



# The Global HIV/AIDS Program

THE WORLD BANK

## AUSTRALIA'S SUCCESSFUL RESPONSE TO AIDS AND THE ROLE OF LAW REFORM

*Danielle Malek*



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World Bank Global HIV/AIDS Program Discussion Paper

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## World Bank Global HIV/AIDS Program Discussion Paper

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## Australia's Successful Response to AIDS and the Role of Law Reform

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**Abstract:** This paper describes Australia's response to HIV and AIDS from the first death from AIDS in 1983 to the present, with particular attention to the role of law reform. The report considers the characteristics of HIV infection in Australia, then examines how the Australian approach succeeded in containing the spread of HIV and maintaining low rates of incidence. The paper highlights the leading role taken by community advocacy groups at a state and national level in responding quickly to the crisis and liaising effectively with government; and also points to the existence of bipartisan parliamentary support in formulating a strategy to combat HIV and AIDS. This included significant policy and legal reform. Among the law reforms considered are: laws prohibiting homosexual acts, age of consent laws, anti-discrimination and anti-vilification laws, drug laws, laws regulating prostitution, prison laws and immigration laws. Examples of relevant provisions are provided.

**Keywords:** HIV, AIDS, Australia, Legal Reform, Law Reform

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## Acronyms and Abbreviations

ACT	The Australian Capital Territory
ADF	Australian Defence Force
AFAO	Australian Federation of AIDS Organizations
AIDS	Acquired immunodeficiency syndrome
ARCBS	Australian Red Cross Blood Service
ARV	Antiretroviral
AZT	zidovudine
DHAA	Disorderly Houses Amendment Act
HIV	Human immunodeficiency virus
HREOC	Human Rights and Equal Opportunities Commission
ICCPR	International Covenant on Civil and Political Rights
IDUs	injecting drug users
IEC	Information, education, and communication
NACAIDS	National Advisory Committee
NCHECR	National Centre in HIV Epidemiology and Clinical Research
NGO	Nongovernmental organization
NSW	New South Wales
NT	Northern Territory
PLGAIDS	Parliamentary Liaison Group on AIDS
PLWHA	People living with HIV/AIDS
Qld	Queensland
SA	South Australia
Tas	Tasmania
TGLRG	Tasmanian Gay and Lesbian Rights Group
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNHRC	United Nations Human Rights Committee
VCT	Voluntary counseling and testing for HIV/AIDS
Vic	Victoria
WA	Western Australia
WHO	World Health Organization
WWII	World War II

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## FOREWORD

The need for legal reform to underpin the response to AIDS is frequently neglected or underestimated. However, particularly with respect to key populations at higher risk, law reform can play a crucial role in ensuring a structural framework that is consistent with sound public health and social policy considerations.

Australia recognized the importance of a proper legislative framework early on. With bipartisan support, at both the federal and state levels, a number of legal reforms were enacted that sustained and helped fuel the country's vigorous response. This report is the story of that response. It is a story that many countries can learn from, even now, twenty-five years into the pandemic.

We thank the author, Danielle Malek, Legal Associate, for her in-depth research and lucid presentation, and Rudolf V. Van Puymbroeck, Lead Counsel, Public Health and HIV/AIDS, who saw the potential of the Australian experience to serve as an example and who commissioned and oversaw the work. We are confident that this report will prove useful to many governments who are still shaping and adjusting their policy and legal responses.

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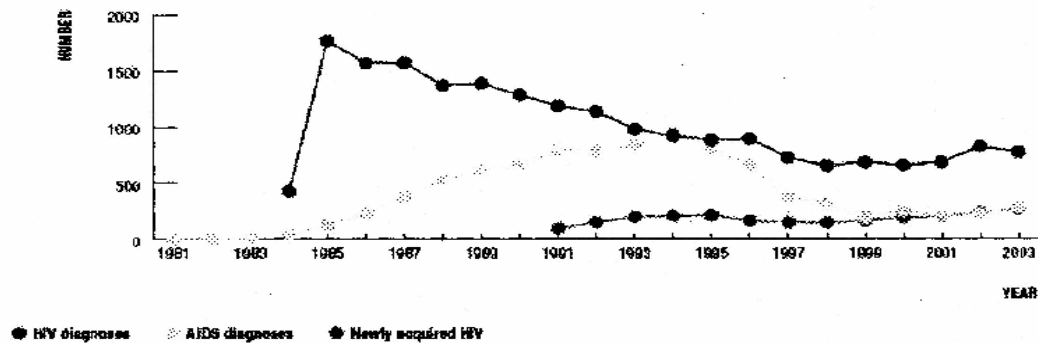
# Australia's Successful Response to AIDS and the Role of Law Reform

## INTRODUCTION

In his foreword to *The AIDS Pandemic: Complacency, Injustice and Unfulfilled Expectations* (2003), Justice Michael Kirby of the High Court of Australia writes of the success of efforts to reduce and maintain incidence of HIV in Australia since the early 1980s.<sup>1</sup>

Kirby lauds the Australian response: “[w]ords were translated into ideas. Honesty replaced silence. Education reached all sections of the community. Sex education was introduced into schools. Condom distribution was stepped up. Free needle exchange was promoted. Law reforms were passed to proscribe HIV discrimination. Laws on homosexual offenses, drugs, and commercial sex work were changed.” The effect of these reforms is evident in the graph which follows:<sup>2</sup>

**Figure 1**  
**Number of diagnoses of HIV infection, and AIDS in Australia**  
1 HIV diagnoses adjusted for multiple reporting. AIDS diagnoses adjusted for reporting delays.



Source: National Centre in HIV Epidemiology and Clinical Research, 2004 Annual Report

<sup>1</sup> *The AIDS Pandemic: Complacency, Injustice and Unfulfilled Expectations*, Lawrence O. Goston (ed.), Chapel Hill and London: University of North Carolina Press, 2003.

