

SUBMISSION TO INFORM CURRENT AND PROPOSED SEXUAL CONSENT LAWS IN AUSTRALIA

16 March 2023



Purpose of document

AFAO, HALC, NAPWHA and Scarlet Alliance welcomes the opportunity to comment on current and proposed sexual consent laws in Australia. This submission mainly deals with three topics relating to consent that have a substantial and adverse impact on persons living with HIV as well as other marginalised communities and the broader Australian population. These laws:

- criminalise HIV transmission, exposure and the failure to disclose HIV status to a sexual partner;
- define consent in a way that exposes people living with HIV to criminalisation; and
- enable Mandatory Disease Testing (MDT).

For each of these topics, this submission:

- sets out the relevant laws of each state and territory in Australia;
- notes the key issues in the area; and
- outlines suggestions on law reform options.

This submission does not consider the intricacies of each individual offence and the relevant elements of each. All maximum penalties specified in this document do not include consideration of aggravated offences unless specified.

This submission will respond to the following Terms of Reference in the Discussion Paper:

- a. inconsistencies in consent laws across different jurisdictions;
- b. the operation of consent laws in each jurisdiction;
- c. any benefits of national harmonisation;
- h. any other relevant matters

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About us

The **Australian Federation of AIDS Organisations (AFAO)** is the national federation for the HIV community response in Australia and is recognised globally for its expertise in HIV and health promotion. Through advocacy, policy and health promotion, AFAO champions awareness, understanding and proactivity around HIV prevention, education, support and research. AFAO provides a voice for communities affected by HIV and leads the national conversation on HIV.

The **HIV/AIDS Legal Centre (HALC)** is the only not-for-profit, full time specialist community legal centre of its kind in Australia. HALC provides free and comprehensive legal assistance to people living with HIV or hepatitis-related legal matters, within operational guidelines. HALC also undertake community legal education and law reform activities in areas relating to HIV and hepatitis.

The **National Association of People with HIV Australia (NAPWHA)** is Australia's peak non-government organisation representing community-based groups of people living with HIV (PLHIV) across Australia. NAPWHA provides advocacy, policy, health promotion, effective representation, and outreach on a national level. Its work includes a range of health and education initiatives that promote the highest quality standard of care for HIV-positive people.

Scarlet Alliance is the Australian Sex Workers Association. Through its objectives, policies and programs, Scarlet Alliance aims to achieve equality, social, legal, political, cultural and economic justice for past and present workers in the sex industry. Scarlet Alliance represents a membership of individual sex workers and sex worker organisations, projects and groups from around Australia and has the highest level of contact with sex workers in Australia of any agency, government or non-government.

Criminalisation of HIV Transmission, Exposure (and Non-disclosure)

Legislation that criminalises HIV transmission, or exposure to the 'risk' of HIV transmission, in Australia is the responsibility of individual states and territories and consequently varies between each jurisdiction. Since 2015, no legislation in any Australian jurisdiction contains HIV specific offences, where HIV is specifically referenced, within criminal legislation.

Although no HIV-specific criminal laws exist in Australia, charges are still brought against people for transmission of and/or exposure to HIV under general criminal law provisions. Public health legislation in some jurisdictions also criminalises HIV transmission, exposure, or both. It is important to note that the information contained below refers generally to how HIV is criminalised under legislation in Australia.

Criminal laws relevant to this section can broadly be divided into two categories:

1. **Transmission offences where the actual transmission of HIV between parties must occur** for a charge to be brought, assuming other elements of the offence can be established. These offences can be:
 - a. *Intentional* – Intentional transmission refers to offences where the accused acted to produce a particular result – to transmit HIV. For more commentary around 'intention', see *Zabouroni v The Queen*¹ where the High Court reaffirmed a high threshold of proof necessary to establish specific intent.
 - b. *Reckless/Negligent* – Reckless or negligent transmission refers to offences where the accused was aware that their actions could lead to transmission of HIV, and they failed to take adequate precautions. As a result, transmission of HIV occurred. Please note that different thresholds apply to recklessness and negligence as well as different penalties that vary between jurisdictions.
2. **Endangerment/exposure offences where transmission has not occurred but where someone has allegedly been put at risk of exposure to HIV.** These offences can relate to:
 - a. *Endangerment/Exposure* – Endangerment and exposure offences generally relate to a person who exposes another person to the risk of contracting HIV, even if there is no actual transmission of HIV.
 - b. *Failure to take precautions* – Failure to take precautions against the transmission of HIV is the subject of offences found in the public health legislation of certain Australian jurisdictions. These offences are similar to endangerment/exposure offences in that a person may be charged even if there is no actual transmission of HIV.

Below outlines the different offences that may apply to the transmission of or exposure to HIV. This is not an exhaustive list of all criminal laws. Instead, it is a catalogue of the provisions that have been used to charge people living with HIV for transmission/exposure or could be used to do so. Some offences are located in public health legislation but are still criminal offences with penalties implemented through the criminal legal system.

Relevant laws

New South Wales

In NSW, general criminal laws have been used to prosecute alleged transmission of HIV and public health laws have been used to prosecute alleged ‘exposure’ to HIV.

Under the *Crimes Act 1900* (NSW) a person living with HIV can potentially be charged with a range of offences under the Act where transmission has occurred. The definition of grievous bodily harm in the Act includes ‘any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).’²

The *Public Health Act 2010* (NSW) contains an ‘exposure’ offence where someone who fails to take reasonable precautions against spreading HIV is guilty of an offence. Reasonable precautions are not explicitly defined under the Act but includes ‘acting in accordance with the information relating to the means of minimising the risk of infecting other people if the information is provided to person under section 78(1).’³

Under section 78 of the *Public Health Act 2010* (NSW) a medical practitioner has a duty to provide information to a person they suspect has a sexually transmitted infection concerning the precautions that should be taken to minimise the risk of transmitting such an infection. This information is prescribed in the regulations and may include:

- Using a condom during sexual intercourse;
- Receiving treatment for the sexually transmitted infection;
- For a patient living with HIV, seeking and receiving confirmation from a sexual partner that the sexual partner is on HIV pre-exposure prophylaxis medication; or
- For a patient living with HIV, determining if the patient has an HIV viral load of less than 200 copies per millimetre.⁴

Table 1 | NSW laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
<i>Crimes Act 1900</i> (NSW)	Transmission	<p>Section 33</p> <p>(1) A person who –</p> <p>(a) wounds any person, or</p> <p>(b) causes grievous bodily harm to any person,</p> <p>with <i>intent</i> to cause grievous bodily harm to that or any other person is guilty of an offence</p> <p>See also s344A – Attempts ‘any person who attempts to commit any offence for which a penalty is provided under this Act shall be liable to that penalty’</p>	Maximum penalty – Imprisonment for 25 years
		<p>Section 35</p> <p>(2) A person who –</p> <p>(a) Causes grievous bodily harm to any person, and</p>	Maximum penalty – Imprisonment for 10 years

Public Health Act 2010 (NSW)		(b) Is reckless as to causing actual bodily harm to that or any other person Is guilty of an offence	
		Section 54 Whosoever by any unlawful or negligent act, or omission, causes grievous bodily harm to any person, shall be liable to imprisonment for two years	Maximum penalty – Imprisonment for 2 years
Public Health Act 2010 (NSW)	Exposure	Section 79 (1) A person who knows that he or she has a notifiable disease, or a scheduled medical condition, that is sexually transmissible is required to take reasonable precautions against spreading the disease or condition. (2) An owner or occupier of a building or place who knowingly permits another person to have sexual intercourse in contravention of subsection (1) at the building or place for the purpose of prostitution is guilty of an offence.	Maximum penalty – 100 penalty units or imprisonment for 6 months, or both Maximum penalty – 100 penalty units or imprisonment for 6 months, or both

Victoria

In Victoria there are several offences that are relevant to HIV transmission or where a person’s behaviour places another person, deliberately or recklessly, at risk of contracting HIV. Charges in Victoria have generally been brought under sections 22 and 23 of the *Crimes Act 1958* (Vic) where there has been transmission of or exposure to HIV.

The definition of ‘serious injury’ includes an ‘injury’ that endangers the life of a person.⁵ ‘Injury’ is further defined as a ‘physical injury’ which includes ‘infection with a disease.’⁶

The *Public Health and Wellbeing Act 2008* (Vic) does not contain provisions that criminalise the exposure to or transmission of HIV. The Act does outline principles of mutual responsibility to be followed to limit the risk of transmitting HIV.

