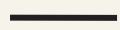


# Hepatitis B and the Law in Australia



A Mapping Review  
of Contemporary  
Case Law



## Acknowledgment of Country

Health+Law proudly acknowledges the Bedegal, Gadigal, Turrbal and Yugara people, who are the Traditional Custodians of the land at the campuses of UNSW, UTS and QUT respectively, where our research is based. The Health+Law Partnership includes people and organisations in every state and territory of Australia, and we recognise the unique and ongoing connection of First Nations people to the land and waterways in all of those places. We also value the unique contribution of Aboriginal and Torres Strait Islander people and community-led organisations working to support and improve the lives of people living with HIV and hepatitis B.

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Health+Law is a research partnership to identify and eliminate legal barriers to testing and treatment for people living with hepatitis B or HIV in Australia.

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## Acronyms used in this report

<b>ABA</b>	American Bar Association
<b>ASHM</b>	Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
<b>BBV</b>	Blood-borne virus
<b>CALD</b>	Culturally and linguistically diverse
<b>CHB</b>	Chronic hepatitis B
<b>DSP</b>	Disability support pension
<b>HALC</b>	HIV/AIDS Legal Centre
<b>HBV</b>	Hepatitis B
<b>HCV</b>	Hepatitis C
<b>MSM</b>	Men who have sex with men
<b>NAPWHA</b>	National Association of People with HIV Australia
<b>PLHBV</b>	Person/People Living with Hepatitis B
<b>PLHIV</b>	Person/People Living with HIV



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THE  
HEALTH+LAW  
RESEARCH  
PARTNERSHIP

# Health+Law is a research partnership that works to identify and eliminate legal barriers to testing and treatment for people living with HIV and people living with hepatitis B.

The partnership is led by a consortium of research, community, health and legal organisations, including the University of New South Wales (UNSW) Faculty of Law & Justice, the University of Technology Sydney (UTS) Law Faculty, Queensland University of Technology (QUT) School of Public Health and Social Work, the HIV/AIDS Legal Centre (HALC), ASHM Health (formerly the Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine), the National Association of People with HIV Australia (NAPWHA), and Hepatitis Australia. The partnership also draws from the expertise of people with lived experience of blood-borne viruses (BBVs) and the peers and community organisations across Australia that support them.

The demographics of people seeking HIV- and hepatitis-related legal services in Australia is changing. Increasingly, legal support is sought by people born overseas who identify as female and/or heterosexual, and younger people.<sup>1</sup> Preliminary research conducted by Health+Law has shown that people living with BBVs view the law as both a barrier to and enabler of access to health care, and many other things they value beyond physical health, including good working conditions, positive mental health, family stability and engagement with the community.

Australia currently lacks the evidence and means to provide appropriate legal support for people living with BBVs. By integrating expertise from the health and legal sectors, as well as from people who are part of the affected communities, Health+Law is working both to gather the evidence needed and establish practical initiatives that work to enhance access to justice for PLHIV and PLHBV.

To achieve these aims, Health+Law is currently:

- 1 **Conducting research to identify the legal issues facing PLHIV and PLHBV across Australia.**
- 2 **Assessing the impact of different legal issues on access to testing, treatment and other forms of care.**
- 3 **Developing a tool for use by healthcare workers to determine the specific legal needs of a patient or client living with HIV or hepatitis B and refer them to an appropriate legal service provider.**
- 4 **Establishing a national network of legal service providers with expertise in BBVs.**

Go to the **Health+Law website** for more information, including updates on these activities, or to read publications, watch webinars and access other outputs from our work.

<sup>1</sup> David J Carter et al, 'HIV-Related Legal Needs, Demographic Change, and Trends in Australia since 1992: A Review of Legal Administrative Data' (2023) 28(2) *AIDS and Behavior* 574.

# Introduction

**Hepatitis B (HBV) is a liver infection caused by the hepatitis B virus. If hepatitis B infection becomes chronic it may cause liver failure, liver cancer or cirrhosis and other serious health problems. Hepatitis B is the most prevalent blood-borne virus (BBV) in Australia, and a leading cause of primary liver cancer. In 2021, there were over 200,000 people living with chronic hepatitis B (CHB) in Australia.<sup>2</sup>**

As has been recognised in the case of other BBVs, including HIV and hepatitis C (HCV), an enabling legal environment is central to the effectiveness of public health responses to hepatitis B. However, to date, no assessment has been undertaken of the state of the legal environment surrounding hepatitis B in Australia. This report presents the results of a legal mapping review that aims to advance our understanding of the legal environment surrounding hepatitis B in Australia.

Through a structured analysis of legal disputes and issues, this legal mapping review identifies hepatitis B-related legal issues that are of current concern. It examines primary legal materials with a specific focus on case law, which represents an important subset of legal disputes that arise in relation to hepatitis B.

While this approach offers significant advantages, we recognise that it also has its limitations, and that further research and analysis is needed to build a more complete picture of the legal environment surrounding hepatitis B. This review is a first step in the

assessment of the legal environment in Australia and will soon be complimented by primary socio-legal research with people living with hepatitis B (PLHBV) and the peers and other professionals who work with them.

This review is one of a set of two reviews presenting an overview of current scholarly literature and primary legal materials regarding hepatitis B. The second review, titled 'The Health Impacts of Law for People Living with Hepatitis B'<sup>3</sup>, is a systematic review of current scholarly literature on the health-related impacts of law and justiciable issues in high-income countries for PLHBV. That review is designed to complement and extend the review of primary legal materials presented here. Together, these aim to advance our understanding of the legal needs of PLHBV, as well as the state of the legal environment surrounding hepatitis B in Australia. They form a starting point for further research being undertaken by the Health+Law partnership to identify and understand more about the legal issues and experience of navigating the law for PLHBV across Australia.<sup>4</sup>

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<sup>2</sup> Jonathan King et al, 'Viral Hepatitis and Sexually Transmissible Infections in Australia: Annual Surveillance Report 2022', (The Kirby Institute, UNSW Sydney, Sydney, Australia, 2022) 13

<sup>3</sup> David J Carter et al, 'The Health Impacts of Law for People Living with Hepatitis B: A Systematic Review of Literature' (2024)

<sup>4</sup> See 'Health+Law Partnership' website for information, updates and findings from this research: [www.healthpluslaw.org](http://www.healthpluslaw.org)

## Evidence Prior to this Study

**While the Australian Commonwealth, states and territories have long recognised the importance of law and an enabling legal environment as part of the response to hepatitis B, there has been no systematic assessment of the legal environment surrounding hepatitis B.**

Indeed, there exists very little legal research on the topic of hepatitis B and the law in any Australian jurisdiction. In the systematic review that sits alongside this legal mapping review, we identified only seven peer-reviewed publications of relevance to hepatitis B and Australian law and legal experience.<sup>5</sup> Notably, few of these studies are from the legal discipline, and do not present research or analysis with law or the experience of law as their primary phenomenon of interest.

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5 These are: Roger S Magnusson and Hayden Opie, 'HIV and Hepatitis in Sport: A Legal Framework for Resolving Hard Cases' (1994) 20 *Monash University Law*. 214 ('HIV and Hepatitis in Sport'); Jennifer H MacLachlan and Benjamin C Cowie, 'Bridging the Access Gap: Medicare Ineligibility in People Living with Chronic Hepatitis B' (2019) 49(1) *Internal Medicine Journal* 122; David Hirsch, 'The Doctor's Duty of Care to a Patient's Sexual Partners.' (2000) (37) *Plaintiff* 8; M Guirgis et al, 'Barriers Faced by Migrants in Accessing Healthcare for Viral Hepatitis Infection' (2012) 42(5) *Internal medicine journal* 491; Nicole Allard et al, 'Knowing and Telling: How African-Australians Living with Chronic Hepatitis B Understand Hepatocellular Carcinoma Risk and Surveillance' (2018) 24(2) *Australian Journal of Primary Health* 141; MacLachlan and Cowie; Nafisa Yussf et al, 'Women with Hepatitis B: How Mothers with Chronic Hepatitis B Understand and Experience the Prevention of Mother-to-Child Transmission Interventions in Victoria, Australia' (2022) 28(6) *Australian Journal of Primary Health* 514; Defeng Jin, Loren Brener and Carla Treloar, 'Hepatitis B-Related Stigma among Chinese Immigrants Living with Hepatitis B Virus in Australia: A Qualitative Study' (2022) 30(6) *Health & Social Care in the Community* e5602.

# This Legal Mapping Review

**This review aims to search, screen and synthesise hepatitis B-related judgments and tribunal decisions from all Australian jurisdictions. It searched specialist legal databases, with results screened by researchers with legal training. In addition, it searched Factiva, a media database with strong coverage of Australian newspaper sources, to identify media reports on hepatitis B-related court and tribunal proceedings.**

There are a range of challenges and limitations associated with legal research of this type. The most significant limitation is the coverage of cases by specialist legal databases. These databases provide access to some reported decisions, but not all; they are especially limited in their coverage of matters heard in tribunals and lower courts. Therefore, news media is another important source of information regarding hepatitis B-related court and tribunal activity. However, news media coverage is also limited in the detail and quality of reporting. The availability of hepatitis-B related legal matters is also influenced by the discretion of judges or decision-makers to prohibit or limit the publication of judgments or decisions. This may occur to protect participants or others due to the sensitive nature of a diagnosis, health-status disclosure or related experience. Judgments or decisions may also be unreported or otherwise unavailable through specialist legal databases for reasons unrelated to the subject of hepatitis B.

Given these limitations, the aim of this legal mapping review was to represent the scope of hepatitis B-related legal matters of concern that is useful for the purposes of further legal analysis and primary socio-legal research. The results reported here should not be interpreted as providing a complete or wholly representative picture of the legal environment surrounding hepatitis B in Australia, nor of the nature or incidence of legal disputes related to hepatitis B. Nor should they be interpreted as a complete or wholly representative sample of hepatitis B-related judgments or decisions available on the public record or in specialist legal databases. Rather, the review offers a 'map' of the existing legal terrain that identifies key features of interest, including areas of law around which disputes arise, the priority populations engaged in those disputes, and a classification of primary and secondary 'legal factors' involved in each dispute. Like any map, it is a partial but useful representation of the underlying territory.

## Key Findings

**Australian hepatitis B-related case law arises in a wide range of primary areas of law, including criminal law, social security law, anti-discrimination law, migration law and refugee law.**

Results from our classification of included records according to their primary legal factor demonstrate that the legal issues that emerge most frequently in relation to hepatitis B are 'access to a forum, fair trial, and enforcement of remedies', closely followed by 'entry, stay and residence' and 'social protection and material assistance'. These matters arise in most Australian jurisdictions, although no judgments or decisions from Tasmania or the Northern Territory were identified by this review.

This study has identified some emerging themes, including a predominance of migration law-related disputes and the presence of hepatitis B-related criminal legal matters. Migration law was a major area of hepatitis B-related case law identified by this review. The review found migration-related matters such as refugee claims, visa cancellations and migration-related health requirement proceedings give rise to a large body of reported judgments and decisions. The limited number of refugee claims

Migration law was a major area of hepatitis B-related case law identified by this review. The review found migration-related matters such as refugee claims, visa cancellations and migration-related health requirement proceedings give rise to a large body of reported judgments and decisions.



identified by this review has made it difficult to make assertions regarding the relevance of an applicant's hepatitis B status to their claims for protection. The majority of judgments and decisions in this area concern claims for protection on the grounds of homosexuality, ethnicity, religion and political unrest, rather than claims relying primarily on hepatitis B status. Changes to the health-related criteria imposed by the Australian government on those seeking to migrate to Australia were favourable for PLHBV who are applying for a permanent visa. These reforms changed the way the Australian government calculates estimated costs for health and social care. Although we cannot yet be sure, this change may result in a shift away from disputes regarding the health requirement, the application of its criteria, and other rules and procedures related to health costs. Since we conducted this review of cases, there have been additional changes to Australian migration regulations.

