a person has HIV. This is discrimination in the provision of services, and is prohibited under both state and federal law. See 10 Discrimination.

5.2 Access to drugs

Under section 100 of the *National Health Act 1953* (Cwlth), new drugs that are recommended by the Pharmaceutical Benefits Advisory Committee may be made available through hospital pharmacies. See also section 100AA of the Act, *Special Pharmaceutical Products*.

It is sometimes possible to get access to new drugs by enrolling as a participant in a drug trial. Anyone considering participating in a drug trial should be aware of the following:

- The benefits and safety of drugs being tested are unknown (that is why they are being tested).
- Being a participant in a drug research trial can sometimes be an unpleasant experience.
- A person who wants to participate in a trial may not be accepted by the researchers.
- A participant in a drug trial may not be given the drug (she or he may instead be given a placebo).

Any person interested in participating in a drug trial should first talk with her or his own doctor.

5.3 Entitlement to refuse treatment

Under section 6 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA), a person of or over 16 years of age may make decisions about her or his own medical treatment. This includes the right to refuse treatment. As to children, see 9 Children and young persons.

A person may also give advance directives for when she or he is incompetent. This may include a directive refusing treatment. See 7.6 Advance directives.

5.4 Medical practitioner's duty to explain

Under section 15 of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA), a medical practitioner has a duty to explain to a patient or to the patient's representative, so far as may be practicable and reasonable in the circumstances:

- (a) the nature, consequences and risks of proposed medical treatment; and
- (b) the likely consequences of not undertaking the treatment; and
- (c) any alternative treatment or courses of action that might reasonably be considered in the circumstances of the particular case.



6 Antibody testing

6.1 Children

See 9.1 Medical treatment of children.

6.2 Adults – compulsion

Unless it is authorised under the *Public and Environmental Health Act 1987 (SA)*, testing a person without consent is an unlawful assault. It may result in criminal prosecution. Also, the person tested may be entitled to institute civil proceedings.

As to compulsory testing under the *Public and Environmental Health Act 1987 (SA)*, see 4.1.8 Restraints under the *Public and Environmental Health Act 1987 (SA)*.

Section 13 of the *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* allows a medical practitioner to administer medical treatment, without the consent of the patient, in an emergency. The circumstances in which this may be done are unlikely ever to permit testing a person for HIV without that person's consent.

6.3 Tests required by employers

Some employers insist on applicants for employment being tested for HIV. Some also insist on current employees being tested. This may amount to unlawful discrimination (see 10 Discrimination) unless it can be shown to be relevant to the performance of work duties. The Commonwealth Government and the Australian Federation of AIDS Organisations have a policy that counselling should be provided both before and after testing.

6.4 Tests required by the defence forces

Under section 53 of the *Disability Discrimination Act 1992 (Cwlth)* the Defence Force is exempted from laws prohibiting discrimination on the ground of disability. The Defence Force insists on all applicants being tested for HIV. It will also require serving members to be tested at certain times, e.g. on being posted or returning from overseas. The Act states that: 'Serving members who test positive are not automatically discharged. They are discharged if they have group III or IV HIV infection, that is, if they have lymphadenopathy or AIDS'. See 3.6 AIDS Council of South Australia.

6.5 Providing information about results of a test

This should be done:

- In confidence
- In a face to face consultation
- If partners in a relationship are tested, they should be counselled jointly and they should receive the results of their test in a joint consultation.

See 4 Confidentiality for the discussion of the case *PD v Harvey*.



6.6 Duty to notify the Department of Health

If a test is positive, the Government of South Australia Department of Health will be notified. See 4.1.8 Restraints under the *Public and Environmental Health Act 1987(SA)*.

6.7 Legal obligations if test is positive

A person who intentionally, recklessly or negligently infects another person with HIV may be liable both in negligence (civil law) and under section 29 of the *Criminal Law Consolidation Act 1935 (SA)*. See 16 Criminal Law and 17 Civil Law.



7 Making decisions about life and property

7.1 Powers of attorney

A power of attorney is an authority given by one person (called the 'donor') to another person (called the 'donee') to make decisions on behalf of the donor. This will usually include decisions in respect of banking, entering into contracts and signing documents on behalf of the donor. The power lapses if the donor loses legal capacity. In South Australia, powers of attorney must be in the form of a document that is set out in the *Powers of Attorney and Agency Act 1984 (SA)*. To find this Act, see 2 Finding the law.

7.2 Enduring powers of attorney

This is a power of attorney that does not come into effect until the donor loses legal capacity or is unable to handle her or his affairs. It is particularly appropriate for people who have medical conditions which may deteriorate. When the donor becomes incompetent, the donee will take responsibility for the donor's affairs. In South Australia, enduring powers of attorney must be in the form of a document that is set out in the *Powers of Attorney and Agency Act 1984 (SA)*. To find this Act, see 2 Finding the law.

7.3 Enduring guardians under section 25 of the *Guardianship and Administration Act 1993 (SA)*

A person, aged 18 or more, may, in writing, appoint an enduring guardian. If the person making the appointment becomes mentally incapacitated, the guardian will have wide powers to manage the affairs of the person who made the appointment and, in particular, to consent or refuse to consent to medical treatment. The appointment must be in the form set out in the schedule to the Act. To find this Act, see 2 Finding the law.

7.4 Overlap between the roles of guardians and attorneys

The role of an enduring guardian is very similar to that of someone who has been given an enduring power of attorney. It may be that enduring powers of attorney relate more to business matters and that enduring guardianships relate more to health and welfare. However this is not clear and it may be appropriate to make both appointments. As the two roles clearly overlap, it is important that one person or, if there are to be joint guardians or attorneys, the same persons should be appointed to both positions. Otherwise, there may be conflict between the enduring guardian and the enduring attorney.



7.5 Medical powers of attorney under the *Consent to Medical Treatment and Palliative Care Act 1995 (SA)*

A person who is aged 18 or older and who is of sound mind may, by medical power of attorney, appoint an agent to make decisions on her or his behalf about medical treatment. Further information about medical powers of attorney is set out in sections 8 to 11 of the *Consent to Medical Treatment and Palliative Care Act 1995 (SA)*.

A medical power of attorney authorises the agent, subject to any conditions or directions contained in the power of attorney, to make decisions about the medical treatment of the person who granted the power if that person is incapable of making decisions on her or his own behalf.

A medical power of attorney must be in the form prescribed in *Consent to Medical Treatment and Palliative Care Regulations 2004 (SA)* or to similar effect. To find this Act, see 2 Finding the law.

