

## POLICY POSITION

### Offences relating to the transmission of HIV in Criminal and Public Health Law

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The law in NSW prohibits the intentional or reckless transmission of HIV and requires that people living with HIV/AIDS must disclose their status prior to sexual intercourse (including oral sex).

ACON and PLWHA (NSW) acknowledge the need for the use of criminal and public health law provisions in certain circumstances and the importance of people understanding their obligations under the law.

We also acknowledge that the evidence suggests disclosure of HIV status by people with HIV is not always an effective strategy in preventing HIV transmission.

We recognise that the vast majority of people actively seek to protect their own, and their partner's, sexual health. In these circumstances, legal intervention is not needed or appropriate.

We recognise that 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.

We recognise that a very small number of people living with HIV/AIDS may deliberately or recklessly expose others to the risk of HIV transmission. In these circumstances, criminal prosecution may be appropriate.

ACON and PLWHA (NSW) believe that everyone has a responsibility to ensure that HIV and other STIs are not passed on. Both HIV positive and HIV negative people must take responsibility for protecting themselves, as well as their sexual partners, from HIV and other STIs.

The way in which the media has portrayed the recent increase in criminal prosecution may undermine public health interventions by creating negative stereotypes about people living with HIV/AIDS and perpetuating misinformation about the best methods of HIV prevention.

Therefore it is timely that we acknowledge and support:

- The rights of individuals to information that will assist them in making informed decisions to protect and maintain their health.
  - The creation of environments free from stigma and discrimination that support appropriate disclosure of HIV status.
  - The promotion of condoms and lube as the most effective strategy for the prevention of HIV transmission.
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## **BACKGROUND**

Specific offences relating to HIV transmission have been in place across Australia since the early 1990s. Up until recently there have been very few criminal prosecutions.

Most states and territories in Australia have a dual system of legal regulation of HIV transmission: criminal law and public health legislation. Since 2004 there have been a series of criminal prosecutions relating to the transmission of HIV in every state except Tasmania.

The majority of the prosecutions have been in relation to heterosexual relationships, however there have 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 demonize people living with HIV/AIDS and gay men in particular.

This paper addresses the transmission of HIV with a primary focus on gay or homosexually active men. We recognise that the legal regulation of HIV has different implications for other groups such as heterosexual women and sex workers and will address these issues in a companion document.

## **KEY ISSUES**

It is important that we continue to support people living with HIV/AIDS and continue to provide information on HIV prevention.

As community-based health organisations, we are responsible to our individual clients and the communities we serve.

We recognise our obligations under the law in relation to HIV transmission. We seek to ensure that the application of the law fulfils its intended purpose of preventing transmission, without compromising the rights of people living with HIV/AIDS.

There are a number of issues that have arisen as a result of the recent increase in criminal prosecutions of HIV offences in Australia.

## **DISCUSSION OF ISSUES**

### **The centrality of people living with HIV/AIDS**

Central to our position on this issue is our recognition and acknowledgement of the central role that people living with HIV/AIDS have played, and will continue to play, in the low rates of HIV transmission in this country. Gay men 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 living 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.

## **Public health interventions**

We support the use of public health interventions to facilitate behavioural change for those people who may not be able to modify their behaviour. Given that most people who risk infecting others with HIV have a range of complex needs, public health interventions are the most appropriate mechanism to prevent the transmission of HIV.

Public health interventions generally provide the necessary skills, resources and supports for individual behavioural change.

## **Criminal sanctions**

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.

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.

## **Disclosure of HIV status**

Under the NSW Public Health Act a person who has HIV is required to disclose their status to any sexual partner.

We support honest disclosure of HIV status by sexual partners. Individuals are entitled to information that allows them to make informed choices about their sexual health. We recognise that people are more likely to seek and receive information in environments that are free from discrimination. We oppose stigma and discrimination and support the creation of environments that support and enable disclosure.

We know however that some people will not be aware of their actual status, particularly at the time that they are seroconverting. For this reason we continue to support condom use as the primary HIV prevention strategy for all people regardless of their HIV status.

## **Discrimination**

The way in which the media portrays criminal prosecutions of HIV transmission is very concerning. The creation of negative stereotypes of people living with HIV/AIDS, and particularly gay men, is not helpful to our HIV prevention efforts and can contribute to discrimination and stigma.

Discrimination and stigma have a negative impact on the lives and health of people living with HIV/AIDS. We reject discrimination in any form and support the rights of people living with HIV/AIDS to fully participate in society.

Discrimination impacts not only on the capacity of individuals to access services and support but also on our capacity to implement effective HIV prevention strategies and to provide support services.

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.

## **Responsibility and confidentiality**

We recognise that we have a legal and moral obligation to all people who use our services to ensure that the information that they provide to us when accessing our services is to remain confidential.

However, in certain circumstances we have a legal responsibility to disclose information to an authorised body in accordance with NSW Health guidelines and the criminal law.