Criminal legal matters accounted for eleven records included in this review. Of these eleven criminal matters, eight were related to criminal sentencing. These cases clearly demonstrate the relevance of a person's health and hepatitis B status to considerations regarding the appropriateness of a custodial sentence. Prior to this review, it was assumed that hepatitis B status might be a mitigating factor in sentencing. Despite the potential relevance of hepatitis B status to those proceedings, the judgments identified did not demonstrate significant or sustained engagement with material related to a person's hepatitis B status and the potential impacts on their health of a custodial sentence.

This is a stark contrast to the results produced in a similar HIV-related legal mapping study we have conducted,<sup>6</sup> where courts often cite cases, materials and submissions regarding the detrimental impacts that a custodial sentence may have on the health and security of a person living with HIV (PLHIV). Hepatitis C has been regarded similarly in historical sentencing decisions in Australia, as a mitigating factor, although this may have been affected by the advent of curative treatment for hepatitis C, which became available in Australia in 2016.<sup>7</sup> Engagement with hepatitis B-related material in sentencing matters might occur for a range of reasons, as we discuss in more detail later in this report.

Both migration and criminal law matters are areas of law where the state acts as a party or prosecutor. This can be contrasted with private law matters, which do not require the state to act as a party or participant in proceedings. This review identified very few records of disputes relating to private law, and far more that involved the state as party or prosecutor, in public or criminal law disputes. While many private law disputes are resolved prior to formal adjudication by a court or tribunal — and so therefore never produce a reported judgement or decision that might be collected by a study like this — it seems reasonable to conclude that the state is a primary participant in hepatitis B-related legal disputes or legal matters that involve PLHBV in Australia. Given the predominance of legal matters that involve the state as party or participant represented in our findings here, state practice will be a key site of intervention for improving the legal environment around hepatitis B.

6 David J. Carter et al, 'HIV and the Law in Australia: A Mapping Review of Contemporary Case Law', (Health+Law, Sydney, 2024) ('HIV and the Law in Australia').

7 Kate Seear et al, 'Complicating Cure: How Australian Criminal Law Shapes Imagined Post-Hepatitis C Futures' 45(1) *Sociology of Health and Illness* 179.

# Preliminary Implications of the Available Evidence

**While it is estimated that approximately 200,000 people are living with hepatitis B in Australia today,<sup>8</sup> relatively few judgments or decisions were identified by this review. In contrast to the 40 records identified here, our parallel legal mapping review of HIV-related case law generated 281 records in relation to a population of approximately 30,000 people living with HIV in Australia. In recent legal mapping by Seear and colleagues of case law and statutes that impact people living with hepatitis C using similar methods, 59 pieces of legislation were found and 232 relevant cases (including 98 cases involving the criminal law).<sup>9</sup>**

The reason for this disparity between the high prevalence of hepatitis B in the population and the comparatively low number of relevant decisions or judgments — at least compared to HIV and hepatitis C, which are both BBVs that may lead to chronic infection — is not clear. This may be a feature of coverage and editorial decision-making, with HIV-related and hepatitis C-related judgments or decisions more frequently made available in specialist legal databases. It is likely also a result of an important difference in the underlying laws relating to HIV, hepatitis C and hepatitis B. There are very few hepatitis B-specific legal provisions compared with the relatively high number of current or formerly HIV-specific legal provisions, particularly in the criminal law.<sup>10</sup> Given the nature of these provisions, it is likely that HIV-related matters are generally heard in higher courts and may thereby generate more frequent reporting in specialist databases. The reasons for these disparities surrounding judgements relating to HIV, hepatitis C and hepatitis B are also likely informed by the particular histories of law, healthcare policy, treatment and practice surrounding these conditions in Australia.

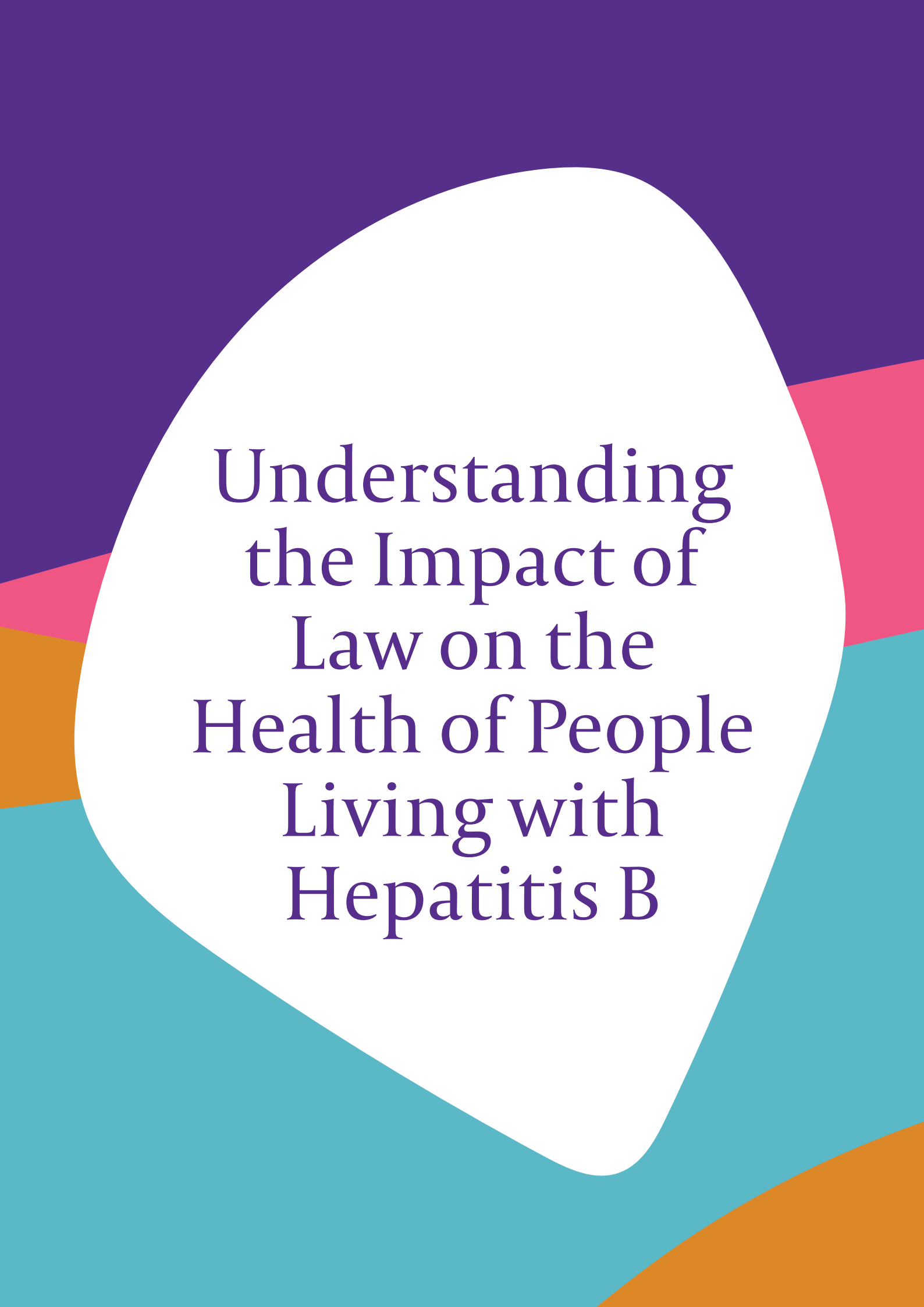
It is important to recognise that most people living in Australia, including PLHBV, will experience a justiciable issue or legal dispute on a regular basis without the matter reaching resolution through formal court or tribunal processes.<sup>11</sup> While the results reported here produce an important and useful ‘map’ of hepatitis B-related disputes and areas of law of concern, which provides a starting point to assess the legal environment surround hepatitis B, there are likely to be other types of legal experience affecting those living with hepatitis B not accounted for here including ‘everyday’ experiences of law and legal disputes that require further primary socio-legal research to identify and understand.

<sup>8</sup> King et al (n 2) 13. See also ‘Prevalence and epidemiology of hepatitis B’, B Positive (2022) <<https://www.hepatitisb.org.au/prevalence-and-epidemiology-of-hepatitis-b/>>.

<sup>9</sup> See Dion Kagan et al, ‘Hepatitis C-Related Stigma and Discrimination in a Post-Cure World: Summary Report of Project Findings and Recommendations’ (La Trobe University, Melbourne, 2023).

<sup>10</sup> See, for example, in relation to criminal legal matters, David J Carter, ‘Transmission of HIV and the Criminal Law: Examining the Impact of Pre-Exposure Prophylaxis and Treatment-as-Prevention’ (2020) 43(3) *Melbourne University Law Review* 937.

<sup>11</sup> Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia*, vol 8 (Law and Justice Foundation, 2012) 98.



Understanding  
the Impact of  
Law on the  
Health of People  
Living with  
Hepatitis B

# The Enabling Legal Environment

**Law affects individual and public health. Governments use legislation, formal regulations, policy and other legal tools to influence and change the flow of events around individual and public health. So too do non-government actors use private legal ordering in ways that influence individual and public health. Taken together, this public and private legal ordering creates a ‘legal environment’ around health conditions like hepatitis B that influences individual and public health, people's quality of life and access to justice.**

The influence of the legal environment has long been recognised in Australian responses to viral hepatitis generally and hepatitis B specifically. The current insufficiency of the legal environment is acknowledged in the broader literature and in community practice, both of which have asserted that ‘[h]igh levels of stigma, discrimination, social marginalisation and legal impediments<sup>12</sup> affect PLHBV.<sup>13</sup> The *Third National Hepatitis B Strategy* (2018-2022), which was current at the time the searches for this review were conducted, recognised the importance of an enabling environment, with calls for continued action ‘towards addressing the legal, regulatory and policy barriers which affect priority populations and influence their health-seeking behaviours’.<sup>14</sup> To this end, the Third Strategy sought to ‘eliminate the negative impact of stigma, discrimination, and legal and human rights issues on people’s health’ as a clearly identified goal.<sup>15</sup> The more recently released *Fourth National Hepatitis B Strategy* (2023-2027), includes an enhanced focus on legal environments. It establishes the goal that, by 2030, hepatitis B will be no longer be a public health threat in Australia, and everyone affected will have equitable access to safe and effective vaccines, prevention, education, testing,

management and treatment by this time. The current Strategy also includes specific legal targets and legal outcomes among a number of its key action areas. This includes: the establishment of ‘a baseline of the negative impact of legal and human rights issues in people’s health and wellbeing for people affected by hepatitis B by 2025’; the implementation of hepatitis B capacity building for the legal workforce; and the implementation of ‘a national project focused on access to justice and support for people affected by hepatitis B to meet their legal needs.’<sup>16</sup>

## Assessing the Enabling Legal Environment

While the importance of law and an enabling legal environment has been long recognised in Australia in relation to hepatitis B, such an environment has not been the subject of a systematic assessment. While there has been assessment of the enabling legal environment in relation to HIV in 1992,<sup>17</sup> and a recent, emerging body of work on legal barriers and enablers relating to hepatitis C,<sup>18</sup> thus far no such assessment or body of evidence has been generated in relation to hepatitis B.

