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## STATEMENT ON REASONABLE PRECAUTIONS IN RELATION TO CHANGES TO THE NSW PUBLIC HEALTH ACT

The following is a joint statement from ACON and the HIV/AIDS Legal Centre (HALC):

### New changes to the NSW Public Health Act 2010

The NSW Parliament has recently passed the *Public Health Amendment (Review) Bill 2017* which makes amendments to s79 of the *Public Health Act 2010*. The amendments came into force on 18 October 2017.

### Removal of disclosure provisions

A person with a sexually transmissible disease or condition is no longer required by law to disclose that they have the condition prior to sexual intercourse. ACON and HALC are strongly supportive of this for a number of reasons.

- Firstly, the disclosure requirement placed the legal responsibility for preventing HIV transmission on one person rather than framing it in the context of mutual responsibility.
- Secondly, disclosure is not a reliable safeguard to transmission.
- Thirdly, people with HIV are highly motivated to prevent HIV transmission and this law implies otherwise.
- Finally, the removal of disclosure requirements brings NSW into line with all other states and territories in Australia.

### Requirement to take reasonable precautions

Instead, the amendments *require* someone who knows that they have a scheduled or notifiable disease or condition that is sexually transmissible to take reasonable precautions against transmitting the condition to others.

The maximum penalty for an offence against this provision is significant; up to 100 penalty points (equivalent to a fine of \$11,000) or imprisonment for up to six months, or both. The provision reads as follows:

#### **79 Duties of persons in relation to sexually transmissible diseases or conditions**

(1) A person who knows that he or she has a notifiable disease, or a scheduled medical condition, that is sexually transmissible is required to take reasonable precautions against spreading the disease or condition.

Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.

### Application of the Act

The section applies to a person who knows that they have a notifiable disease or scheduled medical condition that is sexually transmissible. Although a public health approach supports mutual responsibility for safer sex, under this law the person with the condition is the person who bears legal responsibility for taking reasonable precautions.

### Scope of the provision

There is some uncertainty as to which additional conditions might fall within the new law. The condition must be either a notifiable disease or a scheduled medical condition that is sexually transmissible.

At the time of writing, 'notifiable disease' under Schedule 2 of the Act includes:

- Acquired Immune Deficiency Syndrome (AIDS)
- Syphilis

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At the time of writing, a ‘scheduled medical condition’ under Schedule 1 of the Act includes:

- Acute viral hepatitis
- Chlamydia
- Gonorrhoea
- Hepatitis A, B, C, D and E
- Human Immunodeficiency Virus (HIV) infection
- Lymphogranuloma Venerum (LGV)
- Shigellosis

This offence only applies if the notifiable disease or scheduled medical condition is also *sexually transmissible*. However, s79 does not specifically mention transmission via sexual intercourse. This is in contrast to the previous law which specified via sexual intercourse and defined sexual intercourse.

The new provision could include other forms of transmission of the relevant condition, and require reasonable precautions to be taken for example, during pregnancy and birth, breastfeeding or in the use of injecting equipment.

In the past, the law referred to ‘sexually transmitted infections’ which had a particular meaning, and excluded for example, Hepatitis C, which although *possible* to transmit via sex, is not classified as a ‘sexually transmitted infection’. While hepatitis C has not generally been considered an STI in the past, because it is possible for hepatitis C to be transmitted in sexual settings in some circumstances, it could potentially be included within the scope of this new provision.

However, in a briefing document released by the NSW Ministry of Health brief on s79, the Ministry provides a non-exhaustive list of conditions covered by this section. The scope in the Ministry’s briefing document is narrower. The conditions listed are chlamydia, gonorrhoea, syphilis, lymphogranuloma venereum, hepatitis B, and HIV. This brief can be accessed on the NSW Health website [here](#).

