HIV & NSW Consent Law

Disclosing your HIV status to sexual partners in NSW

On 1 June 2022, reforms to the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) (the 'Act') came into effect. This is an important step in updating NSW consent laws by introducing *affirmative consent* provisions. Affirmative consent means that a person will need to take active steps to establish that their sexual partner/s are consenting.

A sexual partner must say or do something to indicate they consent to sexual activity. If you would like more information about the affirmative consent provisions generally, click here to visit the legal online information service (LOIS).

Certain provisions introduced in the Act may also have an impact on the lives of people living with HIV (PLHIV). If a PLHIV misleads or lies to a sexual partner about their HIV status, this may mean that the sex is no longer consensual.

What does the legislation say?

Section 61HJ of the *Crimes Act 1900* (NSW) outlines circumstances where a person will not have consented to sexual activity. This includes, but is not limited to, circumstances where a person fraudulently induces someone into participating in a sexual activity.

61HJ Circumstances in which there is no consent

(1) A person does not consent to a sexual activity if –

(k) the person participates in a sexual activity because of a fraudulent inducement.

Section 61HJ(3) limits its application to not include a misrepresentation about a person's income, wealth, or feelings. The Attorney General has made specific reference to 'an infection or disease' when discussing the Act in Parliament, stating:

'If an accused person expressly and fraudulently warranted that they did not have an infection or disease, but knew this to be untrue, and the complainant made clear their consent is contingent on the representations, this may constitute a fraudulent inducement depending on the context and state of mind of the accused.'

HALC recognises that it is important that the law protects against some forms of 'fraudulent inducement' such as where a person engages a sex worker, who consents to sex on the condition that they will receive payment, and then the client withholds payment.

However, HALC is concerned that the broad nature of this provision will have negative impacts on the public health response in NSW including the privacy and safety of PLHIV.

HALC will continue to advocate for the amendment of section 61HJ of the *Crimes Act 1900* (NSW) to ensure that misrepresentation about someone's HIV status will not constitute 'fraudulent inducement' or negate consent, so that the privacy and safety of PLHIV in NSW are protected.

Do I have to disclose my HIV status before I have sex?

You are not legally required to disclose your HIV status before you have sex. However, under the new consent laws, lying about your HIV status or lying about being on pre-exposure prophylaxis (PrEP) to 'induce' someone to participate in sexual activity may mean that the sexual partner has not consented to the sexual activity under the law.

As the new law is untested, we are unaware what impact, if any, having an undetectable viral load (UVL) will have if someone misleads or lies about their HIV status to their sexual partner.

If you lie about your HIV status to 'induce' your sexual partner to participate in sexual activity you may be charged with sexual assault. A person found guilty of sexual assault may be liable to imprisonment for up to 14 years.

It is also important to still remember that under the *Public Health Act 2010* (NSW), if you know you are living with HIV, you must take reasonable precautions against transmitting HIV.

What are reasonable precautions?

Under the *Public Health Regulation 2022* (NSW), reasonable precautions may include the following:

- Using condoms;
- Having an UVL of less than 200 copies/mL; or
- Seeking and receiving confirmation from a sexual partner that they are taking PrEP.

You should also consult with your HIV specialist about the risk of HIV transmission to sexual partners and what the most appropriate reasonable precautions are for you based on your circumstances.

Penalties apply for not taking reasonable precautions against transmission of HIV (maximum of 100 penalty units ($11,000), 6 months in jail, or both).

Even if you disclose your status to your sexual partner, you could still be charged under this section if you fail to take reasonable precautions.

Do I need to disclose my HIV status on my dating profile?

You do not have a duty to disclose your HIV status on your dating profile. However, you should not lie on any dating profile about your HIV status or being on PrEP.

If you aren't comfortable with people knowing your HIV status, it is best not to include this information on your dating profile.

If you are asked online about your HIV status, it is your decision whether you wish to disclose or disengage from the conversation. It is still important to remember that if you lie about or misrepresent your HIV status on a dating application or website the sexual activity may not be consensual under the law.

Do I need to disclose my HIV status if I'm asked after engaging in sexual activity?

No, if your sexual partner asks your HIV status after engaging in sexual activity you do not have to disclose. If you misrepresent or lie about your HIV status, this may impact that person's future consent to engage in sexual activity with you.

What about other sexually transmissible infections (STIs)? Do I have to disclose them?

Similar to HIV, you do not have a duty to disclose your STI status. However, if a sexual partner asks you if you have any STIs you shouldn't lie to them.

If your sexual partner doesn't ask if you have a specific STI or any STIs, you don't have a duty to disclose. However, you have a duty to take 'reasonable precautions' to not transmit any STIs. You should talk to your doctor about suitable 'reasonable precautions' you can take, to avoid transmitting the STI.

What if I didn't know that I had HIV or other STIs at the time sex happened?

If you didn't know that you had HIV or other STIs at the time sex happened, there was no 'fraudulent inducement' or misrepresentation on your part, and your HIV status or other STI status would not impact your sexual partner's consent at that time. However, we recommend that you take regular tests to know your status so that you can look after your health and obtain optimal support and treatment.

If you find out later that you had HIV or another STI at the time of sex, you have no obligation to notify your past sexual partners that they may be at risk of contracting HIV or other STIs. Under r61 of the *Public Health Regulation 2022* (NSW), the Secretary of the NSW Ministry of Health and your attending medical practitioner may conduct contact tracing (without disclosing your details) by notifying your past sexual partners at risk of contracting HIV or other STIs of measures to be taken, and activities to be avoided.

What should I do if I'm contacted by a sexual partner or the police about this?

If you are contacted by the police, or your sexual partner has informed you they will be contacting the police, you should not say anything and seek legal advice immediately. You can contact HALC on (02) 9492 6540 or email halc@halc.org.au.

For more information phone 02 8357 8386 or 1800 245 677 (freecall) or visit www.positivelife.org.au

Updated July 2023

The voice of all people living with HIV

Positive Life NSW

halc HIV/AIDS Legal Centre

Images used are stock photos and do not imply any HIV status, sexuality or behaviours.