12 Sophia E Schröder et al, ‘Innovative Strategies for the Elimination of Viral Hepatitis at a National Level: A Country Case Series’ (2019) 39(10) *Liver International* 1818, 1832.

13 Ibid

14 The Australian Government Department of Health, *Third National Hepatitis B Strategy* (2018) 17.

15 Ibid 16.

16 Australian Government Department of Health and Aged Care, *Fourth National Hepatitis B Strategy* (2023–2030).

17 See our parallel HIV-related legal mapping review. Carter et al, ‘HIV and the Law in Australia’ n 6. (2024).

18 See, for e.g., Seear et al (n 7); Kagan (n 9).

## First Steps Toward Assessing the Legal Environment

The aim of assessing the legal environment is to review health, disease-specific and any other related laws, regulations and practices that have an important influence on hepatitis B, on PLHBV and all those potentially affected by the virus, including those at risk of acquiring it. However, assessment must also go beyond just those laws that specifically apply to hepatitis B, and beyond matters that would normally be considered ‘health law’, as hepatitis B is not merely a health issue or medical condition. Rather, chronic infection highlights and is connected to multiple equity and justice factors that generate ‘significant unmet need for individuals, families and communities, often from marginalised backgrounds.’<sup>19</sup>

A key preliminary step in the process of assessing the legal environment around hepatitis B is to establish evidence in response to the following questions:<sup>20</sup>

1. What are the major hepatitis B-related, health and other relevant legal issues of concern?
2. Which laws, regulations and policies regulate hepatitis B and/or priority populations identified in Australia’s national hepatitis B response?
3. How do these laws, regulations and policies address hepatitis B-related legal and human rights issues as priority concerns?

This legal mapping review responds to the first of these three questions: identifying which hepatitis B-related, health and other related legal issues are of concern. It does so by presenting a ‘map’ of hepatitis B-related legal disputes available on the public record that have generated a judgment or decision.

## A Ground-Up Perspective on the Law and Legal Research

While any assessment of the legal environment will use a mix of perspectives, sources of evidence, approaches to analysis and stakeholder views, the selection and balance of these factors can generate a review that is predominantly ‘top down’ or ‘ground up’ in its understanding of what hepatitis B-related legal issues are of concern.

A ‘top-down’ approach would seek to understand the law and its effects on PLHBV from the perspective of the state, service organisations, legal and healthcare practitioners, experts and researchers. In contrast, a ‘ground-up’ approach seeks to understand the same material from the perspective of those affected by law and the legal system — in this case, people living with and affected by hepatitis B. While both forms of analysis are required, the advantages of emphasising the ground-up approach are multiple. This approach is interested in the law *in practice*, seeking to understand people’s lived experience of the law, how the application of law affects everyday life, and which laws have the most significant impact for PLHBV, including on their health. We suggest that this approach generates a more accurate, ‘truer picture’ of the law and its impacts around hepatitis B. A ground-up approach can also support greater and more meaningful participation of PLHBV in research, recognising that the expertise that comes from lived experience of the law can often better perceive the reality of the law’s operation and effects, including injustice.

<sup>19</sup> Hepatitis Australia, *Submission to the MRFF Australian Medical Research and Innovation Strategy and Priorities Consultation* (2022) 8

<sup>20</sup> Adapted from United Nations Development Programme, *Legal Environment Assessment for HIV: An Operational Guide to Conducting National Legal, Regulatory and Policy Assessments for HIV* (Practical Manual, January 2014) 47

These two approaches to legal analysis and research are often described as 'de facto' or 'de jure' legal analysis. De facto analysis looks at the law 'in reality' and how it is applied in the real world. It is interested in how the law actually functions, and what people affected by particular laws actually experience. De jure analysis looks at the law 'on the books'; it is more interested in the law as written, what possibilities it creates or forecloses, and how it is meant to work in theory.

This legal mapping review is a first step towards assessing the state of the legal environment around hepatitis B in Australia. It emphasises a ground-up approach. This means that while it is concerned with establishing a better understanding of the legal environment in Australia, it does so by focusing less upon the law itself, and more upon the operation, impact and outcomes of the law. For this reason, it begins with an examination of the existence and nature of relevant disputes, rather than identifying hepatitis B-related legislative or regulatory provisions. In the next section, we outline our method for searching and identifying relevant disputes.





# Hepatitis B- Related Legal Disputes and Issues of Concern in Australia

**Legal mapping studies analyse the state of the law concerning a particular legal topic. They are an important method in a variety of socio-legal approaches to legal research, including specific approaches used in some legal sub-disciplines, such as legal epidemiology.<sup>21</sup>**

There are different styles of legal mapping review. In this review, we aim to identify and describe legal issues and areas of legal concern relevant to hepatitis B in Australia through an identification of legal disputes that have arisen in that area. Our aim is not to identify every single instance of a relevant legal dispute. Instead, it is to create a broad 'map' of the areas of law that give rise to these issues and to identify areas of legal concern. This aim is influenced in part by the paucity of literature or analysis of hepatitis B-related legal disputes or areas of concern in this jurisdiction. So too is it influenced by legal methods — in both research and advocacy. From a legal research or advocacy perspective, there is little benefit to identifying and synthesising every hepatitis B-related dispute in a jurisdiction. Also, the latter is likely an impossible task given the limitations of access to and coverage of disputes in specialist legal databases, as described in more detail below. Rather, the focus is on mapping and identifying as many of the relevant areas of law where disputes occur, with some insight into more or less common areas. This difference in both goals and method creates an important distinction between the mapping approach we have used here and other approaches to literature or evidence review or synthesis, like systematic reviews, for example, which are more frequently used in health and medical disciplines.

## Methods

**The aim of this legal mapping review was to search, screen and synthesise hepatitis B-related judgments and tribunal decisions that occurred in any Australian jurisdiction, in order to identify the areas of law that gives rise to these legal disputes.**

As we noted above, a challenge for legal research of this type is coverage of judgments and decisions. While courts and tribunals provide reasons for their decisions, written judgments and decisions are not always produced nor always made available to the public through databases such as those used in this study. Further, some courts and tribunals have higher publication rates than others. While judgments or decisions that hold legal or public interest significance are more likely to be published, the digitisation of court and tribunal processes has led to an increasing number of judgments and tribunal decisions produced and made available through specialised legal databases.<sup>22</sup> This means that coverage has increased over time. However, legal material relating to matters heard in lower courts and tribunals remains an area with far less coverage. There remains potential for a bias towards decisions handed down more recently, in relation to appellate cases, or to cases with significant public or media interest, which are often more sensational in nature.

Given these limitations of coverage and access, an important complementary — though also incomplete — source of information regarding hepatitis B-related court and tribunal activity is media reporting. For this review, researchers searched both specialist legal databases and media sources.

<sup>21</sup> Scott Burris, 'How to Write a Legal Mapping Paper' (SSRN Scholarly Paper No 3133065, 2020).

<sup>22</sup> See, for example, Jade BarNet, AustLII and Westlaw AU.

## Search Strategy

### Specialist Legal Databases

Specialist legal databases Jade BarNet, AustLII and Westlaw AU were searched using the terms ‘hepatitis B’ and ‘HBV’. Jade BarNet’s Advanced Search function refined results to ‘judgments’. These were sorted by each database’s ‘Best Match’ algorithm. Researchers reviewed these in descending order, reviewing the full text until results were consistently and repeatedly excluded. Results were excluded in instances where, for example, a search term (e.g. ‘hepatitis B’) was mentioned in passing but did not indicate that the judgment was hepatitis B-related. The same approach was taken with both AustLII and Westlaw AU. AustLII’s ‘All Case Law Databases’ was searched, while Westlaw’s results were confined to ‘Cases’.

### Media and Hepatitis B-Specific Legal Information Sources

Hepatitis B-related court and tribunal matters are often reported on in print and online media. Factiva, a media database with strong coverage of Australian newspaper sources, was searched for hepatitis B-related court and tribunal proceedings. The search terms used were ‘hepatitis B’ and ‘court’ or ‘tribunal’ or ‘judge’, with results limited to media reports from Australia since 2018.

## Extraction, Charting and Inclusion Criteria

Extracting information from primary legal sources involves reviewing full-text records and engaging in some legal interpretation. We extracted key pieces of information from the included records and applied a classification system to assist in charting the results of this review.

As noted above, coverage of cases in legal databases is limited and non-comprehensive. As our aim here was to generate a ‘map’ of areas of law and legal engagement with hepatitis B, we focused on the most relevant results returned by searches.

Specialist legal databases lack the functionality of exporting results systematically, unlike equivalent health and biomedical databases of peer-reviewed literature. This export method is commonly used in those disciplines to collect all potential records in bulk, ahead of screening for reviews and other forms of evidence synthesis. Given this limitation, results from searches in specialist legal databases were manually screened by researchers. Those results deemed relevant were then listed in a table using Excel.

Table 1: Extraction Form

EXTRACTION FIELD	EXTRACTION FIELD DEFINITION
<b>Year</b>	Year of the judgment or decision.
<b>Jurisdiction</b>	Jurisdiction in which the judgment or decision was handed down.
<b>Court/Tribunal</b>	Court/Tribunal in which the case was heard.
<b>Case Name</b>	Full citation for the judgment or decision.
<b>Area of Law</b>	Area of law that the judgment or decision relates to.
<b>Full Headnote</b>	Headnote (where provided).
<b>Summarised Headnote</b>	A summary of the headnote or judgment or decision generated by the researcher.
<b>Legal Factor — Primary</b>	The American Bar Association (ABA)’s HIV/AIDS Legal Assessment Tool (2011) <sup>23</sup> identifies a set of legal factors, including Public Education, Research, and Information Exchange, Testing, Counselling, and Referral, and Social Protection and Material Assistance. Cases were classified according to an adapted version of this framework.
<b>Legal Factor — Key Population</b>	The ABA HIV/AIDS Legal Assessment Tool identified a list of key populations, including Women, Children & Youth, and People Under State Custody. Cases were classified according to an adaptation of this framework.
<b>Priority Population</b>	Australia’s <i>Third National Hepatitis B Strategy (2018-2022)</i> <sup>24</sup> identified a set of priority populations affected by hepatitis B, including emerging populations at elevated risk and vulnerability alongside groups that have been impacted historically and remain at continued risk. Cases were classified using this framework of priority populations.

23 American Bar Association, ‘HIV/AIDS Legal Assessment Tool - Assessment Methodology Manual’ (2011) (American Bar Association).

24 Australian Government Department of Health, *Third National Hepatitis B Strategy (2018-2022)*.

## Results

Application of the search and screening strategy resulted in the inclusion of 40 judgments or decisions where there was direct access to the written judgment or tribunal decision, or where judgements or decisions could be reconstructed through media or other records.

## Jurisdiction

We searched all Australian jurisdictions — Commonwealth, state and territory — and found relevant case law at each level, though no records were included from Tasmania or the Northern Territory. The number of included records from each Australian jurisdiction are listed in Table 2 below, in descending order. We also list reference to the earliest and most recent judgment or decision in each jurisdiction.

