

## **Submission – NSW Justice’s Review of the Operation of Suppression Orders, Non-Disclosure Orders and Access to Information in NSW Courts and Tribunals.**

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### **Introduction**

The National Association of People with HIV Australia (NAPWHA) and the HIV/AIDS Legal Service (HALC) make this submission to NSW Justice in response to the Attorney General’s review of the operation of suppression and non-disclosure orders and access to information in NSW Courts and Tribunals.

### **About NAPWHA**

NAPWHA is the peak organisation representing people with HIV at the national level. NAPWHA’s membership of national networks and state-based organisations reflects the diverse make-up of the HIV-positive community. We promote the meaningful involvement, visibility and centrality of PLHIV in all aspects of Australia’s response.

### **About HALC**

HALC is a not-for-profit, specialist community legal centre in NSW. HALC provides free and comprehensive legal assistance to people in NSW with HIV or Hepatitis-related legal matters, undertakes Community Legal Education and Law Reform activity in areas relating to HIV and Hepatitis, provides legal training, education and experience to employees and volunteers and liaises and works in partnership with other organisations to achieve these objectives.

### **Background**

The National Association of People with HIV Australia (NAPWHA) and the HIV/AIDS Legal Centre (HALC) welcome the opportunity to make this submission to the NSW Law Reform Commission regarding the use of suppression and non-publication orders. This submission focusses on the importance of these provisions in relation to HIV which remains highly stigmatised. In particular, we submit that existing acts should be regulated to provide for specific circumstances in which suppression and/or non-publication should be imposed, including where a party to or person incidental to the proceedings is a person living with HIV, including defendants in criminal law proceedings.

This submission is informed by the following factors:

### **Understanding the experience of HIV-related stigma**

Stigma against PLHIV remains persistent in the Australian community. Data from the Stigma Indicators monitoring Project shows 74% of HIV positive respondents experienced stigma in 2016<sup>1</sup>.

People fear disclosing their HIV status for a range of reasons including fear of rejection and violence. The fear has a sound basis, noting the 2008 case of Podesta, who was found guilty of stabbing his mother's partner to death after 'prank calls' led him to mistakenly believe the deceased had HIV<sup>2</sup>.

HIV-related stigma undermines the HIV response, noting the National HIV Strategy acknowledges criminalisation as problematic, "perpetuating isolation and marginalisation and limiting [priority population's] ability to seek information, support and health care".

Stigma makes it difficult for a person to disclose their HIV-positive status to a potential partner, to speak openly and honestly to a healthcare provider, and to access treatment and other forms of support which in turn reduce HIV transmission risk.

At a time when great inroads are being made to reduce the number of cases of HIV transmission each year, it is vital that all arms of government come together to support the HIV response. Suppression orders have a vital part to play given the role of the media.

### **Important Role of Suppression Orders to PLHIV**

Disclosure of the HIV status of a PLHIV in a court setting places them at risk of violence, stigma, discrimination and harassment. This frustrates the public interest in maintaining the peace between citizens, undermines court's authority as the sole arbiter of justice and undermines public health goals of ending the HIV epidemic.

Current legislative provisions to allow for court suppression or non-publication could effectively protect PLHIV from unnecessary disclosure of their HIV condition however in certain jurisdictions decision makers are often reticent to grant the orders and/or legal practitioners are often of the view that it would be futile to make such a request.

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<sup>1</sup> [https://csrhc.arts.unsw.edu.au/media/CSRHFile/Stigma\\_Indicators\\_Monitoring\\_Project\\_Plain\\_Language.pdf](https://csrhc.arts.unsw.edu.au/media/CSRHFile/Stigma_Indicators_Monitoring_Project_Plain_Language.pdf)

<sup>2</sup> <https://www.abc.net.au/news/2008-11-14/families-brawl-as-prank-call-killer-jailed/205678>

Granting automatic suppression and/or non-publication for all matters which expose the HIV status of any person is necessary to prevent prejudice to the proper administration of justice.