A person living with HIV must take ‘all reasonable steps’ to eliminate or reduce the risk of another person contracting HIV.⁷ The principles also state that a person who is not HIV positive, but is at risk of contracting HIV, must take all reasonable precautions to avoid contracting HIV.⁸

Table 2 | VIC laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
	Transmission	Section 16 – Causing serious injury intentionally	

Crimes Act
1958 (Vic)

	A person who, without lawful excuse, intentionally causes serious injury to another person is guilty of an indictable offence	Maximum penalty – Imprisonment for 20 years
	Section 17 – Causing serious injury recklessly A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence	Maximum penalty – Imprisonment for 15 years
	Section 24 – Negligently causing serious injury A person who by negligently doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence	Maximum Penalty – Imprisonment for 10 years
Transmission and Exposure	Section 22 – Conduct endangering life (3) A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence.	Maximum Penalty – Imprisonment for 10 years
	Section 23 – Conduct endangering persons A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence.	Maximum Penalty – Imprisonment for 5 years

Queensland

As in Victoria and NSW, general criminal laws have been used to prosecute people for HIV exposure and alleged transmission in Queensland.

Under s.317(e) of the *Criminal Code Act 1899* (Qld) it is an offence to intentionally cause grievous bodily harm or transmit a serious disease to any person.⁹ Serious disease is defined as:

‘a disease that would, if left untreated be of such a nature as to –

- (a) Cause or be likely to cause any loss of a distinct part or organ of the body; or*
- (b) Cause or be likely to cause serious disfigurement; or*
- (c) 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.’¹⁰

Under s 317(k) of the *Criminal Code Act 1899* (Qld) it is also an offence to unlawfully cast or throw any such fluid or substance at or upon any person, or otherwise apply any such fluid or substance to the person of any person with intent to do some grievous bodily harm or transmit a serious disease to that person.¹¹ Charges which have been brought under this section demonstrate that this section functions as an exposure offence in that no transmission is required. Allegedly spitting with intent to transmit HIV is sufficient. It is possible that exchange of bodily fluids during sex could similarly be found to be ‘applying any such fluid’ to a sexual partner and fall under this section.

The *Public Health Act 2005* (Qld) criminalises both the transmission of and exposure to HIV.¹² It is worthwhile noting that under sections 143(3) and (4) of the *Public Health Act 2005* (Qld), it is a defence if a person can prove that the other person knew the first mentioned person was HIV positive and voluntarily accepted the risk of contracting HIV.

Table 3 | QLD laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty	
<i>Criminal Code Act 1899 (Qld)</i>	Transmission	<p>Section 317 – Acts intended to cause grievous bodily harm and other malicious acts</p> <p>(1) Any person who, with <i>intent</i> –</p> <p>(b) To do some grievous bodily harm or transmit a serious disease to any person... either -</p> <p>(e) In any way unlawfully wounds, does grievous bodily harm, or transmits a serious disease to, any person... Is guilty of a crime, and is liable to imprisonment for life.</p> <p>Also see s4 – Attempts ‘When a person, intending to commit an offence, begins to put the person’s intention into execution by means adapted to its fulfilment, and manifests the person’s intention by some overt act, but does not fulfil the person’s intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.’</p>	Maximum penalty – Life imprisonment	
		<p>Section 320 – Grievous bodily harm</p> <p>Any person who <i>unlawfully</i> does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years.</p>		Maximum penalty – Imprisonment for 14 years
		<p>Section 328 – Negligent acts causing harm</p> <p>Any person who unlawfully does any act, or omits to do any act which it is the person’s duty to do, by which act or omission bodily harm is actually caused to any person, is guilty of a misdemeanour, and is liable to imprisonment for 2 years.</p>		Maximum penalty – Imprisonment for 2 years.
	Exposure	<p>Section 317 – Acts intended to cause grievous bodily harm and other malicious acts</p> <p>(1) Any person who, with <i>intent</i> –</p>	Maximum penalty – Life imprisonment	

		(b) To do some grievous bodily harm or transmit a serious disease to any person... either – (k) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person;	
		is guilty of a crime, and is liable to imprisonment for life.	
Public Health Act 2005 (Qld)	Exposure	Section 143 Person must not recklessly spread controlled notifiable condition (1) A person must not <i>recklessly</i> put someone else at risk of contracting a controlled notifiable condition	Maximum Penalty – 200 penalty units or imprisonment for 18 months.
	Transmission	Section 143 - Person must not recklessly spread controlled notifiable condition A person must not <i>recklessly</i> transmit a controlled notifiable condition to someone else	Maximum penalty – 400 penalty units or imprisonment for 2 years
Prostitution Act 1999 (Qld)	Sex work while HIV+	Section 90 Prostitute working while infective with a disease A person must not work as a prostitute at a licensed brothel during any period in which the person knows he or she is infective with a sexually transmissible disease.	Maximum penalty – 100 penalty units

Western Australia

In Western Australia general criminal laws have also been used to prosecute people for HIV exposure and alleged transmission. Sections 294 and 304 of the *Criminal Code Compilation Act 1913* (WA) have been used to do so. Section 1(4)(c) of the Act states that:

‘a reference to causing or doing grievous bodily harm to a person includes reference to causing a person to have a serious disease.’¹³

Serious disease is defined as:

‘a disease of such a nature as to –

- (a) Endanger, or be likely to endanger, life; or*
- (b) Cause, or be likely to cause, permanent injury to health;’¹⁴*

Similar to Victoria, the *Public Health Act 2016* does not contain provisions that criminalise the exposure to or transmission of HIV but contains principles of mutual responsibility.¹⁵

Table 4 | WA laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
<i>Criminal Code Act Compilation Act 1913 (WA)</i>	Transmission	<p>Section 294 - Act intended to cause grievous bodily harm or prevent arrest</p> <p>(1) Any person who, with <i>intent</i> to maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, or to resist or prevent the lawful arrest or detention of any person –...</p> <p>(h) does any act that is likely to result in a person having a serious disease;</p> <p>is guilty of a crime, and is liable to imprisonment for 20 years.</p>	Maximum Penalty – Imprisonment for 20 years
		<p>Section 297 - Grievous bodily harm</p> <p>Any person who <i>unlawfully</i> does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 10 years.</p>	
	Transmission and exposure	<p>Section 304 - Act or omission causing bodily harm or danger</p> <p>(1) If a person omits to do any act that it is the person's <i>duty</i> to do, or <i>unlawfully</i> does any act, as a result of which –</p> <p>(a) bodily harm is caused to any person; or</p> <p>(b) the life, health or safety of any person is or is likely to be endangered,</p> <p>the person is guilty of a crime and is liable to imprisonment for 7 years</p> <p>(2) If a person, with an <i>intent</i> to harm, omits to do any act that it is the person's <i>duty</i> to do, or does any act, as a result of which –</p> <p>(a) bodily harm is caused to any person; or</p> <p>(b) the life, health or safety of any person is or is likely to be endangered,</p> <p>the person is guilty of a crime and is liable to imprisonment for 20 years.</p>	Maximum Penalty – Imprisonment for 7 years

South Australia

General criminal laws have been used to prosecute both HIV exposure and alleged transmission. Section 29(1) of the *Criminal Law Consolidation Act 1935 (SA)* has been used. The definition of harm includes ‘physical harm’ which is defined as including ‘infection with a disease.’¹⁶

Similar to Victoria and Western Australia, the *Public Health Act 2011 (SA)* includes principles of mutual responsibility.¹⁷ Unlike these jurisdictions, public health legislation of South Australia may also criminalise the exposure to or transmission of HIV.¹⁸ It is a defence under section 59 of the *Public Health Act 2011 (SA)* if a person can prove that they took ‘all reasonable precautions and exercised all due diligence to prevent the commission of the offence.’¹⁹