Table 2: Jurisdictional Analysis of Caselaw in the Corpus

JURISDICTION	NUMBER OF CASES	EARLIEST CASE	MOST RECENT CASE
<b>Commonwealth</b>	19	<i>Nardella and Minister for Immigration and Ethnic Affairs</i> [1979] AATA 92	<i>BQNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)</i> [2021] AATA 1186
<b>New South Wales</b>	11	<i>Bt v Oei</i> [1999] NSWSC 1082	'Security Guard Case' Media Reporting Orange Local Court NSW
<b>Victoria</b>	3	<i>DPP v Duong</i> [2006] VSCA 78	<i>Dang v The Queen</i> [2020] VSCA 24
<b>Queensland</b>	4	<i>R v Setters</i> [1999] QCA 350	<i>Re H</i> [2011] QSC 427
<b>Western Australia</b>	1	'Perth Robbery Case' (2022)	'Perth Robbery Case' (2022)
<b>Australian Capital Territory</b>	1	<i>R v McMahon</i> [2019] ACTSC 361	<i>R v McMahon</i> [2019] ACTSC 361
<b>South Australia</b>	1	<i>Commissioner for Equal Opportunity</i> [2013] SAEOT 9	<i>Nungirayi v Commissioner for Equal Opportunity</i> [2013] SAEOT 9
<b>Tasmania</b>	0		
<b>Northern Territory</b>	0		

## Areas of Law

There are multiple ways to classify and synthesise case law. The judgments and decisions included in this review have been classified according to their primary 'area of law'. A summary of this classification is found in Table 3 below.

This classification shows that hepatitis B-related case law has arisen in a range of areas of law in Australia, including migration and refugee law, family law, criminal law, anti-discrimination law, and workers' compensation law. Criminal law was the most frequent area of law to appear in the results followed by migration law.

**Table 3: Areas of Law Represented in the Corpus**

PRINCIPAL AREA OF LAW	NUMBER OF RECORDS INCLUDED	EXAMPLE JUDGMENT OR DECISION
<b>Criminal</b>	11	<i>Gar v R</i> [2021] NSWCCA 265
<b>Migration</b>	6	<i>1729745 (Migration)</i> [2019] AATA 5188
<b>Infant Health</b>	3	<i>Re Marlie</i> [2021] NSWSC 973
<b>Disability Support</b>	2	<i>Ly and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs</i> [2011] AATA 90
<b>Family</b>	2	<i>Wang &amp; Jong</i> [2009] FamCA1150
<b>Refugee</b>	2	<i>2001814 (Refugee)</i> [2020] AATA 4531
<b>Veterans' Entitlements</b>	2	<i>Sandry v Repatriation Commission</i> [2012] AATA 71
<b>Workers' Compensation</b>	2	<i>Trumpf and Comcare</i> [2008] AATA 1024
<b>Discrimination</b>	1	<i>Taikato and Nakle v Western Sydney Area Health Service</i> [1999] NSWADT 52
<b>Industrial Law</b>	1	<i>Federated Engine Drivers and Firemen's Association of Australasia and Abbots Pty Ltd &amp; Ors</i> [1977] CthArbRp 3594
<b>Insurance Law</b>	1	<i>D03-04/183</i> [2004] SCTA 84
<b>Medical Negligence</b>	1	<i>Bt v Oei</i> [1999] NSWSC 1082
<b>Negligence</b>	1	<i>Samardzic v State of New South Wales</i> [2004] NSWSC 15
<b>Patent</b>	1	<i>Braun Melsungen AG v Multigate Medical Devices Pty Ltd</i> [2014] FCA 1110
<b>Privacy</b>	1	<i>BLW v Nepean Blue Mountains Local Health District</i> [2015] NSWCATAD 184
<b>Procedure</b>	2	<i>Samaardzic v New South Wales</i> [2004] NSWSC 1082
<b>Professional Misconduct</b>	1	<i>Re Dr Williams Kwok Wa MA</i> [2005] NSWMT 15

## Priority Populations

Case law identified by this review related to members of priority populations. Where relevant, each judgment or decision was classified as relating to a priority population. As mentioned above, these priority populations were taken from the *Third National Hepatitis B Strategy*, which was the current strategy in Australia at the time this research was conducted. Classification was performed hierarchically, with cases classified first to categories other than 'people with hepatitis B', and only then classified to this group where the case did not also relate to a person or scenario

concerning one of the other more specific priority populations.

For this review, we adapted the Strategy's 'CALD People from High Prevalence Countries' to the more inclusive 'People from CALD backgrounds'. Records assigned to that classification were primarily migration-related, involving migrants from a variety of home countries. Broadening this category ensured that cases engaged with migration-related matters would be grouped together regardless of whether people involved in these cases were from a high prevalence country.

**Table 4: Priority Populations and Number of Cases Associated with Each**

PRIORITY POPULATION	NUMBER OF CASES
People living with hepatitis B	28
People from CALD backgrounds	8
Pregnant women with hepatitis B and their children, and children with hepatitis B	3
Not applicable*	1
Unvaccinated adults and adolescents at higher risk of infection	0
Aboriginal and Torres Strait Islander people	0

\* Healthcare workers - not applicable as a priority population

We recognise that classification according to priority populations in this manner reduces the true complexity of cases and may render partly invisible the intersectional identities of those people involved in each case. Where able, we highlight these aspects in the narrative synthesis of cases presented in the 'Discussion' section of this report.

## Legal Factors

In addition to the classification of primary areas of law summarised in Table 2 above, we have also classified the included judgments or decisions according to their 'primary legal factor' (Table 5). This classification system is derived and adapted from a long-standing system provided by the ABA's HIV/AIDS Legal Assessment Tool.<sup>25</sup> This tool was designed by the ABA to assess a jurisdiction's compliance with international legal standards, and express where law, regulation, policies and legal practices are likely to impact HIV and PLHIV. We recognise that this tool and its classification system was

developed in relation to HIV and in the United States, rather than in relation to hepatitis B and Australia, and that there are disadvantages to applying a HIV-related classification system to hepatitis B-related legal matters in this way, particularly where the classification system concerned has been produced in another jurisdiction. At the same time, however, the legal factors present in the ABA's framework are generic statements derived from international legal standards regarding human rights and health, rather than constructed from local jurisdictional experience and practice. For this reason, and in the absence of an existing hepatitis B-specific classification system for legal factors, we suggest that adapting and applying the ABA's Legal Assessment Tool is appropriate for this study when the results are accompanied by a note of caution. Moreover, we have aimed here to present data in terms that can support cross-jurisdictional comparison, with the hope of leveraging the more developed legal research on HIV to better understand the unique features of hepatitis B's interaction with the law.

Table 5: Primary Legal Factors

	<b>FACTOR GROUP</b>	<b>FACTOR TITLE</b>	<b>FACTOR DESCRIPTION</b>
1	Access to Essential Services	Public education, research and information exchange	Every person enjoys an equal right to seek, receive and impart reliable and accurate information about biomedical and socio-economic aspects of hepatitis B. The state implements and supports raising hepatitis B-related awareness, stigma reduction, training and information exchange programmes, and ensures that research on hepatitis B adheres to the highest ethical standards.
2	Access to Essential Services	Hepatitis B prevention	Every person has equitable and sustainable access to a wide range of effective, human rights-based and evidence-informed measures aimed at preventing hepatitis B transmission.
3	Access to Essential Services	Testing, counselling and referral	Every person has unrestricted access to voluntary, confidential or anonymous hepatitis B testing accompanied by quality counselling and referral to essential services. Arbitrary, mandatory or compulsory hepatitis B testing is prohibited.
4	Access to Essential Services	Treatment, care and other health services	PLHBV enjoy the right to the highest attainable standard of physical and mental health, including equitable and sustainable access to comprehensive health care. The state takes concrete steps to progressively realise universal access to hepatitis B-related treatment and care.
5	Access to Essential Services	Social protection and material assistance	PLHBV enjoy the right to an adequate standard of living, including equitable access to social protection and other forms of material assistance, particularly in the event of unemployment, sickness or disability.
6	Access to Essential Services	Protection of privacy and confidentiality	PLHBV enjoy effective protection from arbitrary or unlawful interference with their privacy. Their medical and personal information is subject to strict rules of data protection and confidentiality.
7	Access to Essential Services	Political, social and cultural life	PLHBV enjoy full equality and inclusion in political, social and cultural life. The state ensures the right of PLHBV, hepatitis B advocates and service workers to peaceful assembly and association.
8	Equality of PLHBV in Public and Private Life	Family, sexual and reproductive life	PLHBV enjoy full equality in family life and the right to the highest attainable standard of sexual and reproductive health. The State facilitates the prevention of vertical transmission.

	<b>FACTOR GROUP</b>	<b>FACTOR TITLE</b>	<b>FACTOR DESCRIPTION</b>
9	Equality of PLHBV in Public and Private Life	Education and training	PLHBV enjoy the right to equal educational opportunity. Where appropriate, special measures are employed to provide reasonable accommodations for PLHBV and increase their representation in educational institutions.
10	Equality of PLHBV in Public and Private Life	Employment, work and economic life	PLHBV enjoy equal rights to: work in the public and private sectors, including just, favourable, safe and healthy conditions of work; property and inheritance; and credit. Where appropriate, special measures are employed to provide PLHBV with income-generating opportunities and reasonable accommodations in the workplace.
11	Equality of PLHBV in Public and Private Life	Private and public housing	PLHBV enjoy equal access to adequate private and public housing, including residential facilities. Where appropriate, special measures are employed to provide reasonable accommodations for PLHBV and protect their rights in their place of residence. Segregation, exclusion and coercive or punitive measures based on hepatitis B status are prohibited.
12	Equality of PLHBV in Public and Private Life	Entry, stay and residence	The state does not impose restrictions on the entry, stay and residence of PLHBV based on their hepatitis B status. PLHBV are not returned to countries where they face persecution, torture or other forms of cruel, inhuman or degrading treatment. Migrants and mobile populations have equitable and sustainable access to comprehensive hepatitis B-related services.
13	Equality of PLHBV in Public and Private Life	Non-criminalisation of hepatitis B exposure and transmission	Hepatitis B exposure and non-intentional transmission are not criminalised. Deliberate and intentional transmission of hepatitis B is prosecuted under general rather than hepatitis B-specific criminal law.
14	Key Populations	Women	The state takes all appropriate measures to reduce specific hepatitis B vulnerabilities of women, eliminate hepatitis B-related discrimination against them and provide them with equitable and sustainable access to comprehensive hepatitis B-related services.
15	Key Populations	Children and youth	The state takes all appropriate measures to reduce specific hepatitis B vulnerabilities of children and youth, eliminate hepatitis B-related discrimination against them and provide them with equitable and sustainable access to comprehensive hepatitis B-related services.

	<b>FACTOR GROUP</b>	<b>FACTOR TITLE</b>	<b>FACTOR DESCRIPTION</b>
16	<b>Key Populations</b>	<b>People who use drugs</b>	The state takes all appropriate measures to reduce specific hepatitis B vulnerabilities of people who use drugs, eliminate hepatitis B-related discrimination against them and provide them with equitable and sustainable access to comprehensive hepatitis B-related services.
17	<b>Key Populations</b>	<b>Adults engaged in commercial sex</b>	The state takes all appropriate measures to reduce specific hepatitis B vulnerabilities of adults engaged in commercial sex, eliminate hepatitis B-related discrimination against them and provide them with equitable and sustainable access to comprehensive hepatitis B-related services.
18	<b>Key Populations</b>	<b>Men who have sex with men (MSM); transgender people</b>	The state takes all appropriate measures to reduce specific hepatitis B vulnerabilities of MSM, and transgender people, eliminate hepatitis B-related discrimination against them and provide them with equitable and sustainable access to comprehensive hepatitis B-related services.
19	<b>Key Populations</b>	<b>People under state custody</b>	The state takes all appropriate measures to reduce specific hepatitis B vulnerabilities of people under state custody, eliminate hepatitis B-related discrimination against them and provide them with equitable and sustainable access to comprehensive hepatitis B-related services. Terminally ill PLHBV are considered for early release and given proper treatment outside prisons.
20	<b>Access to Justice</b>	<b>Legal Protection</b>	Every person enjoys the right to an adequate and effective protection against violations of human rights based on hepatitis B status, vulnerability, advocacy or service work.
21	<b>Access to Justice</b>	<b>Legal awareness, assistance and representation</b>	The state implements and supports educational programs aimed at raising legal literacy among PLHBV. PLHBV have equal access to adequate and affordable legal assistance and representation.
22	<b>Access to Justice</b>	<b>Access to a forum, fair trial, and enforcement of remedies</b>	PLHBV, hepatitis B advocates and service workers are guaranteed equal access to a forum administering justice, the right to a fair trial, and effective enforcement of remedies.