<sup>2</sup> This graph is taken from national HIV/AIDS statistics prepared by the National Centre in HIV Epidemiology and Clinical Research (NCHECR). Refer *Annual Surveillance Report (2005): HIV/AIDS, viral hepatitis, and sexually transmissible infections in Australia*, Ann McDonald (ed.), University of New South Wales, 2005, p. 7. HIV infection is a notifiable condition in all state and territory health jurisdictions in Australia (as are AIDS diagnoses) and are reported to the NCHECR by the diagnosing doctor. Information passed onto the center includes the state or territory of diagnosis, name code (based on the first two letters of the family name and the first two letters of the given name), sex, date of birth, Indigenous status, date of HIV diagnosis, CD4+ cell count at diagnosis, source of exposure to HIV and evidence of newly acquired HIV infection. Testing for the HIV antibodies became widely available in Australia in early 1985. It was not until 1989 that all state and territory health authorities agreed to establish standardized reporting through the NCHECR.

The line tells its own story: from 1984 – when the number of cases of newly acquired HIV reported ‘spiked’ – the incidence of HIV in Australia began to decline rapidly. Where the incidence of HIV in other countries grew exponentially, the Australian approach appeared both to contain HIV incidence and to decrease it.

This report examines the nature of those initiatives with particular attention to the role law reform has played in this success.

### **THE NATURE OF REFORM** <sup>3</sup>

The first case of AIDS was detected in Australia in November 1982.

The first death from AIDS in Australia occurred in July 1983.

After an initial increase in HIV incidence in the mid-1980s, numbers of new HIV infections declined markedly. Since that time, Australia has controlled the spread of HIV and maintained very low rates of new HIV infection.

In Australia, the HIV epidemic initially involved three main community groups: 1. men who have sex with men, 2. injecting drug users (IDUs), and 3. haemophiliacs and those transfused with HIV-infected blood before the routine testing of blood products for HIV. Australia’s relative success in controlling HIV incidence has been attributed to its success in containing the spread of HIV from those groups first affected by the virus and taking measures to combat incidence of the virus within those groups.

This strategy has several key characteristics:

1. It was essentially a grass roots response involving the mobilization of community groups (particularly groups most affected by the HIV virus/at risk of infection) and health officials.
2. It mobilized quickly following the first reported case of AIDS in Australia.
3. From the outset, it involved the active coordination of civil society organizations, physicians, researchers, and state and federal governments in a partnership to find practical and creative responses to the complex of political, legal, social, economic and public health challenges of the epidemic.

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<sup>3</sup> Much of this report is based on the careful and systematic research of civil society advocacy groups and researchers on the history and epidemiology of the AIDS epidemic in Australia. I am particularly indebted to the report prepared for the Research and Dialogue Project on Regional Responses to the Spread of HIV and AIDS in East Asia, *Australia’s Response to HIV/AIDS 1982-2005*, Lowy Institute for International Policy, Sydney, Australia, 2005, which provides a clear and insightful history and assessment of Australia’s response to the HIV and AIDS crisis; I have also drawn on information disseminated by the Scarlet Alliance (Australian Sex Workers Association): (<http://www.scarletalliance.org.au/>) and The International Lesbian and Gay Association (<http://www.ilga.info/index.html>).

4. Legal reform was an important part of the Australian approach to the HIV epidemic, but many of the most significant legal reforms occurred well after 1984.

### **(a) Community response**

By the time the first person died of AIDS in Australia in 1983, Australian society was typically permissive, with little enforcement of laws aimed at private homosexual conduct, and an active and politically-organized homosexual community. In 1978, the Sydney gay community (perhaps the largest in the country) organized a march and commemoration of the New York Stonewall riots. The next year, the event was renamed ‘the Sydney Gay Mardi Gras’ (soon after the Sydney Gay and Lesbian Mardi Gras), and is held every year in February/March as a celebration of gay pride, attracting up to half a million spectators and participants and televised nationally on the public broadcasting network. This level of community visibility was the result of successful political activism in the 1970s and 1980s to advance new social agendas combating the stigmatization of homosexuality and promoting the recognition of social and political rights for previously marginalized groups. By 1982, significant headway had been made in advancing these agendas and political mobilization of these communities was rapid, especially in larger states with significant numbers of ‘at risk’ and affected groups (New South Wales and Victoria).

In 1983, community action groups established the New South Wales and Victorian AIDS Action Committees. These later became states AIDS Councils, organized and coordinated nationally under the Australian Federation of AIDS Organizations (AFAO), the peak non-government organization representing Australia's community-based response to HIV/AIDS. State AIDS Councils rapidly began community education and peer education using *ad hoc* government funding. Dedicated funding for HIV and AIDS by the federal government began in 1984.

Similar groups organized soon after to advocate for other ‘at risk’ and affected groups, such as sex workers<sup>4</sup> and haemophiliacs.<sup>5</sup> In 1989, the New South Wales state government funded the first organization of drug users in Australia; other states and territories followed, and the federal government established a national body to represent the interests of drug users. With government involvement came government funding. Thereafter permanent structures were established at all levels of government for other

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<sup>4</sup> The Australian Sex Workers Association, known as the Scarlet Alliance, was formed in 1989 and has provided training and workshops to all sectors of the community and the sex industry since its formation. The Scarlet Alliance has a higher level of contact with the sex industry than any other government or non-government organization and actively works with the industry to promote high standards of occupational health and safety.

<sup>5</sup> There are only about 1500 haemophiliacs in Australia, and HIV incidence among them is low. See Adam Carr, “AIDS, Gays and the Blood System”, *Outrage*, September 1984, <http://www.adam-carr.net/022.html>, also <http://www.arcbs.redcross.org.au/Donor/guide/faq.asp>

interest groups. In time, many of these community activists were recruited into government departments and became integrally involved in government efforts to formulate and implement policy on HIV and AIDS.

### **(b) Government involvement**

In immediate reaction to the threat of an AIDS epidemic in Australia, the Federal Minister for Health consulted with community groups and health experts. A reform of health care policy began in 1983, with dedicated federal AIDS-funding beginning in 1984.