Section 8 (7) provides that the agent does not have the power to refuse:

- the natural provision or administration of food and water;
- or the administration of drugs to relieve pain or distress; or
- medical treatment that would result in the person who granted the power regaining the capacity to make decisions about her or his own medical treatment unless that person is in the terminal stage of a terminal illness.

Section 8 (10) provides that the person who made the grant may, on regaining capacity to make decisions about her or his medical treatment, vary or revoke any decision taken by the medical agent during the period of incapacity.

7.6 Advance directives

Section 7 of the *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* provides as follows:

- (1) A person of or over 18 years of age may, while of sound mind, give a direction under this section about the medical treatment that the person wants, or does not want, if he or she is at some future time:
 - (a) in the terminal phase of a terminal illness, or in a persistent vegetative state; and
 - (b) incapable of making decisions about medical treatment when the question of administering the treatment arises.
- (2) A direction under this section:
 - (a) must be in the form prescribed by regulation; and
 - (b) must be witnessed by an authorised witness who completes a certificate in the form prescribed by regulation.
- (3) If
 - (a) a person by whom a direction has been given under this section –
 - (i) is in the terminal phase of a terminal illness or in a persistent vegetative state; and
 - (ii) is incapable of making decisions about his or her medical treatment; and



- (b) there is no reason to suppose that the person has revoked, or intended to revoke, the direction,

the person is to be taken to have consented to medical treatment that is in accordance with the wishes of the person as expressed in the direction, and to have refused medical treatment that is contrary to those expressed wishes.

The form of the direction and the certificate referred to in subsection (2) are set out in the *Consent to Medical Treatment and Palliative Care Regulations 2004* (SA). These may be found by searching the Parliament of South Australia website. See 2.1 Law online.

7.7 Euthanasia and suicide

Section 13A of the *Criminal Law Consolidation Act 1935* (SA) provides that it is not an offence to commit or attempt to commit suicide. However, section 13A (5) provides that it is an indictable offence to aid or abet or assist with advice on the suicide or attempted suicide of another.

7.8 Treatment that relieves pain or distress that also has the effect of hastening death

Section 17 (1) of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) provides that a medical practitioner responsible for the treatment or care of a patient in the terminal phase of a terminal illness, or a person acting under a medical practitioner's supervision will not be criminally or civilly liable for administering medical treatment with the intention of relieving pain or distress if it is done:

- (a) with the consent of the patient or the patient's representative; and
- (b) in good faith and without negligence; and
- (c) in accordance with proper professional standards of palliative care,

This applies even though an incidental effect of the treatment is to hasten the death of the patient.



8 Organ and blood donation

The *Transplantation and Anatomy Act 1983 (SA)* does not expressly prohibit the donation of organs or blood by persons with HIV. However, as a matter of practice, organs and blood will not be accepted from people who have HIV and people who want to be donors will be required to give information about their health and lifestyle. It is an offence to provide false or misleading information. The maximum penalty is \$10 000.

The law allows a wide discretion to hospitals in deciding whether or not to accept organs for transplant. The following is from the criteria for organ donation contained in the *Royal Adelaide Hospital Department of Anaesthesia and Intensive Care Handbook* which states that a donor must not have a previous history of:

- HIV, hepatitis B or hepatitis C
- Drug abuse
- Being a 'practicing homosexual'.

Medical authorities will not accept blood or organs from anyone who is HIV positive. A person with HIV should not offer to be a blood or organ donor. A person with HIV should not agree to be an organ donor. 'Organ donor' must not be endorsed on her or his drivers licence.



9 Children and young persons

9.1 Medical treatment of children

Section 12 of the *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* provides that a medical practitioner may administer medical treatment to a child if:

- (a) the parent or guardian consents; or
- (b) the child consents and –
 - (i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and well being; and
 - (ii) the opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

Section 13 sets out the conditions under which medical practitioners may, in emergency situations, administer medical treatment without consent of the patient.

Part 5 of the *Guardianship and Administration Act 1993 (SA)* deals with issues of consent to medical and dental treatment of mentally incapacitated persons. If the person is a child and there is no parent or guardian who can give consent, a relative can give consent to some, but not all, treatment. In other cases, it may be appropriate to apply to the Guardianship Board for consent.

Address: The ABC Building, 85 North East Road, Collingwood

Telephone: (08) 8368 5600

Freecall: 1800 800 501

Email: guardianship.board@agd.sa.gov.au.

9.2 Children at risk

There are cases in Australia where courts have intervened to safeguard children from being infected with HIV, for example by ordering a mother with HIV to not breastfeed her child. In South Australia, if children are in any way at risk of harm, proceedings should be taken under the *Children's Protection Act 1993 (SA)*. The Act deals with voluntary custody agreements, notification and investigations of abuse or neglect, removal of children in danger, examination and assessment of children, family care meetings and care and protection orders.

Section 4 sets out the principles to be observed in dealing with children. Safety of the child is the paramount consideration and powers must always be exercised in the best interests of the child. It is recognised that it is desirable to keep the child within her or his family and generally to avoid disruption to the child's family relationships, family environment, neighbourhood, education or employment. Race, ethnicity, religion and the cultural identity of the child are important. A child's views should always be taken into account.



The term 'abuse or neglect' of a child is widely defined in section 6 and includes physical abuse or neglect to the extent that she or he may suffer physical or psychological injury.

A person who notifies the Australian Government Department of Family and Community Services of suspicion on reasonable grounds that a child is being abused or neglected will be protected from civil or criminal liability. Some people, such as doctors, pharmacists, nurses, dentists, psychologists, teachers and social workers are under a legal obligation to report their suspicions of child abuse or neglect.

The courts and the Department have wide powers in dealing with cases of child abuse or neglect including the power to remove children from dangerous situations.

Part 5 of the Act provides for family care meetings. This is an appropriate procedure for the application of the principles referred to in section 4. Section 28 provides that the purpose of a family care meeting is to provide a proper opportunity for a child's family, in conjunction with a Care and Protection Coordinator, to make informed decisions as to arrangements for best securing the care and protection of the child and to review these arrangements from time to time.

9.3 Adoption

The law governing adoption in South Australia is set out in the *Adoption Act 1988 (SA)*. HIV/AIDS is not mentioned in the Act. However, a person's HIV status may be relevant in the application of the following sections:

- Section 7 provides that in all proceedings under the Act, the welfare of the child to whom the proceedings relate must be regarded as the paramount consideration.
- Section 12 provides that, unless special circumstances can be shown, an adoption order will not be made except in favour of two persons who have been cohabiting together in a marriage relationship for a continuous period of at least five years. A marriage relationship is defined as 'the relationship between two persons cohabiting as husband or wife or de facto husband and wife'.

