

The Australian legal response to HIV

MICHAEL ALEXANDER *

Introduction

In Australia, as in many other countries, initial legal responses to HIV were knee-jerk ones. Governments moved to require doctors to report names and addresses of people with HIV to the government, to stop people from risk groups from donating blood, and to criminalise sexual conduct of people with AIDS. These moves sparked immediate reactions from the newly formed community based AIDS organisations, mostly made up of gay men mobilising to combat the threat of AIDS to their communities. In the New South Wales, the largest state and the epicentre of HIV infection in Australia, many people taking HIV tests gave their name as Neville Wran (the then state Premier).

These moves sparked intense debate, and many of these repressive measures have since been removed. Since that time Australia's legal response to HIV has more often (but not always!) followed the path of consultation in line with the pattern followed in relation to other aspects of the epidemic. This is characterised by a partnership between government, health professionals and organisations representing people affected by HIV/AIDS.

Australia's federal system

Australia's federal system, with eight state and territory governments responsible for most of the relevant areas of law, creates obvious difficulties for a co-ordinated national response. Unfortunately the HIV does not recognise our state boundaries. States and territories have governments of different political complexions and with different ideas on appropriate response to HIV.

The Federal Government has taken responsibility for leadership in the legal response to HIV, and it has some tools (mostly involving funding) to persuade the states and territories to follow its lead. However ultimately the Federal Government has no power to force states and territories to do so.

Government responses

The Federal Government has established a number of mechanisms to examine the legal changes necessary to prevent HIV transmission and to minimise the personal and social impact of HIV. In 1989 a National AIDS Strategy was released, putting in place a 3 year plan with detailed measures to be implemented during that period. It covered all aspects of the response to HIV/AIDS, including the need for legislative reform. These measures had the broad support of all state and territory governments, and community based AIDS organisations.

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The law reform recommendations of the National Strategy were largely based on an earlier report of a Panel on Discrimination and other legal issues which held public hearings in capital cities. Recommendations were made in the areas of public health laws,

immigration, legal standards for condoms, prostitution laws, laws on homosexuality, drug laws, laws affecting procedures on death, censorship and media law, confidentiality and privacy, prisons, insurance and superannuation.

However the National Strategy did not make detailed recommendations on most of these issues. Instead, it recommended the establishment of a Legal Working Party comprising representatives of Federal and State Attorneys-General and Health Departments to review these areas of law, and to make more detailed recommendations. It also recommended the establishment of a Privacy and HIV/AIDS Working Party, which produced guidelines for government departments handling HIV-related information.

Significantly, the National Strategy also recognised the need for legal advice and advocacy services for people with HIV, and for the first time provided funding to the Australian Federation of AIDS Organisations (AFAO) to employ a solicitor. It also recognised the need for lawyers and other HIV workers to be better aware of the existing laws relating

* *Legal Policy Analyst, Australian Federation of AIDS Organisations (AFAO), PO Box 1789, Sydney, New South Wales, Australia. Paper presented at UNDP Workshop on HIV Law and Law Reform, May 22-25 1995, Nadi, Fiji.*

to HIV/AIDS, and provided funding to AFAO to produce the first edition of the Australian HIV/AIDS Legal Guide.

The Legal Working Party

The Legal Working Party was set up in 1990 under the Intergovernmental Committee on AIDS (IGCA). It produced a series of nine discussion papers which were widely circulated throughout the community. The discussion papers contained preferred options for reform, and public comment was sought. They received over 300 submissions from organisations and individuals. People making submissions ranged from government departments to church bodies, unions, academics, legal organisations, and AIDS organisations.

In November 1992 the Legal Working Party produced its Final Report, containing a series of detailed recommendations for reform. The recommendations are in general very progressive, remarkably so in view of the fact that they were drafted by a committee of bureaucrats. Whilst not agreeing with every recommendation, AFAO and other community based AIDS organisations have in general embraced the report and have adopted it as a desirable agenda for reform.