The federal approach had a number of notable characteristics:

- It actively pursued **links with community groups**, utilizing their community knowledge and community reach to formulate and implement education campaigns directed at 'at risk' and affected individuals.
- **Education campaigns** were timely, peer-based, direct and explicit, and focused on both high-risk groups and the general public.
- It diverted significant amounts of federal funding to medical and sociological **research** on HIV and AIDS, establishing organizations for this purpose, and creating institutional linkages and mechanisms that enabled research results to be quickly translated into policy solutions. The National Advisory Committee (NACAIDS), the peak government advisory committee on AIDS was established in 1984, and began to negotiate with the Department of Health, state and territory governments and civil society organizations on priorities and needs. In addition, an AIDS Task Force was created to bring together scientific research, social research, and clinical expertise. The AIDS Task Force worked with two specialized scientific/clinical research units for AIDS research from 1986 and from 1990 a unit dedicated to social and behavioural research. Innovative policy ideas could move very quickly from researchers to the Ministerial level of decision-making.
- It had **bipartisan support** at federal and state level. Somewhat unusually, there existed bipartisan commitment to formulating a successful and reasonable response to the Australian AIDS threat. In 1985, a federal Parliamentary Liaison Group on AIDS (PLGAIDS) was formed, which brought together politicians of both parties with an interest in AIDS policy. Similar groups existed in many state and territory governments.
- It sought to create an **enabling political environment** that encouraged the involvement of typically marginalized social groups in the national response (homosexuals, IDUs, sex workers). This included, from the outset, public

statements from both the federal and state government to counter public hysteria and prejudice against affected groups.<sup>6</sup>

- It was **coordinated**. In 1989, the federal government formulated its first National HIV/AIDS Strategy in consultation with researchers, physicians, state government, and affected social groups. This national strategy has been reformulated by successive federal governments since, roughly every three to four years. A fifth strategy is now in place. The National HIV/AIDS strategy sets down policy approaches not only for the public health sector but dictates policy directives to other affected ministries: social security and welfare, housing, drug law enforcement, immigration, insurance and superannuation, human rights legislation, scientific research, prisons and education.
- It sought to **remove political and legal barriers** preventing an effective national response to the epidemic and introduced policies and laws needed to facilitate that response.

### (c) Key policy and law reforms

Below are listed key policy and legal reforms introduced at the state and federal level from 1983. Legal reforms are discussed in more depth in the section which follows.

1. **Education** – as previously discussed, this involved a sustained program of timely, peer-based, direct, explicit, and federally-funded programs directed at educating ‘at risk’ groups and the general public on the nature of HIV and AIDS, and HIV prevention, and in countering stigmatization and prejudice against HIV-affected individuals and groups perceived to be involved in its transmission. Safe sex was promoted at various levels (through advertisements targeting the general public, through community group campaigns – in the homosexual community, among sex workers – and as part of a revamped sex education program in public schools).
2. **Public-funded** health measures for the **treatment** of affected individuals – Australia already had a national health care program that provided all individuals with free access to clinical care. Subsidized AZT (zidovudine) and anti-retroviral treatments were introduced for affected individuals.<sup>7</sup>
3. Existence of **widespread availability of free, anonymous and universal testing** – testing for the presence of HIV is mandatory only for individuals seeking to donate blood voluntarily, and for individuals wishing to immigrate to Australia
4. Introduction of **tighter controls on blood donation** – mandatory HIV-blood screening for donors began in April 1985. Between 1992 and 1993, testing for

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<sup>6</sup> For example, in July 1983, then Australian Health Minister, Dr Neal Blewitt, spoke out against what he called the ‘growing AIDS hysteria’, including media reports that the Reverend Fred Nile had called for gay men to be quarantined.

<sup>7</sup> By 2003, 50% of all people living with HIV infection in Australia had received antiretroviral treatment

HIV2 began. The Australian Red Cross Blood Service (the ARCBS is the only recognized service for blood donation in Australia) now screens all blood samples for five transfusion/transmissible infectious diseases, including HIV, using Nucleic Acid Testing. The process used to test for HIV is different from traditional testing because it looks for the actual presence of viruses. Most other tests detect the presence of antibodies, which are the body's response to an infection and which take time to develop. The process used by the ARCBS provides an opportunity to improve the safety of the blood supply by reducing the 'window period', which is the time between exposure to a virus and the time when current tests are able to detect antibodies to the virus. Legislation prohibits the collection of blood donations from anyone who has been imprisoned (in prison or lockup for more than 72 hours) within the previous 12 months.

5. Introduction in 1984 of a '**harm minimization strategy**' as the national policy on illicit drugs. This involved the introduction of needle and syringe exchange programs (from 1986), the expansion of methadone treatment programs to IDUs, and coordination of health and law enforcement policies and personnel.
6. The introduction of **legislation** that facilitated the reforms introduced by state and federal government (removal of obstructive provisions), and the introduction of new laws which sought to combat the stigmatization of HIV and AIDS-affected individuals, which banned discrimination (direct and indirect), and in some cases, introduced laws which prohibited speech and behaviour that led to vilification of those affected by HIV or AIDS or perceived to be carriers of HIV.

### **LAW REFORMS IN AUSTRALIA: 1983-2006**

From 1983, reforms in state and federal legislation both removed legal provisions that were obstacles to sound public health policy with respect to HIV and AIDS and introduced new provisions to facilitate a successful response.

However, unlike in many countries, where the norms of conservative social and cultural systems are reflected in law, legal barriers to HIV policy were relatively weak in Australia. Only three states still had laws criminalizing homosexual sex; these laws were not in states with large gay populations, and were, in any case, rarely enforced.<sup>8</sup>

At any rate, the removal of these discriminatory provisions and the introduction of laws prohibiting discrimination against homosexuals and individuals affected by HIV, the introduction of anti-vilification laws, and changes to drug laws and laws on sex work (prostitution) sent a powerful symbolic message which helped to counter the stigmatization of marginalized social groups associated in the public mind with HIV/AIDS. These efforts at legal reform are covered in depth below.