9.4 Foster care

Foster care is provided for in the *Family and Community Services Act 1972 (SA)*. Section 40 provides that the purpose of the foster care system is to provide for the care of a child in a safe and stable family environment during a period when the child cannot for any reason remain in the care of his or her own family. Section 42 provides that in considering any application for approval as a foster parent, the Chief Executive Officer (CEO) must attempt to assess the capacity and willingness of the applicant to care for a child according to adequate principles and standards of child care. The CEO must be satisfied on a number of specific matters, including:

- (g) that the applicant is of sound health and is able to withstand the demands of providing foster care.

In determining whether a child should be placed in foster care, it will be relevant to consider the HIV status of the child and the child's special needs.

As in all legislation concerning children, the welfare of the child is the paramount consideration.



10 Discrimination

Discrimination because of a person's HIV status is not specifically stated to be unlawful under either state or federal law. However, it is effectively prohibited under state law because it is discrimination on the ground of impairment and under federal law because it is discrimination on the ground of disability. In other words, it is unlawful to discriminate because someone has an impairment or a disability. A person who is discriminated against can make a complaint to the Equal Opportunities Commission:

Address: Level 2, 45 Pirie Street, Adelaide

Telephone: (08) 8207 1977

Freecall: 1800 188 163

Email: eoc@agd.sa.gov.au

Website: www.eoc.sa.gov.au.

Discrimination is discussed under the headings:

- What is discrimination?
- Prohibited discrimination
- What laws apply to discrimination?
- Making a complaint – what happens next?
- Obstacles to success – best evidence
- Alternative strategies
- Unlawful grounds of discrimination under the Equal Opportunities Act 1984 (SA)
- Exemption for the Defence Force from anti-discrimination laws
- Discrimination in prisons.

10.1 What is discrimination?

Discrimination is treating a person or group of people less favourably than another person or group of people. Some discrimination is generally acceptable in our society, for example, giving a job to the best candidate or a prize to the best performer in an exam. Other discrimination is not acceptable, for example, when a person is discriminated against on the ground of race, religion, sex, sexuality, marital status, pregnancy, age or disability. Such discrimination is usually unlawful.



Discrimination may be direct or indirect. Direct discrimination is where, in similar circumstances, a person is treated less favourably than another person. For example, there is direct discrimination by a landlord if she or he refuses to let premises to a person because that person has HIV, but is willing to let the premises to another person who does not have HIV. Indirect discrimination is where people are disadvantaged because of conditions that adversely affect them but which do not adversely affect other people. For example, if the only access to a public building is by steps, there may be indirect discrimination against people in wheelchairs.

10.2 Prohibited discrimination

A person's HIV status is not specifically stated to be a prohibited ground of discrimination in either state or federal law. However, it is generally unlawful to discriminate on the grounds of sex, sexuality, disability or impairment in the areas of:

- Employment
- Membership of a club or an association
- Education
- Disposing of an interest in land
- Provision of goods and services
- Accommodation
- Superannuation
- Sport.

Most of these areas are provided for in both state and federal law. Sport is provided for in the *Disability Discrimination Act 1992* (Cwlth). It is not specifically provided for in the *Equal Opportunities Act 1984* (SA). However, it is indirectly covered in the areas of education and membership of an association. Most organised sporting activities are run by educational authorities or sporting associations.

There are exceptions. These are discussed in 10.7 Unlawful grounds of discrimination under the *Equal Opportunities Act 1984* (SA).

It should be noted that there are many more Commonwealth laws on discrimination than there are state laws. However, the state provides more accessible means of making complaints and having them resolved by conciliation. If a complaint is made to the South Australian Equal Opportunities Commission (SAEOC) and it is thought that it would be better dealt with under federal law, it will be referred to the Human Rights and Equal Opportunity Commission (HREOC). As HREOC does not have an office in South Australia, it is much more convenient for complaints to be dealt with by SAEOC.

10.3 What laws apply to discrimination?

10.3.1 State laws

A complaint about discrimination may be made under the *Equal Opportunities Act 1984* (SA) which is administered by the South Australian Equal Opportunities Commission. The Commissioner may attempt to resolve the complaint by conciliation. If the complaint is not resolved or if conciliation is inappropriate, it may be referred to the Equal Opportunities Tribunal for a hearing.



The *Equal Opportunities Act 1984 (SA)* provides that discrimination is prohibited on a number of grounds including impairment. This is defined to include physical impairment which may apply to a person who has HIV or AIDS.

10.3.2 Commonwealth Laws

The following Commonwealth Acts apply throughout Australia:

- *Racial Discrimination Act 1975 (Cwlth)* incorporating the *Racial Hatred Act 1995 (Cwlth)*
- *Sex Discrimination Act 1984 (Cwlth)*
- *Disability Discrimination Act 1992 (Cwlth)*
- *Age Discrimination Act 2004 (Cwlth)*
- *Human Rights and Equal Opportunity Commission Act 1986 (Cwlth)*.

These Acts are administered by HREOC, which investigates complaints and brings the parties together to attempt conciliation. If issues are not then resolved, the complainant may take a case to the Federal Magistrates Court of Australia or to the Federal Court of Australia.

The *Disability Discrimination Act 1992 (Cwlth)* is of particular relevance because the term disability is defined so that it includes persons who have HIV or AIDS. However the other Acts are also important. People may be discriminated against, at the same time, on many grounds – race, sex, disability and age – and each Act may have to be consulted.

10.4 Making a complaint – what happens next?

A person who is discriminated against can make a complaint to the South Australian Equal Opportunities Commission. The service is confidential, impartial and free.

Address: Level 2, 45 Pirie Street Adelaide SA

Telephone: (08) 8207 1977

Freecall: 1800 188 163

Email: eoc@agd.sa.gov.au

Website: www.eoc.sa.gov.au.

Section 93 of the *Equal Opportunities Act 1984 (SA)* explains how complaints must be made and what happens when they are made. A complaint must be in writing and set out the details of the alleged discrimination. It must be lodged with the Commissioner within six months of the alleged act of discrimination or, if there are a series of Acts, within six months of the last of those Acts. On receipt of a complaint, the Commissioner will ensure that the particulars of the complaint are served on the person about whom the complaint has been made. The Commissioner may then conduct an investigation under section 94.



