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Queensland Positive People
INCLUSIVE, INNOVATIVE HIV SERVICES

31 January 2020

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop QLD 4003

By email: lawreform.commission@justice.qld.gov.au

Dear Secretary,

RE: QPP/ HALC Submissions in response to 'Review of consent laws and the excuse of mistake of fact' Consultation Paper, December 2019

About Queensland Positive People

Queensland Positive People (QPP) is a peer-led, community-based, not-for-profit, peak statewide organisation for people living with HIV (PLHIV), which is committed to actively promoting self-determination and empowerment for all PLHIV throughout Queensland.

QPP aligns with international, national[1] and Queensland[2] HIV policy strategies that recognise equitable access to HIV education and prevention, testing, treatment and management, and addressing stigma and discrimination to sustain improved individual and public health outcomes as we work towards the virtual elimination of new HIV transmission.

These strategies recognise the need for a critical partnership between PLHIV and those responsible for making decisions that affect their access to specialist care, treatment and support. This partnership is also recognised under Australia's endorsement of the United Nations principle of MIPA: Meaningful Involvement of PLHIV in program development, implementation and policy-making will improve the relevance, acceptability and effectiveness of the HIV response as they have directly experienced the factors that make individuals and communities vulnerable to HIV. [3] The strategies also include the principle of

[1] Australian Government, Department of Health, *Eight National HIV Strategy 2018 – 2022* (2018) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/HIV-Eight-Nat-Strategy-2018-22.pdf>.
[2] Queensland Government, *Queensland HIV Action Plan 2019 – 2022* (November 2019) <https://www.health.qld.gov.au/__data/assets/pdf_file/0032/601889/qh-hiv-action-plan.pdf>.
[3] The MIPA/GIPA Principle (Greater Involvement of PLHIV) is from the Paris AIDS Summit Declaration in 1994, endorsed by Australia and 42 other countries <http://data.unaids.org/pub/briefingnote/2007/jc1299_policy_brief_gipa.pdf> .

shared responsibility which articulates that both HIV positive and HIV negative people are responsible for preventing HIV transmission and that each party should take responsibility for maintaining their own sexual health without assuming, or relying on representations made by other parties, as to the presence, absence or likelihood of transmission risk.

National and Queensland HIV strategies have identified the shared goals of achieving the virtual elimination of HIV transmission in Australia by 2020. Accordingly, QPP is dedicated to leading the Queensland HIV response and facilitating access to a comprehensive range of services that promote the health and well-being of PLHIV in Queensland.

QPP is funded by Queensland Health to provide a range of statewide services to PLHIV. QPP provides HIV and sexually transmissible infections (STIs) testing services; peer navigation and support programs for people newly diagnosed or re-engaging in care; case management and treatment support for people with complex needs experiencing challenges around engagement in HIV treatment and care; and support services for people experiencing stigma and discrimination.

QPP continues to work to support HIV prevention and management strategies driven by evidence-based best practice models of public health interventions that prioritise self-determination through access to education, prevention, testing and early treatment. Public health responses, which support and empower people to change behaviour, are the most effective strategies for preventing onward HIV transmission.

About the HIV/AIDS Legal Centre

The HIV/AIDS Legal Centre (HALC) is a not-for-profit specialist community legal centre in NSW. HALC provides free and comprehensive legal assistance to people in NSW with HIV or Hepatitis-related legal matters, undertakes Community Legal Education and Law Reform activity in areas relating to HIV and Hepatitis, provides legal training, education and experience to employees and volunteers and liaises and works in partnerships with other organisations to achieve these objectives. QPP has an arrangement with HALC to provide services in Queensland in certain circumstances.

Submissions

We thank the Commission for the opportunity to provide submissions on the issues raised in the Consultation Paper.[4] Our submissions focus on PLHIV and respond to Question 9(c).

We share submissions and concerns raised in the NAPWHA/HALC submissions in the NSW context and have duplicated select extracts in this submission.[5]

We are concerned that the proposal, if enacted, could result in increased criminalisation of PLHIV, as has been the case in Canada, where a similar legal framework to that proposed by the Commission exists. Such a development could negatively impact efforts to eliminate the transmission of HIV in Australia. Stigma, fear and discriminatory perceptions of HIV includes the decision to proceed with criminal charges. The latter is evidenced by a lack of

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[4] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact: Consultation Paper (December 2019).*

[5] NAPWHA/HALC, *Submission to the NSWLRC in Response to "Consent in relation to sexual offences: draft proposals" published October 2019* (25 November 2019) <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO80.pdf>.

criminal prosecutions or media attention regarding the transmission of other "serious diseases" and "notifiable conditions", such as Syphilis or Hepatitis.

Australia, and indeed Queensland is a world leader in HIV prevention, treatment and care. We are well placed to be the first country in the world to virtually eliminate HIV transmission. In part this is because successive Australian governments, over many national and jurisdictional HIV Strategies, have adopted the principle of shared responsibility. This principle articulates that both HIV positive and HIV negative people are responsible for preventing HIV transmission and that each party should take responsibility for maintaining their own sexual health without assuming, or relying on representations made by other parties, as to the presence, absence or likelihood of transmission risk.

