

HIV AND THE LAW –

NEW LEGAL DEFENCE FOR NON-DISCLOSURE

BACKGROUND

From 1 September 2012 an amendment to the NSW *Public Health Act (2010)* came into force. The amended Act maintains the longstanding requirement for all people with HIV/AIDS (PWHIV) to disclose their status before a sexual encounter but has also introduced a possible defence of taking 'reasonable precautions' to avoid transmission in cases of non-disclosure.

Most Australian jurisdictions have a dual system of legal regulation of HIV transmission: criminal law and public health law.

Specific offences relating to HIV transmission were introduced in the early 1990s and there have been an increasing number of criminal prosecutions relating to the transmission of HIV in all states and territories.

The majority of the prosecutions have been in relation to heterosexual transmission. However there have also been some high profile cases involving men who have sex with men that have attracted a great deal of media attention and comment.

These cases, and particularly the media coverage that has accompanied them, have the potential to stigmatise and demonise PWHIV.

KEY ISSUES

The requirement to disclose

ACON and Positive Life NSW acknowledge that there is a place for criminal and public health law provisions in specific circumstances and stress the importance of people understanding their obligations under the law.

However, it is the case that disclosure by PWHIV does not in itself guarantee safe sex or zero risk in any given sexual encounter. For instance people with an undiagnosed HIV infection are much more likely to pose a transmission risk than people on effective anti-retroviral treatment with optimal viral suppression.

ACON and Positive Life NSW recognise that:

- The vast majority of people actively seek to protect their own, and their partner's, sexual health. Everyone, regardless of HIV status, has a mutual responsibility to ensure that HIV and other STIs are not passed on. In these circumstances, legal intervention is neither needed nor appropriate.
- Due to a range of social and psychological factors, some people may engage in behaviour that endangers their own, and their partner's, sexual health. In these circumstances, public health interventions should be used to manage those who are at risk of infecting others with HIV or other STIs.
- A very small number of people may deliberately or recklessly expose others to the risk of HIV transmission. In these circumstances, criminal prosecution may be appropriate.

We acknowledge and support:

- The right of individuals to have access to information aimed at providing them with the basis for making informed choices about reducing HIV/STI transmission risk;
- Initiatives aimed at reducing rates of stigma and discrimination sufficient to enable and encourage appropriate disclosure of HIV status; and
- The promotion of risk reduction strategies, the most assured and safest of which remains the use of condoms and lube in anal and vaginal intercourse with casual partners of different or unknown HIV status.

What the law says

In NSW the law regarding the transmission of HIV is covered under two Acts, the *Public Health Act 2010* and the *Crimes Act 1900*. These two laws operate in different ways with different outcomes and both need to be understood alone and together, as a person can be dealt with under either or both of the Acts.

Public health interventions

The *Public Health Act 2010* requires any person who has an STI, including HIV, to inform any prospective sexual partner of their status and the risk associated with having sexual intercourse before intercourse takes place. The prospective partner must also voluntarily accept the risk involved. Failure to comply with these requirements can result in a fine of up to 50 penalty units (currently \$5,500).

From 1 September 2012, an amendment to this Act has provided a defence of taking 'reasonable precautions' to prevent transmission in the event of non-disclosure. There is limited guidance as to what may or may not constitute a 'reasonable precaution' although it appears likely that the proper use of condoms will be considered 'reasonable precautions' and we support and recommend condom use.*

We support the use of public health interventions to facilitate behavioural change for those people who may not be able to modify their behaviour. People who know their HIV status, and then go on to risk infecting others with HIV, often have a range of complex needs. Therefore public health interventions are the most appropriate mechanism in preventing the transmission of HIV with this population group.

Criminal sanctions

Under the *Crimes Act 1900*, a person who recklessly causes another person grievous bodily harm (GBH) can be imprisoned for up to 10 years. This can include causing someone to be infected with HIV. A person is generally deemed as reckless when they are aware that there is a risk that another person may be caused GBH as a result of their actions, but they proceed to act anyway. There have been two criminal prosecutions for sexual transmission of HIV in NSW – one in 2004 and the other in 2008.

Although not specified as a defence, the use of condoms or other safe sex methods is likely to mean that a person was not being reckless if transmission occurred. Likewise, based on previous legal cases involving non-HIV forms of GBH, it is likely that a person cannot escape conviction because the partner who became infected accepted that risk by practising unsafe sex.

While the vast majority of people with HIV are unlikely to come into contact with the criminal justice system in relation to their HIV status, prosecutions for HIV transmission do occur.

Individuals who recklessly or intentionally endanger others by exposing them to the risk of HIV need to be aware of the criminal and health implications of their actions.

It must also be acknowledged that there are rare cases where a person is intentionally infecting or attempting to infect others. In these cases criminal sanctions may be necessary.

Disclosure of HIV status

We support open and informed disclosure of HIV status to sexual partners, along with the right of individuals to have access to information that allows them to make informed decisions about their sexual health.

We know however that some people will not be aware of their HIV status, particularly during the time that they are seroconverting or prior to diagnosis. Others may not disclose and believe that by having an undetectable viral load that they are less infectious than those with a higher viral load, an understanding that is in-line with the Swiss Statement announced in 2008 and initial results from clinical trials such as HPTN 052 in 2011. Despite this understanding it appears at this stage condom use will be the only action that is likely to constitute a reasonable precaution under the *Public Health Act 2010*.

The centrality of people living with HIV/AIDS

We recognise and acknowledge the crucial role that PWHIV have played, and will continue to play, in the low rates of HIV transmission in this country. PWHIV in particular have responded to safe sex messages and have taken responsibility for their health and the health of their partners.

We know that the vast majority of people with HIV/AIDS seek to protect both their own and their sexual partners' health. This is part of the reason why we have low rates of HIV in Australia.

Stigma and discrimination

We fight stigma and discrimination and support the creation of environments that enable and support disclosure. Stigma and discrimination have a negative impact on the lives and health of PWHIV and also on our capacity to implement effective HIV prevention strategies and to provide support services.

The way in which the media portrays prosecutions of HIV transmission is concerning. The creation of negative stereotypes of PWHIV is not helpful to our HIV prevention efforts and can contribute to HIV stigma and discrimination.

Fear of stigma and discrimination may discourage people from HIV testing and early treatment. It is important that people are able to access relevant and honest resources, support, counselling and treatment when they need them.

**This is not to be considered as formal legal advice and people affected by the legislative amendment are encouraged to seek legal advice.*

