Joint Submissions to the Review of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW)

July 2026

NAPWHA

HIV/AIDS Legal Centre

Positive Life NSW

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NSW Department of Communities and Justice

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To the NSW Department of Communities and Justice,

Joint Submissions to the Review of the C*rimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW)

Introduction

Thank you for the opportunity to contribute to the review of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW). We are a consortium of organisations representing people living with and affected by HIV.

Collectively, we bring decades of expertise in HIV and the law, peer navigation and support, public health and policy reform.

> ***The 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 and undertake community legal education and law reform activity in areas relating to HIV and hepatitis.
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> ***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 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.
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> ***Positive Life NSW (Positive Life)*** is the lead peer-based community organisation in NSW representing all people living with and affected by HIV in NSW. Positive Life provides leadership and advocacy in advancing the human rights and quality of life of all people living with HIV, and to change systems and practices that discriminate against people living with HIV, our friends, family, and carers in NSW.

We have reviewed the October 2025 Discussion Paper and April 2026 Issues Paper. Our submission focuses on section 61H(1)(k), which provides that a person does not consent to a sexual activity if they participate in the sexual activity because of a fraudulent inducement.

While we strongly support the broader consent reforms, we are concerned that this provision, in its present form, has serious unintended consequences for people living with HIV and, more broadly, the public health response to HIV in NSW.

KEY RECOMMENDATION

We recommend that 61HJ(3) be amended to exclude misrepresentations related to medical conditions:

> ***"fraudulent inducement*** does not include a misrepresentation about a person's income, wealth, feelings or medical condition."

This amendment is necessary to restore legal certainty, align the law with public health principles, and prevent unjust and harmful criminalisation.

We are hopeful the amendment will reduce the negative impact of the fraudulent inducement provision without limiting the effectiveness of sexual consent laws in achieving justice for victim-survivors of sexual assault.

We believe it is most appropriate to use the term 'medical condition' rather than singling out any particular condition, such as HIV or infectious diseases more broadly. This approach reflects the need for an inclusive framework, ensuring the exclusion is not limited in its application. Avoiding HIV-specific language in this context is appropriate because the reason a misrepresentation as to any medical condition should not vitiate consent applies just as aptly to HIV.

This submission, however, does focus on fraudulent inducement as it relates to HIV. This is both because it is our organisations' area of focus and because, historically, HIV has been the medical condition most likely to attract criminal sanction for non-disclosure, exposure or transmission. In addition, due to ongoing stigma, hesitancy surrounding disclosure, and legal frameworks that have, until recently, imposed disclosure obligations specifically on people living with HIV, these individuals are disproportionately affected by section 61HJ(1)(k).

Overview of Concerns

Section 61HJ(1)(k) significantly expanded the scope of frauds deemed to vitiate consent in NSW, where the scope of vitiating frauds has long been held to be limited to those frauds that misrepresent the identity of the sexual partner or nature of the sexual act.[1]

By treating seemingly any material misrepresentation[2] as vitiating consent – except for a narrow set of exclusions regarding income, wealth and feelings – the provision:

- Criminalises sexual activity that, in ordinary understanding, is fully consensual and involves no harm or risk of harm.

[1] *Papadimitropoulos v The Queen* (1957) 98 CLR 249

[2] As in, any misrepresentation which was a substantial reason that someone participated in sexual activity.

- Creates pressure on people with stigmatised medical conditions to disclose their private medical information, even if those conditions are not of relevance to the sexual act. Disclosure can put people living with HIV at risk of discrimination, ostracism, and even violence.
- Undermines established public health approaches to HIV prevention, including considered 2017 reforms removing a legal requirement to disclose HIV status
- Is legally unnecessary: conduct which does involve a risk of HIV transmission or exposure is already criminalised and/or regulated in NSW criminal and public health laws.
- Compounds the burden of HIV-related stigma on people living with HIV, including in their sexual and intimate lives

These consequences have already manifested in the initial years of the provision's operation and will continue unless there is an explicit carve-out as we have recommended.

HIV in NSW Today

Our recommendation to exclude medical conditions from the scope of section 61HJ(1)(k) should be considered in light of the current scientific and epidemiological reality of HIV. This shows that there is no mischief left unaddressed by the recommended amendment.

HIV transmissions in Australia are at record lows and continue to fall. Highly effective prevention mechanisms that make the transmission of HIV virtually impossible are universally available to all Australians.

