CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION AMENDMENT BILL 2023

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Submitted by:	Queensland Positive People, HIV/AIDS Legal Centre & the National Association of People with HIV Australia
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QUEENSLAND POSITIVE PEOPLE

ABN 89 010 040 914
21 Manilla Street, East Brisbane
Queensland 4169 Australia
PO Box 7403 East Brisbane

Phone 07 3013 5555
Free Call 1800 636 241
Fax 07 3891 1830
Email info@qpp.org.au

Queensland Positive People
INCLUSIVE, INNOVATIVE HIV SERVICES

27 October 2023

Via email: LASC@parliament.qld.gov.au

Submission on the Criminal Law (Coercive Control and Affirmative Consent) and other Legislation Amendment Bill 2023

To the Queensland Law Reform Commission,

We thank you for the opportunity to make a second submission on the *Criminal Law (Coercive Control and Affirmative Consent) and other Legislation Amendment Bill 2023*. We are happy for our names and submission or part thereof to be referred to in your report. We would also like to please request that we attend and speak at the public hearing set to be held on 8 November 2023.

About us

Queensland Positive People (QPP) is a state-wide organisation committed to improving the quality of life of people living with HIV (PLHIV) and helping reduce new infections of HIV and STIs. Since its inception in 1989, QPP has grown from a community grass-roots organisation focused on peer-based advocacy and support, into an accredited multi-disciplinary health and community services provider. QPP employs 38 staff and delivers programs in areas that include peer led point of care HIV/STI testing; community development; peer navigation; case management, aged care navigation; legal support and referral for HIV stigma and discrimination; emergency relief funding; research; public health campaigns; advocacy and policy development.

HIV/AIDS Legal Centre (HALC) is the only not-for profit, specialist community legal centre of its kind in Australia. HALC provides free and comprehensive legal assistance to people in NSW with HIV or hepatitis-related legal matters. Free legal assistance is also provided to PLHIV in Queensland through

a partnership arrangement between QPP and HALC. Community Legal Education and Law Reform activities are also carried out in areas relating to HIV and Hepatitis.

The National Association of People with HIV Australia (NAPWHA) is the national peak, non-government organisation representing community-based groups of people living with HIV (PLHIV) across Australia. NAPWHA's membership of national networks and state-based organisations reflects the diverse make-up of the HIV-positive community and enables NAPWHA to confidently represent the positive voice in Australia. NAPWHA's vision is of a world where people with HIV live their lives to their full potential, in good health and free from discrimination.

Submission

This submission focuses primarily on draft section **348AA(m) of the *Criminal Code Act 1899* (QLD).** The section extends the circumstances in which a person's consent to a sexual act is not freely and voluntarily given. It proposes to stipulate that a person does not consent to a sexual act if '*the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease*', and '*the other person transmits the serious disease to the person'*. [1]

Firstly, we need to examine and question the transmission of 'serious disease' broadly.

Serious disease, defined within this code as '*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'*.[2]

Infectious 'serious diseases' are responsible for an immense global burden of disease that impact public health systems and economies worldwide, disproportionately affecting vulnerable populations. Viruses and bacteria spread between humans and animals through:

- the air as droplets or aerosol particles
- faecal-oral spread
- blood or other body fluids
- skin or mucous membrane contact
- sexual contact.

Tuberculosis, syphilis, hepatitis B, multi-drug resistant gonorrhoea – to name only a few, are other infectious diseases that all fall within the definition of serious disease under our current and proposed laws.

However, we do not apply the existing criminal code laws to these serious diseases.

[1] *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* s 13.
[2] *Criminal Code Act 1899* (QLD) s 1.

Syphilis, hepatitis B and multi drug resistant gonorrhoea are transmitted through sexual conduct as HIV is, yet the laws continue to be solely and consistently applied and targeted on HIV.

If s348AA(m) was to be enacted, it is most likely to be solely used in prosecutions of people living with HIV. Historically it has been rare that people with other 'serious' infectious diseases and indeed those sexually transmitted have been subject to prosecution within Australia.

There is irrefutable evidence that criminal laws for infectious/health conditions are ineffective in reducing overall burdens of disease and misguided in their focus on punishment of the diseased individual as a wrongful transmitter. By criminalizing only those people who know they are HIV positive, the very people who are less likely to pass on HIV, these laws penalize people for testing for HIV and for knowing their health status; thus, creating a powerful incentive NOT to test for HIV. They also encourage people who think they are HIV negative to incorrectly assume that others will protect them from HIV transmission despite the fact that we know most transmission happens in situations where the HIV positive partner doesn't know their HIV status – and so is unable to take precautions. By rewarding strategic ignorance as to health status these laws, if enacted, will result, perversely, in more people getting HIV/STIs/BBV despite the fact that this is precisely what this law is trying to prevent.