The manner in which the Commissioner may then deal with complaints is set out in section 95. The Commissioner may decide that the complaint is frivolous, vexatious, misconceived or lacking in substance and accordingly take no further action. However, the Commissioner may decide that the matter could be resolved by conciliation and will then arrange for a meeting with the parties. Parties are not allowed to be represented by lawyers except with the permission of the Commissioner. The Act does not specify the circumstances in which the Commissioner will permit parties to be represented by lawyers but it would probably be in the interests of fairness, where otherwise a party would be disadvantaged.

Conciliation is a method of dispute resolution in which a third party – the conciliator – attempts to facilitate an agreed resolution of a dispute. The Commissioner as the conciliator will have a good understanding of the legal principles and issues in dispute and may actively contribute to the substance of the agreement.

Most complaints are voluntarily conciliated. This might result in an apology, compensation, job reinstatement, policy changes or anything else that could be reasonably agreed upon by the parties. If a matter cannot be appropriately resolved by conciliation, the Commissioner may refer it to the Tribunal for hearing and determination. If there is a hearing, the person who made the complaint is entitled to be assisted by the Commissioner or the Commissioner's representative in the presentation of the complaint to the Tribunal.

Under section 95, the following orders may be made by the Tribunal:

- Compensation for loss or damage
- Requiring a person to refrain from further discrimination
- Performance of specified acts with a view to redressing loss or damage arising from the discrimination.

Section 95 provides for a right of appeal to the Supreme Court.

10.5 Obstacles to success – best evidence

It is not enough for a person who has been discriminated against to simply say that it has happened. There must be evidence of the fact. If, for example, a property owner says to a prospective tenant 'I will not let the premises to you', it may be because the tenant has HIV or AIDS, but if the property owner does not also state that to be the reason, the prospective tenant will probably be unable to establish that she or he has been unlawfully discriminated against. Even if the property owner adds the words 'because you have HIV' there will be a problem if she or he later denies it and there are no independent witnesses.

It helps to have a witness, preferably an independent witness. Sometimes the discrimination will take place over a period of time. There will be a number of items of information that, when accumulated, establish a case. It is important to:

- On each occasion, take a note of what happened. Do it when it happens, not later. Record what happened, what was said, and the time and place when it happened.
- Talk to witnesses. Get their version of events. Ask them to make a contemporaneous note of what happened.
- Collect physical evidence – letters, notes, photos.



- Talk to friends, colleagues, counsellors, sector workers – anyone who can help you clarify the issues in your own mind.
- Consider whether, in the company of an independent person of good repute – preferably someone who will have the respect of the other party – you should discuss the matter with the other party.
- Don't delay. If you make a complaint or take other action promptly, your evidence will be stronger and you will probably be better able to present it.

10.6 Alternative strategies

If the discrimination is in respect of a person's work, a complaint may be made to:

- A union or other professional body to which that person belongs
- A member of staff who is responsible for the observance of workplace standards and ethical and professional practices
- A professional association to which the employer or supervisor may belong – many professional associations have codes of ethics, dispute resolution services and disciplinary tribunals to which employers and supervisors are accountable.

In all cases of discrimination, the following options may be considered:

- Taking legal proceedings. This may be appropriate where there has been a breach of contract or, perhaps, negligence that has resulted in personal injury or financial loss. However, legal proceedings are expensive, time consuming and very stressful.
- Talking with the other party. This could be done either directly or with the help of another person. Sometimes people who have discriminated against others are not aware that they have done so – particularly in the case of indirect discrimination – or they are not aware of the consequences of their actions. If they are made aware, they may be willing to make amends.
- Talking to the other party with the help of a professional mediator. The process may be similar to that of making a complaint to the Human Rights and Equal Opportunity Commission or the Commissioner under the *Equal Opportunities Act 1984 (SA)*. However, as it does not start with a formal complaint, the other party may have a more positive attitude to the process. The success of mediation is dependent of the goodwill of the parties. The mediator cannot order either party to do anything. The process is similar to conciliation under the *Equal Opportunities Act 1984 (SA)* except that the mediator will usually not have a good understanding of the legal principles and issues in dispute and will not contribute to the substance of the agreement. Mediation is successful only if, at the end, there is a voluntary agreement of the parties that satisfactorily resolves the issue in dispute. Mediation should never be resorted to if one of the parties is not willing to participate or if there is a power imbalance between the parties. For further information on mediation in South Australia, contact the Community Mediation Centre on (08) 8350 0376.



10.7 Unlawful grounds of discrimination under the *Equal Opportunities Act 1984* (SA)

In South Australia, under the *Equal Opportunities Act 1984* (SA), discrimination is prohibited on the grounds of:

- Sex, sexuality, marital status or pregnancy
- Race
- Impairment
- Age.

'Impairment' means damage or weakness and might apply to a person with HIV/AIDS. 'Impairment' is the ground that will be the basis of most discrimination complaints where the discrimination is because of a person's HIV status.

'Impairment' is defined in Section 5 of the Act to mean 'intellectual impairment or physical impairment'.

Section 66 sets out criteria for establishing discrimination on the ground of impairment. A person discriminates on the ground of impairment:

- (b) if he or she treats another unfavourably because of the other's impairment or a past or presumed impairment;
- (c) if he or she treats another unfavourably because the other does not comply, or is not able to comply with particular requirement and –
 - (ii) the nature of the requirement is such that a substantially higher proportion of persons who do not have such an impairment complies or is able to comply with the requirement than those persons who have such an impairment; and
 - (iii) the requirement is not reasonable in the circumstances of the case;
- (d) if he or she treats another unfavourably on the basis of a characteristic that appertains generally to persons who have such an impairment, or on the basis of a presumed characteristic that is generally imputed to persons who have such an impairment;
- (e) if, in circumstances where it is unreasonable to do so –
 - (i) he or she fails to provide special assistance or equipment required by a person in consequence of that person's impairment; or
 - (ii) he or she treats another unfavourably because the other requires special assistance or equipment as a consequence of the other's impairment.