HIV treatment is free in NSW, including for people without Medicare. In 2025 it was estimated that over 92% of people living with HIV in NSW were aware of their status, and among those diagnosed, more than 99% were on treatment and virally suppressed.[3] Viral suppression (having an undetectable viral load) means that people cannot transmit HIV sexually. **That means these people pose zero risk of HIV transmission to their sexual partners, regardless of (mis)representations made prior to sexual intercourse.**

Complementing the use of HIV treatment to prevent transmission (treatment as prevention or TasP), there are highly effective precautions s that can be adopted by people who are currently HIV negative to prevent HIV transmission, including:

- Pre-exposure prophylaxis (PrEP), which can reduce the risk of acquiring HIV through sexual activity by 99%,[4]
- Post-exposure prophylaxis (PEP), which can be taken after a potential exposure incident, and

[3] NSW Health. (2025). *HIV Strategy 2021–2025: Annual Data Report 2025*. Retrieved from: https://www.health.nsw.gov.au/endinghiv/Publications/annual-2025-nsw-hiv-data-report.pdf.

[4] See generally Health Direct (2024), *Pre-Exposure Prophylaxis (PrEP)*. Retrieved from: https://www.healthdirect.gov.au/Pre-exposure-prophylaxis-PrEP.

- Condoms.

Against this backdrop, the inclusion of HIV within the scope of fraudulent inducement is difficult to justify – it captures conduct disconnected from harm.

Capturing Non-Disclosure: The Practical Operation of Section 61HJ(1)(k)

We submit that, in coming to its provisional recommendation not to exclude HIV from the operation of section 61HJ(1)(k), the Issues Paper does not properly grapple with the harmful consequences of this provision.

As stated in the Second Reading Speech, and noted in the Issues Paper, section 61H(1)(k) sets a "high bar" and is only intended to capture "very serious deceit": the complainant must have participated in the sexual activity substantially because of the accused's fraudulent inducement. Additionally, the accused must intend that by making the false representation, they seek to obtain the complainant's participation in the sexual activity.

The allegedly high threshold, or the assertion that mere non-disclosures are not intended to be captured, unfortunately do nothing to prevent the community's anxiety about the potential impact of this provision nor prevent its stigmatising effects. While legal liability may be contingent on establishing causation, and examining the motives and intentions of the complainant at the time consent was given, how courts will interpret "the substantial reason" requirement is yet to unfold, and in practice, can be difficult to understand for the many people, especially those from multilingual communities or those unfamiliar with the Australian legal system. Where non-disclosure could result in legal liability, community will always view this as a law that compels them to disclose their status and as indicated above, disclosure of HIV status can put people at risk of harm and have serious consequences.

The only way people living with HIV can maintain personal safety in many situations, especially situations preliminary to sex is not to disclose their status. Matching this, for many years, the message from the government and our organisations has been "there is no requirement to disclose, as long as you take reasonable precautions to prevent transmission." This message, before the passage of section 61HJ(1)(k) was accurate. It took many years to resonate.

In explaining disclosure obligations to people living with HIV, our organisations are now obliged to make people aware that they may risk being charged under these provisions if, before sexual intercourse they:

- Misrepresent their HIV status, and/or
- Misrepresent methods they take to prevent HIV transmission

This includes making people aware that benign – and victimless - misrepresentations that are common amongst people living with HIV in their dating and sex life, could be criminalised. Someone living with HIV with an undetectable viral load might, for example,

inform sexual partners they are on PrEP (a medication that HIV negative people use to prevent HIV transmission), which implies they are HIV negative. Part of the reason for this specific misrepresentation can be to aid the understanding of sexual partners who are ignorant about the impossibility of transmission when on a person living with HIV is on treatment and virally surpressed.

That misrepresentations can lead to a person living with HIV being charged with a criminal offence, is the key message that is communicated in conversations about disclosure. Not that these misrepresentations are 'ok' as long as they are not deemed "very serious" or as long as they were not a 'substantial' reason for someone having sex with you. In the nuanced, private, emotive and vulnerable realm of negotiating sex, people are not best placed to make these judgments and understand whether – or not – they are falling foul of section 61HJ(1)(k). A charge of sexual assault, facing up to 14 years imprisonment, is a very serious offence to hang over someone's head in such circumstances.

The provision as it stands, we submit, undermines the principle of legality which presumes that parliaments do not intend to curtail rights and freedoms when enacting legislation. If such an intention is present then criminal laws curtailing freedoms should be clear, precise, unambiguous and publicly accessible so that individuals can know in advance which conduct is prohibited.