Table 5 | SA laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
<i>Criminal Law Consolidation Act 1935 (SA)</i>	Transmission and exposure	<p>Section 29 - Acts endangering life or creating risk of serious harm</p> <p>(1) Where a person, without lawful excuse, does an act or makes an omission –</p> <p>(a) Knowing that the act or omission is likely endanger the life of another; and</p> <p>(b) Intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered,</p> <p>that person is guilty of an offence.</p>	Maximum Penalty – Imprisonment for 15 years for a basic offence
		<p>(2) Where a person, without lawful excuse, does an act or makes an omission –</p> <p>(a) Knowing that the act or omission is likely to cause serious harm to another; and</p> <p>(b) Intending to cause such harm or being recklessly indifferent as to whether such harm is caused,</p> <p>that person is guilty of an offence.</p>	Maximum Penalty – Imprisonment for 10 years for a basic offence
		<p>(3) Where a person, without lawful excuse, does an act or makes an omission –</p> <p>(a) Knowing that the act or omission is likely to cause harm to another; and</p> <p>(b) Intending to cause such harm or being recklessly indifferent as to whether such harm is caused,</p> <p>the person is guilty of an offence.</p>	Maximum Penalty – Imprisonment for 5 years for a basic offence
	Transmission	<p>Section - 23 Causing serious harm</p> <p>(1) A person who causes serious harm to another, intending to cause serious harm, is guilty of an</p>	

		offence....	Maximum Penalty – Imprisonment for 20 years for a basic offence
		A person who causes serious harm to another, and is reckless in doing so, is guilty of an offence.	Maximum Penalty – Imprisonment for 15 years for a basic offence
Public Health Act 2011 (SA)	Transmission and Exposure	Section 57 – Material risk to Public health	
		(1) A person who causes a material risk to public health intentionally or recklessly and with the knowledge that harm to public health will result is guilty of an offence.	Maximum penalty - \$250,000 or 5 years of imprisonment or both
		(2) A person who causes a material risk to public health in circumstances where the person ought reasonably be expected to know that harm to public health will result is guilty of an offence	Maximum penalty - \$120,000 or 2 years of imprisonment or both
		(3) A person who causes a material risk to public health is guilty of an offence. For the purposes of this section, a material risk to public health occurs if the health of 1 or more persons has been, or might reasonably be expected to be, harmed by an act or omission of another, but does not include a case where the harm, or risk of harm, is trivial or negligible.	Maximum penalty - \$25,000. Expiation fee: \$750

Tasmania

We are unaware of anyone in Tasmania who has been charged under the *Criminal Code Act 1924* (Tas) related to HIV exposure or alleged transmission. In theory, a person could be charged under section 172 of the Act.

A person has been prosecuted under section 51 of the *Public Health Act 1997* (Tas) whereby a person who knows that they are HIV positive must take ‘all reasonable measures and precautions’ to prevent the transmission of HIV. Unlike in NSW, under section 51(2) of the *Public Health Act 1997* (Tas) it is a defence if a person can prove that the other person was aware of the risk of HIV transmission and voluntarily accepted the risk.²⁰

Table 6 | TAS laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
<i>Criminal Code Act 1924</i> (Tas)	Transmission	Section 172 – Wounding or causing grievous bodily harm	Maximum Penalty – Imprisonment 21 years

Any person who **unlawfully** wounds or causes grievous bodily harm to any person by any means whatever is guilty of a crime

Public Health Act 1997 (Tas)

Transmission and Exposure

Section 51 – Transmitting Disease

(1) A person who is aware of having a notifiable disease –

- (a) Must take all **reasonable measures and precautions** to prevent the transmission of the disease; and

Must not **knowingly or recklessly** place another person at risk of contracting the disease

Maximum Penalty – Fine of 100 penalty units and/or imprisonment for 12 months

Northern Territory

In theory, a person could be charged under general criminal laws in the Northern Territory. As far as we are aware, only one criminal charge has been brought against a person living with HIV and little is known about the case.

Under the *Criminal Code Act 1983* (NT), conduct that may give rise to a danger of death or serious harm ‘includes exposing a person to the risk of catching a disease that may give rise to a danger of death or serious harm.’²¹ Harm is defined as physical harm which includes ‘infection with a disease.’²²

No provisions under the *Notifiable Disease Act 1981* (NT) criminalise the transmission of or exposure to HIV.

Table 7 | NT laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
<i>Criminal Code Act 1983</i> (NT)	Transmission and Exposure	174B - Danger of death or serious harm (1) For this Division, conduct that may give rise to a danger of death or serious harm includes exposing a person to the risk of catching a disease that may give rise to a danger of death or serious harm.	Maximum Penalty – Imprisonment for 10 years
		174C - Recklessly endanger life A person is guilty of an offence if: (a) The person engages in conduct; and (b) That conduct gives rise to a danger of death to any person; and The person is reckless as to the danger of death to any person that arises from the conduct.	
		174D - Recklessly endangering serious harm A person is guilty of an offence if: (c) The person engages in conduct; and (d) That conduct gives rise to a danger of serious harm to any person; and	

(e) The person is *reckless* as to the danger of serious harm to any person that arises from the conduct.

Transmission	174E - Negligently causing serious harm A person is guilty of an offence if: (a) The person engages in conduct; and (b) That conduct causes serious harm to another person; and (c) The person is <i>negligent</i> as to causing serious harm to the other person by the conduct.	Maximum Penalty – Imprisonment for 10 years
	177 - Acts intended to cause serious harm or prevent apprehension Any person who, with <i>intent</i> to disfigure or disable any person, or to cause serious harm to any person, or to resist or prevent the lawful arrest or detention of any person: (a) Causes any serious harm, or causes any other harm, by any means; or Is guilty of an offence and is liable to imprisonment for life.	Maximum Penalty – Life Imprisonment
	181 - Serious harm Any person who <i>unlawfully</i> causes serious harm to another is guilty of an offence and is liable to imprisonment for 14 years.	Maximum Penalty – Imprisonment for 14 years.

Australian Capital Territory

A sex worker living with HIV has been prosecuted in the Australian Capital Territory under now repealed provisions in the *Sex Work Act 1992* (ACT). Again, in theory a person living with HIV could be charged under general criminal laws.

The definition of grievous bodily harm in the *Crimes Act 1900* (ACT) does not make any reference to ‘diseases’ or ‘serious diseases.’²³

Under the *Public Health Regulation 2000* (ACT) a person living with HIV who knows or suspects that they are living with HIV may commit an offence if they fail to take ‘reasonable precautions (appropriate to that condition)’ against transmission of HIV. Reasonable precautions are stated to include ‘precautions take on the advice of a doctor or an authorised officer.’²⁴

Table 8 | ACT laws that criminalise HIV transmission, exposure and non-disclosure

Legislation	Offence Type	Provision	Penalty
<i>Crimes Act 1900 (ACT)</i>	Transmission	Section 19 - Intentionally inflicting grievous bodily harm (1) A person who <i>intentionally</i> inflict grievous bodily harm on another person is guilty of an offence punishable, on conviction, by imprisonment for 20 years	Maximum Penalty – Imprisonment for 20 years
		Section 20 - Recklessly inflicting grievous bodily harm A person who <i>recklessly</i> inflicts grievous bodily harm on another person is guilty of an offence punishable, on conviction, by imprisonment for 13 years.	Maximum Penalty – Imprisonment for 13 years
		Section 25 - Causing grievous bodily harm A person who, by an <i>unlawful</i> or <i>negligent</i> act or omission, causes grievous bodily harm to another person is guilty of an offence punishable, on conviction by imprisonment for 5 years.	Maximum Penalty – Imprisonment for 5 years
<i>Public Health Regulation 2000 (ACT)</i>	Exposure	Section 21 – People with transmissible notifiable conditions A person who knows or suspects that the person has a transmissible notifiable condition, or knows or suspects that the person is a contact of such a person, must take reasonable precautions (appropriate to that condition) against transmitting the condition.	Maximum Penalty – 10 penalty units

Key Issues

Jurisdictional inconsistencies

In every jurisdiction in Australia, people living with HIV know that transmitting HIV and potentially ‘exposing’ someone to the risk of HIV transmission is an offence. While prosecution related to HIV transmission/exposure in Australia is rare, they do occur. Approximately 40 prosecutions related to HIV transmission/exposure have occurred in Australia.

Criminal laws, and public health laws, vary widely across each Australian state and territory creating a difficult landscape for people living with HIV, their legal representatives and HIV support organisations to navigate. For example, in NSW under the *Public Health Act 2010 (NSW)* it is an offence for a person living with HIV to fail to take reasonable precautions from ‘spreading’ HIV.²⁵ A similar provision applies under the *Public Health Act 1997 (Tas)* that requires people living with HIV to take ‘all reasonable measures and precautions’ to prevent transmission of HIV.²⁶ It is unclear if ‘reasonable precautions’ and ‘all reasonable measures and precautions’ could be interpreted

differently by the courts. For example, in NSW a person living with HIV may only need to prove that they used a condom OR had an undetectable viral load whereas, in Tasmania, a person may need to show both. Due to the limited cases that have been brought before the court, it is unclear how these sections could be interpreted differently.

Another key point of difference is the inclusion of a defence under the Tasmanian Act which states: 'it is a defence in any proceedings for an offence under subsection (1) for a person to prove that the person know of, and voluntarily accepted, the risk of getting the disease.'²⁷ Therefore a person living with HIV who engages in sexual activity with a person who voluntarily accepts the risk of transmission could still be successfully prosecuted in NSW but not Tasmania.²⁸

Public health laws across the jurisdictions are also framed differently with regards to whose responsibility it is to take 'reasonable precautions' to stop the transmission of notifiable conditions such as HIV. Public health laws in certain jurisdictions are framed in a way that puts a duty or responsibility only on the person living with HIV, such as in NSW.²⁹ In some jurisdictions, such as Victoria and Western Australia, both a person living with HIV and their sexual partner have such a responsibility and there are no exposure or transmission offences under public health laws.³⁰ Queensland public health legislation contains both principles of mutual responsibility and provisions that criminalise the exposure or transmission of HIV.³¹

The variation in laws between jurisdictions create a complicated landscape that impacts people's awareness of their legal obligations, not only locally but Australia wide. This significantly undermines what is arguably one of the intentions of the law – to modify behaviour to protect public health. It is also unrealistic to expect medical practitioners to understand the jurisdictional differences that may impact the responsibilities of their patients as they travel across Australia.

