

23. **Roger S Magnusson, A Decade of HIV Testing in Australia, Part I : A Review of Current Legal Requirements UNSW Law Journal Vol.18(2), 341-363, 1995.**

Responsibility for health services rests primarily with the States, rather than the Commonwealth, and there are considerable variations in the law between each State and Territory. Law reform is an ongoing process, and the likely introduction of new Public Health Acts in Western Australia, Tasmania and the ACT in 1995, as well as amendments to Notifiable Diseases legislation in the Northern Territory, may affect the legal regulation of HIV testing to greater or lesser degrees.

### **The HIV Testing Process**

HIV testing in Australia is closely linked with the doctor/patient relationship 'Over-the-counter' or 'do-it-yourself' HIV test kits are not sold in Australia, thereby ensuring that the testing process includes an opportunity for pre-and post-test counselling by the medical practitioner who draws the blood sample, and who later receives back the HIV test result and communicates it to the patient. Blood samples and accompanying HIV test request forms are forwarded, either directly or via a private pathology firm, to licensed HIV testing laboratories.

### **Mandatory and Compulsory Testing**

Australian federal Government policy advocates voluntary HIV testing. However, compulsory HIV testing is required by legislation at both State and federal levels in some circumstances.

Applicants for migration to, or for permanent residency in, Australia, as well as some other categories of applicant have been required to undergo HIV testing since December 1989, in order to determine whether they satisfy the 'health requirement'. The compulsory testing of defence forces recruits and selected classes of serving personnel has been authorised since 1989. Legislation in most jurisdictions requires or encourages the testing of donated blood and tissue for HIV, and such testing has in fact been carried out throughout Australia since April 1985.

The HIV testing of prisoners is authorised in all Australian jurisdictions, either specifically, or through general provisions. In practice, Victoria has a 'voluntary' HIV testing program (with a 99.6 per cent level of participation by prisoners); in Western Australia only prisoners considered to be 'high risk' are tested; and in the remaining Australian States and Territories, compulsory HIV testing is carried out at various times, including upon admission. In New South Wales, mandatory HIV testing of prisoners is carried out, although the regulation requiring this is due to be repealed early in 1995, and thereafter a voluntary HIV/hepatitis testing program will operate as part of an induction program for new prisoners. Most jurisdictions provide for the use of reasonable force to obtain a blood sample, and these powers may be activated where compulsory testing programs are in operation and a prisoner refuses to be tested.

"Nobody, nobody," he said, "I talked to my cat and, you know, you don't get too much response." At the health department where he was tested, individuals received counselling that was limited to information on safe sex practices. "I was going bonkers....," Joe said. He felt as if he, "...had been given a death sentence which for me not knowing that much about AIDS, when they said I was HIV positive, you know, I thought I was going to die in a year or two. I really didn't know."

At the end of several months of emotional and social isolation, Joe became involved as a volunteer coordinator with a support group for persons with AIDS of Nevada. He said that the AIDS clinic then became his "primary focus." Eventually, Joe began having cramps in his legs and was told by his physician that he needed to cut back on his hours at work. When asked by his supervisor why it was necessary to work fewer hours, Joe told him he had cancer, "It is easier to say I got cancer, than it is to say I have AIDS." Later, Joe experienced guilt, "about telling him a lie," and he went back to his supervisor to explain that he had AIDS. Joe had not expected his employers to be responsive to him, but he said that they were supportive and allowed him to change his work schedule.

Joe experienced difficulties with his girlfriend after he tested positive for HIV and they ended their relationship without her knowing. He left Nevada in 1988 and moved to Oklahoma, to attend Bible School for approximately a year. When he began to have recurring headaches that prevented him from attending school and work, he moved to Chicago.

At this point in the narrative, Joe described his hospitalization and his subsequent need to share his diagnosis of AIDS with his church community:

So, on December 26th I had one of those attacks, or whatever it was with my head.....I didn't want to deal with those headaches anymore, I was just fit to be tied...they diagnosed me as having toxoplasmosis...when I got out of the hospital I was on treatment....taking medications and everything and the Lord was dealing with me to be open with my Church, because I needed their prayers. At that time, I was very very sick and I needed their prayers. So in front of the church from the pulpit....I shared with them my diagnosis of AIDS...and asked for their prayers and that the elders lay hands on me and anoint me with oil and I believe God did heal me.