### **What constitutes reasonable precautions**

What constitutes ‘reasonable precautions’ against the spread of such conditions is not defined by the Act. In the event that a person was charged with this offence and went to trial, what constitutes ‘reasonable precautions’ to stop the spread of the condition would be open to interpretation by a court, based on the circumstances of the case. It is unclear how broadly or narrowly this could be interpreted.

What constitutes reasonable precautions will depend on a number of factors, including the type of condition, where the infection is on the body, the type of sexual or other activity, and the presence of other infections in the person with the infection or the person’s partner.

At the time of writing, medical and scientific evidence, as well as guidance from NSW Health, indicates that reasonable precautions to prevent the transmission of HIV in relation to s79 may include:

- taking a prescribed antibiotic course for bacterial STIs; or
- use of a condom; or
- for HIV, having an HIV viral load of less than 200 copies/mL, usually resulting from being on effective treatment; or
- for HIV, seeking and receiving confirmation from a sexual partner that they are taking HIV pre-exposure prophylaxis (PrEP); or
- for hepatitis B, seeking and receiving confirmation from a sexual partner that they are immune to hepatitis B (e.g. vaccinated or previously infected)

More information on sexual transmission of HIV and the law can be found in the MJA article *Boyd M, Cooper D, Crock EA, et al. Sexual transmission of HIV and the law: an Australian medical consensus statement. Med J Aust 2016; 205: 409-412.*

This is based on the information provided at the time that the Amendment was introduced in Parliament, however, there is no guarantee that a court would agree.

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We strongly advise people living with HIV to discuss what constitutes reasonable precautions with their treating doctor and sexual partners. It might be that what constitutes reasonable precautions at one time, will not at another, depending on a person's particular circumstances. There will also be advances in medical and scientific knowledge that might affect what constitutes reasonable precautions in relation to HIV, and other conditions.

Since the law does not apply specifically to HIV, what constitutes reasonable precautions will depend on the medical condition.

If you are charged with an offence under s79 of the *Public Health Act 2010*, you should immediately seek legal advice.

### **Disclosure is not a defence**

A person who discloses their HIV status can still be charged under the new section. There is no provision for circumstances in which persons decide, after disclosing that they have HIV to engage in sexual intercourse without taking reasonable precautions to prevent transmission of the condition. Charges could result, even in circumstances where the person with HIV has informed their sexual partner of the risk of transmission, and the person voluntarily agrees to such a risk, and where HIV is not transmitted.

### **Steps we can take to improve the sexual health of ourselves and our partners**

Preventing transmission of conditions that are sexually transmissible should be a matter of mutual responsibility. A person who has, or suspects they have, a sexually transmissible condition as well as a person at risk of contracting a sexually transmissible condition should take reasonable precautions to avoid transmitting or contracting it.

There are steps we can take to prevent transmission of conditions that are transmitted sexually and improve the sexual health of ourselves and our partners.

- Test often or test regularly (2-4 times per year) for STIs (and viral load if you are HIV positive) depending on the number of sexual partners you have, regardless of your HIV status or prevention strategy;
- Have open and honest conversations with your sexual partners (whether it is online, via an app or face-to-face) about how you can maximise pleasure whilst minimising risk;
- Depending on the type and location of the condition, communicate, negotiate and if appropriate, modify your sexual practices with all your partners to reduce risk of transmission;
- Most STIs are treatable. If you are diagnosed with an STI, treating early is important for your sexual health as well as for reducing transmission to your partners;
- If you are on treatment for an STI, it is important to take a break and talk to your sexual healthcare provider about how long to wait before sex;
- If you are HIV positive, engage in discussions with your treating doctor about what constitutes reasonable precautions for you. In the event that charges are laid, clinical notes can be used as evidence;
- Choose combination prevention strategies that work for you, such as using condoms for anal or vaginal sex, maintaining viral suppression of less than 200 copies/ml, taking PrEP, or if you have HIV, confirming your sexual partner is taking PrEP;
- If you are exposed to HIV, take Post-Exposure Prophylaxis (PEP) within 72 hours.

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