A world leading model of best-practice or a reactionary nation? Implementation of mandatory disease testing highlights laws at odds with Australia's reputation as a pillar of human rights

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What a load of spit

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Australia prides itself on having "a world leading model of best-practice" in responding to HIV (8th National HIV Strategy). Yet in recent years, domestic laws have been amended and enacted which penalise, criminalise and stigmatise PLHIV and key populations (KP).

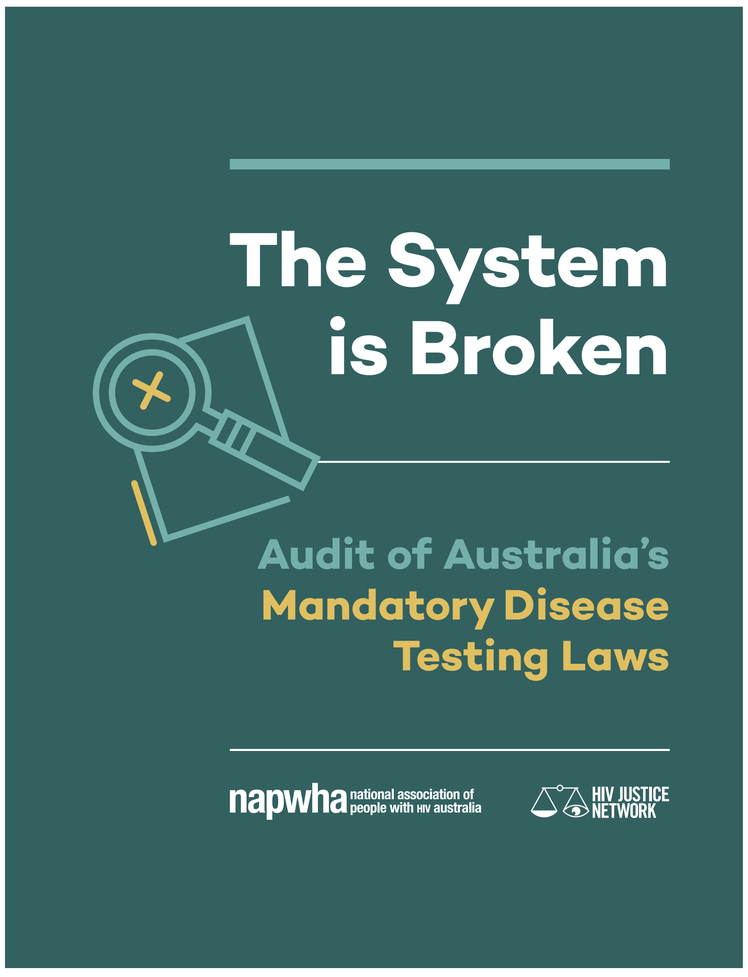
Laws detrimental to PLHIV and the HIV response can be categorised as follows:

1. Laws that directly regulate HIV (such as public health laws, and criminal transmission offences)
2. Laws of general application that are used in practice to target people with HIV (such as criminal laws, immigration laws, and exemptions under anti-discrimination acts)
3. Laws that are not generally used against people with HIV but which adopt stigmatizing notions of HIV as their justification (such as laws regulating sex work, and mandatory disease testing laws)

The past five years have seen a number of laws introduced or amended, across various Australian jurisdictions, that threaten our world-leading model of best practice and take Australia's progress on HIV prevention backwards.

- Public Health Acts in New South Wales (NSW) and Tasmania have been amended to significantly increase penalties for failing to take reasonable precautions to prevent HIV transmission. These laws make HIV positive people constantly vulnerable to accusations of misconduct made by HIV negative current and former partners. The threat to make such an accusation can feature in intimate partner violence targeting people with HIV. Where such accusations are made, we have seen disproportionately harsh responses by the criminal-legal system, including the denial of bail and media releases calling for other partners of the accused to come forward.
- Affirmative consent laws have been introduced in NSW and are being considered in several other Australian jurisdictions. These laws criminalise misrepresentations of HIV status. This has undermined decades of work to decriminalise all forms of non-disclosure. Misrepresentation of HIV status now vitiates consent in NSW which leaves HIV positive people vulnerable to charges of rape and some of the heaviest penalties of the criminal law. HIV positive people often have no choice but to misrepresent their status to avoid stigma, discrimination and the threat of physical violence.
- The most recent wave of law-making falls into the third category above: mandatory disease testing laws, while not aimed at HIV alone, validate illusory fears of HIV and other blood-borne viruses (such as the fear of transmission via spitting). In so doing they contribute to the stigmatisation of HIV and people in key populations.