We are opposed to inclusion s348AA(m) on the following grounds:

1. The enactment of this provision further criminalises people living with HIV (in 2023) against well-established evidence that the criminalisation of HIV is not in the public interest, individual and public health. It also contradicts Queensland and national government commitments to address legal barriers to achieving HIV strategy targets.
2. This inclusion is legally unnecessary – provisions for management of people living with HIV whose behaviour may place others at risk is already included in the Queensland Public Health Act 2005 and the Queensland Criminal Code Act 1899. Further, it is detrimental to the Queensland and Australian HIV public health response.
3. This inclusion stigmatises HIV and discriminates against people living with HIV, exposing them to potential psychological and physical harm and violence. The fact that transmission of the 'serious disease' is required along with false or fraudulent representation does not negate the discriminatory nature of this proposed amendment nor the potential for significant harm for people living with HIV.

There is no mischief for the proposed amendment to solve. HIV transmissions in Australia are at record lows and they continue to fall. Less than 0.1% of the Australian population is HIV positive and over 90% of these people are on effective ARVs and so cannot transmit HIV. Thus, there is no elevated risk of HIV transmission for these proposed laws to respond to. Perversely, these laws will make HIV transmission more likely, not less and they will increase the risk to people with HIV of stigma, discrimination and physical violence.

1. The criminalisation of HIV is detrimental to public interest

At the Queensland Roundtable on the Decriminalisation of HIV and STIs, chaired by then Attorney-General Shannon Fentiman on 15 May 2023, the Queensland Government committed to support evidence-based public health management approaches and decriminalise HIV.

The Hon Shannon Fentiman, Minister for Health, Mental Health and Ambulance Services and Minister for Women recently addressed the closing ceremony of the 12th International AIDS Society Conference on HIV Science 2023 in Brisbane 23-26 July committing to work with stakeholders to right the wrong of the stigmatising impact of some of Queensland's laws on people living with HIV and to *"ensure that no-one is criminalised for living with the virus".*

Following the Roundtable, QPP, NAPWHA and HALC, Queensland Health, the Department of Public Prosecutions and the Queensland Police Service are currently working together to update policies and guidelines to direct that matters relating to HIV related criminal allegations, should in the first instance, always be referred to Queensland Health for assessment and management under the Queensland Public Health Act 2005 and *The Queensland Health Guideline for the management of people with HIV whose behaviour may place others at risk of HIV.*

There are also significant bodies of work on HIV Law Reform currently being progressed nationally through the Blood Borne Viruses and Sexually Transmissible Infections Standing Committee under the National strategies for bloodborne viruses and sexually transmissible infections. This includes addressing legal, regulatory and policy barriers that are not in the public interest, nor based on well-established evidence and a catalogue of the main pieces of jurisdictional legislation that operate as barriers to achieving the targets in the National HIV Strategy.

2. Unnecessary inclusion and detrimental to the Queensland and Australian HIV public health response

Evidence-based provisions for management of people living with HIV whose behaviour may place others at risk already exists under the Queensland Public Health Act 2005. This includes a mechanism for prosecuting the offence of recklessly putting someone else at risk of contracting a controlled notifiable condition,[3] or recklessly transmitting a controlled notifiable condition.[4] 'Controlled notifiable condition' is defined to include HIV.[5] The Act also imposes an obligation on everyone to prevent or minimise the risk of transmission.

[3] *Public Health Act 2005* (QLD) s 143(1).
[4] *Public Health Act 2005* (QLD) s 143(2).
[5] *Public Health Regulation 2018* (QLD) sch 1.

The intentional transmission of a serious disease with intent to do harm,[6] and unlawfully causing grievous bodily harm (which includes transmission of HIV without intent) are already criminalised in the Queensland Criminal Code Act 1899.[7] People living with HIV are subject to section 348AA(m) and would already likely face charges under either section 317 or 320 of the Code.

The decriminalisation of HIV is a critical element to end new HIV transmissions by 2030, which is a state, national and international target. The detrimental impact of criminalising HIV to public health efforts is significant. Punitive laws have been shown to be actively harmful, blocking access to HIV testing, treatment and other health services and increase HIV risk. The use of criminal laws to punish people living with HIV have negative consequences not just for the individual themselves but also for the broader community.

The UNAIDS publication *Judging the epidemic – A judicial handbook on HIV, human rights and the law* states:

> *'There is no evidence that criminal prosecutions [of HIV] help prevent new HIV infections. Rather, there are indications that overly broad criminalisation of HIV non-disclosure, exposure or transmission undermines public health and can result in miscarriages of justice'.*

The criminalisation of HIV (and indeed any health condition) undermines public health efforts to encourage testing and know one's status and access/engage with treatment and support services. Criminalisation actively promotes stigma and discrimination and encourages unfounded complacency for individuals taking care of their own sexual health.

The management of people living with HIV whose behaviour may place others at risk of HIV

Existing public health laws and guidelines in Queensland and Australia are the evidence-based best practice measure for dealing with cases of HIV transmission and exposure and reflect established scientific clinical and behavioural knowledge. HIV prevention efforts should be focused on early diagnosis of HIV infection through access to testing, followed by supporting those diagnosed to engage with clinical care and peer support. For the vast minority of people whose behaviours may place others at risk of HIV transmission, they are often living with complex needs including various co-morbidities and risk factors such as mental illness, drug or alcohol dependence, homelessness, poverty or incarceration. Multi-disciplinary collaborative clinical and community case management and support is what is required and demonstrates the best outcomes for the individual and the broader community.

