

DISCRIMINATION

Infected by association?

CHRIS McDERMOTT looks at how the Red Cross lawfully discriminates against sexually active gay and bisexual men

The latest advertising campaign of the Australian Red Cross Blood Service, 'It takes a special person to donate blood', should have a footnote reading '*Conditions Apply: Sexually active gay and bisexual men need not apply'.

The Tasmanian Anti-Discrimination Tribunal ('the Tribunal') has delivered a ruling ('the Cain determination')¹ following a complaint made against the Australian Red Cross Society ('Red Cross') because of its policy that effectively excludes sexually active gay and bisexual men ('the group') from donating blood. The exclusion is referred to as a 'deferral'; this is a euphemism. The group are not deferred but excluded from donation if they answer positively to the question 'within the last 12 months have you had male-to-male sex'. The deferral pertains to individuals who have had either male-to-male anal intercourse or oral sex. The Red Cross justifies this policy on the basis that there is a higher 'prevalence of [HIV/AIDS] infection in certain population groups'.²

The complainant alleged that the Red Cross, directly or indirectly, discriminated against the group and had contravened the *Anti-Discrimination Act 1998 (Tas)* ('the Act'). Direct discrimination occurs where a person is treated, on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute, less favourably than a person who does not have that attribute.³ Indirect discrimination occurs where a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who share a prescribed attribute or share any of the characteristics imputed to that attribute.⁴

The Tribunal concluded that the policy did not constitute either direct or indirect unlawful discrimination under the Act because of the Tribunal's findings about the prevalence and incidence of HIV infection amongst Australia's sexually active gay and bisexual men.⁵

The Cain determination presents some significant and concerning legal paradoxes. First, the Tribunal did not appropriately canvass whether there was a reasonable alternative to accommodate blood donations from the group. This brief explores whether this approach narrowly limits the purpose of the Act and its aim to protect against unlawful discrimination. Second, the conflict between an individual's right to be free from discrimination on the grounds of their sexual orientation⁶ and lawful sexual activity,⁷ and the communitarian right of public health⁸ by maintaining the integrity of the blood supply is manifest. This brief argues that the Tribunal has failed to properly consider how both of these competing rights could be 'maximised',⁹ as it did not appropriately explore an alternative that the Red Cross might have of accepting donations from this minority.

The determination

In essence, the Tribunal accepted the submission by the Red Cross that it must take a precautionary approach to protect the public blood supply against the 'worst case scenario';¹⁰ its compromise by HIV infection. The Tribunal accepted evidence from a leading epidemiological expert that the lowest possible risk of HIV transmission amongst monogamous gay and bisexual men who practice safe sex (34.99 to 1) is still six times the relative risk of heterosexual men in the same category.¹¹ This risk is associated with protected anal intercourse between men. It should be noted that the Red Cross does not exclude men who engage in anal intercourse with women. In contrast, the Tribunal inferred that the risk associated with male-to-male oral sex falls below other risks tolerated by the Red Cross for acceptable donations.¹² Nonetheless, the Tribunal found that it is reasonable for the Red Cross to take a very conservative precautionary approach because of the compounded risk of sexually transmitted infections associated with oral sex and the higher HIV prevalence amongst the group as a whole.¹³

Based on its acceptance of the evidence about the risk of HIV transmission among gay and bisexual men, the Tribunal found that the deferral policy did not constitute indirect discrimination. This was because the policy was a reasonable condition, requirement or practice in the circumstances.¹⁴ On the question of reasonableness, the Tribunal concluded that if such donations were accepted and if there was a resultant compromise of the blood supply by HIV infection, this would negatively impact on the lives of blood donation recipients.¹⁵ In the Tribunal's view, this consequence could not be reasonably tolerated.

The Tribunal also found that the Red Cross had not engaged in direct discrimination against the complainant. This was because the deferral policy was not based on the prescribed attributes of sexual orientation or lawful sexual activity, rather it was based on the attribute of being a member of a 'high risk group'¹⁶ susceptible to HIV infection.

The Tribunal did acknowledge the 'wounding quality' of the deferral policy and that it may lead to 'stigmatisation of homosexuals through reinforcement of negative stereotypes'.¹⁷

The Tribunal also concluded that even if the deferral policy contravened the Act as either direct or indirect discrimination, the Red Cross would have a reasonable defence with the statutory exception of complying with a law of Tasmania, namely compliance with the *Blood Transfusion (Limitation of Liability) Act 1986 (Tas)*.¹⁸

REFERENCES

1. *Cain v Australian Red Cross Society* [2009] TASADT 03.
2. Australian Red Cross Blood Service, *Sexual Activity* (2009) <www.donateblood.com.au/page.aspx?IDDataTreeMenu=88 &parent=30#answer47> at 23 October 2009.
3. *Anti-Discrimination Act 1998 (Tas)* s 14.
4. *Anti-Discrimination Act 1998 (Tas)* s 15.
5. *Anti-Discrimination Act 1998 (Tas)* s 14 (direct discrimination) and s 15 (indirect discrimination). The enlivening provision is s 22(1)(c) of the Act – discrimination in the 'provision of facilities, goods or services'. The Tribunal found that the collection of blood donations constitutes a 'service' within the meaning of s 22(1)(c); see *Cain* [29]–[55].
6. *Anti-Discrimination Act 1998 (Tas)* s 16(c).
7. *Anti-Discrimination Act 1998 (Tas)* s 16(d).
8. *Cf. Anti-Discrimination Act 1998 (Tas)* s 47.
9. See Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 110.
10. *Cain* [387].
11. *Cain* [384].
12. *Cain* [166].
13. *Cain* [163]–[373].
14. *Cain* [402].
15. *Cain* [396].
16. *Cain* [408].
17. *Cain* [337], [340].
18. *Cain* [552]; *Anti-Discrimination Act 1998 (Tas)* s 24. Unfortunately, given the word limitations on this Brief, a proper analysis of the Tribunal's reasoning on this discrete issue is not possible – refer to *Cain* [457]–[503].