PLHIV taking HIV anti-retroviral therapies (ART) provides highly effective individual and public health benefits. Research has shown that PLHIV who take ART daily as prescribed, and achieve and maintain sustained viral suppression, defined as an undetectable viral load or a viral load of less than 200 copies/mL, have **no risk** of sexually transmitting the virus to a HIV-negative partner [6]

HIV pre-exposure prophylaxis (PrEP) is the use of HIV medications by HIV negative people and is also highly effective in the prevention of HIV. In the context of HIV transmission, it should be stressed that HIV-negative people taking HIV PrEP correctly is also a highly effective strategy for reducing the risk of transmission to a negligible level and, like maintaining an undetectable viral load or proper use of condoms, represents taking reasonable precautions to prevent HIV transmission.[7] HIV PrEP is available to all Australians via Medicare. Making HIV positive people solely responsible for the sexual health of HIV negative people is not an effective way to prevent HIV transmissions and will undermine Australia's world-leading efforts to end HIV transmissions in Australia.

We submit that it is appropriate for cases of HIV transmission to be dealt with pursuant to existing Australian Public Health laws and Guidelines.

The Guidelines describe a staged, public health approach to managing the small minority of PLHIV whose behaviours risk HIV transmission.[8] The Guidelines have been updated primarily to reflect the latest scientific knowledge on the individual and public health benefits of treatment as prevention (TasP) for reducing HIV transmission.

The key objective of public health management under these Guidelines is the prevention of HIV transmission to others. The key to this is ensuring that the person of concern is able to sustain HIV viral suppression through high adherence to their prescribed ART by maintaining involvement in appropriate ongoing clinical care and treatment. The presence of a detectable viral load does not warrant management under these Guidelines, unless there are also behaviours that place others at risk of HIV transmission. People may also demonstrate additional risk reduction strategies (especially where the level of adherence to ART may not

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[6] Boyd M, Cooper D, Crock EA, et al. *Sexual transmission of HIV and the law: an Australian medical consensus statement.* Med J Aust 2016; 205 (9): 409-412; Prevention Access Campaign, *Risk of sexual transmission of HIV from a person living with HIV who has an undetectable viral load, messaging primer and consensus statement*, issued 21 July 2016, endorsements updated 5 May 2019 <https://www.preventionaccess.org/consensus>

[7] Boyd M, Cooper D, Crock EA, et al. *Sexual transmission of HIV and the law: an Australian medical consensus statement*. Med J Aust 2016; 205 (9): 409-412.

[8] National Guidelines for Managing HIV Transmission Risk Behaviours (2018) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/B4D7BD21A78763EDCA257BF0001F951B/$File/Nat-Guide-HIV-Risk-Behaviours-2018.pdf>.

be ideal). These strategies may include the use of condoms and lubricant, sexual contact with partners who are taking HIV pre-exposure prophylaxis (PrEP), and other safer sex practices. Additionally, ART also has a role in prevention as post-exposure prophylaxis (PEP). Employing such strategies demonstrates the person's engagement in, and commitment to, reducing the risk of transmission to others.

Therefore the focus of overall prevention efforts should be on the early diagnosis of HIV infection through testing of at-risk individuals, followed by effective clinical care of those with a diagnosed HIV infection and effective management of the extremely miniscule percentage of persons whose behaviours place others at risk of HIV transmission. For people with newly diagnosed HIV infection, service providers prioritise linking people to treatment and support to reduce infectiousness and increase resilience and reduce their felt stigma. Public health interventions acknowledge the complex factors unique to each individual case, such as power imbalances, impairment, discrimination or other social determinants of health that may confuse or limit an individual's ability to prevent transmission.

Submission in response to Question 9 (c)

We strongly oppose amending s.348(2) of the Criminal Code to extend the list of circumstances, in which a person's consent to a sexual act is not freely and voluntarily given, to include "where the person agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease". The suggested amendment in question 9(c) is vague, arbitrary and does not give consideration to whether there is any risk of transmission. The suggested amendment is contrary to, and would undermine, public health strategies and initiatives.

The proposed amendment could be read that anyone living with a "serious disease" will be required to disclose that "serious disease" prior to engaging in a sexual act, even where the condition poses no risk to the other party.

The Criminal Code definition of "serious disease" currently includes "a disease that would, if left untreated, be of such a nature as to [...] endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available".

If HIV is not treated, it can progress to weaken the immune system and break down its ability to fight infections. Acquired Immunodeficiency Syndrome (AIDS) is the advanced stage of HIV infection and is the result of a badly damaged immune system due HIV. AIDS, if untreated, may lead to morbidity and mortality. HIV is therefore, a "serious disease" pursuant to the definition set out in the Criminal Code. It is important to recognise that the treatment of HIV has significantly changed over time, especially since 1996 with the advent of combination ART. The array of ART available today, is effective, simple and causes fewer side effects. PLHIV can expect a normal life expectancy provided they are diagnosed early in the course of their infection and adhere to treatments and health management. HIV is now widely regarded as a manageable chronic condition.