The key aim is to prevent HIV transmission to others by maintaining involvement of the person in appropriate ongoing clinical care and treatment including adherence to their prescribed HIV ART, so that HIV viral suppression can be sustained. A detectable viral load does not itself warrant management under the Guidelines, unless there are also behaviours that pose a risk of transmission.

[6] *Criminal Code Act 1899* (QLD) s 317.
[7] *Criminal Code Act 1899* (QLD) s 320.

Management approaches under the Guidelines range from counselling, education, and support, including advice from an HIV Advisory Panel, through to management under a Behavioural Order, then, only as a final step, detention and isolation. All of the powers needed to manage HIV are already in the public health act. Involvement of the criminal law is damaging for all involved - including the 'victim'.

Individual responsibility for sexual health

The sexual transmission of HIV can be prevented by:

- A HIV positive person being effectively treated on HIV antiretroviral therapy (ART) and having an undetectable viral load (undetectable = untransmissible)
- An HIV negative person being on HIV PrEP (pre-exposure prophylaxis), which involves taking HIV medications, and makes the risk of transmission negligible.[8] PrEP is available to all Australians via Medicare.
- Using condoms

The sexual transmission of HIV cannot be prevented by asking someone if they are HIV positive.

Australia has long been considered world-leading in HIV prevention, treatment, and care. In part, because successive national and jurisdictional HIV Strategies are underpinned by the public health principle of shared responsibility. Shared responsibility recognises that both HIV positive and HIV negative people ought to take responsibility for their own sexual health, rather than solely relying on representations made by others as to the presence or absence of an infection, or the likelihood of transmission risk.

The proposed amendment is fundamentally flawed and further, likely to encourage complacency, allowing people to ask whether a sexual partner has HIV, then proceed to have sex on the basis that they do not if they are told they do not, which wrongfully assumes that everyone is regularly tested for HIV and aware they have HIV. This line of questioning also does not consider for window periods (between transmission and a positive test result).

***3. S*tigmatises HIV and discriminates against people living with HIV, exposing them to potential psychological and physical harm and violence**

People living with HIV experience significant levels of anxiety, fear and psychological trauma relating to the potential threat of criminal investigation and proceedings (regardless of whether actual transmission is required and the scientific evidence of undetectable = untransmissible[9]). This

[8] Riddell, J., Amico, R. and Mayer, K.H. *HIV Preexposure Prophylaxis: A Review*. JAMA Review 2018 319(12): 1261-1268.
[9] Adam Bourne, G. J. Melendez-Torres, An Thanh Ly, Paul Kidd, Aaron Cogle, Graham Brown, Anthony Lyons, Marina Carman, John Rule & Jennifer Power (2021): Anxiety about HIV criminalisation among people living with HIV in Australia, AIDS Care, DOI: 10.1080/09540121.2021.1936443

contributes to the burden of social isolation and loneliness, anxiety, depression and other mental health conditions.

Every person living with HIV in Australia has a fundamental right to privacy and should not be placed in a position where they are obligated to disclose their HIV status. HIV stigma has insidious impacts in our community, with people who choose to share their HIV status too often facing negative consequences like being 'outed' to others, shunned or ostracised, blackmailed or otherwise physically and psychologically abused. Violence or the fear of violence has been implicated as a barrier to individuals seeking HIV testing and disclosure of HIV status. [10]

Fear of prosecution for HIV non-disclosure has been shown to reduce willingness amongst HIV-negative individuals to test for HIV. [11] The fact is that the vast majority of HIV transmission occurs between people who do not know their HIV status. There is no evidence that applying the criminal law to HIV reduces its transmission. Instead, criminalisation spreads fear and stigma associated with HIV, alienating an already vulnerable population whose effective engagement with services is critical to their wellbeing and public health more broadly, by preventing the spread of HIV.[12]

We compel you to acknowledge the evidence that it is more effective for everyone to manage the risk of sexual transmission of HIV through education and empowerment of people living with HIV and their sexual partners, and by promoting the model of shared responsibility. This should be through a public health-based, rather than criminal justice-based regulatory framework.

The suggested amendment, if implemented, would effectively criminalise non-disclosure of HIV as sexual assault, with detrimental life-long implications for the individual whilst creating disincentives for people to get tested, legitimating a culture of blame surrounding transmission, and contradicting the key message that everyone has shared responsibility for taking reasonable precautions to prevent HIV transmission.

Recommendation

We strongly recommend that the suggested amendment contained in section 13 of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* not proceed given it is evidently not in the public interest and the negative impacts this reform is likely to have on people living with HIV, and public health more broadly.

We respectfully submit the request for a complete carve out as to misrepresentations of HIV and any other STI.

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[10] Harrigan M., CATIE, *The link between intimate partner violence and HIV* (online publication, 22 July 2019) <https://www.catie.ca/prevention-in-focus/the-link-between-intimate-partner-violence-and-hiv>.

[11] Kesler, M.A. et al. *Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission among HIV-negative Men who have Sex with Men*. PLoS ONE 2018 13(2): 1-17.

