

ACON POSITION STATEMENT

HIV DECRIMINALISATION IN NSW

New South Wales has always been a global leader in the response to HIV. Now is the time to be a global leader in the response to HIV stigma, by addressing systemic stigma embedded in our legal frameworks.

June 2024

Introduction

The *NSW HIV Strategy 2021-2025* has Stigma as its fourth pillar, and commits to the goal of a 75% reduction in reported experiences of stigma.

Evidence from the Stigma Indicators Monitoring Project outlines progress toward this goal, however, in order to fully address HIV-related stigma, addressing structural stigma embedded in our legislative frameworks is critical.

NSW has especially made very strong progress toward the decriminalisation of HIV and of priority populations at risk of HIV, through decades of concerted effort in our HIV Strategies. This includes the gradual advancement of LGBTQ+ rights, the decriminalisation of sex work, and successive updates to the *Public Health Act* in line with best evidence.

However, the full decriminalisation of HIV in NSW has yet to be realised, and recent legislative changes have represented a possible step backwards in creating enabling legal environments that will minimise the impact of systemic and structural stigma on people living with, and at risk of, HIV.

This paper puts forth ACON's position on the necessity of full decriminalisation of HIV to effectively address structural stigma and eliminate HIV transmission.

Addressing stigma will also require the decriminalisation of priority populations, especially those who experience higher levels of stigma, namely people who inject drugs and people who engage in sex work. While sex work was largely decriminalised in 1995, full decriminalisation has yet to occur, including the repeal of Part 3 of the *Summary Offences Act 1988*, which is an amendment in Alex Greenwich MP's *Equality Legislation Amendment (LGBTIQ+) Bill 2023*.

People who inject drugs remain criminalised in many ways. Decriminalisation of drug use is a complex topic, and is likely to be a subject of importance at the NSW Government's forthcoming Drug Summit, the date of which has yet to be announced.

As ACON's primary focus within the *NSW HIV Strategy 2021-2025* is to address HIV responses for people of diverse genders and sexualities, we defer to our sector partners SWOP and NUAA on decriminalisation among these priority populations.

Accordingly, this position statement focuses on HIV decriminalisation especially as it relates to gay, bisexual and other men who have sex with men (GBMSM), and LGBTQ+ populations, and the impact such legislative change would have on our communities, and our efforts reduce HIV-related stigma and eliminate transmission in NSW.

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Policy context

In December 2023, the National HIV Taskforce report recommended the review of laws that indirectly criminalise HIV transmission, exposure, and misrepresentation of HIV status alongside current HIV evidence, in order to work towards the goals of eliminating transmission and stigma.

These recommendations will likely form part of the forthcoming *Ninth National HIV Strategy 2024-2030* to encourage all Australian governments, including states and territories, to review its laws that indirectly perpetuate stigma and are incongruent with current HIV science, including U=U.

Health Equity Matters and the National Association of People with HIV Australia (NAPWHA) released in May their *National Consensus Statement on the Future of Australia's HIV Response*. The consensus statement consisted of 106 experts in the sector scoring statements on a scale of importance. The statement 96.2% consensus that Australian jurisdictions must remove harmful legislation that criminalises HIV transmission.¹

Globally, the UNAIDS Reference Group on HIV and Human Rights is clear: "Criminalisation is deadly; it fuels the HIV pandemic. The misuse of the criminal law also violates human rights on a mass scale globally...The evidence is clear: ending misguided and unjust criminalisation is good for public health and required as a matter of human rights obligation."²

They recognise that, "in a world where HIV is completely preventable, the increased risk of infection and of death faced by key populations is linked directly and significantly to various structural barriers — including laws and policies that stigmatise, discriminate and punish."³

Similarly, the World Health Organisation states:

Contrary to the HIV-prevention rationale that such laws will act as a deterrent and provide retribution, there is no evidence to show that broad application of the criminal law to HIV transmission achieves either criminal justice or public health goals. On the contrary, such laws fuel stigma, discrimination and fear,

discouraging people from being tested to find out their HIV status, and undermining public health interventions to address the epidemic. Thus, such laws may actually increase rather decrease HIV transmission.⁴

UNAIDS recommends that jurisdictions "Abolish or reform relevant laws that are used to criminalise HIV transmission, exposure or non-disclosure, ensuring that the law, in whatever form, allows for criminal liability only in cases of actual, intentional transmission at most."⁵

As already noted, the *NSW HIV Strategy 2021-2025* contains clear targets to reduce stigma. The current NSW strategy has a focus on systemic stigma within health systems, rather than legal frameworks.