Table 9 | Jurisdictional inconsistencies and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas
<ul style="list-style-type: none">○ Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission○ Facilitate a highly skilled multidisciplinary workforce that is respectful of and responsive to the needs of people with HIV and other priority populations○ Increase knowledge of, and access to, treatment as prevention for individuals with HIV○ Increase knowledge of treatment as prevention for those individuals at risk of HIV

People living with HIV and the Criminalisation of HIV

Fears and anxieties surrounding the criminalisation of HIV transmission not only negatively impact HIV prevention efforts but also create a disincentive for people living with HIV to access healthcare. Legislation concerning HIV transmission has also contributed to the stigma and discrimination towards people living with HIV. NAPWHA has used data from *HIV Futures*, a national periodic survey of health and wellbeing of people living with HIV, to conclude that laws criminalising the transmission of HIV have a negative impact on the health and wellbeing of people living in Australia.

HIV Futures found that out of the 895 people who completed their survey, 24.9% of participants indicated that they were worried about disclosing their HIV status to service providers based on the risk of criminal prosecution.³²

Criminalisation of the transmission of HIV has heavily contributed to the anxieties of people living with HIV. If an individual does not disclose their HIV status to their healthcare provider, it can lead to less effective healthcare and treatment.

Legislation that subjects an HIV-positive individual to potential criminal prosecution can also diminish the incentive of the general public to test for HIV and other BBVs. This will not only be detrimental to the personal health and wellbeing of an unaware HIV-positive individual, but by increasing the risk of transmission, be detrimental to public health. According to AFAO, it is estimated that at the end of 2019, about 10% of the total 29,045 people living with HIV in Australia were unaware of their HIV-positive status.³³

HIV specific criminal legislation in Australia has now been repealed. Instead, laws are now framed around the broader concepts of ‘serious disease’, ‘notifiable condition’, or preventing degrees of harm. However, in moving away from HIV specific language, the law has introduced the potential for future prosecutions for transmission or exposure to infections other than HIV. This could have significant negative consequences for the management of STIs, BBVs and public health in general. However, such prosecutions have, so far, been uncommon. Nevertheless, this raises a difficult question; ‘Why, given the treatable and manageable nature of HIV in the modern era, are the policy, policing and prosecution considerations that keep prosecutions for equally treatable and manageable conditions out of court not being applied to cases involving HIV?’. Attempts to rectify this situation have, to date, been unsuccessful.

The UNAIDS ‘Criminal Law, Public Health and HIV Transmission: A Policy Options Paper’ clearly states that prevention of HIV must be the primary objective of any policies of criminalisation. There has been much commentary on Australia’s approach to criminalising HIV and the dangers that such an approach may have on public health goals.³⁴

Every jurisdiction in Australia has developed legislation, internal policies or a combination of both that establish a mechanism to manage people living with HIV who are at risk of transmitting HIV to others. Although very few people living with HIV are subject to these public health mechanisms, some people in Australia are still subject to the following directions:

- To undergo testing and treatment;
- To undergo specified counselling;
- To be confined to a particular place – for example to a particular jurisdiction; or
- To undertake, or refrain from undertaking particular actions.

Education and counselling continue to be the most effective way to increase testing rates and adherence to treatment while also reducing the risk of HIV transmission. This approach is essential considering the application of criminal law has had a disproportionate impact on migrants, people with mental health conditions and people experiencing other social disadvantages. The application of criminal law in these cases does little to modify the behaviours of the individuals through incarceration and only exposes people to further social disadvantages as a ‘criminal.’

Table 10 | Criminalisation of HIV and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas
<ul style="list-style-type: none">○ Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission

- Increase knowledge of, and access to, treatment as prevention for individuals with HIV
- Increase knowledge of treatment as prevention for those individuals at risk of HIV
- Improve the frequency, regularity and targeting of testing for priority populations and decrease rates of late diagnosis
- Improve early uptake of sustained treatment to improve quality of life for people with HIV and prevent transmission
- Continue to work towards addressing the legal, regulatory and policy barriers which affect priority populations and influence their health-seeking behaviours
- Strengthen and enhance partnerships and connections to priority populations, including the meaningful engagement and participation of people with HIV
- Implement a range of initiatives to address stigma and discrimination and minimise the impact on people’s health-seeking behaviour and health outcomes

Media Coverage

Although Australia does not have HIV-specific criminal legislation, individual prosecutions against people living with HIV, particularly for exposure offences, is often accompanied by sensationalised media coverage. This often frames people living with HIV as ‘potential criminals’ and as a threat to the general public. Media coverage, as the main way that Judges, juries, police and legal professionals learn about HIV, influences future cases; resulting in more prosecutions, more convictions, longer sentences and fewer suppression orders.

A recent example of such coverage occurred when a Sydney man was charged under section 79 of the *Public Health Act 2010* (NSW). One media article was titled “Have you had sex with this man?” stating that police are suggesting that anyone who had unprotected sex with the man should seek testing for HIV. The media article included the Sydney man’s full name and picture. After a period on remand, the man was found not guilty, but there is little to no recourse for action against media reporting on such matters as the media will have a defence to contempt where they can show there is public interest in the open discussion of the matter. This case was particularly unfortunate as under the *Public Health Act 2010* (NSW) proceedings in court related to section 79 offences are required to be heard in closed courts. For another example of the damage that the media can cause when covering HIV related offences, see ‘The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality.’³⁵

Efforts to educate communities about HIV have been particularly successful for specific demographics such as Australian-born, gay men. Concerningly, successful prosecutions have disproportionately been against migrants, people with poor mental health or other forms of social disadvantage that are living with HIV. Efforts to educate these populations on HIV have been less successful and media coverage about HIV criminalisation not only spreads misinformation about HIV transmission but may also deter these populations to engage in testing or treatment.

Table 11 | Media coverage and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas

- Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission
- Increase knowledge of, and access to, treatment as prevention for individuals with HIV
- Increase knowledge of treatment as prevention for those individuals at risk of HIV

- Improve the frequency, regularity and targeting of testing for priority populations and decrease rates of late diagnosis
- Improve early uptake of sustained treatment to improve quality of life for people with HIV and prevent transmission
- Continue to work towards addressing the legal, regulatory and policy barriers which affect priority populations and influence their health-seeking behaviours
- Strengthen and enhance partnerships and connections to priority populations, including the meaningful engagement and participation of people with HIV
- Implement a range of initiatives to address stigma and discrimination and minimise the impact on people’s health-seeking behaviour and health outcomes

Medical advancements and the law

Issues can arise when medical advancements in HIV prevention and transmission develop since reforms to laws can be slow and definitive decisions on interpretation often do not occur until a matter is dealt with in court. Due to the broad application of criminal laws, it is difficult for all stakeholders to understand what impact new scientific evidence may have on prosecutions. It is still unclear what impact the recent advancement in HIV prevention known as ‘Undetectable = Untransmissible’ will have on HIV exposure or transmission prosecutions.

Some Public Health legislation, such as in NSW, have included specific reference to undetectable viral loads and does leave open, to a certain degree, the consideration of future advancements in HIV prevention. In theory it is unlikely that a person living with HIV would be charged with exposure offences where they have an undetectable viral load with medical evidence showing zero risk of transmission. Unfortunately, this is not guaranteed until such a matter is brought before the courts.

Table 12 | Medical advancements and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas
<ul style="list-style-type: none"> ○ Facilitate a highly skilled multidisciplinary workforce that is respectful of and responsive to the needs of people with HIV and other priority populations ○ Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission

Areas for Reform

Public health legislation

The framework for managing people living with HIV who risk infecting others has become increasingly consistent across all jurisdictions in Australia. One area that remains inconsistent are the provisions that criminalise exposure to or transmission of HIV. While law makers and governments may justify such provisions on the ground of protecting public health broadly, it is clear in some jurisdictions such offences are HIV-specific offences. In New South Wales, the use of section 79 charges, both prior to and after the 2017 disclosure reforms, have only even been brought against people living with HIV.

We recommend that public health laws should not contain criminalisation provisions for the exposure to or transmission of HIV. In the extreme circumstances where transmission has occurred due to the intention of the

accused, such matters can be dealt with under criminal law provisions where it is deemed to be in the public interest to do so.