The test was addressed in *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW*<sup>3</sup>. At 477 Justice McHugh noted that the test is one of necessity, namely, whether it is ‘*really necessary to secure the proper administration of justice*’ in the proceedings.

In *E v Australian Red Cross Society*<sup>4</sup>, orders of non-publication (suppression) and appointment of a pseudonym were granted under the *Federal Court of Australia Act 1976*. The plaintiff sought the orders on the basis of the stigma attached to persons with HIV. Following the orders being made, a further 42 applicants came forward to make complaints. The same confidentiality orders were applied to those applicants and the matter was listed as “*Various Applicants v Australian Red Cross Society and Others*”. Had suppression orders not been granted, those additional applicants may not have felt able to come forward. The proper administration of justice in cases where HIV status is material to the proceedings is thus facilitated by confidentiality orders.

*GB v Michael Aubrey*<sup>5</sup> and *D v C*<sup>6</sup> were two cases involving civil claims for transmission of HIV.

The HIV status of the plaintiff and defendant in the matter of *GB v Michael Aubrey*, was disclosed in the pleadings and then in open court, however unlike the plaintiff, the defendant did not have the benefit of a pseudonym. The defendant did not appear at any point during the proceedings and the plaintiff was awarded default judgment. Had a default non-disclosure order been granted to Mr. Aubrey he may have felt safe enough to mount a defense. Thus, the absence of default non-disclosure orders in cases where HIV status is a relevant factor arguably inhibits the proper administration of justice.

In the matter of *D v C* both plaintiff and defendant were living with HIV. Suppression was granted to both parties pursuant to the *Suppression and Non-Publication Orders Act 2010*. The HIV/AIDS Legal Centre represented the defendant in those proceedings and sought suppression for both the plaintiff and defendant, the legal representative for the plaintiff had not turned their mind to this issue. In this case the defendant felt safe enough to exercise his legal right to a defense and was ultimately successful.

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<sup>3</sup> (1986) 5 NSWLR 465;

<sup>4</sup> (1991) 27 FCR 310

<sup>5</sup> [2010] NSWDC, Sydney Registry (unreported)

<sup>6</sup> [2010] NSWDC, Wollongong Registry (unreported)

The test was also applied in *AGU v Commonwealth of Australia*<sup>7</sup> and *SZPZH v Minister for Immigration & Anor*<sup>8</sup>, where suppression (non-publication and/or non-disclosure) was granted on the basis of the appellant/applicant's HIV status. *AGU* involved an alleged breach of privacy and disclosure of the appellant's HIV status to a third party. Basten JA stated that:

*“Whether or not the Commonwealth was answerable to the complaint made by him under State legislation, it is clearly necessary to prevent prejudice to the proper administration of justice that he be allowed to agitate his claim without further jeopardising the very confidentiality which he seeks to protect. The public interest in this regard significantly outweighs the public interest in open justice which is only diminished to the extent of maintaining the confidentiality of his identity: Court Suppression and Non-publication Orders Act, s 8(1)(a) and (e).”*

We also note that the HIV/AIDS Legal Centre sought and was granted in the NSW Administrative Decisions Tribunal/NSW Civil and Administrative Tribunal, suppression (Non-publication and/or non-disclosure) orders in the following matters all involving HIV based discrimination/vilification;

*TU v AMI Australia Holdings Pty Ltd t/as Advanced Medical Institute [2010] NSWADT 290*

*JM and JN v QL and QM [2010] NSWADT 66*

*QT v Sydney South West Area Health Service [2010] NSWADT 74*

*MT v AA [2009] NSWADT 268*

*CAS v TAL Life Limited [2015] NSWCATAD 51 (23 March 2015)*

We acknowledge that the primary objective of the administration of justice is to safeguard the public interest in open justice, however, the HIV status of a party to proceedings gives rise to circumstances whereby the making of a non-publication and/or non-disclosure (suppression) orders are necessary to secure the proper administration of justice.