Members of the Legal Working Party were at pains to emphasise that their task was to produce a broad prescription for legislative action, rather than attempting to find the lowest common denominator based on the current position in each state and territory. They saw their job as producing logical solutions to problems, rather than pragmatic compromises. They emphasised that adoption of the recommendations by a particular jurisdiction did not commit that government to immediate reform in all areas.

Some recommendations were controversial. The recommendations are too numerous to summarise here, but included the following:

- removing criminal penalties for homosexual conduct in private between consenting adults;
- adoption of consistent ages of consent for homosexual and heterosexual activity;
- legal recognition for partners in non-traditional domestic relationships, including homosexual as well as heterosexual de facto arrangements;
- removing criminal penalties for sex industry work;
- repeal of offences relating to possession of needles and syringes;
- repeal of drug self-administration offences;
- non-custodial offences for minor drug offences;
- repeal of legislative barriers restricting distribution, promotion, advertising or sale of condoms;

- all jurisdictions to adopt anti-discrimination legislation covering disability (including HIV/AIDS) and sexuality; and
- public health legislation to require notification of HIV and AIDS only in coded, non identifiable form

Implementation has been heartbreakingly slow. The majority of the recommendations are to be implemented at State and Territory level and most governments appear to have taken precious little interest in them. Worse than being inactive, some states have introduced new laws which go in the complete opposite direction. Queensland, for example, has passed a new prostitution law which is highly restrictive and makes virtually all sex work illegal.

Tasmania has obstinately refused to decriminalise homosexual acts (all other states and territories have now done so), and the situation for gay men in that state has only changed by virtue of an individual com-

plaint to the UN Human Rights Committee followed by controversial Federal legislation implementing the sexual privacy aspect of the International Covenant on Civil and Political Rights. New South Wales (NSW) set up its own committee to report on how the recommendations should be implemented at the state level, and that committee has produced its own substantial report. However, there has been little legislative change.

At the Federal level, the Minister for Justice and the Minister of Human Services and Health have established and HIV/AIDS Implementation Working Group to oversee reforms. This Working Group is compiling a status report on implementation of the various recommendations in each state and territory, which is to be raised at various ministerial meetings, and directly with the state and territory governments. The Implementation Working Group is also working on a number of areas of federal responsibility which are outstanding – notably issues involving insurance and superannuation, privacy and media regulation.

Discrimination initiatives

In 1991 the NSW government asked the state's Anti-Discrimination Board to conduct an inquiry into HIV and AIDS related discrimination. The inquiry heard evidence and received submissions, and produced a report in 1992 entitled *Discrimination – the Other Epidemic*. The report found that HIV discrimination was pervasive and extensive, and documented many instances of discrimination.

This report was very significant in documenting conclusively the extent of HIV-related discrimination, and has led to a number of further initiatives. The Federal Department of Human Services and Health has subsequently run a

national media campaign about HIV discrimination, and funded a number of community based projects aimed at reducing the incidence of discrimination.

Community based organisations

Community based AIDS organisations in Australia recognised the significance of the law in the fight against HIV/AIDS at a very early stage, and have been involved at every stage in pressing for, liaising with and responding to the various government activities. Much of this activity has been driven by the Legal Working Groups.

The primary focus of activity has been the AIDS Council of NSW (ACON) in Sydney. Since the mid eighties ACON has had an active group of volunteer lawyers and other interested people involved in its Legal Working Group. This group has been at the forefront of the push for law reform. The Legal Working Group has also produced a number of publications on HIV law, and conducted other educational activities for people with HIV/AIDS, affected communities, lawyers, and the general community.

Agitation by the ACON Legal Working Group led to the establishment and funding of the AFAO Legal Project in Sydney. Since 1987, the AFAO Legal Project has had at least one (and sometimes more than one) paid staff member working on legal policy issues, education and legal casework. The paid staff members have always relied to a very heavy extent on the volunteers of the ACON Legal Working Group, and the other Legal Working Groups which have since sprung up in some of the other states and territories. AFAO itself now has a national Legal Working Group, drawing together people from around the country to advise it on legal policy issues. This group has recently drafted a Legal Strategic Plan for AFAO, nominating priority areas for law reform.