This event marked a turning point in Joe's experience of himself as being someone with AIDS-simultaneously 'sick' and 'healed'. Members of Joe's church invited him to come to a prayer group:

I went to their home and as I walked into their basement I felt the presence of the Lord there... He touched me at that time because up to that point I had absolutely no appetite whatsoever. I was losing weight, I would eat three or four bites of food... and I just couldn't take

In New South Wales, a medical practitioner must counsel those whom he or she believes to be suffering from a sexually transmissible disease (which would include HIV). By regulation, counselling must include discussion of the means of minimising infection, public health implications of infection, diagnosis and prognosis, treatment options, as well as the statutory obligation owed by infected persons in New South Wales, to inform sexual partners and to obtain their consent to the risk of disease transmission prior to sexual intercourse.

Finally, in the Northern Territory, a medical practitioner who diagnoses or suspects a patient to be infected with a notifiable disease (which includes HIV/AIDS) must advise the patient about the nature of the disease, the measures needed to prevent transmission, and required treatment.

### **Requesting an HIV Test : Privacy Requirements**

There is evidence that anonymous HIV testing, by ensuring privacy, encourages voluntary testing.

Some States or area health authorities have developed specific HIV test request forms which provide for patient codes instead of names to protect privacy. A good example is the proforma developed by the Victorian Health Department, which protects privacy by identifying patients through a combination of their birth-date, sex, and a name code constructed from the first two letters of the patient's surname, followed by the first two letters of the given name. The trend is towards coded identification using these identifiers.

### **Notification of HIV Test Results and Contact Tracing**

The mandatory reporting of HIV/AIDS to the Health Department is required by public health legislation in all Australian jurisdictions.

### **New South Wales and Victoria**

Coded notification of patients with HIV or AIDS is required in both States. Medical practitioners are required to report diagnosed cases of AIDS to the Health Department using a name code constructed from the first two letters of the patient's surname and given name.

There is no legislation requiring contact tracing. In extreme situations where the patient refuses to authorise contact tracing and where third parties are in danger of contracting HIV or transmitting it to others, a medical practitioner may, with authorisation from the Director-General of the Health Department, inform third parties of the risk of infection in accordance with contact tracing guidelines, although this does not authorise direct disclosure of the patient's identity. In Victoria, contact tracing is also negotiated between the doctor who diagnoses the new case of HIV and the patient, although the Health Department employs specialist contact tracers, who assist in contact tracing if asked by the doctor.

## **Queensland**

Coded notification is authorised under the Health Act 1937 (Qld), s 32A (8), although the Director-General may require nominal notification in order to protect the public against an "outbreak" of HIV (s 32A(9)). Presumably, this might occur if the Department became aware that a person with HIV was placing third parties at risk of HIV transmission.

## **South Australia**

Medical practitioners and HIV testing laboratories are required to notify new cases of HIV and AIDS to the Health Commission.

Contact tracing is authorised by a general empowering provision. As in Queensland, the Health Commission administers a contact tracing program.

## **Tasmania**

The Public Health (Notifiable Diseases) Regulations 1995 (Tas) provide for coded notification of HIV and AIDS by medical practitioners and hospital superintendents and for coded notification of HIV by those superintending HIV testing in laboratories. The HIV/AIDS Preventive Measures Act 1993 (Tas) also requires medical practitioners to inform the Health Department of positive HIV test results in a non-identifying form. Laboratories are similarly prohibited from transmitting nominal HIV test results.

Persons with HIV in Tasmania have a duty to take reasonable precautions to prevent further transmission, and the Secretary of the Health Department is required to provide adequate information, counselling, and medical and psychological assessment for this purpose.

## **Western Australia**

A new Public Health Act is likely to be introduced into Parliament in 1995, although not all of these recommendations are expected to be included. The notification of HIV and AIDS by medical practitioners is the only legislative requirement currently observed. AIDS is notified by name and address, although HIV infection is notified under code.