Criminal law

Decriminalising the reckless transmission of and exposure to HIV under the criminal law is complicated. To date, charges of 'grievous bodily harm', 'serious harm' or 'endangering life' have been used to prosecute the reckless transmission of and exposure to HIV.

While the removal of the reference to 'serious diseases' where found in criminal legislation may lead the court to consider whether or not HIV transmission should be defined in such away, this would not stop courts defining it as such, based on the evidence put to them. In addition, the broad application of provisions currently used to prosecute HIV transmission and exposure matters means that lesser charges could still be brought against people living with HIV if a court decides that HIV transmission is not defined as 'serious harm' or 'grievous bodily harm'. For example, in NSW, a charge of 'actual bodily harm' as opposed to 'grievous bodily harm' could still be brought.

This is further complicated by evidence that where HIV specific laws have been removed, the coercive apparatus of the state adapts to use laws of more general application to maintain prosecutions of people with HIV. This hints at an institutional stigma that is so far resistant to change.

For this reason, we recommend that prosecutorial guidelines be introduced which state that:

- 1) prosecutions for exposure, non-disclosure or misrepresentation, in the absence of transmission should never occur
- 2) prosecutions for reckless and/or negligent transmission should not occur, rather such instances should be appropriately referred for public health management
- 3) prosecutions should only occur as a last resort where there is actual transmission and intent to the relevant criminal law standard can be proven and where public health management has failed.

This approach is in keeping with international best practice.

Consent Laws

In Australia there have been very few matters before the courts of people living with HIV being charged with sexual offences for failing to disclose or making a misrepresentation about their HIV status to a sexual partner.

Fraudulent sex criminalisation, similar to HIV transmission/exposure criminalisation, varies widely across jurisdictions in Australia as criminal laws are generally the responsibility of individual states and territories. To date, we are unaware exactly how courts may interpret specific provisions that relate to misrepresentations of a persons HIV status to sexual partners. Concerningly, NSW has made specific reference to 'an infection or diseases' during the second reading speech when introducing amendments to sexual offences contained in the *Crimes Act 1900* (NSW) which will be discussed below. Provisions that relate to fraudulent sex criminalisation can be broadly broken down into two categories:

1. **Sexual assaults by deception** – Sexual assaults by deception refer to sexual assaults where consent has been obtained due to a fraudulent act or omission of the accused. Although only some jurisdictions reference that fraud generally may negate consent it is important to note that the definition is not expressly limited in any way by legislation. There has been much legal analysis as to whether or not the

definition should only be limited to fraud as to the ‘identity or nature of the act’ yet concerns remain about issues of vagueness and overbreadth.

2. **Procurement offence** – a procurement offence is a lesser sexual offence to sexual assault and may be relied upon where prosecutors are unable to bring a sexual assault charge, or fraud is not a consideration in a jurisdiction’s definition of consent.

Below is an outline of the different offences that may apply to people living with HIV who make a misrepresentation about their HIV status to sexual partners. As we have noted, very few matters of these types have been brought before the courts in Australia, however, due to the broad nature of some of these offences, there is some likelihood (in some jurisdictions more than others) that charges may be brought.

Relevant Laws

New South Wales

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) has brought changes to the *Crimes Act 1900* (NSW) which introduced provisions that may impact people living with HIV. Section 61HJ of the Act outlines circumstances where a person will not have consented to sexual activity.

Under the Act, sexual activity is defined as ‘sexual intercourse, sexual touching or a sexual act.’³⁶ Sexual intercourse is defined under section 61HA(1) as:

- (a) *the penetration to any extent of the genitalia or anus of a person by –*
 - i. *any part of the body of another person, or*
 - ii. *any object manipulated by another person, or*
- (b) *the introduction of any part of the genitalia of a person into the mouth of another person, or*
- (c) *the application of the mouth or tongue to the female genitalia, or...*³⁷

Table 13 | NSW consent laws

Legislation	Offence Type	Provision	Penalty
<i>Crimes Act 1900 (NSW)</i>	Consent and Fraud	<p>Section 61HJ Circumstances in which there is no consent</p> <p>(1) A person does not consent to a sexual activity if - ...</p> <p>(k) The person participates in the sexual activity because of a fraudulent inducement.</p> <p>(2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.</p> <p>(3) In this section – fraudulent inducement does not include a misrepresentation about a person’s income, wealth or feelings.</p> <p>Section 61I Sexual assault</p>	Maximum Penalty - Imprisonment for 14 years

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years

Victoria

In Victoria, charges have been brought under section 45 of the *Crimes Act 1958* (Vic) against people living with HIV who have made a misrepresentation about their HIV status. This offence has a lower penalty and can be seen as an ‘alternative’ to the offence of sexual assault.

Section 45 refers to a ‘taking part in a sexual act’ which is defined under section 35C of the Act.

Section 35C Taking part in a sexual act

A person takes part in a sexual act if –

(a) The person is sexually penetrated or sexually touched –

- i. By another person; or*
- ii. By an animal; or*

(b) The person sexually penetrates or sexually touches –

- i. Another person; or*
- ii. Themselves; or*
- iii. An animal.*

Table 14 | VIC consent laws

Legislation	Offence Type	Provision	Penalty
<i>Crimes Act 1958 (Vic)</i>	Procurement	<p>Section 45 – Procuring sexual act by fraud</p> <p>(1) A person (A) commits an offence if –</p> <ul style="list-style-type: none"> (a) A makes a false or misleading representation; and (b) A knows that – <ul style="list-style-type: none"> i. The representation is false or misleading; or ii. The representation is probably false or misleading; and (c) As a result of A’s representation, another person (B) takes part (whether at the time the representation is made or at a later time) in a sexual act with A or another person; and 	Maximum Penalty – Imprisonment for 5 years

- (d) A intends that, as a result of A's representation, an outcome mentioned in paragraph will occur.

For the purposes of subsection (1), a false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit.

Queensland

Under the *Criminal Code Act 1899* (Qld) consent is defined as 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent.'³⁸

Section 218 of the Act criminalises the act of procuring a person to engage in a sexual act by a false pretence. Procure is defined as 'knowingly entice or recruit for the purposes of sexual exploitation.'³⁹

Table 15 | QLD consent laws

Legislation	Offence Type	Provision	Penalty
<i>Criminal Code Act 1899 (Qld)</i>	Procurement	<p>Section 218 – Procuring sexual acts by coercion etc.</p> <p>(1) A person who – ...</p> <p>(b) By a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; or....</p> <p>commits a crime</p> <p>(2) For subsection (1), a person engages in a sexual act if the person –</p> <p>(a) Allows a sexual act to be done to the person's body; or</p> <p>(b) Does a sexual act to the person's own body or the body of another person; or</p> <p>(c) Otherwise engages in an act of an indecent nature with another person.</p> <p>Subsection (2) is not limited to sexual intercourse or acts involving physical contact.</p>	Maximum Penalty – Imprisonment for 14 years

Western Australia

Western Australia references fraud in the definition of fraud under the *Criminal Code Act Compilation Act 1902* (WA). Section 319 of the Act states:

'consent means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means...'

As previously noted, although the term ‘any fraudulent means’ is used there is much legal decision to be made about how broad such a definition does, and should, go for the purposes of finding sexual activities with ‘consent’ obtained by fraudulent means as sexual assaults.

The *Criminal Code Act Compilation Act 1902* (NSW) also contains a procurement offence under section 192.

Table 16 | WA consent laws

Legislation	Offence Type	Provision	Penalty
<i>Criminal Code Act Compilation Act 1902</i> (WA)	Consent and Fraud	325 Sexual Penetration without consent A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.	Maximum Penalty – Imprisonment for 14 years
	Procurement	192 procuring person to have unlawful carnal knowledge by threat, fraud or administering drug (1) Any person who - ... (d) ... (e) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere... (d) Does any of the foregoing acts with respect to a man or boy; is guilty of a crime, and is liable to imprisonment for 2 years	Maximum Penalty – Imprisonment for 2 years

South Australia

Section 46 of the *Criminal Law Consolidation Act 1935* (SA) states:

(2) *For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.*

Section 46(3) states that a person is taken not to freely and voluntarily agree to sexual activity in circumstances where the person is mistaken about the nature of the activity or the identity of the person.