NSW has had great success in many of the other aspects of its current Strategy, especially in treatment and suppression of the virus. As we look ahead to the development of future Strategies from 2026, stigma may have a central focus, and addressing the criminalisation of HIV will be critical to addressing systemic and structural stigma.

The evidence

When a person living with HIV has an undetectable viral load (UVL, defined as <200 copies/mL), they are unable to transmit HIV to another person.⁶

NSW is very close to achieving the UNAIDS Fast-track 95-95-95 targets for HIV diagnosis, treatment and viral suppression. That is, 95% of people with HIV are diagnosed, 95% diagnosed with HIV are on treatment, and 95% of people living with HIV on treatment have an undetectable viral load.

The 2022 NSW HIV Cascade notes that 93% of people living with HIV are diagnosed, 96% of those people are retained in care, 98% of those in care are receiving treatment, and 99% of those receiving treatment have suppressed the virus, or have UVL.⁷

This means that, due to the overwhelming success of NSW's response to HIV to date, there are very, very few people in NSW who have a

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detectable viral load, and the vast majority of those with a detectable viral load do not know they are living with HIV (are undiagnosed).

The legal frameworks in NSW

While there has not been any legislation in any Australian jurisdiction that contains HIV specific offences since 2015, in NSW, there are laws that significantly contribute to stigma and the criminalisation of HIV transmission and prevention efforts, such as section 79 of the *Public Health Act 2010* (NSW), and the *Mandatory Disease Testing Act 2021* (NSW).

These laws are not based on evidence, are contrary to NSW's otherwise world-leading responses, perpetuate stigmatising and false narratives around the transmission of blood-borne viruses (BBVs), and, in many cases, represent a violation of human rights.

Section 79 of the *Public Health Act*, amended in 2017, now requires a person who knows they have HIV to take "reasonable precautions" against transmission.⁸ Due to the limited number of cases that have come before the courts, it is unclear exactly what might constitute 'reasonable precautions' but this could include UVL, condom use, and PrEP. However, the onus sits with the person living with HIV, so it is unclear whether knowing a sexual partner is on PrEP is considered a 'reasonable precaution'. Penalties include fines and imprisonment.

There are also concerns that, as part of the new affirmative consent legislation (that provides welcome changes to consent law in NSW), section 61HJ(k) of the *Crimes Act 1900* (NSW) may needlessly criminalise people who state they are on PrEP, rather than explicitly state their positive HIV status.

As this law is currently untested with regard to HIV, we are unaware what impact, if any, this might have on a person with an undetectable viral load and misrepresents their HIV status to their sexual partner. Since the *Public Health Act 2010* (NSW) was amended in 2017, people living with HIV do not need to disclose their status to a sexual partner if they are taking reasonable

precautions. This section may therefore be at odds with the *Public Health Act*.

Mandatory Disease Testing

ACON has always firmly opposed the introduction, and passage, of the *Mandatory Disease Testing Act 2021* in NSW.

We believe the Act was introduced due to baseless fears and misunderstandings about people with HIV and other BBVs. The Act does nothing to address or change these discriminatory views. Indeed, the Act contributes much to the further discrimination faced by people living with HIV and other BBVs.⁹

Fundamentally, mandating a test for HIV on a third party does not change the emergency services worker's risk. It does not protect emergency service workers. The law only serves to perpetuate HIV stigma and misinformation, which negatively impacts the ability to achieve the goal of virtual elimination of HIV in NSW.

ACON has provided a submission to the Ombudsman's review of the Act, and await the findings of that review.

Impact of criminalisation on our communities

Criminalisation most clearly affects those who have been criminalised by these laws. Our partners at the HIV/AIDS Legal Centre (HALC) have assisted clients that have spent time in custody, despite eventually being found not guilty, and had their identity revealed by mainstream media as a result of these laws, leading to experiences of discrimination, stigma, and isolation. The HIV Justice Network indicates there has been at least 13 cases in NSW.¹⁰

Criminalisation also contributes to the stigmatisation of all people living with HIV. Efforts to minimise, rather than perpetuate, stigma, are essential if we are to achieve virtual elimination of HIV, and improve the quality of life of all people living with HIV.

Research indicates the criminalisation of HIV is effective in perpetuating HIV stigma and that fear of criminal prosecution impacts people's

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ability to live openly with HIV, which results in disclosing less frequently, or seeking out anonymous sexual encounters, and has an overall negative impact of quality of life.^{11,12}

In Australia's *HIV Futures 8* research project, 1 in 4 participants living with HIV indicated they were worried about disclosing their HIV status to service providers, based on the risk of criminal prosecution.¹³ By not disclosing due to fear of stigma and discrimination, this can considerably impact the quality of healthcare or service provision a person receives.