In addition to legal policy issues, Legal Working Groups and the AFAO Legal Project have attempted to meet the HIV legal education needs of people with HIV, affected communities, lawyers, other service providers, and the general public. Publications include the following:

- HIV/AIDS & Your Rights, a pamphlet on HIV legal issues for people with HIV/AIDS and affected communities, now in its 4th edition;
- Australian HIV/AIDS Legal Guide, a book of over 500 pages containing a detailed exposition of the relevant law in each state and territory of Australia, now in its 2nd edition;

- Planning Ahead for People with HIV and AIDS, a series of pamphlets dealing with wills, powers of attorney, advance treatment directives, and superannuation;
- A Guide to HIV/AIDS Confidentiality and the Law;
- Applying for Permanent Residence in Australia, an information sheet for people with HIV/AIDS and their advisers; and
- HIV/AIDS Legal Link, a quarterly newsletter on HIV related law and policy.

Most of these publications have been funded by the Federal Department of Human Services and Health. The Legal Working Group in Sydney has also run regular forums on various HIV related legal issues, and provides legal speakers to forums organised by other groups. Arising out of the work of the Legal Working Groups, specialist HIV/AIDS Legal Centres (HALC) have been established in Sydney and Melbourne to provide legal advice and representation for people with HIV/AIDS. The Centre in Sydney employs a full time lawyer who works with a large roster of volunteer lawyers and law students to meet the heavy demand for specialist, well informed legal services. The Centre in Melbourne receives no funding, and totally depends on volunteers. There is also a specialist legal service in Brisbane based at the Queensland AIDS Council, where a lawyer from the Legal Aid Office attends on a regular basis.

Each of these centres is connected with an extensive network of people working in the field such as doctors, hospital social workers and other service providers who refer clients needing specialist legal advice. These service providers themselves also tend to rely heavily on the HIV/AIDS Legal Centres for legal and ethical advice which arise in the course of their work.

A significant aspect of legal casework provision is that it informs the legal policy work and education work performed by community based AIDS organisations. Because they are daily confronting the legal problems of people with HIV/AIDS, HALC have an excellent picture of what the legal issues are. They know what laws need to be changed, and they know what the education and information needs are. Several government inquiries and working parties on various legal issues have relied substantially on material from the case work database of HALC to inform them of the nature and extent of the problems confronting people with HIV.

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Coalitions

AIDS organisations involved in legal issues recognise the need to work in coalition with other non-government organisations. For example the HIV/AIDS Legal Centres are part of a network of community legal centres around Australia, which are generally concerned with social justice issues. HALC workers and volunteers regularly run workshops at community legal centre conferences to build knowledge about HIV legal issues. Other networks in which AIDS organisations are involved include:

- Human rights organisations. AFAO is a member of the Australian Forum of Human Rights Organisations, and participates in its regular consultations with the Department of Foreign Affairs and Trade;
- Other disability organisations. AFAO is a member of the National Coalition for the Development of Disability Standards, and participates in regular consultations between the Federal Disability Commission and the national disability bodies; and
- Other health advocacy organisations.

There are also networks and coalitions which come together in relation to specific legal issues. For example, when working on prison law reform issues relating to HIV/AIDS, it makes sense to join with people and organisations working on other aspects of prison reform. Sometimes these networks do not exist when they are needed, and it is necessary to set them up. For example, AIDS organisations have been at the forefront of community organisations in Australia in grappling with the complex laws relating to superannuation. It was at the initiative of AIDS organisations that a Superannuation Consumer Coalition has recently been established in Sydney, comprising a broad range of consumer and legal organisations with an interest in the general area of superannuation.

