

CRIMINALISING SEXUAL HEALTH IN NSW: TAKING A STEP BACKWARD

Public Health Amendment (Review) Bill 2017

SUMMARY

- ✗ The *Public Health Amendment (Review) Bill 2017* introduces new offences and penalties to section 79 of the *Public Health Act 2010* that are **regressive and counterproductive and should not be adopted**.
- ✗ The **new offences and penalties – both financial and criminal – are excessive and disproportionate**. If enacted, they would impact on a significantly large part of the NSW population.
- ✗ The Bill's proposal to **expand the offence** in s52 to apply to people having sex in private settings in s79 is **unprecedented and unjustified**. The settings are materially different, as are the relationships between the parties implicated by these provisions.
- ✓ The removal of the existing disclosure provisions set out in the Bill is a welcome and progressive step reflecting that STI prevention is a mutual responsibility.
- ✓ All existing provisions in the Act and proposed provisions in the Bill related to s79 should be removed and replaced with a statement of principles setting out the expected responsibilities of each person.
- ✗ The **amendments run counter to the comprehensive consultation process that occurred in 2016** and do not reflect recommendations made by the NSW Ministry of Health in their report tabled in the NSW Parliament.
- ✓ STI transmission (including HIV and hepatitis B) is a health issue, not a criminal issue. STI prevention requires a strong culture of appropriate disclosure, safe behaviours, regular testing and early treatment.

✗ **The enactment of this Bill will:**

- ✗ Deter people from sexual health testing and knowing their STI status
- ✗ Dissuade people from participating in contact tracing of sexual partners
- ✗ Discourage open communication about sexual health, safe sex and STI transmission
- ✗ Clog up our court systems and waste law enforcement resources
- ✗ Criminalise populations in NSW disproportionately affected by STIs, including young, CALD and ATSI people
- ✗ Jeopardise excellent and world renowned public health infrastructure
- ✗ Create fear, uncertainty, stigma and discrimination
- ✗ Result in net widening, with additional individuals captured by the criminal justice system and subject to increasing penalties

✗ **STIs singled out for specific offence**

The obligation on a person with a notifiable communicable disease to take reasonable precautions against spreading the condition already exists in s52 of the Act. The proposed s79 extends s52 to apply to STIs in a private setting.

There is no evidence to suggest people are recklessly transmitting STIs or that STIs pose greater public health risk warranting a specific offence. The setting of the offences and the nature the relationship in s52 (public places) is materially different to s79 (sex in private). STIs should not be singled out for a unique and unprecedented offence.

✗ **Creation of a new offence and criminal penalty in s79 is excessive and disproportionate**

The current Bill before Parliament creates a new offence for a person with a notifiable STI failing to take 'reasonable precautions' against spreading that STI. The Bill's proposed new penalties are an \$11,000 fine and/or 6 months imprisonment. These penalties apply irrespective of whether a person has disclosed their STI status.

The proposed penalties are grossly disproportionate to the risk of transmission of such a wide range of now treatable conditions.

In the rare circumstance that people who intentionally or recklessly put others at risk, NSW already has a highly effective health framework for the *Management of People with HIV Infection who Risk Infecting Others*. These new offences will create red-tape and congestion in the criminal justice system for matters that should be dealt with by the public health system.

✓ **Ministry of Health, *Final Report on the Statutory Review of the Public Health Act 2010*:**

“... the Ministry supports the removal of s79 from the Act.”

“s79 is considered to be a blunt and ineffective tool for protecting public health”

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✔ What should s79 be replaced with?

There needs to be constructive and practical measures to assist people to take responsibility for their sexual health and prevent the spread of STIs. The criminalisation of sexual behaviour is counterproductive to the objectives of the *Public Health Act*.

NSW's longstanding investment in educating communities around the importance of regular STI testing and early treatment, in addition to open communication and contact tracing of sexual partners, will be compromised by the introduction of an offence.

All existing provisions in the Act and proposed provisions in the Bill related to s79 should be removed and replaced with statement of principles setting out the expected responsibilities of a person with an STI, as well as those of a person who is at risk of contracting an STI.

The *Victorian Public Health and Wellbeing Act 2008* has a similar principle which could be adapted for use in NSW.

✔ Proposed statement of mutual responsibility – a new s79

The following principles apply to the management and control of infectious diseases—

- (a) the spread of an infectious disease is a matter of mutual responsibility and should be prevented or minimised with the minimum restriction on the rights of any person;
- (b) a person at risk of contracting an infectious disease should take reasonable precautions to avoid contracting the infectious disease;
- (c) a person who has, or suspects that they may have, an infectious disease should—
 - (i) ascertain whether they have an infectious disease and what precautions they should take to prevent any other person from contracting the infectious disease; and
 - (ii) take reasonable precautions to eliminate or reduce the risk of any other person contracting the infectious disease;
- (d) a person who is at risk of contracting, has or suspects they may have, an infectious disease is entitled—
 - (i) to receive information about the infectious disease and any appropriate available treatment;
 - (ii) to have access to any appropriate available treatment.

✔ Removal of existing disclosure requirements a welcome step

The Government's proposal to remove the current requirement in s79 to disclose one's STI status before having sex with another person is welcomed.

Removal of the existing disclosure requirement places a mutual responsibility on each individual to consider and negotiate sexual practices.

As it currently stands in the existing *Public Health Act*, s79 contributes to an expectation that condomless sex is safe if the person has not disclosed that they have an STI (including HIV and hepatitis B). However, a substantial number of HIV and STI infections continue to be transmitted by people with undiagnosed infection.

✘ NSW's internationally recognised response is under threat

The *Public Health Act* is an important mechanism in supporting the NSW response to sexual health. NSW has an excellent framework for an effective response to the management of STIs. In particular, the NSW Government has been a world leader in developing a contemporary response to HIV.

The *Public Health Act* should support the rapid progress being made in NSW, most notably the extraordinary gains we are seeing in driving down new HIV infections.

The Act should maximise public health outcomes, in particular safeguarding the health, wellbeing and rights of people with HIV and other STIs.

✘ The Bill is contrary to consultation and expert recommendations

The proposed amendments to s79 do not reflect the results of the rigorous process of consultation undertaken through the review of the *Public Health Act* in 2016.

The Ministry of Health's *Final Report on the Statutory Review of the Public Health Act* tabled in Parliament in November 2016 recommended that the existing s79 be completely replaced with a statement of principles setting out the responsibility of all individuals to take reasonable precautions to ensure infections are not transmitted.

The *Public Health Amendment (Review) Bill 2017* was introduced to the Legislative Assembly by the Minister for Health, The Hon. Brad Hazzard, on 10 August 2017. The Bill had its first and second reading speeches and is expected to have the second reading debate during the September sitting of the Legislative Assembly. If passed, the Bill will then move to the Legislative Council. Action needs to be taken now to prevent this Bill becoming law.