## **The Northern Territory**

Medical practitioners are required to notify new cases of HIV and AIDS to the Department of Health and Community Services. Legislation currently provides that persons with HIV may be required to disclose the names and addresses of contacts to a medical practitioner or authorised officer for the purposes of contact tracing. However, in practice, Departmental contact tracers only become involved if the notifying doctor desires assistance and the patient has consented to Departmental involvement.

## **The Australian Capital Territory**

Medical practitioners, including those attending hospital patients, are required to report cases of HIV infection and AIDS to the Medical Officer of Health. Medical pathologists are

also required to notify HIV infection to the Medical Officer of Health. Coded notification using the first two letters of the patient's surname and given name is required in all cases. In view of this, contact tracing is carried out by the individual doctor who negotiates with the patient as to how to inform contacts.

### **Confidentiality and Non-Disclosure of HIV Status**

Maintaining the confidentiality of HIV test information is a crucially important aspect of Australia's public health response to HIV/AIDS. Australia's record in this area is a mixed one, although there is a considerable body of non-disclosure and privacy legislation relevant to HIV testing.

#### **New South Wales**

The Public Health Act 1991 (NSW) imposes upon persons who, in the course of providing a service, learn that a person has HIV/AIDS or has been tested for HIV, a duty to "take all reasonable steps to prevent disclosure of the information to another person" : s 17(2).

#### **Victoria**

Under the Health Act 1958 (Vic), a person who finds out another person's HIV status in the course of providing a service must take "all reasonable steps to develop and implement systems to protect the privacy of that person" : s 128.

#### **Tasmania**

The HIV/AIDS Preventive Measures Act 1993 (Tas) imposes a duty of non-disclosure with respect to HIV test results, HIV status, and information relating to the sexual behaviour and drug use of a test subject: s 19. There are a number of exceptions, including:

- \* disclosure with written consent (with detailed procedures where a person is incapable of giving written consent);
- \* disclosure to fellow health care workers directly involved in treating or counselling the HIV infected person;
- \* disclosure for the purpose of epidemiological research authorised by the Secretary of the Health Department;
- \* disclosure in court or where disclosure is authorised by the Act.

### **HIV/AIDS Discrimination and Vilification Law**

The Disability Discrimination Act 1992 (Cth), as well as legislation in all States (except Tasmania) and in Both Territories, prohibits discrimination on the basis of a real or imputed physical 'impairment' or 'disability' in a variety of different sectors. Provisions authorising representative complaints, or the non-disclosure of the identify of complainants, go some way towards eliminating disincentives to prosecuting claims by persons who wish to preserve their privacy.

Since the burden of HIV within the gay community is high, it should also be noted that discrimination on the basis of sexual orientation is prohibited in New South Wales, Queensland, South Australia, the ACT, and the Northern Territory.

HIV/AIDS vilification legislation has recently been enacted in New South Wales. The Anti-Discrimination (Amendment) Act 1994 (NSW) creates the offence of serious HIV/AIDS vilification for public actions which incite hatred towards, serious contempt for, or severe ridicule of persons on the ground that they have HIV/AIDS: s 49ZXC. The offence extends to :

- (i) threats of physical harm to person or property; and
- (ii) inciting others to threaten physical harm to person or property, although public acts done for purposes of academic, artistic, scientific, research or religious discussion are exempted, and the Attorney-General must consent to each prosecution.

### **Compliance with Legislation Regulating HIV Testing**

A number of States have also introduced health complaints legislation which provides for the appointment of a Health Care Complaints Commissioner with power to investigate and conciliate complaints against health care providers. The establishment of medical ombudsmen or health complaints authorities was recommended by the Legal Working Party of the Intergovernmental Committee on AIDS as a means of providing effective practical remedies (apart from formal recourse to the law), for breach of public health and pre- and post- test counselling legislation regulating HIV testing. Complaints of discrimination may, of course, be made to the relevant Board or Commission within all jurisdictions except Tasmania.