Part V of the Act specifies the following areas in respect of which discrimination is unlawful:



- *Employment:* section 71. This includes discrimination by an employer against an applicant for employment or against an employee. It also includes discrimination by any person in a working relationship with the person discriminated against, including contract workers and business partners. There are three exemptions: employment within a private household, where a person would not be able to do the work without endangering herself or himself or others and where a person would not be able to respond adequately to situations of emergency. Also, in section 79, it is provided that prohibition of discrimination on the ground of impairment does not render unlawful discriminatory rates of salary, wages or other remuneration payable to persons who have impairments. This means that an employer may pay less money to an employee whose work performance is adversely affected by her or his disability.
- *Membership of an association:* sections 72 and 73. This includes refusing to provide a service or benefit to a member. It also includes discrimination by a body that confers authorisation or qualification to carry on a profession, trade or occupation. There is an exception where a person's impairment would be such that she or he would be unable to carry on the profession or engage in the trade or occupation adequately or safely.
- *Education:* section 74. This includes refusing or failing to accept an application for admission as a student and accepting an application but on discriminating terms. It also includes discrimination in the treatment of a student.
- *Disposing of an interest in land:* section 75. This includes refusing to sell land and imposing discriminating terms or conditions on the sale. It does not apply to dispositions under a will or to gifts.
- *Provision of goods and services:* section 76. This may be of particular significance in respect of the provision of drugs and treatment and funeral services. As to funeral services, anti-discrimination laws do not apply to dead persons. However, it is unlawful to discriminate against a person wanting to arrange a funeral. Section 76 does not apply to the performance of a service where, because of a person's impairment, the service can only be performed in a special manner and the person asked to perform the service should not reasonably be expected to do so.
- *Accommodation:* section 77. This applies particularly to refusing to lease premises to persons with disabilities, imposing discriminating conditions in the tenancy agreement and evictions. There is an exception in section 84 which provides that it is not unlawful to discriminate where, because of a person's impairment, premises are physically inaccessible.
- *Superannuation:* section 78. Employees join superannuation schemes as an investment so that when they cease employment or retire or die there will be financial support for themselves and/or their dependants. Generally, it is unlawful to discriminate in allowing people to join superannuation schemes or in providing benefits to members of schemes and their dependants. However, it is not unlawful if the discrimination is based on actuarial or statistical data from a source on which it is reasonable to rely and the discrimination is reasonable having regard to the data and other relevant factors. In essence this means that it is lawful to discriminate on the basis of a person's health circumstances or reduced life expectancy.
- *Exemption in relation to insurance:* section 85. It is not unlawful to discriminate on the grounds of impairment in the terms of which an annuity, life assurance, accident insurance or any other form of insurance is offered or may be obtained where the discrimination:



- is based upon actuarial or statistical data from a source on which it is reasonable to rely; and
- is reasonable having regard to that data and other relevant factors; or
- no such actuarial or statistical data is available, the discrimination is reasonable having regard to other relevant factors.

In essence this means that it is lawful to discriminate on the basis of a person's reduced life expectancy.

10.8 Exemption for the Defence Force from anti-discrimination laws

Under section 53 of the *Disability Discrimination Act 1992* (Cwlth), the Defence Force is exempted from laws prohibiting discrimination on the ground of disability in connection with employment, engagement or appointment in the Defence Force. See also the 1999 High Court decision in the case of *X v The Commonwealth* where it was held that an inherent requirement of the job of a member of the Defence Force was the ability to 'bleed safely' when deployed.

10.9 Discrimination in prisons

Federal anti-discrimination law does not apply to prisoners in state prisons. They are, however, entitled to make complaints to the Equal Opportunities Commission under the *Equal Opportunities Act 1984* (SA), although there are two potential problems. First, the Commission may be unwilling to be concerned with issues of prison administration. Second, the grounds for making a complaint are limited. The most obvious ground is discrimination in the provision of health services to persons who suffer from an impairment. There are likely to be difficult issues of allocation of limited resources and problems of proof.



11 Insurance

Insurance companies do discriminate against people who have HIV.

Section 85 of the *Equal Opportunities Act 1984 (SA)* provides that it is not unlawful to discriminate on the grounds of impairment in the terms of which an annuity, life assurance, accident insurance or any other form of insurance is offered or may be obtained where:

- (a) the discrimination:
 - (i) is based upon actuarial or statistical data from a source on which it is reasonable to rely; and
 - (ii) is reasonable having regard to that data and other relevant factors; or
- (b) no such actuarial or statistical data is available, the discrimination is reasonable having regard to other relevant factors.

In essence, this means that insurance companies are entitled to discriminate on the basis of a person's reduced life expectation.

There is a similar provision in the *Disability Discrimination Act 1992 (Cwlth)*.

11.1 Intrusive questions and insistence on HIV antibody tests

Insurance companies are entitled to ask an applicant about risk activities or if the applicant is a member of an at-risk group.

An insurance company may insist that an applicant whom it considers to be at risk must undergo a HIV antibody test before it will insure the applicant. If the amount of insurance sought is very high, the company may insist that the applicant has a test and that the test shows a negative result before it will insure an applicant.

Rather than have the test arranged through the insurance company, it may be less intrusive to privately arrange for a test and then decide whether or not to proceed with an insurance application.

11.2 Entitlement to refuse insurance or to grant insurance subject to conditions

If an applicant is HIV positive an insurance company may refuse to insure the applicant, or it may offer insurance that excludes HIV related conditions.

If an applicant is not HIV positive but is gay, the insurance company should not refuse insurance solely because the applicant is gay. This may amount to unlawful discrimination under both the *Equal Opportunities Act 1984 (SA)* and the *Disability Discrimination Act 1992 (Cwlth)*. It would also contravene an insurance industry code of practice that specifies that insurance should not be refused solely on the ground of a person's homosexuality. However, a healthy gay applicant may be required to provide detailed information about sexual activities and, if the applicant is not in a stable one-to-one relationship, may be refused insurance.



11.3 Can an insurance company refuse to pay?

If a claim is AIDS or HIV related, a company can refuse to pay on a claim if:

- The policy specifically excludes AIDS or HIV related conditions
- The insured person failed to declare risk information when she or he applied for the insurance.

11.4 Travel insurance

Travel insurance generally excludes cover for:

- Sexually transmitted diseases (including HIV and AIDS)
- Pre-existing conditions.

It may be possible to get insurance for declared conditions. However, the additional premiums are usually high and it may be difficult if the declared conditions relate to HIV/AIDS.



12 Superannuation

HIV status should not prevent anyone joining a superannuation fund. However, if the scheme requires individual cover for death or disability, it is like any other insurance scheme and a person with HIV may not be able to get death or disability cover unless she or he joined the scheme before finding out that she or he had HIV.

The topic of discrimination in respect of superannuation is discussed in [10 Discrimination](#).