Section 60 of the Act also contains a procurement provision. For the purposes of this section, sexual intercourse is defined as:

‘sexual intercourse includes any activity (whether of a heterosexual or homosexual nature) consisting of or involving –

(a) *Penetration of a person’s vagina, labia majora or anus by any part of the body of another person or by any object; or*

- (b) *Fellatio*; or
- (c) *Cunnilingus*,

and includes a continuation of such activity;⁴⁰

Table 17 | SA consent laws

Legislation	Offence Type	Provision	Penalty
<i>Criminal Law Compilation Act 1935 (SA)</i>	Procurement	Section 60 – Procuring sexual intercourse Any person who – (a) by threats or intimidation, procures any person to have sexual intercourse; (b) by false pretences, false representations or other fraudulent means, procures any person to have sexual intercourse, is guilty of an offence	Maximum Penalty – Imprisonment for 7 years

Tasmania

Under the *Criminal Code Act 1924 (Tas)* consent is defined as follows:

- (1) *In the code, unless the contrary intention appears “consent” means free agreement*
- (2) *Without limiting the meaning of “free agreement”, and without limiting what may constitute “free agreement” or “not free agreement”, a person does not freely agree to an act if the person –...*
 - (f) Agrees or submits because of the fraud of the accused;

Section 2B of the Act states:

‘sexual intercourse means –

- (a) *The penetration, to the least degree, of a person’s vagina, genitalia, anus or mouth by a penis; or*
- (b) *The penetration, to the least degree, of a person’s vagina, genitalia or anus by a body part of a person other than a penis; or*
- (c) *The penetration, to the least degree, of a person’s vagina, genitalia or anus by an object held or manipulated by, or attached to, another person; or*
- (d) *The continuation of an act of penetration referred to in paragraph (a), (b) or (c) of this definition. ‘*

A procurement offence is also contained under section 129.

Table 18 | TAS consent laws

Legislation	Offence Type	Provision	Penalty
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<i>Criminal Code Act 1924 (Tas)</i>	Consent and fraud	Section 185 – Rape Any person who has sexual intercourse with another person without that person’s consent is guilty of a crime	Maximum Penalty – Imprisonment for 21 years
	Procurement	Section 129 – Procuring a person for penetrative sexual abuse by threats or fraud Any person who – (a) By threats or intimidation of any kind procures another person to have unlawful sexual intercourse, either in this State or elsewhere; or (b) By any false pretence or false representation procures another person to have unlawful sexual intercourse, either in this State or elsewhere – is guilty of a crime	Maximum Penalty – Imprisonment for 21 years

Northern Territory

In the Northern Territory the relevant definition of consent is found under section 192 of the *Criminal code Act 1983* (NT).

‘192 Sexual intercourse and gross indecency without consent

- (1) *For this section, consent means free and voluntary agreement.*
- (2) *Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where:...*
 - (g) *The person submits because of a false representation as to the nature or purpose of the act.*

As previously noted, this definition only makes reference to a false representation about ‘the nature or purpose of the act’ which under current interpretation of the legislation would unlikely include a misrepresentation about a person’s HIV status. No procurement provisions under the Act are relevant for the purposes of this report.

Australian Capital Territory

In the Australian Capital Territory consent is defined under section 50B of the *Crimes Act 1900* (ACT). The section states:

‘consent, to a sexual act, means informed agreement to the sexual act that is –

- (a) *Freely and voluntarily given; and*
- (b) *Communicated by saying or doing something.’*

Section 67 outlines circumstances where a person does not consent to an act and includes if a person ‘participates in the act because of fraudulent misrepresentation of any fact made by someone else.’⁴¹

Table 19 | ACT consent laws

Legislation	Offence Type	Provision	Penalty
<i>Crimes Act 1900 (ACT)</i>	Consent and Fraud	Section 54 – Sexual intercourse without consent A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.	Maximum Penalty – Imprisonment for 12 years.

Key Issues

Recent Reforms

Although in Victoria persons living with HIV have been charged under procurement offences, we are unaware of any prosecutions under similar provisions in other jurisdictions. In New South Wales, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* has recently come into effect and while many of the provisions are an important step in updating NSW consent laws, certain provisions may impact people living with HIV. In the second reading speech of the Act, the Attorney General made specific reference to ‘an infection or diseases’ stating:

‘If an accused person expressly and fraudulently warranted that they did not have an infection or diseases, but knew this to be untrue, and the complainant made clear their consent is contingent on the representations, this may constitute a fraudulent inducement depending on the context and state of mind of the accused.’

This raises concerns not only about how NSW courts will interpret this provision but what broader implications this may have in other jurisdictions and what types of misrepresentation could negate consent. On its face, it partially re-criminalises non-disclosure (at least when asked) of HIV status and this undermines significant public health efforts which, until this Act was passed, had removed this requirement from NSW law.

Table 20 | Recent reforms and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas
<ul style="list-style-type: none"> ○ Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission ○ Implement a range of initiatives to address stigma and discrimination and minimise the impact on people’s health-seeking behaviour and health outcomes ○ Continue to work towards addressing the legal, regulatory and policy barriers which affect priority populations and influence their health-seeking behaviours

- Strengthen and enhance partnerships and connections to priority populations, including the meaningful engagement and participation of people with HIV

While the newness of the NSW legislation makes it difficult to evaluate, Figure 1 outlines how laws like those in NSW can increase the likelihood of HIV transmission within the community.

Figure 1 | Canada case study⁴²

Current Canadian legislation states that nondisclosure or misrepresentation of an individual's HIV status constitutes a fraud that vitiates consent to sexual intercourse which can result in sexual assault charges. While the Canadian government has acknowledged the negative impacts that these jurisdictions can have on public wellbeing, people living with HIV remain subject to prosecution in Canada's provinces. By increasing criminalisation of HIV transmission and other HIV-related criminal cases, individuals in Canada are discouraged to test due to the fear of any prosecution. In Canada, out of the 70,000 individuals who are HIV-positive, about 25% of these individuals are unaware of their HIV-status.

While the newness of the NSW legislation makes it difficult to evaluate, Figure 1 outlines how laws like those in NSW can increase the likelihood of HIV transmission within the community.

Figure 1 have likely contributed to a large portion of people living with HIV in Canada who do not their HIV status because criminalisation of HIV-related matters creates a fear of undergoing regular HIV testing. This situation could severely increase the risk of transmission within the community and have a broad negative impact.

Australian public health laws and criminal laws already subject a person living with HIV who fails to take reasonable precautions in preventing the transmission of HIV to be prosecuted. Australia is in danger of expanding its legislation to resemble the Canadians public health laws.

If Australia were to adopt similar legislation as Canada's jurisdictions, fear and anxiety surrounding HIV would increase the disincentive to test for HIV. This, again, would increase the risk of transmission and could potentially discourage HIV-positive individuals from disclosing their HIV-status to healthcare providers.

The HALC and NAPWHA made submissions to the NSW Law Reform Commissions report on 'Consent in relation to sexual offences' warning that the legislation could lead to the same cases experience in Canada. After providing a brief overview of the concern the report simply stated:

'While we acknowledge these criticisms, the law must offer protection to complainants who are fraudulently induced to participate in sexual activity'⁴³

Overall, Canadian public health laws relating to HIV and consent can have a detrimental effect to the health of its community. If Australia were to adopt or expand similar legislation, it will have similar effects: disincentive to test for HIV, increase risk of transmission and inadequate healthcare and treatment.

Table 21 | Consent laws and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas
<ul style="list-style-type: none">○ Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission○ Ensure priority populations have access to the means of prevention○ Increase knowledge of, and access to, treatment as prevention for individuals with HIV○ Increase knowledge of treatment as prevention for those individuals at risk of HIV○ Improve the frequency, regularity and targeting of testing for priority populations and decrease rates of late diagnosis○ Improve early uptake of sustained treatment to improve quality of life for people with HIV and prevent transmission○ Implement a range of initiatives to address stigma and discrimination and minimise the impact on people's health-seeking behaviour and health outcomes○ Continue to work towards addressing the legal, regulatory and policy barriers which affect priority populations and influence their health-seeking behaviours○ Strengthen and enhance partnerships and connections to priority populations, including the meaningful engagement and participation of people with HIV○ Continue to build a strong evidence base for responding to HIV in Australia that is informed by high-quality, timely data and surveillance systems

Mandatory Disease Testing

In Australia, in most cases, informed consent is required for HIV testing. Although fewer than 0.1% of the Australian population is living with HIV and it is not easily transmitted, six jurisdictions allow for mandatory testing of a person whose bodily fluids come in contact with police and/or emergency service personnel. This power is subject to criteria that varies between jurisdictions. NAPWHA has conducted a national audit of Australian mandatory disease testing laws on five of these states to better understand the use of these laws to test for HIV. Data and information from NAPWHA's research have been highlighted here to better understand mandatory testing laws in addition to information on the recently introduced *Mandatory Disease Testing Act 2021* (NSW) in New South Wales.