Suppression orders were made in the cases cited above due to the sensitivity of the information concerned, and the fact that stigma against HIV positive people is commonplace and pervasive.

It is noted that legislation exists in relation to HIV discrimination and vilification throughout the country. *Australian Human Rights Commission Act 1986* deals with discrimination on the

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<sup>7</sup> (No 2) [2013] NSWCA 473

<sup>8</sup> [2011] FMCA 407 (hearing on suppression unreported)

basis of disability. Part 2 of *Disability Discrimination Act 1992* (Cth) deals with the prohibition of direct and in-direct disability discrimination. NSW *Anti-Discrimination Act 1977* makes HIV/AIDS discrimination unlawful<sup>9</sup>. This indicates legislative recognition of the particular stigma attached to HIV/AIDS.

Section 80 of the *Public Health Act 2010* requires that proceedings for offences under that act for non-disclosure/exposure to HIV be heard in closed court. This is clearly indicative of parliament's view that it is in the public interest, and importantly in the best interests of public health, for a person's HIV status to remain private. We would argue that automatic suppression should be extended to other areas of law including to criminal offences for HIV non-disclosure, exposure or transmission.

### **Disclosure of HIV Status is Contrary to Public Health Objectives and Prevents the Proper Administration of Justice**

Stigma is widely recognized as the most significant barrier to an effective HIV response in Australia. Fear of stigma, disclosure, rejection, personal violence and prosecution create an environment in which people with HIV cannot openly and safely disclose their status and negotiate HIV prevention with their partners. The potential for prosecution of HIV transmission, exposure or non-disclosure and the potential for a person's HIV status to be disclosed as part of legal or civil proceedings thus contributes to the stigmatization of HIV. This inhibits the ability of people to talk safely about HIV prevention and makes future HIV transmissions more likely, not less. In a recent study undertaken by the Australia Research Centre in Sex, Health and Society at Latrobe University 41% of HIV positive respondents indicated that they would be less likely to disclose their status to sexual partners due to current laws<sup>10</sup>.

Whilst we acknowledge that open justice is an important principle, we also note that Parliament has seen fit to overwrite this principle in circumstances where it is contrary to the interests of public health. Section 80 of the public health act (NSW) provides that offences in relation to the failure to take reasonable precautions to prevent sexual transmission of a notifiable disease must be heard in closed court. The automatic extension

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<sup>9</sup> Part 4F, *Anti-Discrimination Act (NSW) 1977*.

<sup>10</sup> Power J, Bourne, A, Melendez-Torres, Cogle, A, G.J, Brown, G, Lyons, A, **Anxiety about criminalisation among Australians living with HIV**, Australian Research Centre in Sex, Health and Society, La Trobe University: Unpublished.

of this principle to all cases, civil or criminal, in which HIV is a material factor is therefore vital to the proper administration of justice.

Media coverage of HIV cases routinely employs heightened arguments about the ethics and morality of behaviours associated with HIV transmission. Media regularly misinterprets legal language to suggest the accused's actions were a deliberate and calculated plan to transmit HIV.

HIV transmission is not generally perpetrated by a person on another person. When two people engage in consenting sexual intercourse it always carries the risk of STI transmission. The principle of shared responsibility adopted by successive Australian Governments and Departments of Health clearly articulates that HIV positive and HIV negative people are both responsible for their own sexual health and for the sexual health of others. Where HIV transmission through sex occurs, it is generally the result of the consenting acts of two people. This means negotiating HIV prevention is the responsibility of both partners. Creating an environment in which HIV negative people rely on HIV positive people to protect them from HIV is an ineffective mechanism to prevent HIV transmission as most HIV is transmitted by people who are unaware of their status. Nevertheless, PLHIV in relationships always remain vulnerable to HIV related proceedings being used by disgruntled partners as a way to seek revenge for relationship failure.