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<sup>8</sup> The last time someone was convicted of private consenting gay sex under a state criminal code in Australia was in 1981. The penalty was a \$50 fine. The maximum penalty for breaking sections 122 or 123 of the Act (which set out categories of homosexual offences) was 21 years jail.

The Commonwealth of Australia has a federal system of government. The Australian constitution sets out the powers and responsibilities of federal government, and the six states and two territories of the federal union (New South Wales (NSW), Victoria (Vic), Queensland (Qld), South Australia (SA), Tasmania (Tas), Western Australia (WA), the Australian Capital Territory (ACT) and the Northern Territory (NT)). Responsibility for the health care system is shared between the federal and state/territory governments but power to enact many of the laws necessary to facilitate a coordinated response to HIV/AIDS resides with the states and territories. This is certainly the case with criminal law, and with anti-discrimination laws. As with the United States, the federal government retains the power of leverage that comes with an expansive federal tax power and the distribution of these monies to state governments.

Australia does not have either a Bill of Rights or a constitutional guarantee of equality. "Rights" at the federal level have to be established by legislative means. Those guaranteed in international treaties ratified by Australia (such as the UN International Covenant on Civil and Political Rights or the International Labour Organisation Convention) do not become part of domestic law automatically but must be incorporated through an act of parliament. Legislation at the Commonwealth level which is within the constitutional power of the federal government and directly counter to equivalent state provisions overrides state legislation to the extent of the inconsistency.

#### **(a) Laws criminalizing homosexual acts**

Consensual male homosexual acts are currently legal in all states and territories of Australia. Lesbian sex has never been against the law in Australia.

At the time of the first AIDS death in Australia (1983), the following states/territories had laws criminalizing homosexuality: Northern Territory (decriminalized 1983), Tasmania (decriminalized 1997), and Western Australia (decriminalized 1989 for men 21 years and over).

A number of states, however, retain constitutional preambles that condemn homosexuality and maintain discriminatory public decency laws. The preamble to Victorian legislation decriminalizing sex between consenting male adults (1980) states that it was not Parliament's intention to "condone immorality". Western Australia decriminalized sex between consenting male adults in 1989; however, the preamble to the legislation states Parliament's disapproval of relationships between persons of the same sex, of institutions encouraging same-sex relationships, and of the involvement of homosexuals in the care of children where homosexuality is portrayed in a positive light. The law also contains what is known as a "proselytizing" clause that attempts to prohibit public actions and teaching in primary or secondary schools which portray homosexuality in a positive light. Consensual sex between consenting male adults was decriminalised in Queensland in 1982, although Queensland has discriminatory public

decency laws; the preamble to the Act condemns homosexuality. The Northern Territory has discriminatory public decency laws

On 1st May 1997, the Tasmanian parliament finally repealed the laws which had criminalised all consensual sex acts between men. This repeal followed a nine year legal battle by the Tasmanian Gay and Lesbian Rights Group (TGLRG), and was the result of an historic ruling by the UN Human Rights Committee (UNHRC) in 1994 in *Toonen vs Australia*. Toonen argued that the ban on same-sex male acts in the Tasmanian Criminal Code violated his right to privacy and equality under the International Covenant on Civil and Political Rights (ICCPR) (Articles 17 and 26). The UNHRC found in Toonen's favour.

As the Tasmanian government did not intend to comply with the UNHRC's ruling, the Federal government enacted the *Human Rights (Sexual Conduct) Act 1994* invalidating laws which constituted an "arbitrary interference" with privacy. This law was the Federal government's means of forcing the Tasmanian government to comply with the ruling of the UNHRC in *Toonen v. Australia*. Only after the passage of this Act, further attempts at law reform in the Tasmanian Parliament (rejected by the upper chamber of Tasmania's legislature in 1996) and a Federal High Court case, did the Tasmanian legislature finally decide to repeal the discriminatory provisions.

On 10th December 1998, the Tasmanian Parliament passed the most progressive anti-discrimination legislation in Australia with unanimous support in both chambers of parliament (examples of which can be found below).

### **(b) Age of consent laws for consensual sex acts between men**

Most states maintain discriminatory age of consent provisions (usually 16 years for heterosexual sex and 18 or 21 for homosexual sex). For example, in Western Australia, sex between males between the ages of 16 and 21 is criminalized. Offenders can be fined or jailed for up to five years. Attempts to repeal the anti-gay laws have been blocked in the Upper House.

The Australian Capital Territory, South Australian, and Victoria are exceptions – the age of consent is the same for homosexual and heterosexual acts.

### **(c) Anti-discrimination laws**

Because of its constitutional arrangement, Australia does not have legislation outlawing discrimination on the ground of sexual orientation at the federal level. However, in response to Australia's obligation to implement the principle of non-discrimination in employment and occupation pursuant to the International Labour Organisation

Convention No.111,<sup>9</sup> the *Human Rights and Equal Opportunities Commission (HREOC) Act* (1986) empowers HREOC to investigate complaints of discrimination in employment and occupation on various grounds, including sexual preference, and to resolve such complaints by conciliation. It is important to note, however, that such discrimination is not rendered unlawful under the Act.

Before 1986, the Australian Defence Force (ADF) had no formal policy on the recruitment of homosexuals to the military, and recruits were not asked about their sexual orientation. However, informal procedures were in place to bar personnel suspected of homosexual behaviour and remove them from duty. As a result of the repeal by state and federal governments of anti-homosexual laws and the enlargement of anti-discrimination provisions to prohibit discrimination against homosexuals, the ADF was no longer able to use the legal framework to support discriminatory practices against homosexuals. In September 1986, the ADF issued a written policy formalizing its longstanding informal procedures barring homosexual personnel from service. This policy soon attracted legal challenge.