Most importantly, as outlined below, we are deeply concerned that the proposed section will result in increased criminalisation of people living with HIV who either do not disclose their HIV status before sex, or who for whatever reason misrepresent their HIV status. We argue that the appropriate mechanism for management of the risk of sexual transmission of HIV is via education and empowerment of people living with HIV and their partners, and by

promoting and sustaining the model of shared responsibility to prevent HIV transmission. The appropriate regulatory framework is a health-based, not criminal justice-based, one.[9]

We also support the fundamental right of every person living with HIV to privacy in relation to their HIV status. No one should be placed in a position where they are obligated to disclose the fact that they are living with HIV, especially not when they are taking appropriate precautions to prevent its transmission.

Since 1989, QPP and its partner organisations have borne witness to the insidious impact of HIV stigma on our communities. People with HIV who choose to share their HIV status with their partners or prospective partners have all too often faced negative consequences including: being 'outed' to family or community; being shunned or ostracised; being blackmailed; being subjected to verbal abuse; being reported to police or health authorities; and being subjected to physical abuse, violence and, on at least one occasion, homicide.

Various pieces of Queensland legislation recognise the potential for discrimination and stigmatisation against PLHIV by protecting PLHIV from unwanted disclosures. For example, the *Anti-Discrimination Act* makes it unlawful to discriminate against a person on the basis of HIV, which is considered an impairment under the Act.[10] The *Public Health Act* protects confidentiality of information by, for example, imposing penalties for disclosing confidential information.[11]

The suggested amendment is overly broad and can be interpreted as expanding the offence of rape to include sexual acts where a party either did not disclose their HIV status or misrepresented their HIV status. The maximum penalty is life imprisonment. This should be compared to the existing Criminal Code offences relating to the intentional transmission of a serious disease (which includes HIV) with intent to do harm, or to unlawfully causing grievous bodily harm (which includes transmission of HIV without intent) carrying respective penalties of life imprisonment and 14 years imprisonment.[12]

There is currently no legal requirement for PLHIV in Queensland to disclose their HIV status before engaging in sexual acts, provided that they do not recklessly put another person at risk of contracting HIV. The *Public Health Act 2005* defines "controlled notifiable condition", which includes HIV. The Act imposes an obligation on everyone to prevent or minimise the risk of transmission.[13] It is an offence to recklessly put someone else at risk of contracting a controlled notifiable condition.[14] It is also an offence to recklessly transmit a controlled notifiable condition.[15] The *Public Health Act* already provides a mechanism for prosecuting these offences.

We are concerned that the suggested amendment would effectively criminalise non-disclosure of HIV. Criminalising HIV non-disclosure creates disincentives for people to get tested, creates a culture of blame and contradicts the most essential prevention message, that

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[9] See Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) for a detailed examination of the issues around criminalisation of HIV in Australia.

[10] *Anti-Discrimination Act 1991* (QLD) s.7(h); See also the Schedule Dictionary for the definition of "impairment" which includes "the presence in the body of organisms capable of causing illness or disease"

[11] *Public Health Act 2005* (QLD) s.77.

[12] *Criminal Code Act 1899* (QLD) s.317 and s.320.

[13] See s.66(1)(b) of the *Public Health Act 2005* QLD which imposes a responsibility to take all reasonable precautions to avoid contracting or being infection with the condition.

[14] *Public Health Act 2005* (QLD) s. 143(1).

[15] *Public Health Act 2005* (QLD) s. 143(2).

every person has a responsibility to take all reasonable precautions to avoid contracting HIV. These outcomes undermine prevention efforts and actually increase the risk of further HIV transmission.

The suggested amendment does not acknowledge the complex factors that may impact on an individual's ability to disclose status or take the necessary precautions to prevent HIV transmission. For example, domestic violence can increase risk of HIV transmission by limiting a person's ability to negotiate safer sex practices; PLHIV may experience worse or more frequent episodes of inter partner violence than people who do not have HIV; and violence or the fear of violence has been implicated as a barrier to individuals seeking HIV testing and disclosure of status.[16]

Recommendation

Due to the volume and complexity of the issues raised in the Consultation Paper (December 2018), we urge the Commission to allow for extensive consultation and further opportunity to provide submissions.

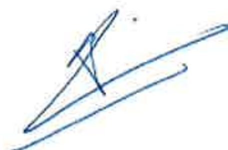
We strongly recommend that the suggested amendment set out Q9(c) be entirely removed from the next stage of the review and any proposed law reform.

Sincerely,

Melissa Warner

Chief Executive Officer

Queensland Positive People



Vikas Parwani

Principal Solicitor

HIV/AIDS Legal Centre

[16] See M. Harrigan, CATIE, *The link between intimate partner violence and HIV* <https://www.catie.ca/en/pif/fall-2019/link-between-intimate-partner-violence-and-hiv>; The Global Coalition on Women and AIDS, *Violence Against Women and HIV/AIDS Critical Intersections, Intimate Partner Violence and HIV/AIDS*, World Health Organisation Information Bulletin Series Number 1 <https://www.who.int/hac/techguidance/pht/InfoBulletinIntimatePartnerViolenceFinal.pdf>.