HIV-related stigma has a negative impact on the physical and mental health of PLHIV, contributes to secrecy and social isolation, and can compromise confidence and resilience.

ACON is committed to ending HIV-related stigma for all. Our work to reduce stigma spans our HIV support, policy, advocacy and research, peer education, testing, and campaigns work. In 2021, we produced the campaign '[It's time to think positive about HIV](#)'. Rather than focus on the harms of HIV stigma, Think Positive celebrates HIV allyship and calls on the broader community to confront HIV stigma together. To complement the campaign, we launched a skills-building resource called It's [Time to Think Positive About HIV – A Practical Guide to Being a Better HIV Ally](#), produced with support from Positive Life NSW.

But these efforts to combat stigma must be coupled with efforts to fight structural stigma. Our advocacy work has long argued that an enabling legal environment, centred around evidence and public health principles, is critical to reducing structural stigma.

However, the criminalisation of HIV not only impacts stigma experienced by people living with HIV, and their quality of life, but it also inhibits our public health goals of eliminating HIV transmission.

It is important to note that both the Public Health Act and the Crimes Act provisions apply to a person who knows they have HIV. This has an inhibiting and stigmatising effect on testing, incentivising people to remain unaware of their status.

If a person with HIV is undiagnosed, they are unable to access lifesaving treatment and may unwittingly transmit the virus to others. Most HIV transmissions in Australia occur where the partner who lived with HIV was undiagnosed and untreated at the time of the sexual interaction. It is therefore critical that we encourage testing, rather than disincentivise it through laws and policies that may indirectly encourage people to remain unaware of their status.

UNAIDS notes that prevention must be the primary goal of any criminalisation of HIV.¹⁴ However, some US-based research indicates that the criminalisation of HIV is not associated with increased safe sex behaviours.¹⁵

The vast majority of people living with HIV take suitable measures to prevent transmission and want to reduce such risks. Existing laws fail to embrace the important principle of mutual responsibility, wherein both parties have a responsibility to make efforts to prevent the spread of sexually transmitted infections (STIs) and take responsibility for their own sexual health, like using condoms or taking PrEP (pre-exposure prophylaxis).

People may instead develop a false sense of security that their sexual partners will disclose or use protection if they are positive. This approach also does not take into account window periods (between transmission and a positive test result).

Conclusion

It is established that laws that seek to criminalise HIV do not reflect current HIV science, and serve to perpetuate structural and systemic stigma.^{16,17} Not only that, but such laws often have the (unintended) effect of incentivising not knowing your status, and therefore are contrary to public health goals and impact the success of the HIV response in that jurisdiction.^{18,19,20}

An essential way for NSW to eliminate HIV transmission is to encourage everyone who might be at risk of HIV to voluntarily come forward for testing, and to empower everyone in

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NSW to take control of their health when it comes to HIV.

But more than that, if NSW is to meet its targets to reduce stigma and improve quality of life for all people living with HIV, it is essential that systemic and structural stigma embedded in our legal frameworks is addressed, our policy frameworks are based on current evidence, and those within our justice systems have a strong knowledge and trust in current HIV science.

Recommendations

Based on this position, ACON recommends the NSW Government:

1. Review current HIV evidence and science and ensure legal and policy frameworks are in line with current public health evidence and human rights, and that frontline workers and policymakers are informed about current evidence.
2. Repeal s79 of the *Public Health Act 2010*, and if necessary, substitute it with non-stigmatising provisions that recognise genuine mutual responsibility to protect public health.
3. Amend s61HJ(k)(3) of the *Crimes Act 1900* to clarify that fraudulent inducement does not include misrepresentation about a person's health.
4. Consider the findings of the Ombudsman's review into the *Mandatory Disease Testing Act 2021*, including whether the Act is operating as intended, and commit to its repeal if the Act is not serving its purpose, in a way that could be better served by other mechanisms, including education, accurate risk assessment, and mandatory hepatitis B vaccination.
5. Act on the relevant recommendations of the National HIV Taskforce Report in NSW.
6. Commit to including measures to create an enabling policy environment to reduce HIV-related stigma in forthcoming NSW HIV Strategies.