In 1992, the ADF changed its rules regarding homosexual members of the military forces. Previously obliged to leave the services, homosexuals not only gained the right to be accepted and not to be dismissed on the basis of their sexuality, but also gained access to certain of the benefits available to other ADF members although certainly not to all.<sup>10</sup> This position is tempered by subsequent rulings. In January 1998, a federal court in Queensland found that the Australian military has the right to discharge any defence member who tests positive for HIV, chronic hepatitis B or chronic hepatitis C, saying the risk of bloodshed during military service is too great to tolerate soldiers with permanent blood-borne infections.<sup>11</sup> On 3 December 1999, the High Court of Australia similarly ruled that disability discrimination laws protecting HIV-positive workers who are in good health did not prevent the defence force from lawfully dismissing soldiers with the virus.<sup>12</sup>

All six States provide protection from discrimination, but to varying extents.

The NSW *Anti-Discrimination Act 1977* prohibits discrimination on the ground of homosexuality or infection with HIV in a number of areas including employment, accommodation, education, the provision of goods and services, and club membership or

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<sup>9</sup> Convention concerning Discrimination in Respect of Employment and Occupation 1958 (entered into force, 15 June 1960).

<sup>10</sup> Senate Legal and Constitutional Committee - [Inquiry into Sexuality Discrimination](#) Para 6.141.

<sup>11</sup> *Commonwealth of Australia v The Human Rights & Equal Opportunity Commission & Anor* [1998] 3 FCA (13 January 1998), overturning *X v Department of Defence* [1995] HREOCA 16 (29 June 1995).

<sup>12</sup> *X v The Commonwealth* [1999] HCA 63 (2 December 1999).

benefits.<sup>13</sup> 'Homosexuality' is defined as a 'male or female homosexual'. Anti-discrimination legislation in all states and territories prohibits discrimination based on disability or impairment; as this definition typically covers "the presence in the body of organisms that may cause disease", it effectively prohibits discrimination based on status as an HIV positive individual.

In addition, the NSW anti-discrimination law contains anti-vilification provisions (introduced in 1994). The State Cabinet refused to support legislation banning discrimination and vilification based on "sexual preference," choosing instead to ban only discrimination and vilification based on "homosexuality". Cabinet said it did not want to create a mechanism under which heterosexuals could file discrimination complaints against gay businesses or organizations. In 1996, provisions were added to prohibit discrimination on the basis of transsexuality. The Equal Opportunity Tribunal of New South Wales has subsequently ruled that the Act bans discrimination based on homosexuality but not heterosexuality (1997).<sup>14</sup>

The Victorian *Equal Opportunity Act 1995* prohibits discrimination including discrimination on the basis of sexuality, gender identity and status as HIV positive. The areas of public life protected by the legislation are: employment, education, provision of goods and services, disposal of land, accommodation, clubs and club members, sport, and local government. However, its benefits are limited by a number of weaknesses:

- (i) the narrow phrase "lawful sexual activity" rather than "sexual orientation" is the basis for protection; this excludes any discrimination because of a person's wider orientation; it also means that transgendered people are not covered.
- (ii) there is an exemption that excuses discrimination by an employer where: (a) the employment involves the care, instruction or supervision of children (defined as people under the age of 18 years); and (b) the employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children; and (c) having regard to all the relevant circumstances, including, if applicable, the conduct of the employee or prospective employee, the employer has a rational basis for that belief.
- (iii) it exempts discriminatory conduct where a respondent is able to establish that 'the discrimination is necessary for the ...[respondent] to comply with the ...[respondent's] genuine religious beliefs or principles'.
- (iv) The Act does not include anti-vilification provisions.

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<sup>13</sup> In July 1995, the Equal Opportunity Tribunal of New South Wales ruled that an insurance company discriminated against a gay couple by refusing to grant them family health coverage. The decision has precedential effect for all insurers in the state of NSW.

<sup>14</sup> Brett Halliwell, 32, had sued the Sydney lesbian nightclub, Sirens, for kicking him out, claiming he was mistreated due to his sexuality but Tribunal Chair, Peter King, said the law only protects gays.

[The ACT Discrimination Act 1991](#) bans discrimination, *inter alia*, on the basis of sexuality and transsexuality. 'Sexuality' includes heterosexuality, homosexuality (male and female) or bisexuality. 'Transsexual' is separately defined. The definition of transsexual is very broad, and equivalent to 'transgender' in other legislation. The Act covers discrimination in employment, education, access to premises, goods, services and facilities, accommodation, clubs, and requests for information.

The Queensland *Anti-Discrimination Act 1991* contains provisions prohibiting discrimination, including based on sexuality, gender identity and status as HIV positive. The South Australian *Equal Opportunity Act 1984* provides protection from discrimination on the grounds of "sexuality". "Sexuality" is defined to include "heterosexuality, homosexuality, bisexuality and transsexuality" but it exempts discrimination on the basis of dress, appearance and behaviour that is characteristic of a person's sexuality.<sup>15</sup> The Act covers discrimination (*inter alia*) in employment, "other bodies" (associations, trades unions), education, land, goods, services, and accommodation.

The Tasmanian *Anti-Discrimination Act 1998* is the most comprehensive anti-discrimination legislation in Australia. In addition to usual prohibitions on sexuality and transgendered discrimination, the legislation outlaws incitement to hatred against sexual minorities. Moreover, there are virtually no exemptions, except where discrimination is necessary to protect the interests of disadvantaged groups. Organizations like church schools, which in some other states are permitted to treat gays and lesbians unfairly, have no such leeway in Tasmania. Churches act illegally even if they discriminate against lesbian, gay, bisexual or trans-gendered priests and parishioners.

#### ANTI-DISCRIMINATION ACT 1998 - SECT 16

##### **16. Discrimination on ground of attribute**

A person must not discriminate against another person on the ground of any of the following attributes:

- (a) race;
- (b) age;
- (c) sexual orientation;
- (d) lawful sexual activity;
- (e) gender;
- (f) marital status;
- (fa) relationship status;
- (g) pregnancy;
- (h) breastfeeding;

<sup>15</sup> "Where - (a) a person discriminates against another on the basis of appearance or dress; (b) that appearance or dress is characteristic of, or an expression of, that other person's sexuality; but (c) the discrimination is reasonable in all the circumstances, the discrimination will not, for the purposes of Division II, be taken to be discrimination on the ground of sexuality." South Australia *Equal Opportunity Act 1984*, s.29(4).