[12] *HIV Criminalisation is Bad Policy Based on Bad Science*. The Lancet. 2018 392: 534-544.

Kind regards,

[redacted]

Melissa Warner
CEO QPP
[redacted]

[redacted]

Alexandra Stratigos
Principal Solicitor HIV/AIDS Legal Centre
[redacted]

[redacted]

Aaron Cogle
Executive Director, NAPWHA
[redacted]

QUEENSLAND POSITIVE PEOPLE

ABN 89 010 040 914
21 Manilla Street, East Brisbane
Queensland 4169 Australia
PO Box 7403 East Brisbane

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Fax 07 3891 1830
Email info@qpp.org.au

Queensland Positive People
INCLUSIVE, INNOVATIVE HIV SERVICES

napwha national association of people with HIV australia

17 August 2023

Via email: WSJ-Taskforce-Legislation@justice.qld.gov.au

QPP and NAPWHA submission to the WSJ Taskforce regarding the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

1. About Queensland Positive People (QPP)

QPP is a peer-led state-wide community organisation established in 1989. We are committed to improving the quality of life of all people living with HIV (PLHIV) and reducing new infections of HIV and STIs across Queensland. QPP provides services that build capacity and empower those living with, and affected by HIV. We are primarily funded by Queensland Health to deliver the following programs:

- Peer led HIV and STI point of care testing clinic and outreach
- HIV home testing
- Community development and peer support
- Peer navigation
- Case management for PLHIV with complex needs
- Legal support and referral for stigma and discrimination
- Emergency funding support
- Public health campaigns, advocacy, policy development and research.

2. About NAPWHA

The National Association for People with HIV Australia (NAPWHA) is Australia's peak non-government organisation representing community-based groups of PLHIV across Australia. We provide advocacy, policy, health promotion, effective representation, and outreach on a national level. Our work includes a range of health and education initiatives that promote the highest quality standard of care for HIV-positive people. Our vision is a world where all people with HIV can reach their full potential free from stigma and discrimination.

3. Policy context

Australia is a global leader in the HIV response due to the strong partnership between governments and affected communities. For example, the eighth *National HIV Strategy 2018-2022* (the National Strategy) includes the centrality of people with HIV and human rights as guiding principles.[1] The National Strategy is closely linked to the latest *Queensland HIV Action Plan 2019-2022,* which includes the need to:

4.4 Address the legal, regulatory, system and policy barriers which affect priority populations and influence their health-seeking behaviour and access to testing and healthcare services.

This is because the criminalisation of HIV transmission is a barrier to achieving public health goals and to eliminating HIV by 2030, as the Queensland Government has undertaken to do. Further, criminalisation of HIV transmission disproportionately affects certain groups of people living with HIV including women, and culturally and linguistically diverse communities. It also deters people from testing and from receiving treatment - both of which are vital to improving health outcomes and decreasing the risk of further transmission.

For this reason, over the past 40 years, HIV-specific criminal laws have been removed from every Australian jurisdiction[2]. NAPWHA and QPP note with great concern that any attempt to undo this work, to recriminalise misrepresentation of HIV status in Queensland, will undermine the public health response and make HIV transmission more likely, not less.

Both the National and Queensland-specific HIV strategies are based on the principle that both HIV-positive and HIV-negative people ***share*** the responsibility for preventing HIV transmission, and each party is responsible for maintaining their sexual health without assuming or relying on representations made by other parties on the risk of HIV transmission.

Queensland should be commended for entrenching this shared responsibility principle from the strategies into law through the *Public Health Act 2005* (QLD)[3]. This Act (the Health Act) doesn't require disclosure of HIV status but instead places a general duty on *all* people to take reasonable precautions to avoid HIV transmission.[4]

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[1] Commonwealth Department of Health, *Eighth National HIV Strategy 2018-2022* (Strategy, 2018) 8 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/HIV-Eight-Nat-Strategy-2018-22.pdf>.

[2] https://www.clcnsw.org.au/ending-criminalisation-hiv-transmission-and-discrimination-against-people-living-hiv#:~:text=Over%20the%20past%2030%20years,HIV%2Dspecific%20law%20in%202015.

[3] Public Health Act 2005 (QLD) Ch3 Sect 66(1)

[4] Ibid Ch3 Sect 66(1).

Countries with clear laws that advance non-discrimination and human rights in the context of HIV perform better on HIV treatment and care targets.[5] Australia has made significant progress towards decriminalising HIV across the states and territories, making us well-positioned to become the first country in the world to virtually eliminate HIV transmission[6].

Our success is contingent on not walking-back the gains we have made in the legal and policy space over the last 40 years.

4. About this submission

We ask the Commission to carefully consider how any changes to the law relating to consent in sexual offences could recriminalise people with HIV by diminishing the principle of shared responsibility as established in the Health Act. In particular, we are concerned that broad legislative changes that specify how consent is vitiated through fraud or deception could criminalise people with HIV who either do not disclose their HIV status to sexual partners or who, for whatever reason, misrepresent their HIV status.

We note that people with HIV often have no choice but to misrepresent their HIV status in order to ensure their physical safety or to avoid discrimination. Proposed changes to the law which would undermine HIV positive people's ability to protect themselves in this way should be strongly resisted.