'Access to a forum, fair trial, and enforcement of remedies' was the leading legal factor among cases in this corpus, followed closely by 'entry, stay and residence' and 'social protection and material assistance.' The predominance of 'access to a forum, fair trial, and enforcement of remedies' as a primary legal factor was largely

related to criminal legal cases. The majority of matters were appeals of conviction or sentence, where the PLHBV was exercising their right to a fair trial, rather than the closely related category of 'legal protection', which concerns the adequate and effective protection against violations of human rights based on hepatitis B status.

**Table 5: Jurisdictions and Related Studies**

PRIMARY LEGAL FACTOR CLASSIFICATION	NUMBER OF INCLUDED CASES
Access to a forum, fair trial, and enforcement of remedies	9
Entry, stay and residence	7
Social protection and material assistance	7
Employment, work and economic life	4
Hepatitis B prevention	4
Non-criminalisation of hepatitis B exposure and transmission	3
Treatment, care and other health services	2
Family, sexual and reproductive life	2
Legal protection	1
Protection of privacy and confidentiality	1

The distribution of case law relating to different legal factors is not uniform across Australian jurisdictions. Table 6 provides a summary of

case law and their primary legal factor as they appear in different Australian jurisdictions.

**Table 6: Primary Legal Factor Classification by Jurisdiction**

PRIMARY LEGAL FACTOR	FEDERAL	NSW	QLD	VIC	ACT	WA	SA
Public education, research, and information exchange							
Hepatitis B prevention	1	2	1				
Testing, counselling, and referral							
Treatment, care, and other health services		2					
Social protection and material assistance	7						
Protection of privacy and confidentiality		1					
Family, sexual, and reproductive life	2						
Education and training							
Employment, work, and economic life	1	2					1
Entry, stay, and residence	7						
Non-criminalisation of hepatitis B exposure and transmission		1	1			1	
Legal protection	1						
Access to a forum, fair trial, and enforcement of remedies		3	2	3	1		

## Discussion

**Mapping published and accessible judgments and decisions, as we do here, reveals important signals about the law and hepatitis B. However, this approach can only ever present a partial view of law's relationship with hepatitis B and the legal needs of PLHBV.**

It must be remembered, for example, that only a small number of hepatitis B-related legal issues will result in a formally adjudicated dispute by a court or tribunal. Even fewer of these will generate a written judgment or decision that is accessible for the purposes of research. Even those disputes that produce accessible written reasons for a judgement or decision are required to conform to particular norms of narrative and genre, and in so doing, only construct a partial representation of the facts of a case.<sup>26</sup>

Importantly, the occurrence and conduct of legal disputes does not only affect those who are parties to the case. Those living with hepatitis B who may have never sought to access justice through formal legal proceedings are affected by the law and the conduct of legal proceedings because these things construct the legal environment surrounding hepatitis B. This process is not unique to the intersection between hepatitis B and the law, but rather is a core function of the design of legal systems: disputes and decisions interpret legal principles and express law's normative content, influencing the conduct of people who are not parties to a case.

This review engages with a variety of issues that raise complex questions of doctrine. Due to the varied nature of each individual matter, we do not attempt to represent completely the nature and meaning of all included cases, but instead offer a discussion of *patterns among them* that can illuminate some of the experience of navigating life and the law for PLHBV.

As we have noted, the central aim of this work is to 'map' the current terrain upon which the law and hepatitis B come into contact. In what follows, we make several observations about this collection of judgments and decisions and what they indicate about that contact between law and hepatitis B. These observations point to fruitful areas for further research, particularly research that tries to understand more fully the experiences, needs and desires of PLHBV regarding law and access to justice.

### Diversity of Disputes and Areas of Law

As we have found, hepatitis B-related disputes arise in a wide range of areas of law. These include criminal law, refugee and migration law, infant health, disability support and other forms of entitlements, family law, workers' compensation, discrimination law, insurance, tort, patent, privacy and professional misconduct. This list is diverse, however the scope of justiciable issues faced by PLHBV in Australia is doubtlessly broader than those represented here.

### The Limited Number of Hepatitis B-Specific Cases

As hepatitis B is one of the most prevalent BBVs in Australia, with approximately 200,000 people estimated to be living with chronic hepatitis B infection in Australia at the end of 2021,<sup>27</sup> it seems reasonable to expect to find a significant number of hepatitis B-related legal decisions and judgments. This is not the case. Instead, we were able to locate only 40 relevant records. By contrast, we were able to locate 281 relevant cases in a parallel legal mapping study of cases relating to HIV. This much larger number of records were generated in relation to a population of approximately 29,460 PLHIV at the end of 2022<sup>28</sup> — seven times the number of included records for a population that is currently, approximately eight times smaller.

<sup>26</sup> This is a feature that scholars of law and narrative amongst others have provided a sustained engagement with. See for example Anthea Vogl, 'Telling Stories from Start to Finish' (2013) 22(1) *Griffith Law Review* 63; Anthea Vogl, 'The Genres and Politics of Refugee Testimony' (2018) 30(1) *Law & Literature* 81; Lisa Sarmas, 'Story Telling and the Law: A Case Study of Louth v. Diprose' (1993) 19 *Melbourne University Law Review* 701.

<sup>27</sup> J King et al (n 2) 13.

<sup>28</sup> *Ibid*

The reasons for this disparity are not yet known. While HIV and hepatitis B are both communicable BBVs, their histories and socio-cultural meanings are different. From a legal perspective, the ‘harm’ with which HIV transmission has been characterised is not the same as that associated with hepatitis B. For example, while legally possible, there is no known case of a hepatitis B-related transmission offence having been prosecuted in Australia, and so whether hepatitis B transmission represents a harm sufficient to be regarded as the basis for prosecution for a transmission-related offence remains untested. This is in stark contrast to HIV, where transmission-related offences have a long and ongoing history of prosecution.<sup>29</sup> This is an important difference between hepatitis B and HIV: an active area of law and legal dispute around HIV that might reasonably be expected to make up part of the legal environment around hepatitis B is in fact largely absent from it. As recent legal mapping of hepatitis C indicates, a similar (albeit not quite as pronounced) contrast exists between the law surrounding hepatitis C and hepatitis B.<sup>30</sup>

Another significant influence on the availability of hepatitis B-related judgments and decisions is, as we have noted earlier, the nature of legal process and publishing, and the consequent degree of coverage in specialist legal databases. For example, criminal matters, particularly those decided by higher courts, are overrepresented in the records held by many specialist legal databases. The fact that hepatitis B is not presently the subject of any historical transmission-related offences in Australia is therefore one potential explanation for the lower number of published hepatitis B-related judgments or decisions. However, there are identifiable themes in the small number of cases we collected and reviewed, which we enumerate in the next section.

## Emerging Themes

### Migration Law and Hepatitis B Status

Among the emerging themes in the results of this legal mapping review is that of justiciable issues and related disputes regarding migration. This is an area where hepatitis B status plays a major role in legal processes. As most people living with chronic hepatitis B in Australia were born overseas<sup>31</sup>, this appearance of migration-related matters was expected.

Importantly, the predominance of migration-related matters does not necessarily follow from the fact that PLHBV in Australia were born overseas. Rather, it is the specific legal and regulatory settings of *Australia's migration system itself* that generate migration-related matters where hepatitis B becomes a feature, primarily through the construction of hepatitis B status as a matter of legal relevance to the state's control of migration. This review identified a variety of migration matters where hepatitis B status was relevant. In total, we included eight judgments or decisions. These related to refugee claims, visa cancellations and the application of the ‘health requirement’.<sup>32</sup>

Four judgments or decisions related to refugee claims. Given this low number, it is difficult to draw firm conclusions regarding the relevance of an applicant's hepatitis B status to claims for protection at law. In the cases included in this review, claims for protection drew on a person's hepatitis B status; however, they were also accompanied by claims made on the grounds of homosexuality,<sup>33</sup> ethnicity, religion and political unrest.<sup>34</sup>

*Lo, Fu Shuang v Minister for Immigration and Ethnic Affairs* considered whether PLHBV migrating from China could be classified as

29 Sally Cameron and John Stanley Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009); David J Carter, ‘HIV Transmission, Public Health Detention and the Recalcitrant Subject of Discipline: Kuoth, Lam v R and the Co-Constitution of Public Health and Criminal Law’ (2016) 25(2) *Griffith Law Review* 172; Carter (n 10).


30 Seear et al (n 7); Kagan (n 9).

31 WHO Collaborating Centre for Viral Hepatitis, The Peter Doherty Institute for Infection and Immunity and Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine, *Viral Hepatitis Mapping Project: Geographic Diversity in Chronic Hepatitis B and C Prevalence, Management and Treatment. National Report 2020* (Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM), 2020).

32 See, for example, *Lo v Minister for Immigration & Ethnic Affairs* (1995) 61 FCR 221; *BQNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1186; *Qin (Migration)* [2018] AATA 740.

33 *1000139* [2010] Refugee Review Tribunal of Australia 638.

34 *2001814 (Refugee)* [2020] Administrative Appeals Tribunal of Australia 4531.



The predominance of migration-related matters does not necessarily follow from the fact that people living with hepatitis B in Australia were born overseas. Rather, it is the specific legal and regulatory settings of Australia's migration system itself that generate migration-related matters where hepatitis B becomes a feature.

a member of a 'particular social group', an important test that is required to meet the definition of a refugee.<sup>35</sup> In this matter the applicant failed in their appeal of an earlier tribunal decision that held that they did not meet this definition. However, the HIV/AIDS Legal Centre (HALC), which offers legal representation to people with hepatitis B-related legal matters, report that PLHBV have successfully argued that they are a member of a 'particular social group' for the purpose of assessing protection claims. This is in line with the findings of *SZRIR v Minister for Immigration & Anor*, where the court found that a person living with a health condition may be found to be a member of a particular social group.<sup>36</sup> The court noted that factors related to the 'attributes' of an illness and the attitudes of a society to persons living with the illness are relevant to determining whether a particular social group can be identified.<sup>37</sup> If not found to be a particular social group, hepatitis B may be of greater relevance in support of an applicant's claims for complementary protection. In these instances, hepatitis B tends to be of greater relevance in support of an applicant's claims for complementary protection.

In two refugee-related cases included in this review, the relevant tribunal engaged with evidence provided by applicants regarding hepatitis B treatment options in their countries of origin. Issues of credibility in *1000139 [2010]* are the focus of the decision, rendering it difficult to evaluate the tribunal's engagement with material regarding availability of treatment in the applicant's country of origin.<sup>38</sup> However, in *2001814 (Refugee) [2020]*, one of the applicant's claims for protection related to their hepatitis B status, with the tribunal finding that there was 'no real chance' the applicant would 'suffer serious harm by reason of him being a carrier of hepatitis B if returned to South Sudan as claimed'.<sup>39</sup> The tribunal drew this conclusion

having found that that the applicant would not be denied medical services on discriminatory grounds, but rather would 'face difficulty' accessing medical facilities due to the health system in South Sudan.