- (i) parental status;
- (j) family responsibilities;
- (k) disability;
- (l) industrial activity;
- (m) political belief or affiliation;
- (n) political activity;
- (o) religious belief or affiliation;
- (p) religious activity;
- (q) irrelevant criminal record;
- (r) irrelevant medical record;
- (s) association with a person who has, or is believed to have, any of these attributes.

#### ANTI-DISCRIMINATION ACT 1998 – SECT 17

##### **Division 2 - Prohibited conduct 17. Prohibition of certain conduct and sexual harassment**

(1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in [section 16](#)(e), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

(2) A person must not sexually harass another person.

(3) Sexual harassment takes place if a person –

(a) subjects another person to an unsolicited act of physical contact of a sexual nature;  
or

(b) makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person; or

(c) makes an unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence; or

(d) makes any unwelcome gesture, action or comment of a sexual nature; or

(e) engages in conduct of a sexual nature in relation to another person that is offensive to that person

– in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

#### ANTI-DISCRIMINATION ACT 1998 - SECT 18

##### **18. Prohibition of victimisation**

(1) A person must not victimise another person because that other person –

(a) made, or intends to make, a complaint under [this Act](#); or

(b) gave, or intends to give, evidence or information in connection with any proceedings under [this Act](#); or

(c) alleged, or intends to allege, that any person has committed an act which would amount to a contravention of [this Act](#); or

(d) refused or intends to refuse to do anything that would amount to a contravention of [this Act](#); or

(e) has done anything in relation to any person under or by reference to [this Act](#).

(2) Victimisation takes place if a person subjects, or threatens to subject, another person or an associate of that other person to any detriment.

#### ANTI-DISCRIMINATION ACT 1998 - SECT 19

##### **19. Inciting hatred**

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

(a) the race of the person or any member of the group; or

(b) any disability of the person or any member of the group; or

(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or

(d) the religious belief or affiliation or religious activity of the person or any member of the group.

#### ANTI-DISCRIMINATION ACT 1998 - SECT 20

##### **20. Promoting discrimination and prohibited conduct**

(1) A person must not publish or display, or cause or permit to be published or displayed, any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.

(2) Subsection (1) does not apply to anything that is used for the purpose of discouraging discrimination or prohibited conduct.

#### ANTI-DISCRIMINATION ACT 1998 - SECT 21

##### **21. Prohibition of aiding contravention of this Act**

(1) A person must not knowingly –

(a) cause another person to contravene [this Act](#); or

(b) induce another person to contravene [this Act](#); or

(c) aid another person to contravene [this Act](#).

(2) All persons referred to in subsection (1) are jointly and severally liable for any contravention under [this Act](#)

The Western Australian *Equal Opportunity Act 1984* did not originally include provisions prohibiting discrimination on the basis of a person's sexuality. In 1996, a proposal to extend the Act to provide protection to people specifically in respect of sexuality discrimination was defeated in parliament. In August 1997, a similar amendment bill was introduced into the parliament and defeated. It was not until 2002 that provisions were added prohibiting discrimination on the basis of a person's sexuality. There are now also provisions banning discrimination based on 'impairment' (which includes status as HIV positive).

The Northern Territory *Anti-Discrimination Act 1992* contains provisions prohibiting discrimination, including based on sexuality and status as HIV positive. There is no protection against discrimination based on transgender. Section 37 allows a person to discriminate on the grounds of sexuality where work with children is involved:

"A person may discriminate against another person on the grounds of sexuality in the area of work where -

- (a) the work involves the care, instruction or supervision of children; and
- (b) the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of children, having regard to all the relevant circumstances of the case including the person's actions.

The Act does not include any anti-vilification provisions.

#### **(d) Anti-vilification laws**

These are laws that prohibit the vilification of individuals on the basis of certain criteria, including gender identity and sexual preference.<sup>16</sup> They differ from anti-discrimination laws in that there is no necessity to prove either direct or indirect discriminatory conduct. Rather, anti-vilification laws seek to prohibit public behaviour that incites hatred for, serious contempt for, or severe ridicule of a person or group of persons. That said, many anti-vilification provisions are, in fact, contained in anti-discrimination legislation and supplement anti-discrimination provisions.

Because the Constitution of Australia does not contain a Bill of Rights or guarantees of free speech, anti-vilification provisions do not run foul of constitutional proscriptions. Anti-vilification provisions may present a constitutional challenge in legal systems with such constitutionally-guaranteed rights.

Anti-vilification laws were first introduced in Australia in the state of NSW in 1989, and applied initially to instances of racial vilification alone. NSW added provisions to the *Anti-Discrimination Act 1977 (NSW)* in 1993 proscribing vilification of homosexuals, proscribing vilification of HIV-affected individuals in 1994 and proscribing vilification of those individuals identifying as transgendered in 1996. Examples of these provisions are reproduced below:

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<sup>16</sup> Other prohibited categories include sex, pregnancy, relationship status, parental status, breastfeeding, age, impairment, religious belief or activity, political belief or activity, trade union activity, lawful sexual activity, family responsibilities, and association with a person with these characteristics.

#### **49ZT Homosexual vilification unlawful**

(1) It is unlawful for a person, by a [public act](#), to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the [homosexuality](#) of the person or [members](#) of the group.

(2) Nothing in this section renders unlawful:

- (a) a fair report of a [public act](#) referred to in subsection (1), or
- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the [Defamation Act 2005](#) or otherwise) in proceedings for defamation, or
- (c) a [public act](#), done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

#### **49ZXA Definitions**

In this Part:

"HIV/AIDS infected" means infected by the Human Immunodeficiency Virus or having the medical condition known as Acquired Immunodeficiency Syndrome.

"public act" includes:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground that the person is or [members](#) of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected).

#### **49ZXB HIV/AIDS vilification unlawful**

(1) It is unlawful for a person, by a [public act](#), to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or [members](#) of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected).