If a person wants to leave employment because of HIV related illness, she or he should first be sure about financial and personal circumstances. Check the terms of the agreement and seek advice – financial, medical and/or legal – before talking to the employer.



13 International travel

Some countries will not allow people to enter unless they can show that they do not have HIV. The list of countries with regulations keeps changing. Before travelling, people with HIV should:

- Contact the embassies of the places they want to visit to find out about any regulations or entry restrictions that may affect them.
- Talk to doctors or specialised travel clinics about health issues. Diarrhoea can be a problem for travellers and it may be more serious for those who are HIV positive; they may also be more at risk from opportunistic diseases such as tuberculosis and malaria. Find out what medicines should be taken.
- Find out about required and desirable vaccinations and be aware that some vaccinations – live vaccinations – may make them ill. Travellers should always take vaccination certificates with them when they travel.
- Find out about circumstances in the places to be visited such as risks of contracting diseases; precautions that should be taken, for example, from being bitten by mosquitoes and drinking contaminated water; medical services that are available.
- Make enquiries about medical health insurance.
- Check up to date websites on HIV and travel and the countries they want to visit.



14 Immigration

A useful reference on this topic is the Australian Federation of AIDS Organisations (AFAO) web page, *Immigration*. This can be found by visiting http://www.afao.org.au/view_articles.asp?pxa=ve&pxs=99&pxsc=149&pxsgc=&id=247.

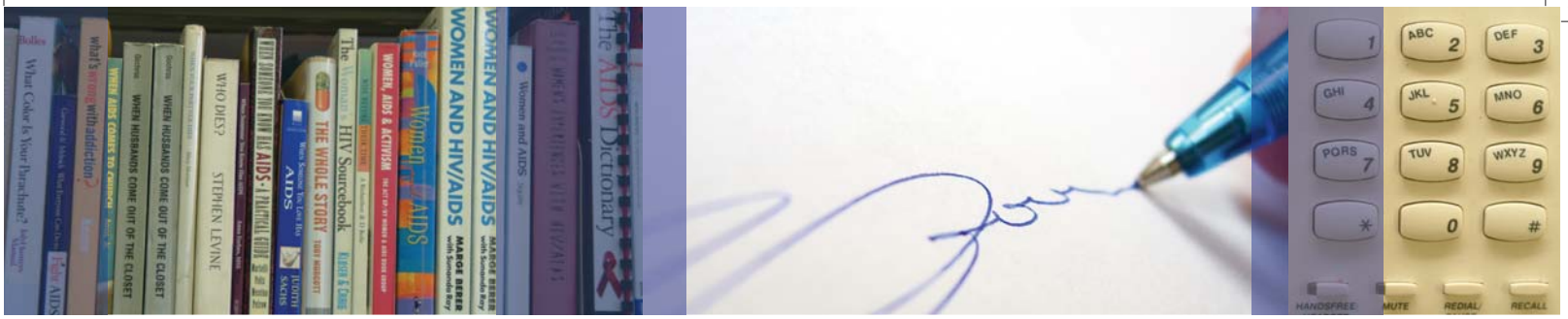
See also the Department of Immigration and Indigenous Affairs website, www.immi.gov.au.

HIV/AIDS status will be taken into account in the consideration of any application for permanent residence in Australia. The AFAO factsheet makes the following comment:

The Australian immigration system has very strict health requirements for all people applying for permanent residence, designed to minimise costs to Australia's health care and welfare system. People are regularly excluded from migrating to Australia on a wide variety of health grounds.

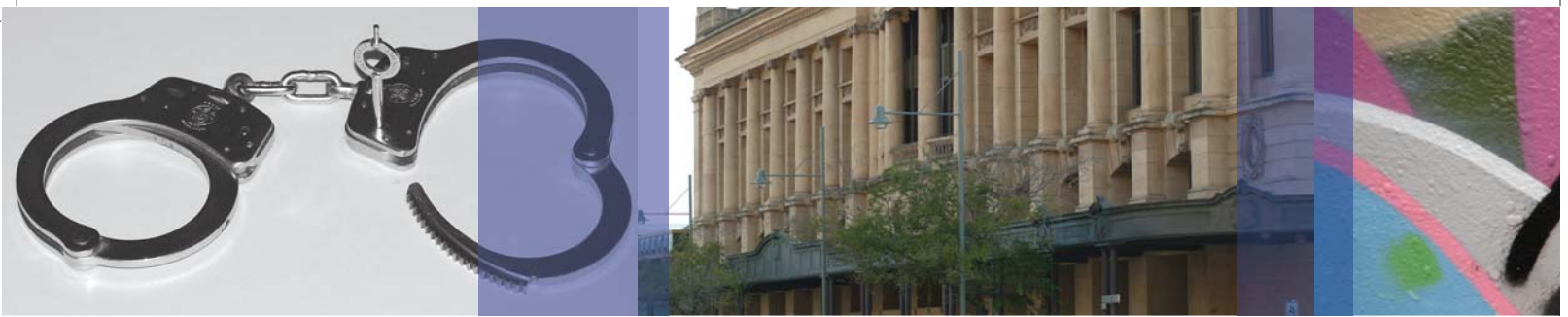
Therefore all applicants are tested for HIV, and HIV status will be taken into account in deciding your application for permanent residence. However, there is no automatic exclusion on people with HIV/AIDS. A considerable number of people with HIV/AIDS have succeeded in obtaining permanent residence in Australia. It will depend on your individual circumstances.

The article discusses interdependency, HIV testing, health requirements, waiver of health requirements, the issue of undue cost to the Australian community, evidence that should be included in applications, appeals and getting help.



15 Making a will

Everyone should make a will, and consider making changes to it whenever circumstances change. Simple will forms are readily available from post offices and newsagencies. However, if it is not possible to make simple provisions, legal advice should be sought. If a will is not made, a person's property will be distributed to her or his family according to a prescribed formula. This may mean that a carer or close friends will get nothing from the estate and have no say in its administration.



16 Criminal law

16.1 Section 29 of the *Criminal Law Consolidation Act 1935* (SA)

Some states provide for offences where a person intentionally or recklessly infects another with a disease. South Australia does not. However, it does have a more general provision that might apply to someone who has unprotected sex with another person and does not tell that other person that she or he has HIV. Section 29 (3) of the *Criminal Law Consolidation Act 1935* (SA) provides:

- (1) Where a person, without lawful excuse, does an act or makes an omission
 - (a) knowing that the act or omission is likely to endanger the life of another; and
 - (b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered,that person shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 15 years.