Conflicting risk assessments: implications for anti-discrimination law

In deciding whether the policy is reasonable in the circumstances, the Tribunal faced a complex task of assessing competing mathematical and medical scientific modelling about the risk inherent in the group because of its members' sexual activity.

In its analysis of the indirect discrimination claim the Tribunal determined 'the epidemiological evidence establishes that the blood of the majority of homosexuals do [sic] not pose a risk to the blood supply'.¹⁹

In its analysis of the direct discrimination claim the Tribunal held, '[t]he evidence before the Tribunal, particularly the epidemiology, establishes that the ... group carry a higher risk of HIV disease than other groups'.²⁰

In these two statements, the Tribunal distinguishes between a group as a whole and the individuals within the group. However, it is paradoxical to note that the majority of homosexuals do not pose a risk to the blood supply and still find that a policy excluding *all* sexually active homosexuals is *not* discriminatory.

This reasoning has obvious and concerning implications for a complainant's faith in the integrity of anti-discrimination law complaint mechanisms bodies and their ability to uphold anti-discrimination law principles.

The Tribunal's conclusion about the direct discrimination claim is difficult to comprehend because of the way it approached the grounds upon which the complainant alleged he had been discriminated against (the prescribed attributes the complainant considered relevant being sexual orientation and lawful sexual activity). The Tribunal concluded that the 'true reason' for excluding members of the group:

[I]s not because they are male homosexuals or because they had sex with a male in the last 12 months as an isolated fact [but because] potential donors belong to a group ... [and] this group carries a higher risk of blood borne diseases than other groups.²¹

The Tribunal seems to have taken the alternative approach of looking at the risk as an isolated fact. The Tribunal's assessment of risk is predicated on the prevalence of infection in the group and the risk coming to fruition *because of* the type of sexual activity in which members of the group engage.²² Consequently, how can the 'true reason' for exclusion be anything other than the sex that the members have engaged in given that this is what allows the risk to be enlivened?

The Tribunal had open to it the option of finding that the deferral policy constituted direct discrimination, but that an exemption of protection of the public health was applicable.²³ This may have ameliorated the 'wounding quality' the deferral policy has towards the group. Such a finding may have sent the message that the policy is discriminatory, but there are necessary reasons for the discrimination. Unfortunately, the exemption was not assessed because the Red Cross abandoned this defence.

'Maximising' competing rights: a reasonable alternative?

One way that the Tribunal could have strived towards 'maximising' the competing rights in this case would have been to canvass a reasonable alternative for

allowing donations. The Tribunal accepted the consensus of the experts that the maximum period in which HIV infection will manifest within a blood donation sample is approximately 3 months.²⁴ The Tribunal did not canvass whether the Red Cross could accept donations from the group by keeping such donations 'on hold' for 3 months and then using such donations in blood supply after they had been deemed free of infection. This was due to the complainant's submissions that this would still constitute unacceptable discrimination from his perspective.²⁵

This question of changing the deferral policy would have entailed an assessment of whether unjustifiable hardship may result for the Red Cross. However, this could have been an approach to ameliorate the discriminatory effect the group may suffer from in a societal context.

The Tribunal also has not provided a satisfactory analysis as to why members of the group who only engage in oral sex could not be permitted to donate, particularly where the Tribunal found that the risk arising from male-to-male oral sex is less than other risks tolerated by the Red Cross.²⁶

The Tribunal acknowledged that the number of men engaging in oral sex only (rather than anal intercourse) was unknown and conceded that if there were a large number of men in this category, 'this would be a consideration in favour of adopting a modified approach'.²⁷ The Tribunal also acknowledged some gay and bisexual men might not actually be captured by the deferral policy because donors may not consider oral sex to be 'male-to-male sex' (referencing it only to anal intercourse) and hence not answer the question positively.²⁸

Notwithstanding this, the non-epidemiological considerations, such as the risk of syphilis transmission arising from oral sex amongst the group, seems to be the justification for the reasonable conservatism the Tribunal permitted the Red Cross to exercise in excluding such potential donors.²⁹ Ultimately, however, in determining whether the policy was reasonable overall, it is unclear whether the Tribunal is suggesting that a change should be made in the future to the policy or that the policy should not be changed because of non-epidemiological factors.

Conclusion

The *Cain* determination provides an opportunity to critically examine the intersection between competing individual and communitarian rights, particularly where the protection of public health is concerned. It also presents the opportunity to question how complaints bodies consider complex medical evidence and how anti-discrimination laws may be applied with the effect of diminishing the objects of such legislation. The *Cain* determination leaves open the question of how the discriminatory effects of the policy on gay and bisexual men in a *societal* context are to be resolved within the Australian legal context.

CHRIS McDERMOTT is Legal Associate to Deputy Chief Justice Faulks, Family Court of Australia. This brief was written in a personal capacity.

© 2009 Chris McDermott

19. *Cain* [381].

20. *Cain* [413].

21. *Cain* [412].

22. *Cain* [209].

23. *Anti-Discrimination Act 1998 (Tas)* s 47.

24. *Cain* [81].

25. *Cain* [85].

26. *Cain* [166].

27. *Cain* [372].

28. *Cain* [359].

29. *Cain* [373].