For many, the very existence of these laws can place them in a position where, when asked about whether they live with HIV (or have any STI, regardless of its transmissibility), they are forced to choose between:

1. Disclosing a medical condition they cannot pass on (and would prefer to keep private), placing themselves at risk interpersonally, OR
2. Not disclose and either proceed with sex, which can place themselves at risk legally, or not proceed with sex, which may effectively mean disclosure anyway.

Therefore, in practice, although as the Issues Paper correctly describes, the provision is not intended to capture mere non-disclosures, the provision does effectively force disclosure. It creates a choice between whether to disclose a highly sensitive medical condition, avoid sex or proceed without disclosure and accept the risk of criminal charges despite the fact that no transmission risk exists regardless of disclosure.

Avoiding intimacy altogether is a common choice. One-third (35.7%) of respondents living with HIV in a 2024-2026 Australian study agreed with the statement, 'I avoid sex, or limit the type of sex I have, due to concerns about laws regarding HIV and disclosure'. A quarter (24.1%) agreed that 'Current laws related to HIV affect my enjoyment of sex'.[5]

[5] T Norman, J Power, A https://airdrive.eventsair.com/eventsairaueprod/production-ashm-public/def8b59d0bb94871af2f17582841fb2a

To our knowledge section 61HJ(1)(k) has not been deployed in any charge for sexual assault involving misrepresentations as to any STI. That is not to say it does not have a negative impact: the fear and anxiety caused by the mere existence of this provision is real.

The Issues Paper notes a concern that the provision "could create stigma". We go further and submit that the provision *already does entrench stigma*. It reflects decades-old problematic beliefs that people have a right to know others' HIV status. It also suggests that asking potential sexual partners about their medical conditions discharges the questioner's responsibility to take preventative precautions, contradicting the notion of shared responsibility (discussed later in this submission).

Because the Second Reading Speech specifically mentioned "infectious diseases" as an example of a fraudulent misrepresentation, courts are likely to regard misrepresentations about infectious diseases as capable of constituting a fraudulent inducement under the provision. In those circumstances, only an explicit exclusion will adequately protect against that result and provide meaningful reassurance that there is no obligation for a person living with HIV to disclose their status before having sex. It is not a consolation that the provision is said to only intend to cover very serious deceits, as this second reading speech, forming part of statutory interpretation, clearly contemplates misrepresentations regarding infectious diseases as falling within its scope.

Inconsistency with Public Health Law

By de facto requiring disclosure, section 61HJ(1)(k) is out of step with other laws regulating STI disclosure, exposure and transmission in NSW. In 2017, the *Public Health Act 2010* (NSW) was amended to remove a requirement to disclose HIV status before having sex. NSW was the last Australian jurisdiction to do so. This followed many years of advocacy from HIV organisations and community and represented a step forward by the NSW Government. As NSW Health stated at the time:

> *"Mandatory disclosure was out of step with current public health practice, and also with other states and territories. In some instances, the requirement for disclosure may have created a disincentive for people to be tested for STIs."*[6]

Section 61HJ(1)(k) effectively re-introduces this obselete requirement through the backdoor with significantly higher penalties for non-compliance. The requirement is also inconsistent with principles of minimal criminalisation and legal certainty. Further, in neglecting to acknowledge that most transmission comes from sexual partners who are not aware of their status, it is also not based in evidence[7]

[6] NSW Health (n.d.) *Changes to the Public Health Act – Preventing the Spread of Sexually Transmissible Infections*. Retrieved from: https://www.health.nsw.gov.au/phact/Pages/pha-s79.aspx.
[7] For further discussion, see page 8, 'Inconsistent with Principles of Shared Responsibility'

Canada has, for over 20 years, adopted a similarly broad definition of frauds that may vitiate consent to sexual intercourse, encapsulating non-disclosure or misrepresentation of HIV status. We should learn from their experience, including:

- The 2014 landmark consensus statement from Canadian medical and scientific experts criticising the unscientific basis of the law.[8]
- The Canadian government's acknowledgement of the law's problematic impacts and directive to federal prosecutors to not prosecute people living with HIV in most cases,[9] and
- The impact of the provision on HIV stigma, testing, treatment and care.[10]

Expanding the scope of sexual assault law in such a way as to effectively re-criminalise non-disclosure of HIV status not only flies in the face of this important and long-advocated-for reform of public policy, it intensifies the impact by in effect moving non-disclosure from public health law to the *Crimes Act 1900* (NSW), and classifying it as among the most serious offences known to the law which attract significantly higher and, we would argue, disproportionate penalties.