(2) Nothing in this section renders unlawful:

- (a) a fair report of a [public act](#) referred to in subsection (1), or
- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the [Defamation Act 2005](#) or otherwise) in proceedings for defamation, or
- (c) a [public act](#), done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

#### **49 ZXC Offence of serious HIV/AIDS vilification**

(1) A person must not, by a [public act](#), incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or [members](#) of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected) by means which include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or

(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Maximum penalty: In the case of an individual—50 penalty units or imprisonment for 6 months, or both. In the case of a [corporation](#)—100 penalty units.

(2) A person is not to be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

In October 1996, the NSW Equal Opportunity Tribunal fined a couple in Sydney (NSW) \$50,000 (US\$38,500) for repeatedly yelling anti-gay slurs at their neighbor.

The states of Tasmania and the ACT also have anti-vilification laws covering sexuality, and HIV/AIDS status in much the same terms as outlined above.

#### **(e) Drug laws**

Australia has been fortunate that the policy of harm-minimization, adopted in 1985, enjoyed bipartisan political support in state and federal parliaments. In April 1985, the then Prime Minister convened a meeting of Australia's state governments solely to decide on a national approach to the rising usage of illicit drugs. This meeting, known as the National Drug Summit, was the first time since WWII when Australia's political leaders had met to discuss matters other than financial matters. The National Drug Summit endorsed 'harm minimization' as a national strategy for combating illegal drug use and especially controlling HIV among IDUs. This bipartisanship enabled the creation of needle and syringe exchange programs and the expansion of methadone treatment programs.<sup>17</sup> Also noteworthy has been the successful collaboration of law enforcement and public health officials. No empirical research indicates a correlation between needle and syringe exchange programs and increased consumption of illicit drugs.

In 1986, the first needle and syringe exchange program began in Sydney (NSW), although it was in contravention of the law at the time. By 1987, as a result of community pressure, NSW amended its criminal laws to permit needle and syringe exchange programs to operate legally. The same year, health ministers from all jurisdictions endorsed and adopted needle and syringe exchange programs as a key policy element in the response to HIV and committed budgetary funds to programs. All jurisdictions in

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<sup>17</sup> In 2005, almost 40,000 Australians are involved in methadone maintenance treatments.

Australia, except for Tasmania, have adopted needle and syringe exchange programs for injecting drug users.

Research indicates that the introduction of needle and syringe exchange programs have been critical to the containment and prevention of HIV among drug users and between drug users and the wider community. In NSW, the Department of Health estimates that some 2 million needles and syringes are distributed annually for IDUs. In a 1991 report, the Australian National Council on AIDS, Hepatitis C and Related Diseases estimated that needle and syringe exchange programs that year had cost A\$10 million but produced savings in health care and other public outgoings of A\$266 million. Needle and syringe exchange programs were estimated to have saved up to 10,000 lives in Australia that year (best case scenario) and no fewer than 300 (worst case scenario).

However, in recent years, as a result of tougher government drug policy and a more conservative political climate, there has been some challenge to harm minimization strategies. Recent federal budgets have de-funded some needle and syringe exchange programs and focused increasingly on supply reduction/policing strategies, abstinence programs and the piloting of retractable syringes.<sup>18</sup>

The National Drug Strategy (2004-2009) recommits to a harm minimization framework though it includes supply-reduction and demand-reduction strategies. The Strategy calls for integration of Drugs Strategy with HIV and Hepatitis C strategies but there is no enumeration of what 'integration' entails.

#### **(f) Laws regulating sex work (prostitution)**

Federal laws deal only with trafficking of sex workers between states and into Australia. Sex industry laws in Australia are determined by state and territory governments. Prostitution is partially de-criminalized or licensed in most state and territories. The state of NSW has fully decriminalized prostitution.

In the 1980s, sex worker advocacy groups mobilized rapidly to the threat of HIV infection. This included education campaigns by prostitutes and promotion of condom use among clientele. As a result of this advocacy, no state requires mandatory HIV testing of sex workers; also removed from law books are provisions allowing evidentiary use of condoms for prostitution offences.

According to sex-worker advocates, there is no known case in Australia of transmission of the HIV virus to a client through sex work.<sup>19</sup> Whether there has been transmission from a client to a sex worker is not stated.

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<sup>18</sup> [http://www.afao.org.au/library\\_docs/policy/harm\\_reduction\\_oct04.pdf](http://www.afao.org.au/library_docs/policy/harm_reduction_oct04.pdf)

<sup>19</sup> Refer, <http://www.scarletalliance.org.au/issues/hiv-strategy/>, last visited 13 April 2006.

In late 1995, the NSW Government passed the *Disorderly Houses Amendment Act 1995* (DHAA) which removed brothels from the jurisdiction of the police. The DHAA also amended the *Environmental Planning and Assessment Act*, to give local councils responsibility for Brothel Development Approval Applications. It is no longer illegal to operate a brothel in NSW, as long as the business obtains development approval. In NSW, any person of any gender over 18 years old may provide sexual services to any person over the age of consent in exchange for money, goods or favours. Running a sex industry business, or working in a sex industry business in NSW is legal so long as it is conducted within the legislative framework. Street sex work is legal provided it is not within view of a residential dwelling, church, hospital or school.

Victorian legislation is governed by the *Prostitution Control Act 1994*, the *Prostitution Control Regulations 1995*, and the *Health [Infectious Diseases] Regulations 2001*. These regulate and license sex work in Victoria in much the same terms as in NSW. Street-based sex work is still illegal although the criminalization of this form of prostitution has been much debated. Brothels must provide condoms to sex workers. There are provisions that prohibit brothels from allowing prostitutes infected with sexually transmitted disease to work.

The ACT *Prostitution Act 1992* limits prostitution to prescribed locations. It contains provisions prohibiting the owner of a brothel or escort agency from hiring a person known to be infected with a sexually transmitted disease; it also mandates use of prophylactics in the provision of sexual services.