Relevant Laws

New South Wales

In NSW, the *Mandatory Disease Testing Act 2021* (NSW) states that a law enforcement officer, a person working in emergency services, or an NSW Health worker can apply for a Mandatory Testing Order (MTO) against a third party for HIV, Hepatitis B, and Hepatitis C if they come into contact with the accused's bodily fluids.⁴⁴ The third party must be at least 14 years old, and the contact must occur while the worker is on duty.⁴⁵ The contact also must be due to deliberate action and without the worker's consent.⁴⁶

A worker must speak to a doctor about the contact within 24 hours before applying for an MTO.⁴⁷ The worker can consult a doctor no later than 72 hours if reasonable circumstances apply. An application then must be made within 5 business days of the contact and should include written advice from the doctor. A senior officer must consider the guidelines issued by the Chief Health Officer under the Act and any other matters that they consider relevant in determining an application.⁴⁸ If the third party is between the ages of 14 and 18 or has a mental health condition or cognitive impairment that affects their ability to consent to providing blood, they are considered a 'vulnerable third party' (VTP).⁴⁹ If the application relates to a VTP, the senior officer cannot make an MTO. The senior officer must apply to the Local Court or Children's Court (depending on the age of the VTP) for an MTO.⁵⁰ They can also refuse the application.

If a third-party refuses to comply with an MTO they can be charged with up to 100 penalty points or imprisonment for 12 months, or both.⁵¹

Due to the recency of the *Mandatory Disease Testing Act 2021* (NSW), NAPWHA was unable to include information on the Act within their audit. A review of the implementation of the Act should be conducted by the NSW Ombudsman this year.

Victoria

In Victoria, under the *Public Health and Wellbeing Act 2008* (Vic) and the associated *Public Health and Wellbeing Regulation 2009* (Vic) the Chief Health Officer must develop and implement strategies to promote and protect public health. They also have the power to make an order if they believe that an incident has occurred where a 'specified infectious disease' could have been transmitted to a caregiver or custodian during their duties.⁵² An order must be in writing and be served before it takes effect.⁵³

A person who is subject to an order can apply to the Victorian Civil and Administrative Tribunal (VCAT) to review the decision. The Chief Health Officer may apply to Magistrates Court for an order that allows a police officer to use

reasonable force to take the person for testing and may restrain the person to enable a medical practitioner to take a blood sample.⁵⁴

The *Public Health and Wellbeing Act 2008* (Vic) requires the Chief Health Officer to publish a biennial report available to the public on wellbeing and public health in Victoria.⁵⁵ The Victorian Department of Health and Human Services annual reports show that, between July 2014 and June 2018, there had been no order for mandatory testing for incidents involving emergency services and healthcare workers under section 134.

Queensland

Queensland does not have laws relating to the risk of HIV transmission against emergency service workers during their duties. However, Chapter 18 of the *Police Powers and Responsibilities Act 2000* (Qld) requires arrested individuals who a police officer suspects have committed a sexual offence or other sexual assault to undergo compulsory testing.⁵⁶ Police must apply for a written order to a magistrate or, if the person is a child, to the Children's Court.⁵⁷ The accused individual must be given a copy of the order and has the right to be represented by a lawyer.⁵⁸

A disease test order allows a police officer to ask a doctor or prescribed nurse to obtain a blood sample from the accused individual.⁵⁹ It is lawful for the healthcare practitioner and a helping person to use reasonably necessary force for taking the sample.⁶⁰ However, there is no specific requirement for the healthcare practitioner to obtain a blood sample.

There are no penalties for non-compliance although a person may be held in custody for the necessary time to enable a sample to be taken.

NAPWHA requested data from Queensland Police's Freedom of Information unit to establish whether and how many times Chapter 18 of the *Police Powers and Responsibilities Act 2000* (Qld) has been used. No formal response was provided. Additional approaches were made to the Queensland Government Statistician's Office and Statistical Services Queensland Police Service; however, they were not able to provide any results.

Western Australia

The *Mandatory Testing (Infectious Diseases) Act 2014* (WA) states a police officer or other public officer may apply to a senior police officer for a disease test approval against a person unless they are a protected person.⁶¹ There must be reasonable grounds for suspecting a transfer of semen, blood, or saliva from a suspected transferor to a public officer due to an assault against the officer, their apprehension, or any other prescribed circumstances.⁶² The person may be detained while determining the application.⁶³ Following approval, police may transfer the accused to a facility and take a blood sample where a doctor, nurse or qualified person will obtain the blood sample.

If the person is a protected person an application must be made to the Children's Court or Magistrates Court.⁶⁴ A 'responsible person' (parent or guardian) must be identified and informed of their right to obtain legal advice and the right of appeal to the District Court.⁶⁵

A person who fails to comply with a disease test approval or disease test order can be fined \$12,000 and sentenced to 12 months imprisonment.⁶⁶ In the case of a disease test order, the 'responsible person' is liable.⁶⁷

The guidelines recommend that the attending doctor determine the likelihood of exposure and whether testing is necessary. However, police may override the attending doctor's recommendation.

NAPWHA lodged a Freedom of Information request to WA Police in December 2018 and a response was received on 30 July 2019. Data shows that of the 387 applications for mandatory disease testing from 1 January 2015 to mid-December 2018, approval had been granted 377 times. This suggests that the legislation has been used approximately 100 times a year to trigger mandatory testing for HIV. This is despite WA currently reporting just tens of new HIV diagnoses each year.

Table 22 | Applications under WA Mandatory Testing (Infectious Diseases) Act 2014 (2015-2018 mid-December)

	Applications	Approved	Not Approved
2018 to mid Dec.	75	73	2
2017	108	108	0
2016	122	121	1
2015	82	75	7
Total	387	377	10

NAPWHA clarified that the WA Police Force is unable to provide the number of BBVs diagnoses.

South Australia

Section 20B of the *Criminal Law (Forensic Procedures) Act 2007 (SA)* allows a senior police officer to issue a blood testing order if an accused individual committed a ‘serious offence’, and it is likely that a police officer, emergency services worker or healthcare provider has been exposed to the accused’s biological material.⁶⁸

If the accused fails to comply with directions, police may apply for a warrant for the person’s arrest so they can obtain a blood test. Reasonable force may be used to obtain the blood sample, and a person who intentionally obstructs or resists the carrying out of a forensic procedure is liable to a maximum penalty of 2 years’ imprisonment.⁶⁹

The *Criminal law (Forensic Procedures) Act 2007 (SA)* requires an annual audit to monitor compliance of South Australian Police’s (SAPOL) with the Act. Compliance requirements detailed in section 57(1) of the *Criminal law (Forensic Procedures) Act 2007 (SA)* has made data available to the public. NAPWHA found that mandatory testing laws appear to have been applied with seven tests taken during a 15-month period between 8 February 2017 and 10 May 2018.

Northern Territory

In the Northern Territory the decision to conduct mandatory testing is made by a senior police officer unless that person is a child or person lacking capacity to consent (a protected person).⁷⁰ If the person is a protected person, police are required to apply to a magistrate for an order.⁷¹ Decisions made before a court require a higher burden of proof, however, whether expert medical evidence is needed is case dependent.

The Northern Territory allows reasonable force to be used when implementing an order.⁷² Division 7AA of the *Police Administration Act 1978 (NT)* outlines different systems to enable forced HIV testing depending on if the person is a protected person. Failure to comply with a disease test order is a criminal offence and a person can be fined 100 penalty units.⁷³

Most people who are subject to mandatory HIV testing orders are not provided the means to present a defence. However, defence is available if the accused has ‘a reasonable excuse.’ The healthcare practitioner then must take a blood sample unless there is a serious risk of harm to an individual involved.

NAPWHA made a Freedom of Information request to secure documents relating to the implementation of the *Police Administration Act 1978 (NT)* and the *NT Police Policy and Standard Operating Procedures*. This request was refused under Section 27 of the *Information Act 2002 (NT)* on the ground that the policy agency “reasonably believes that the requested information does not exist.”

Key Issues

Misinformation and stigma

Current legislation on mandatory disease testing is inconsistent with many State and Territory HIV Testing Policies as well as the Department of Health’s National HIV/AIDS Strategy. The Commonwealth’s Department of Health states that people living with HIV have the same human rights to comprehensive and appropriate information and health care as other members of the community. This involves testing based on the principles of voluntary testing, informed consent, and confidentiality.⁷⁴ HALC strongly recommends that all jurisdictions relating to mandatory testing are repealed based on the inconsistencies with these policies and recommendations.