In the final of these four cases, *BQNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2012]*, the Administrative Appeals Tribunal considered whether returning the applicant to Iraq would breach Australia's non-refoulement obligations under international law.<sup>40</sup> In a manner similar to the other protection-related claim described above, the Tribunal found in this case that, in relation to the applicant's hepatitis B status, the applicant would not be 'deliberately' denied healthcare services or suffer serious harm relevant to complementary protection.<sup>41</sup>

In other cases that concerned migration to Australia, migration law surrounding the 'health requirement' featured frequently. The health requirement is a health standard imposed by the Commonwealth Government in relation to a range of visa classes. To meet the health requirement, applicants must undertake health examinations and meet a set of 'health criteria', which include a requirement that the person's health condition must not present 'a significant cost' or be likely to prejudice access to health care or community services for Australian citizens or permanent residents.<sup>42</sup> In July 2019, a range of changes to this cost assessment were made that will likely have a positive impact for PLHBV applying for permanent visas in Australia. The changes included an increase to the definition of what constitutes a 'significant' cost (from \$40,000 to \$51,000) and a reduction of the time period over which cost is assessed (from 'lifetime' to 10 years). The cost of treatment for hepatitis B is now unlikely to exceed the 'significant cost' threshold.

35 *Lo, Fu Shuang v Minister of Immigration and Ethnic Affairs* [1995] Federal Court of Australia 1743.

36 *SZRIR v Minister for Immigration & Anor* [2012] FMCA 1006 [18].

37 *Ibid* [20].

38 *1000139* (n 33).

39 *2001814 (Refugee)* (n 34) [79].

40 *BQNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] Administrative Appeals Tribunal of Australia 1186.

41 *Ibid* [187].

42 Kostya Kuzmin, 'Disability and the Health Requirement for Migrants to Australia: Exercising the Power of Discrimination?' (2020) (98) *AIAL Forum* 100; Elizabeth Waldeck and Robert Guthrie, 'Disability Discrimination and Immigration in Australia' (2007) 8(4) *International Journal of Discrimination and the Law* 219; Linda Forbes and Michael Frommer, 'Australia, Migration and HIV: An Evolving Policy Landscape' (2020) 12(2) *HIV Australia* 26.

The case of *1729745 (Migration) [2019]* clearly illustrates the impact of these changes to the health requirement and its cost assessment rules can have.<sup>43</sup> In that case, prior to the change in policy, the applicant failed to meet the health requirement on the basis of estimated health and social care costs.<sup>44</sup> After the changes to the cost assessment rules a new report from the Medical Officer of the Commonwealth regarding the applicant's expected health and social care costs found that the applicant no longer breached the (now-revised) significant cost threshold. As Hepatitis Australia, the national peak, non-profit hepatitis organisation and charity in Australia notes, these changes to the health requirement are likely to have a positive impact on most migrants living with hepatitis B, but challenges remain for a 'smaller group of people with more advanced liver disease.'<sup>45</sup>

### Hepatitis B and Criminal Sentencing

The second emerging theme identified by this legal mapping review relates to criminal law and sentencing. Eleven criminal matters were included in this legal mapping review. Eight of these related to criminal sentencing.

Ill-health is generally a mitigating factor in sentencing an offender where it is evident that imprisonment will impose a greater burden on the offender due to their health status or condition when compared with others sentenced in a like manner. Courts may consider issues such as the offender's access to medical treatment and the likelihood that their reasonable healthcare needs will be met while imprisoned.<sup>46</sup> Despite this principle,

the eight sentencing-related judgments or decisions we examined for this review sustain little engagement with evidence and materials presented regarding the accused's hepatitis B status and the likely impact that a custodial sentence would have on their health.<sup>47</sup> As we noted above, this is in stark contrast with sentencing cases included in the accompanying HIV-related legal mapping review. There is evidence from those cases that courts generally consider this at length. It is unclear from the results of this review process alone why this difference is so pronounced. However, reasons may include:

- A lack of available evidence or relevant scholarly and clinical literature on the interaction between hepatitis B status and a custodial sentence
- Legal representatives failing to provide relevant and useful evidence or sufficiently detailed submissions related to the issue of hepatitis B status and custodial sentences
- Local, district and other courts engaging with these materials in cases that do not result in a published and accessible decision, meaning they cannot be identified by this review.

### Hepatitis B and Comorbidities

Each of the criminal sentencing judgments or decisions included in this review identified that those living with hepatitis B were also living with other comorbidities or conditions deemed relevant enough that they were noted by the court in their decision. These included the following:

- *R v Setters* [1999]: hepatitis B and C, substance abuse, alcohol abuse, chronic anaemia, eating disorder and depression.<sup>48</sup>

<sup>43</sup> *1729745 (Migration) [2019]* Administrative Appeals Tribunal of Australia 5188.

<sup>44</sup> Specifically, the Public Interest Criterion 4005 which applied to their visa class.

<sup>45</sup> 'Changes to Immigration Health Requirement a Positive Move for Migrants with Hepatitis B', *Hepatitis Australia* (21 August 2019).

<sup>46</sup> *R v Vachalec* [1981] 1 NSWLR 351

<sup>47</sup> See, for example, *R v Mackiewicz* [2000] QCA 171; *R v Colin Howarth* [2002] NSWCCA 387.

<sup>48</sup> *R v Setters* [1999] QCA 350.

- *R v Mackiewicz* [2000]: hepatitis B and C, irritable bowel syndrome and a major depressive episode lasting three years.<sup>49</sup>
- *R v Howarth* [2002]: 'significant health problems' including diagnoses of hepatitis B and C.<sup>50</sup>
- *DPP v Duong* [2006]: hepatitis B, depression and an instance of cardiac failure that required open-heart surgery.<sup>51</sup>
- *Hendricks v The Queen* [2014]: hepatitis B and physical pain resulting from car accidents and psychological trauma.<sup>52</sup>
- *R v McMahon* [2019]: hepatitis B, cirrhosis of the liver and substance abuse.<sup>53</sup>
- *Dang v The Queen* [2020]: hepatitis B, a bowel condition and elevated cholesterol.<sup>54</sup>

While all criminal sentencing matters included in this review note at least one other health condition in addition to hepatitis B, comorbidity is a feature common to a wide variety of hepatitis B-related judgments and decisions in areas of law outside of criminal law and sentencing. This was especially pronounced in social security matters (particularly related to the Disability Support Pension (DSP)), veterans' entitlements matters, and workers' compensation matters, where comorbidity was an important factor in the reasoning of the court or tribunal.

Matters included in this review that related to the DSP consider the degree to which hepatitis B and other health conditions have impacted the health of the applicant and their ability to engage in employment. See for example *Ly and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011], where Mr Ly claimed the DSP for a range of health conditions including lower back

and neck pain, depression, alcohol dependence, hypertension, hearing loss and hepatitis B. As Mr Ly's hepatitis B was 'fully diagnosed, treated and stabilised at the relevant time' the tribunal concluded that the diagnosis attracted a nil rating in assessing his eligibility for the DSP.

### Hepatitis B Across the Life Course

Hepatitis B-related matters involve and engage with parties and issues present across the life course from birth through to more advanced age.

Three judgements identified in this review relate to hepatitis B prevention in children through vaccination. Two of these involved applications in the court's *parens patriae* and family law jurisdiction for orders to administer a hepatitis B vaccination to children where they were born at high risk of contracting hepatitis B from their mother through intrapartum or vertical infection.<sup>55</sup> Both cases involved opposition from the child's biological parents. The parents in *Re H* were 'opposed in general terms to vaccination'<sup>56</sup> but were willing to consider the merits of each occasion of vaccination. In *Re Jules* the child's parents did not agree with the administration of hepatitis B vaccination on the grounds of concerns primarily regarding the presence of aluminium salts in the vaccine, in addition to the possible effects of vaccine administration on a child born with lower birth weight and their experience with an older child of theirs who had not had the vaccine administered at birth.<sup>57</sup>

Following these legal disputes related to both infancy and hepatitis B, others arise across the life course. These includes workers' compensation for working-aged adults and veteran's entitlements for those seeking entitlements following the death of a veteran from cirrhosis of the liver.

49 *R v Mackiewicz* (n 45).

50 *R v Colin Howarth* (n 45).

51 *DPP v Duong* [2006] VSCA 78.

52 *Hendricks v The Queen* [2014] VSCA 185.

53 *R v McMahon* [2019] ACTSC 361.

54 *Dang v The Queen* [2020] VSCA 24.

55 *Re Jules* [2008] NSWSC 1193; *Re H* [2011] QSC 247.

56 *Re H* (n 53) [4].

57 *Re Jules* (n 53) [3].

### **An Accurate Picture of Legal Engagement with Hepatitis B?**

While most people living in Australia experience justiciable issues on a regular basis,<sup>58</sup> the majority of those issues and associated legal needs are resolved without recourse to formal court or tribunal processes.<sup>59</sup> Of those issues which do make it to a court or tribunal for adjudication, relatively few will result in a written judgment or decision that is then published and available in specialist legal databases. This means that the judgments or decisions included in this legal mapping study are likely to represent a very small number of the instances where a PLHBV experiences a justiciable issue or attempts to have an associated legal need met.

For this reason, the nature and meaning of the results of this review should be treated with appropriate caution. While we have produced a broad map of the legal terrain, identifying areas of law that generate legal disputes and reported judgments or decisions relating to hepatitis B in Australia, this does not represent a comprehensive assessment of the justiciable issues experienced by PLHBV, and the nature of their legal needs as they seek to resolve those issues. Such an assessment should try to understand the ways community members attempt to access justice, and their experience of trying to do so. Without this, we will only ever have a very partial and potentially skewed picture of the nature, experience and influence of law on the lives of PLHBV and their attempts to access to justice.

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<sup>58</sup> Coumarelos et al (n 11).

<sup>59</sup> *Ibid* 98.

As hepatitis B is one of the most prevalent BBVs in Australia, with approximately 200,000 people estimated to be living with chronic hepatitis B infection in Australia at the end of 2021, it seems reasonable to expect to find a significant number of hepatitis B-related legal decisions and judgments. This is not the case.