On Tuesday February 1, 2006, a jury in the Supreme Court found Andree Chad Parenzee guilty of endangering life contrary to section 29. He was HIV positive and had unprotected sex with two women without informing them of his condition. As a consequence, one of them became HIV positive. At the time of writing – March 13, 2006 – the matter has been adjourned for sentencing. The maximum penalty under section 29 is 15 years' jail. The case is also being appealed on legal grounds.

Under section 37 of the *Public and Environmental Health Act 1987* (SA) a person infected with a controlled notifiable disease must take all reasonable measures to prevent transmission of the disease to others. HIV is a notifiable disease. The maximum penalty for breach of this section is \$30 000.

16.2 Application for bail

The fact that a person is HIV positive is a relevant factor to be taken into account in deciding whether she or he should be granted bail.

In the case, *R v P, AC*, Justice Bleby granted bail to a man who was charged with two counts of endangering life contrary to section 29(1) of the *Criminal Law Consolidation Act 1935* (SA). The man was HIV positive and it was alleged that he had unprotected sex with two women without informing them of his condition and, as a consequence, one of them became HIV positive. In the application for bail, the man's HIV status worked both for and against him.

It worked for him because it was said that first, by being held in custody, his health would be adversely affected. He would not have access to medical treatment that would otherwise be available to him, he would be at risk of opportunistic infection and he would be the subject of discrimination and harassment. It worked against him because it was said that the second alleged offence occurred while he was previously on bail. There was concern that if he was granted bail, there was a risk of him offending again.

After a thorough consideration of factors to be considered under section 10 of the *Bail Act 1985* (SA), and bearing in mind that there is a presumption in favour of bail to be displaced only if those factors require otherwise, Justice Bleby granted bail but subject to a number of strict conditions (these are detailed in paragraphs 14, 24, 52, 53, 54, 55 and 56 of the case).



16.3 Sentencing – mitigating factors and factors that might result in an increased penalty

A useful reference on this topic is the *HIV/AIDS Sentencing Kit* by the HIV/AIDS Legal Centre, www.halc.org.au. In particular, see *Part 4: Relevance of HIV to Sentencing Where HIV Status is Relevant to the Crime*. It should be noted that the *HIV/AIDS Sentencing Kit* is a New South Wales reference, and some of the content may not apply in South Australia.

HIV status may be taken into account as a mitigating factor under both state and federal legislation.

In relation to sentencing for state offences, section 10 (1) of the *Criminal Law (Sentencing) Act 1988* (SA) lists matters that a court should have regard to when determining sentence for an offence. These include:

- (l) the character, antecedents, age, means and physical or mental condition of the defendant; and ...
- (o) any other relevant matter.

It is relevant that a person who is HIV positive in the prison system may:

- Become the subject of discrimination and harassment
- Have difficulty accessing necessary medical services and treatment.

In *R v Gezim Recj*, the Court of Criminal Appeal upheld a sentence for murder imposed by the Supreme Court. The judge had said that the defendant would have fixed a non-parole period of 20 years but for the fact that he was HIV positive. Because of that and accordingly because the defendant had a reduced life expectancy, the judge reduced the period to 17 years. It was said in paragraph 14 of the case that HIV does not give a person licence to commit crime with the expectation that an otherwise appropriate penalty will be greatly reduced.

In relation to sentencing for Commonwealth offences, section 16A (2) of the *Crimes Act 1914* (Cwlth) provides:

In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court: ...

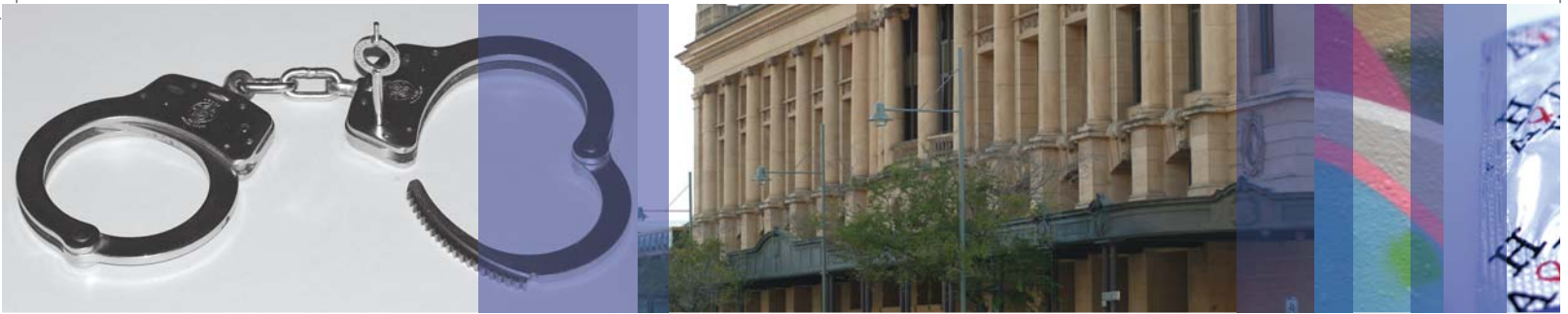
- (m) the physical or mental condition of the person.

Section 16A (3) provides that in determining whether a sentence or non-custodial order is appropriate, the court 'must have regard to the nature and severity of the conditions that may be imposed on, or may apply to the offender, under that sentence or order'.

A person who uses HIV status to help commit a crime, for example, holding up a bank with a blood filled syringe, may find that the penalty is increased because of the serious risk to which others were exposed – see the cases *R v Wright* and *R v Barry*.

16.4 Being in prison

A useful reference on this topic is the *HIV/AIDS Sentencing Kit* by the HIV/AIDS Legal Centre: www.halc.org.au. It should be noted that this is a New South Wales reference and some of it may not apply in South Australia. See also *HIV/AIDS, Prisons and the Law* by Jennifer Norberry, www.aic.gov.au.



The relevant South Australian law is the *Correctional Services Act 1982 (SA)* and the *Correctional Services Regulations 2001 (SA)*. Neither refers specifically to HIV/AIDS.

Being in prison can be problematic for people who are HIV positive for many reasons, including:

- Stress – this can constitute a serious risk to healthy immune functioning and can increase the likelihood of opportunistic disease
- Limited and delayed access to medical services and medication
- Little consideration for dietary needs
- An environment that does not accommodate the circumstances in which drugs have to be taken, i.e. on a full or empty stomach
- Discrimination, harassment and violence
- Breaches of confidentiality – a prisoner's HIV status should be confidential but it is frequently known to the rest of the prison population.