Disclosure of HIV status which is not completely voluntary, can often lead to a person's status being shared more broadly and can lead to harassment, threats or violence In HALC's experience, the legal protections available in these situations are limited with police often unlikely to take steps to protect people with HIV.

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

Legally unnecessary

Where HIV transmission occurs in circumstances where the partner living with HIV acts intentionally or recklessly to transmit HIV, the *Crimes Act 1900* (NSW) already provides mechanisms for prosecuting for causing grievous bodily harm. The *Public Health Act 2010* (NSW) also already provides robust mechanisms for management and prosecution where a

[8] 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').
[9] 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-aviseng.html#nl4>.
[10] See generally, HIV Justice Network (2012) 'Canada: Supreme Court Makes Bad Law Worse', https://www.hivjustice.net/news/canada-supreme-court-makes-bad-law-worse/

person who knows they live with HIV fails to take reasonable precautions to prevent transmission.

There is a stepped approach in the *Public Health Act 2010* (NSW) which addresses the very few people living with HIV whose behaviour places others at risk. Approaches range from counselling, education and support, to management under a Public Health Order. If these are unsuccessful, , as a last resort, powers of detention exist. It is a criminal offence not to comply with a Public Health Order. [11]

These are evidence-based approaches to managing HIV exposure and transmission risks and ensure access to testing, early diagnosis, and to support people diagnosed with HIV to engage in treatment and other forms of care such as peer support. For that extremely small number of people living with HIV 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 health issues, drug or alcohol dependence, homelessness, poverty or incarceration. In these instances, multi-disciplinary collaborative clinical and community case management and support demonstrate 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 treatment, so that HIV viral suppression can be sustained, in which case the transmission of HIV is impossible.

All of the powers needed to manage HIV are already in the *Public Health Act 2010* (NSW). Involvement of the criminal law is unnecessary and ineffective.

Inconsistent with Principles of Shared Responsibility

Australia is a world leader in HIV prevention, treatment and care. In part this is because successive Australian governments, over many National and State/Territory HIV Strategies, including the newly released NSW HIV Strategy 2026-2030, have adopted the principle of shared responsibility. This principle articulates that both people living with and without HIV are responsible for preventing HIV transmission and that each party should take responsibility for maintaining their own sexual health without assuming, or relying on representations made by other partiesabout transmission risks.

Section 61HJ(1)(k) only applies to people who misrepresent a fact they know to be false. Thus, if applied to circumstances regarding HIV, the provision only criminalises people who know their HIV status, the very people who are less likely to pass on HIV, because 99% of people who are diagnosed with HIV in NSW are virally suppressed and cannot transmit HIV.[12] The provision penalises people for testing for STIs and for knowing their health status; thus,

[11] See also NSW Health (2019), *Management of People with HIV who Risk Infecting Others*, Policy Directive. Retrieved from: https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2019_004.pdf.
[12] NSW Health. (2025) *HIV Strategy 2021–2025: Annual Data Report 2025* p. 3 (above n 3).

creating a powerful incentive NOT to test for STIs. Fear of prosecution for HIV non-disclosure has been shown to reduce willingness amongst HIV negative individuals to test for HIV.[13]

The provision also encourages people who think they do not have HIV to incorrectly assume that others will protect them from HIV transmission despite the fact scientific evidence shows that most transmission happens in situations where the partner living with HIV does not know their HIV status – and so is unable to take HIV treatment to prevent transmission.[14]

Holding people living with HIV responsible for the sexual health of people without HIV is not an effective or evidence-based approach to preventing HIV transmissions. It undermines Australia's world-leading efforts to end HIV transmissions in Australia by encouraging reliance on disclosure rather than proven prevention measures.

Additionally, the provision sends an incorrect message that people who do not know their status can protect themselves by asking potential partners about their HIV status, shifting the burden of disease prevention onto others. Disclosure is not a reliable safeguard to transmission. Most STI transmissions occur amongst people who do not know they have an STI (and thus cannot accurately disclose).

The law should not transfer the responsibility for preventing HIV transmissions onto the person living with HIV alone. Both parties participating on sexual acts are responsible for HIV prevention and should take appropriate precautions such as using PrEP, PEP, treatment as prevention (TasP) resulting in an undetectable viral load or using condoms. None of these easily accessible prevention mechanisms require HIV disclosure. The provision encourages people to exchange these proven effective disease transmission prevention methods that do not require disclosure to be effective with an ineffective prevention tactic (disclosure) that increases the risk of transmission.