All these laws focus on the danger that people with HIV are perceived to pose to the community rather than on testing, treatment, and prevention. As a case study this poster specifically examines the mandatory disease testing laws enacted in six Australian jurisdictions, their detrimental impact on PLHIV and KP, and the ways in which they undermine Australia's world-leading response to HIV.



Mandatory Disease Testing in Australia

Mandatory disease testing allows for the non-consensual testing for blood borne viruses (BBV) of people who intentionally expose emergency service workers to bodily fluids. In 2021, NSW became the sixth Australian jurisdiction (WA, NT, SA, NSW, QLD and VIC) to pass such laws. This is entirely at odds with the best-practice 'pragmatic' approach that characterised the first three decades of the Australian response to HIV.

Mandatory disease testing laws empower non-medical personnel – usually police, but in one jurisdiction (Western Australia) this includes prison officers as well – to force a person to undergo mandatory tests for a range of infections including HIV. In some jurisdictions, force can be used to obtain a blood sample; in others, refusal to undergo testing results in a fine.

These laws are generally invoked in cases where a police officer or other emergency responder alleges they have come into contact with the bodily fluids of another person – in the majority of cases this involves saliva (spit).

These non-medical personnel have no expertise in HIV or other communicable diseases and are empowered to force another person to undergo an invasive medical procedure on the basis of a mere allegation of spitting — an act which cannot transmit a blood-borne virus. No evidence is required aside from the allegation, and depending on the jurisdiction there may be no avenue for appeal against the order to undergo testing.

UNAIDS and WHO have long expressed the position that mandatory testing should only apply to the screening of blood products for donation, and it is widely recognised that mandatory testing of HIV is detrimental to testing, treatment and prevention efforts.

In partnership with the HIV/AIDS Legal Centre (HALC), the National Association of People with HIV Australia (NAPWHA) undertook a concerted programme of advocacy seeking to head off these changes.

We identified during advocacy that these laws:

1. Are contrary to science – these laws don't prevent transmission and they don't change treatment/testing recommendations for people exposed to a bodily fluid. HIV cannot be transmitted through contact with saliva.
2. Are contrary to best-practice which, in Australia, requires that all BBV/STI testing be voluntary and with consent.
3. Makes transmission more likely, not less, by creating a stigmatised, disabling environment in which open and honest discussions about HIV prevention are harder to have, since affected communities are aware of the heightened risk of criminalisation and punishment.
4. Cause damage to people living with BBVs by creating a false implication that they pose a threat to emergency services personnel (and the broader society) when no such threat exists.
5. Causes emergency service workers unnecessary stress and anxiety, by purposefully maintaining workforce ignorance about the negligible risk of occupational BBV transmissibility and encouraging fear of people with BBVs.
6. Enable a deeply concerning form of extrajudicial punishment that police can mete out without evidence or accountability.
7. Result in double punishment for someone being criminally charged with an assault offence for transmission of a bodily fluid, e.g. spitting. This is contrary to the principle of minimal criminalisation.
8. Similarly to HIV non-disclosure, exposure and transmission offences under public health legislation and criminal laws, these laws stigmatise PLHIV from a position of unfounded fear rather than enabling testing, treatment and prevention.
9. Make the elimination of HIV transmission in Australia more challenging.

How can we fix this?

Misplaced fear of BBV transmission among law enforcement and emergency services workers drives the implementation of such laws. In HALC's criminal law practice it observes police officers reporting such fears as a significant impact of 'spitting' offences. These laws respond to the fear rather than acknowledging the negligible risk of transmission. Failing to engage with the scientific reality of BBV transmission results in laws which are not evidence-based, do not prevent BBV transmission, and dramatically undermine the human rights of PLHIV, KP and defendants in criminal proceedings.

Mandatory testing laws need to be challenged and repealed. Together, NAPWHA and HALC aim to combat these laws with a tri-level approach:

1. At grassroots HALC provides direct legal representation to individuals impacted by these laws.
2. NAPWHA engages state and territory and federal governments to advocate the repeal of these laws as well as monitoring their implementation
3. Both organisations work together to educate law enforcement and emergency services on the risks of occupational BBV transmission.

The HIV/AIDS Legal Centre Inc (HALC) is a specialist legal centre in Sydney, Australia that provides free legal services for people with HIV-related legal matters.

The National Association of People with HIV Australia (NAPWHA) is Australia's peak non-government organisation representing community-based groups of people living with HIV (PLHIV).

This poster, and the work that has gone into it, is based upon the lives of people living with HIV. Our fight against HIV and AIDS must continue to include people living with HIV and the authors honour their ongoing contributions to the epidemic response.

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