Mandatory testing facilitates the spread of misinformation of HIV and other BBVs. Misinformation surrounding the risk of transmission contributes to stigma associated with the HIV and can result in further discrimination against a person living with HIV and other BBVs. For example, testing orders can be made in situations where a frontline worker has come into contact with a third party’s saliva. However, HIV cannot be transmitted through saliva containing a small quantity of blood of an HIV-positive person, and there is negligible to no possibility of HIV transmission where the saliva contains a significant quantity of blood of an HIV-positive person.⁷⁵

There is also no evidence that shows mandatory testing achieves its purposes: to reduce stress/anxiety of frontline workers and to reduce the risk of BBV transmissions. As stated above, mandatory testing can spread misinformation in regard to HIV and other BBVs, which increases stress and anxiety of frontline workers. Based on NAPWHA’s Mandatory Disease Testing Laws Audit, there has been no evidence of HIV transmission in any occupational setting since 2002. Given the low probability of transmission in an occupational environment and post-exposure prophylaxis’s (PEP) high success rate in preventing HIV from establishing itself in a person’s body after exposure, mandatory testing does not reduce the risk of HIV transmissions.

Table 23 | Misinformation and stigma and the HIV National Strategy Priority Areas

Relevant HIV National Strategy Priority Areas	
o	Maintain focus on health promotion, prevention and peer education to improve knowledge and awareness of HIV in priority populations and reduce risk behaviours associated with HIV transmission
o	Increase knowledge of, and access to, treatment as prevention for individuals with HIV
o	Increase knowledge of treatment as prevention for those individuals at risk of HIV
o	Improve the frequency, regularity and targeting of testing for priority populations and decrease rates of late diagnosis

- Improve early uptake of sustained treatment to improve quality of life for people with HIV and prevent transmission
- Continue to work towards addressing the legal, regulatory and policy barriers which affect priority populations and influence their health-seeking behaviours
- Strengthen and enhance partnerships and connections to priority populations, including the meaningful engagement and participation of people with HIV
- Implement a range of initiatives to address stigma and discrimination and minimise the impact on people's health-seeking behaviour and health outcomes
- Continue to build a strong evidence base for responding to HIV in Australia that is informed by high-quality, timely data and surveillance systems

Areas for Reform

All Mandatory Disease Testing legislation should be repealed in Australia in the interest of public health and the wellbeing of people living with HIV. Efforts should be concentrated on educating individuals who work in law enforcement, emergency services, or healthcare on BBV's and the actual risk of transmission in their workplace settings. This will not only reduce their stress and anxiety after coming in contact with a third party's bodily fluid but will also undermine stigma associated around HIV and other BBVs.

If government officials are unable to repeal all jurisdictions relating to mandatory BBV testing, HALC strongly recommends that amendments are made to all legislation regarding mandatory disease testing. This includes ensuring that any mandatory testing order is assessed by the Chief Health or Medical Officer.

When determining a testing order, the risk of transmission should always be considered by the decision maker. A medical practitioner must also be consulted for each testing order and provide information on the overall risk of transmission, appropriate action to be taken to mitigate the risk of contracting a BBV, and the extent to which testing the third party's BBV status will assist in determining the risk of transmission to the affected officer.

Upon each testing order, the individual should be referred to a professional for pre-test counselling (where possible and if desired) and post-test counselling. Individuals should be assured that all results, including the fact that a test was performed, will be kept confidential. Referrals to medical and psychological services should be given to all individuals who test positive for HIV or another BBV. There also must be greater measures taken to ensure the privacy and confidentiality of all testing orders.

Any person subject to a mandatory disease testing order should be provided with an appropriate and accessible appeal mechanism.

References

- ¹ [2016] HCA 12.
- ² *Crimes Act 1900* (NSW) s4.
- ³ *Public Health Act 2010* (NSW) s79.
- ⁴ *Public Health Regulation 2022* (NSW) r63.
- ⁵ *Crimes Act 198* (Vic) s15.
- ⁶ *Ibid.*
- ⁷ *Public Health and Wellbeing Act 2008* (Vic) s111.
- ⁸ *Ibid.*
- ⁹ *Criminal Code Act 1899* (Qld) s317.
- ¹⁰ *Ibid* s1.
- ¹¹ *Ibid* s317.
- ¹² *Public Health Act 2005* (Qld) s143.
- ¹³ *Criminal Code Act 1913* (WA).
- ¹⁴ *Ibid*, s1.
- ¹⁵ *Public Health Act 2016* (WA) s88.
- ¹⁶ *Criminal Law Consolidation Act 1935* (SA) s21.
- ¹⁷ *Public Health Act 2011* (SA) s14.
- ¹⁸ *Ibid*, s57.
- ¹⁹ *Ibid*, s59.
- ²⁰ *Public Health Act 1997* (Tas).
- ²¹ *Criminal Code Act 1983* (NT) s174B(1).
- ²² *Ibid*, s1A.
- ²³ *Crimes Act 1900* (ACT), Dictionary.
- ²⁴ *Public Health Regulation 2000* (ACT) s18(3).
- ²⁵ *Public Health Act 2010* (NSW) s79.
- ²⁶ *Public Health Act 1997* (Tas) s51.
- ²⁷ *Ibid*, s51(2).
- ²⁸ Similar provisions also exist in Queensland – see *Public Health Act 1899* (Qld) s413.
- ²⁹ *Public Health Act 2010* (NSW) s79.
- ³⁰ *Public Health Act 2016* (WA) s 88(2), *Public Health and Wellbeing Act 2008* (Vic) s111.
- ³¹ *Public Health Act 2005* (Qld) s66(1)(b).
- ³² NAPWA “Anxiety about HIV criminalisation among people living with HIV in Australia” <https://doi.org/10.1080/09540121.2021.1936443>
- ³³ Australian Federation of AIDS Organisations [HIV-in-Australia-2021.pdf \(afao.org.au\)](https://www.afao.org.au/HIV-in-Australia-2021.pdf)
- ³⁴ NAPWA Monograph 2009 ‘The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality’
- ³⁵ Specifically Chapter 11.
- ³⁶ *Crimes Act 1900* (NSW) s61HH
- ³⁷ *Crimes Act 1900* (NSW) s61HA(1).
- ³⁸ *Criminal Code Act 1899* (Qld) s348(1).
- ³⁹ *Ibid*,s218 (4).
- ⁴⁰ *Criminal Law Consolidation Act 1935* (SA) s4.

⁴¹ *Crimes Act 1900* (ACT) s67(1)(j).

⁴² Patrick Hartford “Case comment: a critique of the Supreme Court of Canada’s use of statistical reasoning in *R v. Mabior*” <https://academic.oup.com/lpr/article/13/2/169/92>

⁴³ New South Wales Law Reform Commission ‘Consent in relation to sexual offences’ (Report 148) September 2020, p136, <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>.

⁴⁴ *Mandatory Disease Testing Act 2021* (NSW), s8(1)(a), Dictionary (definition of ‘blood borne disease’).

⁴⁵ *Ibid*, s8(1)(b)(i) and (2).

⁴⁶ *Ibid*, s8(1)(b)(ii) and (iii).

⁴⁷ *Ibid*, s9.

⁴⁸ *Ibid*, s11(5)(a).

⁴⁹ *Ibid*, Dictionary.

⁵⁰ *Ibid*, Part 4.

⁵¹ *Ibid*, s27(1).

⁵² *Public Health and Wellbeing Act 2008* (Vic) s134.

⁵³ *Ibid*, s134(2).

⁵⁴ *Ibid*, s134(3).

⁵⁵ *Ibid*, s143.

⁵⁶ *Police Powers and Responsibilities Act 2000* (Qld) s540(1).

⁵⁷ *Ibid*, s540(2)

⁵⁸ *Ibid*, s540(4).

⁵⁹ *Ibid*, s545(1).

⁶⁰ *Ibid*, s545(5).

⁶¹ *Mandatory Testing (Infectious Diseases) Act 2014* (WA) s8.

⁶² *Ibid*, see s8 and the definition of ‘reasonable grounds for disease testing’ in s4.

⁶³ *Ibid*, s9.

⁶⁴ *Ibid*, s16.

⁶⁵ *Ibid*, s19(2).

⁶⁶ *Ibid*, s13.

⁶⁷ *Ibid*, s23.

⁶⁸ *Criminal Law (Forensic Procedures) Act 2007* (SA) s20B(1).

⁶⁹ *Ibid*, s31 and 32.

⁷⁰ *Police Administration Act 1978* (NT) s147B(1).

⁷¹ *Ibid*, s147FH.

⁷² *Ibid*, s147FR.

⁷³ *Ibid*, s147G and 147FO.

⁷⁴ Eighth National HIV Strategy [Eighth National HIV Strategy \(health.gov.au\)](http://health.gov.au)

⁷⁵ Barré-Sinoussi, F., Abdool Karim, S.S., Albert, J., Bekker, L.G., Beyrer, C., Cahn, P., Godfrey-Faussett, P, et al. (2018). Expert consensus statement on the science of HIV in the context of criminal law. *Journal of the International AIDS Society*, 21(7).