HIV criminalisation cases frequently generate media that is inaccurate and vitriolic in nature<sup>11</sup>, which is worse when the accused can be named and photos or video footage used<sup>12</sup>. Positive HIV related stories are exceedingly rare.

Negative media is exceptionally effective at creating HIV stigma which undermines health promotion efforts to 'normalise' HIV as a means to decreasing HIV discrimination. This in turn, inhibits disclosure before risk events, decreases uptake of testing and treatment, and makes future transmissions more likely.

While it is not the job of the legal system to support public health strategy per se, the automatic suppression of the identity of parties to civil or criminal proceedings where HIV status is a material factor is consistent with health and legal arms of government working towards a common goal of ending HIV transmissions in the public interest and is consistent with the existing provisions in the *Court Suppression and Non-Publication Orders Act*<sup>13</sup>.

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<sup>11</sup> <https://www.smh.com.au/national/hiv-sex-worker-may-have-infected-250-20080130-1p0r.html>; Kelltt, C,

'Court told man lied about HIV', Brisbane Times, 2 May 2007.

<sup>12</sup> *Zaburoni v The Queen* [2016] HCA 12

<sup>13</sup> S8(1) (a) the order is necessary to prevent prejudice to the proper administration of justice,

Proper administration of justice cannot be secured where a party to proceedings or a party incidental to the proceedings is a person living with HIV and their status is disclosed.

Where cases of intentional transmission do happen the reality is extremely complex. The stigmatization of HIV causes many people to react badly to their HIV diagnosis. Complex mental processes mean that while a person may have been given an HIV positive diagnosis, fully understanding and accepting that information can take time.

Courts often impose a constructed narrative on the material case which suggests the person who was diagnosed HIV positive first was the ‘perpetrator’ and the person who was diagnosed later was the ‘victim’. People of colour, sex workers, people who use drugs, women and other marginalized groups are often cast as the perpetrator in these cases. The reality of their situation means they are members of vulnerable, marginalized communities equally deserving of the court’s protection.

Of particular concern, is the high proportion of HIV criminalisation cases against people from marginalised populations, particularly African migrants, sex workers and people who are transgender. The profile of accused is completely at odds with the demographics of Australia’s HIV epidemic suggesting the likelihood of criminal prosecution is directly influenced by endemic discrimination. This practice both reflects and entrenches discrimination against vulnerable populations. It also suggests that criminal law is not being applied in a manner that is fair or consistent. Therefore suppression in such instances sends a message to other people living with HIV from marginalised communities that they should feel safe and secure in accessing services for testing and treatment and in negotiating safe sex practices without fear of their personal health information becoming public knowledge.

### **Naming of Accused exposes and places at risk alleged victim and witnesses**

Despite suppression of the name of witnesses, media reporting of the name of the accused regularly exposes the identity of witnesses in their communities. Examples of which we are aware include a case where a wife’s identity became widely known in her community after her husband was prosecuted. This included the information that she had acquired HIV from her husband. It also includes a case where a woman and her child were ostracized by her

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- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
  - (c) the order is necessary to protect the safety of any person,
  - (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the *Crimes Act 1900* ),
  - (e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

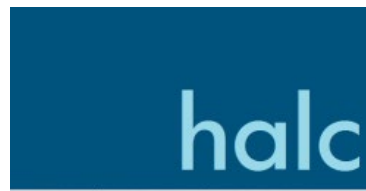
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community after her suppressed identity became known as a result of substantial media coverage regarding prosecution of her ex-partner, and she was treated with mistrust and ostracized by her community.

Further, negative media reporting has had a devastating impact on people living with HIV who have been accused of exposing another to HIV or transmitting HIV but have been found not guilty. For example, the 2007 Queensland case of Richards, who was found not guilty but subsequently reported members of the public harassing him and his parents in their home.

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