5. HIV in Australia

Australia recently recorded the lowest number of new HIV cases since 1984.[7] The notable decline is associated with the high uptake of pre-exposure prophylaxis (PrEP) among HIV-negative people (a medication that is highly effective at preventing HIV acquisition) and advancements in effective HIV antiretroviral treatment (ART) for those with HIV. The latest data shows that 97% of people with HIV in Australia diagnosed and on ART have reached a sustained undetectable viral load.[8] ***This means these people pose zero risk of HIV transmission to their sexual partners regardless of representations made prior to sexual intercourse.***[9]

PrEP and ART are universally available to all Australians through Medicare. From July 2022, ART has been provided equitably to all who need it regardless of their Medicare eligibility. Less than

[5] Matthew Kavanagh et al, 'Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response' (2021) 6(8) *BMJ Global Health* 6e006315.
[6] AFAO, *Agenda 2025, Ending HIV Transmission in Australia* (Technical Paper, 2021) <https://www.afao.org.au/wp-content/uploads/2021/06/Agenda-25-Technical-Paper.pdf>.
[7] Kirby Institute, *HIV, hepatitis and sexually transmissible infections in Australia: annual surveillance report* (Report, 2021) < https://kirby.unsw.edu.au/sites/default/files/kirby/report/Annual-Suveillance-Report-2021_HIV.pdf>.
[8] Ibid 6.
[9] International Network for Strategic Initiatives in Global HIV Trials (INSIGHT), 'Initiation of Antiretroviral Therapy in Early Asymptomatic HIV Infection' (2015) 373(9) *New England Journal of Medicine* 795.

0.1% of the Australian population are HIV positive and nearly 95% of these are on effective treatment - and so unable to pass on the virus. In 2021 there were just 552 new HIV diagnosis in Australia, most of which occurred in the context of one at least partner not knowing their HIV status[10]. Perceptions of HIV positive people as a threat to society are a, largely media generated, illusion.

This has a number of implications. The first is that there is no mischief that criminalising misrepresentations of HIV status before sexual intercourse could possibly seek to address. Such a change to the law will not prevent HIV transmissions. By far the majority of transmissions happen where one partner does not know their HIV status. Thus, the proposed change would criminalise only an HIV positive person who knows their status. People who know their status do not, generally, pass on HIV. This would also leave the person of uncertain status outside the operation of the law. This would criminlise exactly behaviour which we need to encourage (testing regularly, knowing your status) and incentivise exactly the behaviour we need to discourage (not testing, not knowing your status).

Secondly, the surveillance data shows that coming into contact with an HIV positive person for most people is a rarity. Encountering a positive person who is not on treatment (and who could theoretically pass on the virus) is a vanishingly small probability: just an estimated approximately 4,000 people out of a population of nearly 27 million. Further, most HIV positive people in Australia are Gay, Bisexual or other men who have sex with men (GBMSM). Criminalising misrepresentations as to HIV status made before sex is therefore disproportionate to the possibility of harm for the vast majority of Australians and it will predominately expose PLHIV who know their status and are on treatment to the threat of criminalisation.

Thirdly, changes to the law that would criminalise misrepresentations as to HIV status before sexual intercourse would criminalise people with HIV who know their status *even in the absence of HIV transmission; merely through the fact of a misrepresentation.* This ignores HIV negative people's responsibility to take their own precautions to prevent HIV transmission. It encourages HIV negative people to rely on other people to know their HIV status and to reliably disclose it upon request. We know from 40 years of responding to HIV that this is a significantly flawed mechanism of HIV prevention, which actually increases the chances of transmission (because transmission happens where people don't know their status and so cannot answer correctly). Such a change would target only those HIV positive people who pose no risk and criminalises them even though no harm has occurred. Further, it would, expose them to some of the harshest penalties available in the criminal law despite this lack of harm. This is the very definition of an unjust law which exposes negative people to a higher risk of HIV transmission and exposes HIV positive people to the risk of unnecessary criminalisation.

10 https://data.kirby.unsw.edu.au/hiv#:~:text=HIV%20is%20transmitted%20sexually%2C%20by,per%20cent%20over%2010%20years .

With this in mind, disclosing HIV status should only be legally required under absolutely minimal circumstances. Due to advancements in biomedical prevention and treatment such as PrEP and ART, we believe there should be no imposition from the law to disclose HIV status to a sexual partner. These decisions in private settings should rest solely on the individual without fear of repercussion from the *Criminal Code 1899 (QLD)* ('the Criminal Code').[11]

It is an ineffective prevention strategy for one person to ask another if they are HIV positive and then to rely on the subsequent statement. Both parties are responsible for preventing HIV prevention and should take appropriate precautions such as using PrEP, Undetectable = Untransmissible (U=U) or using condoms. None of these easily available prevention mechanisms require HIV disclosure. The law should not transfer the responsibility for preventing HIV transmissions onto the HIV positive person alone.