Criminalisation through this provision can occur in the absence of HIV transmission or exposure to a risk 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 with any authority).

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[13] 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.

[14] See, e.g., R. T. Gray, D. P. Wilson, R. R. Guy., M. Stoove., M. E. Ellard., G. P. Prestage., T. Lea., J de Wit and M. Holt (2018) 'Undiagnosed HIV Infections among gay and bisexual men increasingly contribute to new infections in Australia', *Journal of the International AIDS Society* 21(4) doi: 10.1002/jia2.25104.

This provision targets only those people living with HIV who likely pose zero risk and criminalises non-disclosure even though no harm has occurred. It exposes people living with HIv to some of the harshest penalties available in the criminal law despite lack of harm. The provision also exposes negative people to a higher risk of HIV transmission and exposes people living with HIV at risk of unnecessary criminalisation.

Stigma and Other Harms

People living with HIV may not always be able to disclose their status to sexual partners for reasons relating to their personal safety. We oppose any law which compels someone to share their HIV status in situations that open them up to discrimination, rejection, ostracisation, abuse and/or potential violence.

Over our 30+ year histories, our organisations have borne witness to the insidious impact of HIV stigma on our communities. People living with HIV who choose to share their HIV status with their partners or prospective partners have all too often faced negative consequences including: being 'outed' to family or community; being shunned or ostracised; being blackmailed; being subjected to verbal abuse; being reported to police or health authorities; and being subjected to physical abuse, violence and, on at least one occasion, homicide.

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 living 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 person living with HIV against their will. Maintaining privacy in relation to one's HIV status is a crucial tool people living with HIV have to avoid such abuse. The law should not remove this protection.

People living with HIV have long experienced significant levels of anxiety, fear and psychological trauma relating to the potential threat of criminal investigation and proceedings.[15] This contributes to 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.

People living with HIV are highly motivated to prevent HIV transmission. The median time from HIV diagnosis to initiating antiretroviral treatment is now 12 days, down from 45 days in 2013. Overwhelmingly, people who have received an HIV diagnosis quickly make strenuous efforts to ensure they do not pose a risk of infection to their partners. Unless the suggested exclusion is added, this provision will continue to imply otherwise.

[15] 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 In Australia, *AIDS Care*, DOI: 10.1080/09540121.2021.1936443

Increased stigma: all it takes is one charge

The other important thing to keep in mind is that all it would take for the negative consequences of this provision to multiply would be one charge or prosecution to be reported widely in the media, which has long been a powerful conduit of HIV-related stigma.

A HALC client, for example, was charged with failure to take reasonable precautions against the transmission of HIV, an offence for which he was later found not guilty. Yet the extensive media reporting caused significant distress and reputational damage. In a similar vein, HALC was recently approached by a person living with HIV about a media outlet which reported on his HIV status when describing a crime he committed which was irrelevant to that medical condition (and for which he had already faced criminal sanction); the reporting was hindering employment opportunities. To take another example - although involving a different STI – in the ACT, a man was recently convicted for reckless transmission of genital herpes, a case that was inaccurately reported and attracted widespread attention and commentary across social media.[16] Collectively, these examples demonstrate the significant risk that laws and prosecutions associated with HIV and other STIs pose. Media reporting can generate lasting stigma, particularly where public reporting focuses on a person's medical condition rather than the conduct in issue.

The appropriate mechanism for management of the risk of sexual transmission of HIV is education and empowerment of people living with HIV and their partners, and promoting and sustaining the model of shared responsibility to prevent HIV transmission. The appropriate regulatory framework is a health-based, not a criminal justice-based one. This approach has been the hallmark of Australia's successful response to HIV for more than 30 years, and risks continuing to be undone if misrepresentations about medical conditions are not excluded from the operation of section 61HJ(1)(k).

Criminal prosecution of people living with HIV for transmission, exposure or non-disclosure has been shown to increase risk-taking behaviour among people who have not been diagnosed with HIV, and to decrease engagement in testing, treatment and care.[17] This

[16] Bridget Haire and David J. Carter (2026) 'A man's been convicted for spreading genital herpes. Here's why that might backfire' The Conversation (online). Retrieved from: https://theconversation.com/a-mans-been-convicted-for-spreading-genital-herpes-heres-why-that-might-backfire-282494.

