

Requirements to take reasonable precautions not an improvement on laws criminalising HIV non-disclosure, a case study

V. Parwani
Senior Solicitor

HIV/AIDS Legal Centre NSW,
Surry Hills, Australia

The HIV AIDS Legal Centre Inc (HALC) is a specialist legal centre in Sydney, Australia that provides free legal services for people with HIV related legal matters.

BACKGROUND

In October 2018, New South Wales (NSW) became the last State in Australia to remove requirements for people living with HIV (PLHIV) to disclose their status prior to engaging in sexual intercourse. While other Australian jurisdictions replaced these requirements with statements of principles regarding mutual obligations, NSW instead legislated section 79 of the Public Health Act 2010 (NSW) (s79): which requires a person with HIV to take reasonable precautions to prevent transmission to another. The HIV/AIDS Legal Centre NSW (HALC) is aware of just one prosecution under since s79 to date, however the consequences for the defendant in that case, despite them being found not guilty, were rife.

THE NON-DISCLOSURE OFFENCE

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.
- 1A. Without limiting subsection (1), reasonable precautions include acting in accordance with the information relating to the means of minimising the risk of infecting other people if the information is provided to the person under section 78(1).

The Regulations passed under the Act provide examples of information which are referred to in s79(1A) which would be considered reasonable precautions. These are:

- (i) using a condom during sexual intercourse
- (ii) receiving treatment for the sexually transmitted infection
- (iii) for a patient who has a Human Immunodeficiency Virus (HIV) infection, seeking and receiving confirmation from a sexual partner that the sexual partner is on HIV pre-exposure prophylaxis medication
- (iv) for a patient who has an HIV infection, knowing that he or she has an HIV viral load of less than 200 copies/mL

Unfortunately, there is no defence available under this section for disclosure and obtaining informed consent. This means that if a PLHIV does not use reasonable precautions during intercourse, they cannot rely on disclosure as a defence.

While the Act does require the Court to be closed during the prosecution of this offence, and there is some protection prohibiting the disclosure of information, a loophole in the law allows disclosure for the reporting of legal proceedings.

THE CASE STUDY

“I followed the law and it still ruined my life”

The case related to a person who did not disclose their HIV status to a sexual partner prior to intercourse. The complainant was informed of the person's status afterwards through a mutual friend. The complainant made a complaint with the police who initially questioned the defendant in relation to non-disclosure of their status. They eventually charged the defendant under the offence for not taking reasonable precautions. The PLHIV did not have an undetectable viral load at the time. The defendant maintained throughout and at trial that a condom was used, however the complainant alleged that no condom was used. The case proceeded to a defended hearing and even though the Magistrate in this case found that the prosecution had not satisfied their burden of proof and that the defendant was not guilty, by that stage, it was too late to mitigate the impact of the prosecution on the defendant which included:

- The defendant being held in custody on remand for weeks as the Magistrate considered them a risk to public safety.
- The publication of the defendant's name and HIV status in the media. While the Magistrate cleared the Court (proceedings under s79 must be conducted in closed courts), they omitted to order reporters to remove television cameras from the Court resulting in the mainstream media reporting on the case.
- The defendant facing significant ostracisation and discrimination from their local community as a result of the sensationalised reporting of their status in the mainstream media.

NEED FOR EDUCATION AND REFORM

Lawyers, the judiciary and prosecutors must be trained not only on the current science on HIV treatment and prevention but also to ensure that non-publication orders are sought early in proceedings to prevent any non-consensual disclosure.

HALC continually advocates for s79 to be repealed due to its detrimental impact on HIV testing, treatment and prevention. HALC also continues to advocate for the following amendments to the law:

- Clarify the meaning of reasonable precautions;
- Remove the criminal penalty for the offence;
- Close the loophole which allows for the reporting of the offence by the media; and
- Mandate non-publication orders for the complainant and the defendant both.

Until the law can be amended, HALC will continue to provide ongoing representation for PLHIV facing criminal charges to counter the negative impacts of criminalisation and to ensure that the privacy of PLHIV can be protected at all stages of the process.