# Appendices

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
1977	Federal	CthArbRp (Australian Conciliation and Arbitration Commission)	<i>Federated Engine Drivers and Firemen's Association of Australasia and Abbots Pty Ltd &amp; Ors</i> [1977] CthArbRp 3594	Industrial	N/A
1979	Federal	AATA	<i>Nardella and Minister for Immigration and Ethnic Affairs</i> [1979] AATA 92	Migration	Immigration — s 12 Migration Act 1958 — crimes of violence — psychopathic — whether applicant continues to be a danger to the Australian community — evaluation of psychiatric evidence — absence of effective monitor of applicant's behaviour
1980	Federal	FamCA	<i>O'Dea TM and O'Dea IAM</i> [1980] FamCA 23	Family	N/A
1981	Federal	AATA	<i>Union Carbide of Australia Limited and Collector of Customs, New South Wales</i> — AAT No 625 — [1981] AATA 187	Veteran's entitlements	Repatriation — death from lymphosarcoma — whether lymphosarcoma related to war service — nature of malarial infection — whether causal link between malaria or tropical infections and lymphosarcoma — multifactorial chain of causation — medical hypothesis as to causal relationship between "sustained antigenic stimulation" and lymphomas — statistical survey — epidemiological evidence — standard of proof — satisfaction beyond reasonable doubt that not entitled
1995	Federal	FCA	<i>Lo v Minister for Immigration and Ethnic Affairs</i> (1995) 61 FCR 221	Migration	Immigration — Refugees — Particular social group — Whether hepatitis B sufferer in China member of — Convention Relating to the Status of Refugees (1951) — Protocol Relating to the Status of Refugees (1967)

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
An industrial agreement between ICI Australia Ltd and The Federated Engine Drivers and Firemen's Association; Commission considered clause in agreement naming hepatitis a 'severe illness'.	10 - Employment, work and economic life	Nil	People living with hepatitis B
Applicant convicted of crimes of violence; applicant hepatitis B-positive, hepatitis B not otherwise central to case.	12 - Entry, stay and residence	19 - People under state custody	CALD people from high prevalence countries
Wife applied to be granted sole use of matrimonial home; sought an injunction restraining husband from harassing or abusing her; husband living with hepatitis B.	8 - Family, sexual and reproductive life	14 - Women	People living with Hepatitis B
Whether lymphosarcoma related to war service.	5 - Social protection and material assistance	Nil	People living with hepatitis B
Applicant claimed refugee status on the ground of his membership to a particular social group, being persons who are hepatitis B sufferers in China.	12 - Entry, stay and residence	Nil	CALD people from high prevalence countries

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
1999	Federal	FCA	<i>Ghomrawi v Minister for Immigration &amp; Multicultural Affairs</i> [1999] FCA 1454	Migration	Migration — applicant in immigration detention — whether detention unlawful — whether applicant an unlawful non-citizen at time taken into detention — whether government official refused to accept a valid application for substantive visa — whether refusal to accept valid visa application capable of leading to deemed grant of bridging visa Administrative law — whether conditions of detention capable of rendering otherwise lawful detention unlawful — transfer of applicant from immigration detention centre to State correctional facility — whether failure to comply with departmental policy in making decision to transfer — whether relevant considerations not taken into account in making decision to transfer — whether irrelevant considerations taken into account in making decision to transfer — whether applicant not afforded procedural fairness with respect to the making of the decision — successive decisions not to transfer applicant back to immigration detention centre — whether decision-maker failed to bring open mind to each monthly review — whether irrelevant considerations taken into account
1999	State - NSW	NSWSC	<i>Bt v Oei</i> [1999] NSWSC 1082	Medical negligence	Negligence Duty of care Whether medical practitioner owes duty to sexual partner of practitioner's patient — Principles governing recognition of duty
1999	State - NSW	NSWADT	<i>Taikato and Nakhle v Western Sydney Area Health Service</i> [1999] NSWADT 52	Discrimination	N/A
1999	State - QLD	QCA	<i>R v Setters</i> [1999] QCA 350	Criminal	Criminal law — appeal & new trial — appeal against sentence — appeal by convicted person — application to reduce sentence — when refused — drug offences — heroin possession in excess of scheduled quantity — whether judge erred in sentencing on basis that drugs were for a commercial purpose — effect of <i>R v Morrison</i> — whether Crown or defence bore burden of proof as to whether applicant was dealing or heroin was purely for domestic use — onus of proof — whether judge was satisfied beyond a reasonable doubt in finding it 'quite plain' — preference that judges use phrase 'beyond reasonable doubt' when fact-finding to that standard

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Whether applicant was unlawfully detained; applicant contracted hepatitis B while detained.	20 - Legal protection	19 - People under state custody	CALD people from high prevalence countries
Whether medical practitioner owes duty to sexual partner of practitioner's patient; where partner suffered from hepatitis B.	4 - Treatment, care and other health services	Nil	People living with hepatitis B
Whether refusal to allow hepatitis B -positive complainant to participate in embryo storage program (less favourable treatment) constituted direct discrimination.	4 - Treatment, care and other health services	14 - Women	People living with hepatitis B
Appeal of sentence for heroin possession; applicant hepatitis B-positive; hepatitis B not otherwise central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
2000	Federal	AATA	<i>Sharpe v Secretary, Department of Family and Community Services</i> [2000] AATA 415	Disability Support	Social security — disability support pension — impairments — hepatitis B — hepatitis C — substance abuse — depression — assessment — ability to work
2000	State - QLD	QCA	<i>R v Mackiewicz</i> [2000] QCA 171	Criminal	Application for leave to appeal against sentence — whether proceeds received from sale of drugs overstated — insufficient consideration of rehabilitation prospects — claim that sentence manifestly excessive — no error evident — sentence well within range — application refused
2002	State - NSW	NSWCCA	<i>R v Howarth</i> [2002] NSWCCA 387	Criminal	Appeal against sentence of eight years' imprisonment — non-parole period of six years — assault with intent to rob whilst armed with offensive weapon — plea of guilty following immediate confession — applicant made false call to police — falsely reported domestic dispute — attempted to rob post office across road — dysfunctional upbringing — health problems — significant criminal history — previous offence for armed robbery — matter of aggravation that applicant on parole for previous offence — parole subsequently revoked — need for personal deterrence — objective seriousness of offence — sentence manifestly excessive — appeal allowed — resentence of six years and six months' imprisonment — non-parole period of four years and 10 months
2004	State - NSW	NSWSC	<i>Samardzic v State of New South Wales</i> [2004] NSWSC 15	Negligence	Torts — Negligence — Duty of care — Employer and employee — plaintiff police officer employed by defendant — infected with hepatitis B — whether defendant breached its duty of care — evidence indicated plaintiff came into contact with prisoners infected with hepatitis — court satisfied plaintiff's hepatitis acquired in course of duties as police officer — medical evidence suggested plaintiff suffered degree of fatigue consequent on being infected with hepatitis — defendant did not make vaccination available and encourage plaintiff to receive vaccination — evidence concerning vaccination suggested had plaintiff been vaccinated, he would not have contracted hepatitis from which he suffered — breach of duty of care — orders pending
2004	State - NSW	NSWSC	<i>Samardzic v New South Wales</i> [2004] NSWSC 1082	Procedure	Application under Slip Rule
2005	State - NSW	NSWMT (New South Wales Medical Tribunal)	<i>Re Dr Williams Kwok Wa MA</i> [2005] NSWMT 15	Professional misconduct	Unsatisfactory Professional Conduct — Professional Misconduct — Doctor hepatitis B positive — Did not disclose to Medical Board — Put Patients at Risk — Failed to comply with policy statement on Blood Borne Viruses — Dishonest at s.66 Enquiry

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Court considered whether the applicant was unfit to work on account of the clinical symptomology associated with his hepatitis B, hepatitis C, substance abuse and depression.	5 - Social protection and material assistance	Nil	People living with hepatitis B
Applicant pleaded guilty to trafficking heroin; applicant suffers from hepatitis B; hepatitis B not otherwise central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B
Appeal against sentence for assault with intent to rob; guilty plea; applicant hepatitis B-positive; hepatitis B not otherwise central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B
Court considered whether plaintiff's hepatitis B was acquired in the course of his duties as a police officer; considered defendant breached its duty to plaintiff in not making vaccination available.	10 - Employment, work and economic life	Nil	People living with hepatitis B
Application to vary the amount of the judgment from the case <i>Samardzic v State of New South Wales</i> [2004] NSWSC 15.	22 - Access to a forum, fair trial, and enforcement of remedies	Nil	People living with hepatitis B
Tribunal found doctor's failure to disclose positive hepatitis B status when seeking registration as a doctor amounted to professional misconduct.	10 - Employment, work and economic life	Nil	People living with hepatitis B

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
2006	State - VIC	VCA	<i>DPP v Duong</i> [2006] VSCA 78	Criminal	Criminal law — Sentence — Cultivation of a commercial quantity of cannabis — Theft of electricity — Cumulation upon a count other than that upon which the heaviest sentence was imposed — Sentence of three years and six months' imprisonment with a minimum term of two years' imprisonment not manifestly inadequate having regard to the personal circumstances of the offender.
2008	State - NSW	NSWSC	<i>Re Jules</i> [2008] NSWSC 1193	Infant health	Children — <i>parens patriae</i> — medical treatment orders — application to discharge interim orders making child a ward of the Court and delegating parental responsibility to the Director-General, Department of Community Services — where child was born with high risk of contracting Hepatitis B from mother — where parents refused vaccination and absconded with child — where vaccination unlikely now to be effective but Director-General seeks that child be presented for medical examination — extent and nature of inherent <i>parens patriae</i> jurisdiction — effect of (CTH) Jurisdiction of Courts (Cross-Vesting) Act and (CTH) Family Law Act 1975 on inherent <i>parens patriae</i> jurisdiction — whether child should be made a ward of the Court before orders can be made — nature of medical treatment order — whether the Court can order police officers to recover child Procedure — children — closed court — whether proceedings involving exercise of <i>parens patriae</i> jurisdiction should be heard in closed court Contempt — where parents apparently deliberately failed to present their child for vaccination pursuant to court orders — whether matter should be referred to Attorney General for prosecution of contempt — whether prosecution in the interest of the child — whether prosecution in the public interest — relevant considerations — where Director-General of the Department of Community Services does not press for prosecution
2008	Federal	AATA	<i>Trumpf and Comcare</i> [2008] AATA 1024	Workers' compensation	Compensation — Claims — rescission of decision accepting liability for hepatitis B — claim for adjustment disorder — adjustment disorder not due to employment — no aggravation of adjustment disorder — no acceptance of liability to pay compensation — decision under review affirmed.

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Respondent suffers hepatitis B; respondent arrested on charges of growing cannabis; hepatitis B not central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B
Infant born at high risk of contracting hepatitis B from mother; parents refused vaccination; application to delegate parental responsibility to the Director-General, Department of Community Services.	2 - Hepatitis B Prevention	15 - Children and youth	Pregnant women with hepatitis B and their children, and children with hepatitis B
Tribunal reviewed Comcare's rescission of decision accepting liability for hepatitis B.	5 - Social protection and material assistance	Nil	People living with hepatitis B

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
2008	State - QLD	QDC	<i>Miller v The Estate of Ronald Leon Frampton</i> [2008] QDC 335	Criminal	N/A
2010	Federal	RRTA	1000139 [2010] RRTA 638	Refugee	N/A
2011	State - QLD	QSC	<i>Re H</i> [2011] QSC 427	Infant health	N/A
2011	Federal	AATA	<i>Ly and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs</i> [2011] AATA 90	Disability Support	Social Security — disability support pension — back and neck pain — depression — alcohol dependence — hypertension — hepatitis B — hearing loss — whether conditions rated 20 points — back and neck conditions not fully treated and stabilised — minimal impact of other conditions on ability to function — no continuing inability to work — decision under review affirmed
2012	Federal	AATA	<i>Sandry v Repatriation Commission</i> [2012] AATA 71	Veteran's entitlements	Veterans' Entitlements — widows' pension — whether veteran's death war-caused — reasonable hypothesis — whether cirrhosis caused by hepatitis virus — onus of proof in relation to diagnosis of hepatitis — insufficient material to raise reasonable hypothesis — material raised does not fit the statement of principles — decision under review affirmed.
2014	Federal	FCA	<i>Braun Melsungen AG v Multigate Medical Devices Pty Ltd</i> 2014] FCA 1110	Patent	Patents — patents for safety IV catheters — infringement — 'pith and marrow' principle — whether alleged infringing items disclose all essential features of claims in suit — construction of claims — validity of patents — whether invention novel — priority date of patents — whether claims fairly based on matter disclosed by ancestors — whether real and reasonably clear disclosure of claimed invention in body of specification — whether invention sufficiently described in specification.
2014	State - VIC	VSCA	<i>Hendricks v The Queen</i> [2014] VSCA 185	Criminal	Criminal Law — Sentence — Application for leave to appeal — Cultivation of cannabis in commercial quantity — Cannabis intended for personal medicinal use — Applicant sentenced to 18 months' imprisonment, six months suspended — Relevance of risk of automatic forfeiture under Confiscation Act 1997 (Vic), s 35 to sentence — Whether sentencing discretion re-opened as a result of subsequent forfeiture of applicant's home — Leave granted — Appeal allowed — <i>R v Dang</i> (2009) 197 A Crim R 53 applied — No point of principle