The Queensland *Prostitution Act 1999* permits sex work by private operators without license and requires the licensing of prostitution conducted in brothels. Amendments made in December 2003 make it illegal to provide any service to a client without using the appropriate prophylactic. The law states that prophylactics must be used during penetrative and oral sex. Proposed changes to the law contemplate that it will also be illegal to offer sex without use of a prophylactic. The new law also states that management must take steps to make sure no services are given or received without the right safe sex gear. Managers and licensees of brothels must support the use of condoms and dental dams and must not discourage their use.

The laws surrounding sex work in South Australia are contained in the *Summary Offences Act 1953* and the *Criminal Law Consolidation Act 1935*. Apart from some very minor changes, most of these laws have remained as they were when first enacted more than 50 years ago. Several new laws were enacted in 2000 that deal with 'sex slavery', minors involved in commercial sexual services and the deceptive recruitment of staff to provide commercial sexual services. The act of commercial sex itself is not illegal in South Australia but there are a raft of laws that pertain to commercial sex that occurs in a brothel effectively rendering brothel-based sex work activities illicit. There are no provisions mandating the use of prophylactics in sex work.

Prior to 2006, prostitution in Tasmania was regulated. Amendments introduced into the state parliament in October 2005 move to partially criminalize sex work. Private

prostitution will be allowed but brothel-based sex work and street-based sex work are prohibited.

Western Australian sex work laws can be found in the *Police Act 1892*, the *Criminal Code 1902* and the *Prostitution Act 2000*. There are also provisions covering sex workers in the *Health Act 1911*. The act of prostitution itself is not illegal in Western Australia. However, there are laws pertaining to where it can be done and who can profit from it. The *Prostitution Act 2000* was created specifically to target street work. There are also a number of offences relating to street-soliciting in the *Criminal Code*. Street work is really the only area of the Western Australian sex industry in which prostitution laws are consistently enforced. Brothel-based sex work is illegal although it is widely tolerated by police. Escort agency-based sex work and private sex work appear to operate within a legal loophole. It is illegal both to offer and request a service without a prophylactic.

The Northern Territory *Prostitution Regulation Act* does not require private sex workers to be registered with the police or licensed through the Licensing Commission. Escort agencies, however, must be licensed with the Licensing Commission; they must also provide each staff member with a work contract that sets out certain guaranteed work conditions. When the receptionist/manager arranges the service they must tell the client that all services use safe sex practices – including condoms and dental dams. The agency should provide access to condoms, lube and dental dams. It is then up to the agency to say how much they cost or if they are free. The agency can ask the workers to have regular medical check ups and they may ask to see a certificate of attendance from the doctor. It is a condition of the licences that the operator must tell clients if they know a worker has any blood-borne virus including HIV, Hepatitis B and Hepatitis C.

### **(g) Prison Laws/Regulations**

Since the beginning of the AIDS epidemic, public health and policy experts recognized the susceptibility of prison populations to the disease and introduced preventive strategies to contain and prevent HIV infections. From 1987, the WHO noted that certain features of prison populations and environments were likely to facilitate HIV transmission, and indicated education and other measures should be applied to contain potential outbreaks. In 1988, the Australian National Advisory Committee made similar suggestions regarding correctional policy. In 1992, the Legal Working Party of the Inter-Governmental Committee on AIDS recommended governments ensure that inmates have access to HIV prevention measures (recommendation 9.5); shortly afterwards, the Second National Strategy (1993) specifically referred to prison populations as a target group for preventive strategies.

Unfortunately, despite the success of Australia's HIV/AIDS programs, measures to implement HIV-prevention strategies have been least successful in the area of prison reform. In 1987, the NSW Health Department funded the Prison AIDS project.

Interestingly, despite strong community support,<sup>20</sup> the Department of Corrective Services resisted pressure to distribute condoms through the prison system, and also the use of bleach (already available in prison laundries) for use in cleaning injecting equipment. In February 1996, after more than 8 years of negotiations with corrective service staff unions, the Minister for Corrective Services in NSW finally announced the introduction of condom-dispensing machines on a trial basis in three prisons in the state. While condoms are now provided in five jurisdictions, corrective service staff unions have continued to voice objections both to the provision of condoms and the availability of bleach to prisoners. They argue that providing equipment and services of this kind is inconsistent with their responsibility to contain people who have been criminally sentenced, and that the appropriate remedy is law reform not policy change.

For both industrial and political reasons, there are no needle and syringe exchange programs in Australian prisons. It is argued that the low rate of HIV prevalence in the prison community (0.2%) has more to do with comparably low rates in the general community than the success of HIV prevention strategies in the prison system.

There is no political impetus to introduce law reforms in this area.

#### **(h) Immigration laws**

Citizens and permanent residents of Australia and eligible New Zealand citizens are allowed to have their partners live with them in Australia. Since 1991, the Interdependency Class of visa has been available for same-sex partners and can lead to permanent residency (and then citizenship). It is necessary to prove that "for the period of 12 months immediately preceding the date of application" you had a "mutual commitment to a shared life"; "the relationship between you was genuine and continuing and you had been living together; or not living separately and apart on a permanent basis". The new regulation does not grant equality with heterosexuals, but creates a category of "relationships of emotional interdependency" outside of family links.

In 1994, the Refugee Review Tribunal found that a homosexual applicant will be a refugee where a real chance of persecution is incurred from his/her being a homosexual. Permanent visa applicants 15 years of age or older must take an HIV test. Permanent applicants aged under 15 years must also take this test if being adopted or there is a history of blood transfusions or other clinical indications. Temporary visa applicants who intend to work as a doctor, nurse or dentist in Australia are required to take an HIV test. If the applicant is found to be HIV-positive, a decision on whether the applicant meets the health requirement will be made on the same grounds as any other pre-existing medical condition. The main factor to be taken into account is the cost of the condition to

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<sup>20</sup> A nation-wide mail-telephone survey conducted in August 1991 by the Commonwealth Department of Human Services and Health found that 86% of adult Australians agreed with the statement that 'condoms should be made available to all prisoners in gaol'.

the Australian community of health care and community services. Standard pre- and post-test counseling must be provided by the doctor who examined the applicant.

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