ACON, alongside our partners, HALC and Positive Life NSW, will act in line with the objectives of the 'HIV is Not a Crime Awareness Day'²¹ by continuing to:

1. Raise awareness about the impact of HIV criminalisation on individuals, families, and communities. Foster empathy, understanding, and support for people living with HIV.
2. Ensure that individuals living with HIV have access to legal support and representation to challenge unjust prosecutions and discriminatory practices.
3. Empower communities affected by HIV to advocate for their rights, including for HIV decriminalisation, challenge criminal laws and policies and demand accountability from policymakers and institutions.

References

- ¹ A National Consensus Statement on the Future of Australia's HIV Response Report. Health Equity Matters and the National Association of People With HIV Australia. Sydney. Health Equity Matters, 2024.
- ² UNAIDS Reference Group on HIV and Human Rights. (2023). Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights: A statement from the UNAIDS Reference Group on HIV and Human Rights. *Sexual and Reproductive Health Matters*, 31(1), 219-4188.
- ³ UNAIDS Reference Group on HIV and Human Rights. (2023). Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights: A statement from the UNAIDS Reference Group on HIV and Human Rights. *Sexual and Reproductive Health Matters*, 31(1), 219-4188.
- ⁴ World Health Organisation (2015). *Sexual Health, Human Rights, and the Law*. Human reproduction programme. Available: https://iris.who.int/bitstream/handle/10665/175556/9789241564984_eng.pdf
- ⁵ UNAIDS Reference Group on HIV and Human Rights. (2023). Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights: A statement from the UNAIDS Reference Group on HIV and Human Rights. *Sexual and Reproductive Health Matters*, 31(1), 219-4188.
- ⁶ Barré-Sinoussi, F., Abdool Karim, S. S., Albert, J., Bekker, L. G., Beyrer, C., Cahn, P., ... & Godfrey-Faussett, P. (2018). Expert consensus statement on the science of HIV in the context of criminal law. *Journal of the International AIDS Society*, 21(7), e25161.
- ⁷ NSW Ministry of Health (2023). NSW HIV Strategy 2021-2025: Annual Data Report 2023. <https://www.health.nsw.gov.au/endinghiv/Publications/annual-2023-nsw-hiv-data-report.pdf>
- ⁸ *Public Health Act 2010* (NSW), s79(1)
- ⁹ Cameron, S. (2019). The System is Broken: Audit of Australia's Mandatory Disease Testing Laws to Test for HIV, HIV Justice Network and the National Association of People with HIV Australia.
- ¹⁰ HIV Justice Network (2024) New South Wales. Available: <https://www.hivjustice.net/country/au/au-nsw/>
- ¹¹ Dodds, C., & Keogh, P. (2006). Criminal prosecutions for HIV transmission: People living with HIV respond. *International Journal of STD and AIDS*, 17, 315-318.
- ¹² Mykhalovskiy, E. (2015) The public health implications of HIV criminalization: past, current, and future research directions, *Critical Public Health*, 25:4, 373-385.
- ¹³ : 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
- ¹⁴ UNAIDS (2002). Criminal law, public health and HIV transmission: A policy options paper. Available: https://data.unaids.org/publications/irc-pub02/jc733-criminallaw_en.pdf
- ¹⁵ Harsono, D., Galletly, C. L., O'Keefe, E., & Lazzarini, Z. (2017). Criminalization of HIV exposure: a review of empirical studies in the United States. *AIDS and Behavior*, 21, 27-50.
- ¹⁶ Barré-Sinoussi et al (2018)
- ¹⁷ Gagnon, M., & Vézina, C. (2018). HIV criminalization as "risk management": On the importance of structural stigma. *Seeing red: HIV/AIDS and public policy in Canada*, 55-78.
- ¹⁸ Kavanagh, M. M., Agbla, S. C., Joy, M., Aneja, K., Pillinger, M., Case, A., ... & Graeden, E. (2021). Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response?. *BMJ Global Health*, 6(8), e006315.
- ¹⁹ Harsono, D., Galletly, C. L., O'Keefe, E., & Lazzarini, Z. (2017). Criminalization of HIV exposure: a review of empirical studies in the United States. *AIDS and Behavior*, 21, 27-50.
- ²⁰ Csete, J., Elliott, R., & Bernard, E. J. (2023). So many harms, so little benefit: a global review of the history and harms of HIV criminalisation. *The Lancet HIV*, 10(1), e52-e61.
- ²¹ HIV Justice Worldwide (2024). "Global Statement on HIV is Not a Crime Awareness Day", 28th February. Available: <https://www.hivjustice.net/wp-content/uploads/2024/02/HJWW-Global-Statement-HINAC-Day.pdf>