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Application for criminal compensation; applicant contracted hepatitis B as a result of respondent's sexual assault.	13 - Non-criminalisation of hepatitis B exposure and transmission	15 - Children and youth	People living with hepatitis B
Application for review of decision to refuse to grant applicants protection visas; where applicants have hepatitis B; considered treatment of hepatitis B in country of reference (Vietnam).  "Accordingly, the Tribunal finds that the applicants do not have a well founded fear of persecution on the grounds of membership of a particular social group or any other Convention ground now or in the reasonably foreseeable future and that there is no real chance that they will be at risk of persecution if they return to Vietnam now or in the reasonably foreseeable future."	12 - Entry, stay and residence	Nil	CALD people from high prevalence countries
Infant born at high risk of contracting hepatitis B from mother; parents refused vaccination; application to make orders as to vaccination at two, four and six months of the infant's life.	2 - Hepatitis B Prevention	15 - Children and youth	Pregnant women with hepatitis B and their children, and children with hepatitis B
Tribunal considered whether applicant's hepatitis B contributed to his physical, intellectual or psychiatric impairment	5 - Social protection and material assistance	Nil	People living with hepatitis B
Tribunal considered whether veteran's death from cirrhosis of the liver was due to hepatitis B or C; whether veteran's death was 'war-caused'.	5 - Social protection and material assistance	Nil	People living with hepatitis B
Patent dispute for a safety needle protecting device for an intravenous catheter; whether needle tip leaves health care worker vulnerable to transmission of BBVs (including hepatitis B); hepatitis B not otherwise central to the case.	2 - Hepatitis B Prevention	Nil	N/A
Applicant pleaded guilty to one charge of cultivation of a commercial quantity of cannabis; applicant hepatitis B-positive; hepatitis B not otherwise central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
2015	State - NSW	NSWCATAD (NSW Civil and Administrative Tribunal)	<i>BLW v Nepean Blue Mountains Local Health District</i> [2015] NSWCATAD 184	Privacy	Privacy — Health privacy principles — Information protection principles — Alleged contravention of disclosure, use and security principles — Whether alleged conduct occurred — Information held by agency — Conduct of employees which is attributable to agency
2018	Federal	AATA	<i>Qin (Migration)</i> [2018] AATA 740	Migration	Migration — Contributory Parent (Migrant) (Class CA) visa — Subclass 143 (Contributory Parent) — Requirement to meet health criteria — MOC previously assessed member of family unit as failing to meet health criteria — Hepatitis B — Subsequent MOC opinion assessed member of family unit as meeting health criteria with an undertaking — Undertaking to stay in Australia temporarily
2019	Federal	AATA	<i>1729745 (Migration)</i> [2019] AATA 5188	Migration	Migration — Skilled Nominated (Permanent) (Class SN) visa — Subclass 190 Skilled — Nominated — free from disease or condition that may result in threat to public health — adverse Medical Officer of the Commonwealth (MOC) opinion — Public Interest Criterion 4005 — significant cost to the Australian community — initial MOC opinion invalid — medical condition in the low to moderate phase — positive MOC opinion — exact form or level of the disease or condition suffered by the applicant — decision under review remitted
2019	State - ACT	ACTSC	<i>R v McMahon</i> [2019] ACTSC 361	Criminal	Criminal Law — Jurisdiction, Practice and Procedure — Judgment and Punishment — Sentence — theft — breach of Good Behaviour Order — resentence
2020	Federal	RRTA	<i>2001814 (Refugee)</i> [2020] AATA 4531	Refugee	REFUGEE — Protection Visa — South Sudan — claims to be stateless — race — ethnic Dinka — national of South Sudan — particular social group — person suffering from physical and mental health issues — father is a rebel fighter — mental health issues — extensive criminal record — carrier of hepatitis B — not culturally assimilated as a Dinka tribal member — decision under review remitted
2020	State - VIC	VSCA	<i>Dang v The Queen</i> [2020] VSCA 24	Criminal	CRIMINAL LAW — Appeal — Sentence — Cultivating a commercial quantity of narcotic plant (cannabis) — Whether sentence manifestly excessive — Involvement slightly above crop sifter — Sentence not wholly outside the permissible range — Application for leave to appeal refused.

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Applicant complained that colleagues had disclosed her positive hepatitis B status in the workplace.	6 - Protection of privacy and confidentiality	14 - Women	People living with hepatitis B
Application made by a delegate to the Minister for Immigration to refuse to grant visa applicants Contributory Parent (Migrant) visas on the basis of the applicant's hepatitis B.	12 - Entry, stay and residence	Nil	CALD people from high prevalence countries
Whether applicant met public interest criterion on account of applicant's wife's asymptomatic chronic hepatitis B.	12 - Entry, stay and residence	Nil	CALD people from high prevalence countries
Appeal of sentence to one charge of theft; applicant hepatitis B-positive; hepatitis B not otherwise central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B
Tribunal considered the chance applicant would suffer serious harm by reason of his hepatitis B in country of reference (South Sudan).	12 - Entry, stay and residence	Nil	CALD people from high prevalence countries
Applicant pleaded guilty to one charge of cultivation of a commercial quantity of cannabis; applicant hepatitis B-positive; hepatitis B not otherwise central to case.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
2021	State - NSW	NSWSC	<i>Re Marlie</i> [2021] NSWSC 973	Infant health	Child Welfare — <i>parens patriae</i> jurisdiction — order sought by hospital to administer Hepatitis B vaccine and immunoglobulin injection to baby — where mother of child diagnosed with Hepatitis B — where parents withhold consent for treatment primarily on religious grounds — hospital authorised to carry out treatment
2021	State - NSW	NSWCCA	<i>Gar v R</i> [2021] NSWCCA 265	Criminal	<p>Crime — appeals — appeal against sentence — application for leave to appeal — extension of time in which to appeal — manifest excess — whether extension of time required in the interests of justice — extension of time refused — appeal dismissed</p> <p>Crime — appeals — appeal against sentence — application for leave to appeal — extension of time in which to appeal — fresh evidence — where applicant developed cirrhosis after sentencing — where applicant may have been infected with hepatitis B at time of sentencing — whether evidence of medical condition admissible — whether evidence of effect of COVID-19 pandemic admissible — extension of time and leave granted in respect of grounds of appeal based on evidence of medical condition and on evidence of effect of COVID-19 pandemic — appeal dismissed</p> <p>Crime — violent offences — robbery armed with offensive weapon with wounding</p>
2021	Federal	AATA	<i>Mitchell and Comcare (Compensation)</i> [2021] AATA 3376	Workers' compensation	<p>Compensation — applicant previously employed by Department of Defence — adjustment disorder — anxiety — depression — adult attention deficit disorder — hepatitis B — post traumatic stress disorder — renal failure — back pain — claim for boxing classes to be compensated under s 16 — claim for law degree to be included as part of rehabilitation program under s 37 — whether applicant continued to suffer from aggravation of compensable injury during relevant period — whether applicant still suffered a 'disease' as defined in ss 4 and 5B — reviewable decision related to boxing classes claim affirmed — reviewable decision related to law degree claim set aside and substituted</p>

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Court considered whether to authorise hospital to administer hepatitis B vaccine to infant where parents withhold consent.	2 - Hepatitis B Prevention	15 - Children and youth	Pregnant women with hepatitis B and their children, and children with hepatitis B
Robbery armed with offensive weapon with wounding; Court considered whether evidence of applicant's cirrhosis and/or evidence of COVID-19 pandemic admissible; appeal dismissed.	22 - Access to a forum, fair trial, and enforcement of remedies	19 - People under state custody	People living with hepatitis B
Tribunal considered whether employment made a 'significant contribution' to applicant's hepatitis B.	5 - Social protection and material assistance	Nil	People living with hepatitis B

YEAR	JURISDICTION	COURT/ TRIBUNAL	CASE NAME	AREA OF LAW	FULL HEADNOTE
2021	Federal	AATA	<i>BQNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)</i> [2021] AATA 1186	Migration	Migration — Non-revocation of mandatory cancellation of a Class AZ Subclass 866 (Protection) visa — where Applicant does not pass the character test — whether there is another reason to revoke the mandatory cancellation decision — consideration of Ministerial Direction No. 90 — repeated domestic violence offending — rape of child victim — mental illness — consideration of Australia's international non-refoulement obligations where receiving country is Iraq — likelihood of prolonged or indeterminate detention — decision under review affirmed
2004	Federal	SCTA	<i>D03-04\183</i> [2004] SCTA 84	Insurance	N/A
2009	Federal	FamCA	<i>Wang &amp; Jong</i> [2009] FamCA 1150	Family	Family Law — Children — Whether presumption of equal shared parental responsibility rebutted on ground of family violence — whether in the best interests of the child to make an order for sole parental responsibility on terms — issues of child sexual abuse, family violence and unacceptable risk of such abuse — issues of with whom the child shall live and supervised periods of time with a parent
2021	State - NSW	Orange Local Court	Security Guard Case	Criminal	
2022	State - WA	Perth Sheriff Court	Perth Robbery Case	Criminal	
2013	State - SA	SAEOT	<i>Nungirayi v Commissioner for Equal Opportunity</i> [2013] SAEOT 9	Procedure	Application for a review of a decision made pursuant to s 93(2b) of the Equal Opportunity Act 1984 by the Commissioner for Equal Opportunity to decline to extend the time within which a complaint may be lodged — applicant applied to sit a clinical examination for overseas qualified dentists but was denied access to the examination due to Hepatitis B infection — applicant alleged discrimination on the grounds of disability — complaint lodged out of time — reasons for the delay considered — extension of time for the lodging of the complaint refused — Commissioner's decision confirmed.

SUMMARISED HEADNOTE	LEGAL FACTOR - PRIMARY	LEGAL FACTOR - KEY POPULATION	PRIORITY POPULATION
Where applicant does not pass the character test; where applicant hepatitis B-positive; hepatitis B not otherwise central to case.	12 - Entry, stay and residence	Nil	CALD people from high prevalence countries
Where deceased was hepatitis B-positive; review of decision that deceased failed to disclose relevant medical information upon joining fund.	5 - Social protection and material assistance	Nil	People living with hepatitis B
Custody dispute; where mother hepatitis B-positive; Court rejected father's argument that mother's status is a potential danger to child; Court awarded mother sole parental responsibility.	8 - Family, Sexual and reproductive life	15 - Children and youth	People living with hepatitis B
Accused bit a security guard; the Court heard the security guard was tested for hepatitis B and C but did not contract either.	13 - Non-criminalisation of hepatitis B exposure and transmission	Nil	People living with hepatitis B
Accused assaulted a police officer; charged with attempted robbery; police officer put on a course of antibiotics 'along with a hepatitis B booster'.	13 - Non-criminalisation of hepatitis B exposure and transmission	Nil	People living with hepatitis B
The applicant applied to sit an exam for overseas-qualified dentists, but was denied access to the exam due to their hepatitis B infection. However, the present case was for an extension of time (not the discrim matter itself)	10 - Employment, work and economic life	Nil	People living with hepatitis B

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