6. Australia's HIV success: the health model vs the coercive model

QPP and NAPWHA support the underpinning of sexual assault laws by consent as a voluntary agreement made by people with the freedom and capacity to make that decision. We also support the fundamental right of privacy for people with HIV and that they should not be placed in positions where they are obliged or compelled to disclose their status, especially when they are taking appropriate precautions to prevent transmission.

We note that the *Public Health Act 2005 (QLD)* articulates this right to privacy[12] and, in our opinion, strikes an appropriate balance. We are concerned that any changes to consent as it relates to sexual offences in Queensland, which unnecessarily draws HIV within their scope, will undermine the delicate balance struck by the Queensland Public Health Act.

We argue that the principle of shared responsibility alongside the education and empowerment of people with HIV and their partners are the appropriate mechanisms to continue driving the reduction in HIV transmission. Because of this, HIV prevention has been appropriately managed in our communities, and Queensland is making good progress towards the HIV elimination targets.

We believe that unconsidered changes to the Criminal Code have the potential to shift the regulatory framework in Queensland from a robust and exemplary health-based model that promotes public health toward a criminalised model that stigmatises and discriminates people with HIV. This would make the law involving HIV inconsistent with state and national HIV strategies and undermine other commitments to stigma reduction. Further, evidence shows it will drive people away from testing, treatment and care services and will increase rates of new infections in Queensland.

[11] Criminal Code 1899 (QLD).
[12] CHPT 3, SECT 66(2)

a) The health-based model in Queensland

The health-based model has been a hallmark of the successful Australian response to HIV for more than 30 years since governments quickly emphasised the inclusion of communities affected by HIV when cases began to escalate. The principle of shared responsibility is a feature of Australia's world-leading, health-based response to HIV.

The Queensland Health Act requires *both* parties to take reasonable precautions to limit the risk of HIV transmission.[13] Although reasonable precautions are not defined in the Queensland Health Act, the Departments of Health in WA[14] and NSW[15] have published fact sheets outlining what is considered reasonable to prevent HIV transmission alongside other blood borne viruses (BBVs) and STIs. For people with HIV, these include using condoms or the mutually agreed use of PrEP by the HIV negative partner. Importantly, having an undetectable viral load (and thus being unable to transmit HIV sexually) is also considered a reasonable precaution.

Notwithstanding the above factors, people with HIV may also not always be able to disclose their status to sexual partners for reasons relating to their personal safety. The HIV community sector has been working with affected communities for several decades and has witnessed the impact of HIV stigma on our communities, including abuse (and on one occasion, homicide), being outed to family, and being ostracised from their community or being reported to police or health authorities. QPP and NAPWHA oppose any change to the law that compels someone to share their status in situations that open them up to discrimination, rejection, ostracisation and/or abuse. In contrast, laws relating to consent should safeguard the principle of shared responsibility and avoid creating an imbalance between two consenting individuals before engaging in sexual activity. People with HIV are particularly vulnerable to relationship abuse in situations where the HIV negative partner threatens to go to Police to fraudulently claim they have been exposed to HIV by the HIV positive partner against their will. Maintaining privacy in relation to HIV status is a crucial tool HIV positive people have to avoid such abuse. The law should not remove this protection.

In the vanishingly rare circumstances where a person with HIV knowingly puts others at risk of HIV transmission, the Health Act already provides a range of public health management interventions. Recklessly putting a person at risk of HIV transmission is subject to a fine or imprisonment[16]. Further, the Chief Executive may issue a detention order[17] and behaviour, examination and detention orders may be made by a Magistrate[18]. A person who fails to comply with these orders

[13] Public Health Act 2005 (QLD) CHPT 3, SECT 66 s.1(b)&(c)
[14] Western Australia Department of Health, 'Part 9 Notifiable infectious diseases and related conditions, Understanding reasonable precautions' (Fact Sheet, 2019) <https://ww2.health.wa.gov.au/~/media/Files/Corporate/general-documents/Sexual-Health/PDF/Notifiable-infectious-diseases-fact-sheet.pdf>.
[15] https://www.health.nsw.gov.au/Infectious/factsheets/Pages/HIV-infection.aspx
[16] Public Health Act 2005 (QLD) s.143
[17] Ibid. CHPT 3, PART 4 s.113.
[18] Ibid. ss.118, 125, 129.

faces significant penalties (fines range between $30,000 to over $60,000).[19] Likewise, a person who intentionally or negligently transmits HIV to another person can be charged with a criminal offence.[20] Any change to the law which prohibits misrepresentations of HIV status, or non-disclosure, will do nothing to prevent HIV transmissions but will have the effect of criminalising many more people with HIV.

7. Our response to the proposed changes to s.348AA – how consent may be vitiated through fraud or deception and the proposed 'carve outs' in s.348AA(5)

QPP and NAPWHA ask the WSJ Taskforce to consider with appropriate restraint any change to the law relating to consent which would undermine people's ability to negotiate safer sex without the fear of criminal repercussions. Laws which mandate disclosure or criminalise misrepresentations have the perverse effect of chilling frank discussions about sexual safety and can make transmissions of HIV more likely, not less.