[17] 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

review is a critical opportunity to enact reform that reduces the criminalisation of people living with HIV in NSW, reduces HIV-related stigma, and supports NSW's goal of virtually eliminating HIV transmissions by 2030.

Increased numbers of criminal prosecutions of people living with HIV for transmission, exposure or non-disclosure undermine the significant government investment in Australia's world leading public health response to HIV. Criminal prosecutions hold the potential to inhibit progress at a time when the virtual elimination of HIV transmissions in NSW is within reach. One need only look to the Canadian example to see increases in rates of HIV transmission and reduced HIV testing in the context of fear of legal consequences. [18]

Contrary to the National HIV Strategy (2024-2030) and NSW HIV Strategy (2026-2030)

The provision also contradicts the goals of the Ninth National HIV Strategy 2024-2030.[19] Consent laws which allow misrepresentation of HIV status to be criminalised as sex due to fraudulent inducement are described in the National HIV Strategy as, "in some instances unscientific and do not recognise U=U." The Strategy notes that "the fear of prosecution can lead people to avoid conversations about HIV with sexual partners and health professionals, and delay or forgo HIV testing and treatment, all of which contributes to increased risk of HIV transmission."

Laws and policies based on unscientific principles are said to "stigmatise HIV and place Australia out of step with international practices."[20]

A key area for action under the National HIV Strategy is to "Review laws and policies that perpetuate stigma and discrimination and impact health-seeking among priority populations," with laws that criminalise the misrepresentation of HIV status) explicitly mentioned as such as an example.

The recently released NSW HIV Strategy 2026-2030 similarly contains an initiative to 'ensure that supportive laws and regulations are in place to address structural stigma…and support

of the Evidence' (2015) 18(1) *Journal of the International AIDS Society* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689876/>.

[18] M. 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,' *PLoS ON*E 2018; 13(2): e0193269. Retrieved from: https://doi.org/10.1371/journal.pone.0193269; P. O'Byrne et al., "Nondisclosure prosecutions and HIV prevention: Results from an Ottawa-based gay men's sex survey," *Journal of the Association of Nurses in AIDS Care* 24, 1, 2013, pp. 81–87; HIV Justice Worldwide (2019) 'Study on the Criminalisation of HIV Non-Disclosure', Submission to the Standing Committee on Justice and Human Rights – House of Commons, Canada. Retrieved From: https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10474034/br-external/HIVJusticeWorldwide-e.pdf.

[19] Commonwealth Department of Health and Aged Care (2024), *Ninth National HIV Strategy 2024-2030*. Retrieved from: https://www.cdc.gov.au/system/files/2025-10/ninth-national-hiv-strategy-2024-2030_0.pdf.

[20] Ibid.

public health', and to 'engage with…partners to discuss the laws that may reinforce stigma or conflict with Australia's endorsement of the science of U=U'. [21]

Conclusion

It is for these reasons that we urge the NSW Government to amend section 61HJ(3) so that fraudulent inducement does not include a misrepresentation about a person's income, wealth, feelings or medical condition.

There is no evidence or clear rationale for the broad definition of fraudulent inducement adopted in section 61HJ(1)(k), and nothing to suggest that extending exclusions to cover misrepresentations about medical conditions would conflict with widely held community standards.

As it stands, section 61HJ(1)(k) effectively criminalises non-disclosure of HIV as sexual assault, with detrimental life-long implications for the individual whilst creating disincentives for people to get tested, legitimising a culture of blame surrounding transmission, and contradicting the key message that everyone has shared responsibility for taking reasonable precautions to prevent HIV transmission.

While our strong view is that the exclusion should be for medical conditions, alternative options that are still preferable to leaving section 61HJ as is, would be either:

1. Adding an exclusion for STIs and blood-borne viruses (BBVs), as long as the accused has taken reasonable precautions against their transmission as per the requirement in section 79 of the *Public Health Act 2010* (NSW).
2. As was implemented in Queensland, requiring HIV transmission to have occurred for someone to be found guilty under the provision.

Thank you again for the opportunity to be involved in these consultations. Should there be any further questions, please contact Bethany Rodgers, Policy Lawyer at HALC at beth@halc.org.au.

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[21] NSW Department of Health (2026), *NSW HIV Strategy 2026-2030*. Retrieved from: https://www.health.nsw.gov.au/endinghiv/Publications/nsw-hiv-strategy-2026-2030.pdf.