Successes and failures

From a point of view of a community organisation, law reforms rarely go as far as we would like. In most areas we would like to see further reform. Whilst conceding that in many areas Australia has fairly enlightened laws and policies in place, acknowledgement of success is almost always qualified by some reservations.

Discrimination laws: The Federal Government, and all states and territories (except Tasmania) now have discrimination laws which make discrimination against people with

HIV unlawful. In NSW it is also unlawful to vilify people with HIV/AIDS. This is a powerful symbol, and a potential weapon in the hands of people with HIV/AIDS. Unfortunately, though, complaint and investigation mechanisms are often very slow, and this constitutes a disincentive for people with HIV. There are also continuing problems with the reliance of the system on individual complaints to take on systemic problems, e.g. the ongoing discriminatory policies of the Commonwealth Employment Service and the Australian Defence Force which are in clear breach of the Disability Discrimination Act.

Needle and syringe exchanges: One of the most important and successful aspects of Australia's response to HIV has been the early acceptance by governments of the need for harm minimisation policies to prevent HIV transmission amongst injecting drug users. Needle exchanges are funded by governments in every state and territory to try to ensure that if people use drugs, they use clean needles and syringes. It is no longer against the law to possess needles for the purpose of using illegal drugs, and exchanges generally operate with the support of police services. There are still a number of legal problems with needle exchanges, and many drug law reform issues are still to be tackled. However it must be acknowledged that Australia's

needle and syringe exchange program has meant that there is a much lower rate of HIV infection amongst injecting drug users than in most other comparable developed countries which have generally been slower to adopt this form of harm minimisation.

Decriminalisation of homosexuality: Homosexual activities have now been effectively decriminalised throughout Australia. However ages of consent in many states are inconsistent, and there is a higher age of consent in many places for male homosexual sex as compared with heterosexual sex.

Media discussion/censorship: Since the advent of HIV/AIDS, there is now much more open discussion and depiction of sexual activities, and advertising and availability of condoms. However problems still occur from time to time, as evidenced by the recent banning of AIDS education swap cards produced by the Queensland AIDS Council.

Immigration: People with HIV/AIDS who are married to or in permanent relationship with Australian citizens and permanent residents are now eligible for grant of permanent residence in Australia, as are children of Australians and refugees. This is significant advance over the situation in previous years. However a continuing undesirable

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aspect of the system is that all applicants for permanent residence are tested for HIV, and other classes of applicant (e.g. business migrants, other relatives of Australians) are not eligible for residence.

Superannuation: After a long battle, HIV exclusion clauses for death and disability benefits have now been removed from most superannuation funds.

Prostitution: Prostitution laws vary considerably from one state to another, and no state has fully implemented the recommendations of the IGCA Legal Working Party.

Prisons: Some states carry out mandatory testing of prisoners, and several still segregate prisoners with HIV from the general prison population. Condoms are not supplied to prisoners except in the ACT, and needle and syringe exchange is not available in prisons in any state.

Voluntary euthanasia: Many people with HIV/AIDS who become very ill choose to die when their lives become unbearable, but need assistance to do so. Assisting a person to die remains illegal in every state and territory.

AIDS organisations in several states are undertaking a major law reform push in this area in 1995.

Conclusion

Australia has done very well at documenting HIV-related legal issues, and in producing detailed reports and discussion papers. The AIDS community sector has been active in the legal area, but there is still not a great deal of knowledge or expertise about HIV in the mainstream legal profession. After an early and quite limited bout of enthusiasm for law reform, the attitudes of the state and territory governments have become quite complacent on legal issues. Good work has been done in setting the agenda for law reform. We know what we need to do. Our governments now need to muster the political will to actually implement it.

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References

References are available from the author on request. □

‘It is important to deal with AIDS as a family disease rather than as a disease of the individual, and as an international rather than as a national problem. In developing policies and plans, it is important therefore for countries to recognise the possibility of a higher risk among their migrant populations than among the domestic population, and to incorporate protection of their neighbours as part of their national policy.’

SPC Health Coordinator, Dr Sitaleki Finau