Further, an unacceptably broad approach potentially criminalises an unlimited range of fraudulent statements and could also widen the scope of the criminal law in an uncontrolled and capricious way. Criminalising the misrepresentation of HIV status will stifle conversations surrounding safe sex and HIV status. This will reverse years of progress in efforts to reduce HIV related stigma and will disincentivise people at risk of HIV from testing frequently or from engaging with HIV care.

Hypothetically, these laws would not only revert to the, long ago reformed, criminalisation of HIV non-disclosure and misrepresentation but could potentially criminalise the transmission of common STIs such as the herpes simplex virus. The creation of such a litigious environment as regards to the transmission of a broad range of STI would pose a significant threat to Queensland's excellent public health response and would drastically undermine the good sexual health of Queenslanders to date.

Such laws are also potentially open to abuse in that they allow an aggrieved person to penalise someone with HIV for misrepresenting their HIV status for reasons unconnected to the misrepresentation, even where the risk of harm was zero through the use of reasonable precautions, namely, the accused person having an undetectable viral load. For example, where an HIV negative partner threatens to go to the Police in order to control the HIV positive partner in a relationship.

The long history of stigmatisation against people with HIV is littered with examples of aggrieved partners and ex-partners seeking to use the law against HIV positive people unrelated to the risk of transmission. HIV, BBVs and other STIs all carry an unacceptable amount of stigma. Our experience of HIV and law enforcement shows that, in the context of interactions with the coercive

[19] Public Health Act 2005 (QLD) s 121, 128, 132.
[20] Criminal Code 1899 (QLD) s.317

apparatus of the state, this stigma leads to disproportionate negative impacts on already marginalised and vulnerable communities. Groups that criminal sanctions have heavily targeted include people with HIV, African diaspora heterosexual men, sex workers, trans and gender diverse people and people who inject drugs.[21] Any changes to the law should seek to protect these groups from disproportionate surveillance, over policing and unnecessary criminalisation.

The introduction of the modernised public health legislation in Queensland (without a disclosure requirement) is a cornerstone to Queensland's successful HIV response and low case numbers. Indeed, people who receive an HIV diagnosis make strenuous efforts to prevent onward transmission by reaching an undetectable viral load.[22] However, the stigma persists and exposes people with HIV to harmful impacts - such as unnecessary expansion of criminal laws where this is not needed or scientifically supported.

Expanding the scope of sexual offence laws too broadly risks being counterintuitive to crucial public policy reform in Queensland by diminishing the principles of shared responsibility in the Health Act. It is a backwards step in Queensland's progress towards full decriminalisation of HIV exposure, non-disclosure and transmission. By constructing misrepresentations as to HIV status as misrepresentations which vitiate consent, potentially leading to a charge of rape, proposed changes to these laws could classify instances of misrepresentation as among the most serious of offences in the Criminal Code. This is clearly disproportionate; especially when considering that this would be equally true even where risk of transmission was non-existent. We argue that this would also attract significantly disproportionate penalties. Finally, criminal prosecution of people with HIV for exposure, nondisclosure, misrepresentation of HIV status or HIV transmission has been shown to increase risk-taking behaviour and health care avoidance (testing, treatment and care) by people who have not yet been diagnosed.[23]

We recommend the Commission consider how changes in the law will likely disrupt the Queensland HIV response precisely when Australia has just recorded its lowest number of cases since 1984 and is within reach of virtually eliminating HIV transmission.

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[21] Edwin J Bernard and Sally Cameron, *Advancing HIV Justice 3: Growing the Global Movement against HIV Criminalisation* (HIV Justice Network, 2019) 10.

[22] See, eg, Chris Gianacas et al, *Experiences of HIV: The Seroconversion Study Final Report 2007–2015* (The Kirby Institute, UNSW Australia, 2016).

[23] Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 39 *Arizona State Law Journal* 467; Keith J Horvath, Craig Meyer and BR Simon Rosser, 'Men Who Have Sex with Men Who Believe That Their State Has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who Are Unsure of the Law in Their State' [2016] *AIDS and Behavior* <http://link.springer.com/10.1007/s10461-016-1286-0>; Maya A Kesler et al, 'Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission among HIV-Negative Men Who Have Sex with Men' (2018) 13(2) *PLOS ONE* e0193269 ('Prosecution of Non-Disclosure of HIV Status'); Sophie E Patterson et al, 'The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: A Comprehensive Review of the Evidence' (2015) 18(1) *Journal of the International AIDS Society* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689876/>.

We strongly recommend that misrepresentations as to BBV/STI status (including HIV status) be included in section 348AA(5) along with misrepresentations as to health status and feelings as explicit examples of things which are not fraudulent inducements and so do not vitiate consent. This is consistent with supporting Queensland's impressive public health response. It is also consistent with the shared responsibility model in which people who consent to engage in sex also consent to the obvious potential risks that always accompany sex and for which each individual has a responsibility to take their own preventative measures.

8. Other issues

a) The Canadian Experience

We note, with concern, the apparent use of the Canadian sexual assault law as justification for changes in Queensland in information sheet. Canada provides, in our submission, an illustrative example of the problematic and harmful impacts on people living with HIV, and on the HIV response, of an expansion of the scope of frauds vitiating consent to include nondisclosure or misrepresentation of HIV status.