One problem that is specifically addressed in the *Correctional Services Act 1982 (SA)* is breaches of confidentiality. Section 85C provides that, subject to certain exceptions including consent of the prisoner, a person must not divulge information relating to a prisoner, probationer or parolee, being information obtained in the administration or enforcement of the Act. The prescribed maximum penalty is \$10 000.

As to medical treatment, there is nothing in the Act that entitles a prisoner to request diagnostic tests and to be informed of the results of medical tests.

Under section 23, there is a requirement that, as soon as practicable after the initial admission to a prison of a person whose sentence is for a period of six months or more and thereafter at regular intervals of not more than a year, there must be an assessment of the prisoner's circumstances.

Regulation 38 provides that for the purposes of this assessment or for preventing or containing the spread of disease, the Chief Executive Officer may direct a prisoner to undergo specified medical examinations or tests. This includes tests for HIV.



17 Civil law

If a person becomes HIV positive because of the negligence of another person, it is possible that the person who became HIV positive may be able to sue the other person for compensation. There are no recorded decisions where persons who have been infected with HIV have successfully sued their sexual partners.

One case where medical practitioners were successfully sued by a patient who became HIV positive is *Harvey v PD*. The case is discussed in 4.1.2 Serious risk to the patient or another person. The liability of Dr Harvey arose, in particular, from his failure to exercise reasonable care and skill in the provision of professional advice. It was his duty to address, in the course of the initial joint consultation, the need for consent to disclosure, the manner of disclosure and the possibility of discordant results. Had he done so, PD would, most likely, have become aware that her partner, FH, was HIV positive and she would not herself have become HIV positive.

Where the negligence of a medical practitioner causes the partner of a patient to contract HIV, the partner may be able to sue the medical practitioner for compensation. Thus, in the case of *BT v Oei*, where BT was the partner of AT who was a patient of Dr Oei, Justice Bell, in the New South Wales Supreme Court, commented as follows:

I therefore find that had AT been appropriately counselled, as at December 1992 he would have undergone an HIV antibody test. Such a test would have shown that he had contracted HIV. Proper advice would have brought home to him the need to protect his partner from risk of infections and the means to do so. The couple would not have engaged in unprotected relations thereafter. In the event, unaware of his HIV condition on an occasion between late January and mid February 1993, the couple engaged in unprotected sexual intercourse and BT thereby contracted HIV. The defendant's negligent failure to properly advise AT with respect to a possible diagnosis of HIV and the need for an antibody test materially contributed to the plaintiff's infection with the virus.

Accordingly, there will be a verdict and judgment for the plaintiff in respect of her personal claim.

The damages awarded in this case included amounts in respect of:

- Out of pocket expenses
- Past economic loss
- Past care
- Future care
- Future medical treatment
- Future medication
- Future hospital care
- Future economic loss
- Loss of expected income.



18 Welfare disability support

Entitlement to welfare benefits is means tested through Centrelink. A person with HIV may be eligible for a sickness or disability allowance and/or a Health Care Card. For information regarding qualification for the disability support pension, see section 94 of the *Social Security Act 1991* (Cwlth).



19 Rights of carers

A person who is caring in a private residence for a person with a disability may be entitled to a carer payment if the requirements of Part 2.5 of the *Social Security Act 1991* (Cwlth) are met. This section is complex. It may be accessed by doing a search on the AustLII or SCALEplus websites – see 2 Finding the law.

A useful guide to the rights of carers is the Centrelink website: www.centrelink.gov.au/internet/internet.nsf/individuals/carer_index.htm.

It provides information on the following topics:

- Payments when you are caring for a child (under 16 years)
- Payments when you are caring for an adult (16 years and over)
- Services and programs for carers
- Publications if you are caring for frail, aged, ill or disabled persons
- Claim form if you are caring for frail, aged, ill or disabled persons
- Accommodation and renting issues
- Returning to work when you stop being a carer
- Owing money to Centrelink or the Family Assistance Office
- Useful website links.



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HIV AND HEPATITIS C

WORKER TRAINING PROJECT

The Australian Institute of Social Relations is the training division of Relationships Australia (SA). The Institute houses the HIV and Hepatitis C Worker Training Project (HHWTP) which aims to develop the capacities of workers and organisations to deliver responsive and comprehensive services in relation to hepatitis C and HIV/AIDS.

The HHWTP has an extensive range of training products, techniques and resources, as well as a large network with other training bodies, which can be utilised to provide you and your agency with training. The HHWTP specialises in tailoring programs to ensure they meet the needs of workers in the hepatitis C and HIV sector. In most cases services provided are free of charge.

Annual training calendar

The HHWTP maintains an annual calendar of professional development events relevant to hepatitis C and HIV. Calendar events are tailored to address a variety of issues that may include trends in HIV and hepatitis C, peer education, new treatments, community development, drug use, sex work, Indigenous and cross cultural awareness, mental health, and other technical skills.

Some examples of workforce development projects

- HIV and the Law
- Mental Health First Aid
- Applied Suicide Intervention Skills Training.

Nationally recognised training

The Australian Institute of Social Relations is a Registered Training Organisation through which the HHWTP is able to align classroom and on-the-job learning to nationally recognised qualifications within the Community Services Training Package, for example:

- Certificate III and Certificate IV in Telephone Counselling Skills
- Certificate IV in Community Services Work
- Diploma in Community Education
- Advanced Diploma in Community Services Management
- Certificate IV and Diploma in Training and Assessment.

Other services

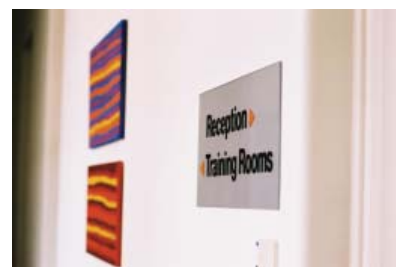
- Consultation and advice
- Facilitating public forums and planning days
- Training needs analysis
- Training and mentoring for boards of management
- Training program development
- Brokering of training from other providers
- Evaluation methodology.

Emailing list

Make sure you are kept up to date by joining our emailing list (see details below).

Contact

For further information please email hhwtp@rasa.org.au or phone (08) 8245 8100.



The Australian Institute
of Social Relations
is a division of
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Australian Institute of Social Relations

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* Outreach services only