For more than 20 years, Canadian courts have upheld the view that nondisclosure of HIV status constitutes a fraud that vitiates consent to sexual intercourse.[24] This is in contrast to other common-law jurisdictions, including Australia, where the scope of vitiating frauds has long been held to be limited to those frauds that misrepresent the identity of the sexual partner, and those that misrepresent the nature of the sexual act.[25] Canadian and international experts and activists have long criticised this interpretation of the law.[26] A landmark consensus statement was published in 2014 by Canadian medical and scientific experts criticising the unscientific basis of the law.[27] More recently, the Canadian government has acknowledged the problematic impact of the law, and issued a directive to federal prosecutors that people with HIV should not be prosecuted in most cases.[28] Notwithstanding this, people with HIV remain subject to prosecution in Canada's provinces.[29]

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[24] *R v Cuerrier* (1998) 2 SCR C 25738, 371; *R v Mabior* [2012] 2 SCR 584.

[25] In Australia, the leading case is *Papadimitropoulos v The Queen* (1957) 98 CLR 249; For a detailed exploration of the topic in the Australian legal context, see eg Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38 *Crim LJ* 236.

[26] Canadian HIV/AIDS Legal Network, *The Criminalization of HIV Nondisclosure in Canada: Current Status + the Need for Change* (Canadian HIV/AIDS Legal Network, 2019) <http://www.aidslaw.ca/site/the-criminalization-of-hiv-non-disclosure-in-canada-report/?lang=en>.

[27] Mona Loutfy et al, 'Canadian Consensus Statement on HIV and Its Transmission in the Context of Criminal Law' (2014) 25(3) *Canadian Journal of Infectious Diseases & Medical Microbiology* 135; Cécile Kazatchkine, Edwin Bernard and Patrick Eba, 'Ending Overly Broad HIV Criminalization: Canadian Scientists and Clinicians Stand for Justice' (2015) 18(1) *Journal of the International AIDS Society* <http://www.jiasociety.org/index.php/jias/article/view/20126> ('Ending Overly Broad HIV Criminalization').

[28] Government of Canada, Office of the Director of Public Prosecutions, 'HIV Non-Disclosure Directive', (2018) 152(49) *Canada Government Gazette* <http://gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>.

[29] Canadian HIV/AIDS Legal Network (n 18) 4.

Criminal prosecution of people with HIV for transmission, exposure or nondisclosure of HIV has been shown to increase risk-taking behaviour by people who have not been diagnosed with HIV, and to decrease engagement in testing, treatment and care.[30] Increased criminalisation of people with HIV is likely to have negative impacts on the HIV response in Queensland, at precisely the time when the positive impacts of improved treatment and prevention technologies are being realised and when Queensland and Australia is striving to end HIV transmission by 2030. A fact supported by the Queensland government's recent announcement that Queensland will waive copayments for HIV medications on public health grounds from 1st October 2023.

We are troubled by the lack of engagement with the potentially catastrophic impact the proposed changes could have on public health (and indeed the health of women in particular) in the information sheet.

b. Impact on trans and gender diverse people

The law must not extend to so-called 'gender fraud' if a nondisclosure or misrepresentation of a person's assigned gender at birth does not match their current gender identity. This would risk criminalising trans and gender diverse people who are an already-vulnerable community. We refer to cases overseas where gender non-conforming individuals have been prosecuted for sexual assault.[31] These situations must not be considered fraudulent, as their impact would be troubling and problematic for all people whose gender identity lies outside the gender binary.[32] Likewise, countries that criminalise trans and gender diverse people perform worse at reaching HIV care cascade targets. Therefore, we recommend a complete carve-out in the law to protect these people.

9. Contact details

[30] Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 39 *Arizona State Law Journal* 467; Keith J Horvath, Craig Meyer and BR Simon Rosser, 'Men Who Have Sex with Men Who Believe That Their State Has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who Are Unsure of the Law in Their State' [2016] *AIDS and Behavior* <http://link.springer.com/10.1007/s10461-016-1286-0>; Maya A Kesler et al, 'Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission among HIV-Negative Men Who Have Sex with Men' (2018) 13(2) *PLOS ONE* e0193269 ('Prosecution of Non-Disclosure of HIV Status'); Sophie E Patterson et al, 'The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: A Comprehensive Review of the Evidence' (2015) 18(1) *Journal of the International AIDS Society* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689876/>.

[31] *McNally v The Queen* [2013] EWCA (Crim) 1051; *R v Newland* (UK Court of Appeal, 12 October 2016); *People v Sean Clark* [1996] Colo Dist Ct 1994CR003290; *State v Wheatley* [1997] Wash Superior Ct 97-1-50056–6; *State of Israel v Alkobi* [2003] Israel Dist Ct 3341(3).

[32] Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] (3) *Criminal Law Review* 207; Alex Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (2015) 33(4) *Nordic Journal of Human Rights* 380; Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *The Journal of Criminal Law* 417 ('Queering Judgment').

Melissa Warner
CEO QPP
[redacted]
[redacted]

Aaron Cogle
Executive Director, NAPWHA
[redacted]
[redacted]