

# Time to review



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**"AIDS makes us angry.  
But in law we must be  
rational."**

THE HON. MICHAEL KIRBY<sup>1</sup>

**T**HOUGH UNHEARD OF IN THE 1980s, and rare in the 1990s, there has recently been an increase in the number of criminal prosecutions over HIV transmission and/or exposure in Australia. This mirrors a similar trend internationally.

In April 2009, a Canadian man was charged and convicted of two counts of murder for having had unprotected sexual intercourse with a number of women, two of whom contracted HIV and died within two years of diagnosis.<sup>2</sup> There is no precedent in Australia of a person being charged with murder in relation to the transmission of HIV. Although unlikely, given the increasing lifespan of HIV-positive people, it is still theoretically possible for a murder charge to be laid for a transmission offence if death occurred soon after transmission. While such rapid progression is rare, it is not unheard of according to expert witnesses. This is a

worrying development with respect to the use of the criminal law for HIV transmission cases.

An Australian prosecution for murder would need to establish causation (that infection with HIV was the "operating and substantial cause of death"),<sup>3</sup> and also that the accused had the required mens rea for murder: the accused must have an intention to kill or reckless indifference to life. Many cases of HIV transmission have not been understood as involving an intention to cause death, but instead recklessness to the risks of infection. The difficulty of proving the high level of mental culpability required to establish murder is likely to prevent murder charges being laid for HIV transmission cases.

Criminal trials for the transmission of HIV arouse considerable community interest, which is often manifested in the form of fear, panic and outrage. Overwhelmingly, the community response comes in the form of calls for unmitigated, punitive justice. However, the law must be implemented in such a way that supports public health initiatives and which has the ultimate aim of preventing the spread of HIV.

In Australia, the criminal and public health laws that relate to HIV transmission and/or exposure vary widely between states and territories. To date, a

# criminalisation of HIV

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variety of charges have been laid against persons in different Australian states, including grievous bodily harm, causing another person to be infected with a grievous bodily disease, transmitting a serious disease with intent, endangering a person by exposing to a risk of serious bodily disease, reckless conduct endangering life, and recklessly causing serious injury. However, these charges do not necessarily represent the full range of charges that might be laid. Prosecutions in overseas jurisdictions indicate that it is theoretically possible that charges could be brought in Australia for murder, attempted murder, manslaughter by criminal negligence, or unlawful and dangerous act, common law nuisance, negligently causing grievous bodily harm by criminal negligence, or sexual assault.

In NSW, two HIV transmission prosecutions have been completed to date. Charges were laid in both cases under s.35 of the *Crimes Act 1900*, prior to the revisions in the *Crimes Amendment Act 2007*. This section provided that:

"1. Whosoever maliciously by any means

...  
(b) Inflicts grievous bodily harm upon any person ...

Shall be liable to imprisonment for 7 years."

The prosecution had to establish that the accused had inflicted grievous bodily harm upon a person, and that the act was done maliciously.

Section 35 has since been amended by item 7, Schedule 1 of the *Crimes Amendment Act 2007*, and the "malicious" element has been removed. The offences are now separated into those done intentionally, and those done recklessly. Consequently, the applicable offences and sen-

tences are as follows:

☐ Section 33 (as amended by item 4, schedule 1):

1. Inflicting grievous bodily harm with intent – 25 years

☐ Section 35 (as amended by item 7, schedule 1):

1. Recklessly inflicting grievous bodily harm in company – 14 years (penalty raised from 10 years)

2. Recklessly inflicting grievous bodily harm – 10 years (penalty raised from 7 years).

The definition of "Grievous bodily harm" in s.4(1) of the *Crimes Act 1900* now explicitly includes "(c) any grievous

that this can only be achieved through the promotion of human rights for those living with the disease: "States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups".<sup>5</sup>

UNAIDS further sets out guiding principles for developing policy and legislation to prevent the spread of HIV, principles that apply to the use of coercive powers under criminal and public health laws. Criminal lawyers and policy makers alike must recognise that there exists a "para-

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bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease)".

Given the potentially wide ranging coverage of the criminal law with respect to HIV transmission, it is crucial to ensure HIV transmission criminality is not extended further.

The Joint United Nations Programme on HIV/AIDS (UNAIDS) *International Guidelines on HIV and Human Rights*<sup>4</sup> outlines how states can effectively manage the spread of HIV. The guidelines stress

doxical relationship of mutual interest"<sup>1</sup> in promoting human rights for HIV-positive people. Ultimately, those who can prevent the spread of the virus are those infected with the virus. Although the guidelines are primarily aimed at governmental action and the drafting of policy, the implementation of the criminal law must be monitored and regulated by the judiciary and legal practitioners so as to prevent the misuse of laws in the context of criminal trials for HIV transmission offences.

The objectives of criminalisation include incapacitation, rehabilitation, retribution

and deterrence. These are fundamentally ill-suited to achieving the policy goal of reducing HIV transmission. The rehabilitative aspect of prison is questionable, since “human behaviours ... are complex and difficult to change through blunt tools such as criminal punishments”,<sup>6</sup> as a UNAIDS policy options paper has noted. Counselling and education are more likely to have a long-term rehabilitative effect. The concept of retribution is not designed to alter future conduct, but to impose retrospective punishment, suggesting the blame rests on one sexual partner, in opposition to the public health message that both partners are responsible for their sexual health. No studies to date have shown that HIV transmission has been prevented as a result of the application of the criminal law.<sup>7</sup> There is a serious risk that harsh punitive justice will reinforce the HIV/AIDS related stigma, spread misinformation about HIV/AIDS and create a disincentive to HIV testing, as people fear a threat of incurring criminal liability. Furthermore, application of criminal sanctions may in fact hinder access to counselling and support, by discouraging honest disclosure to medical staff and creating a false sense of security that the criminal law can protect a person from contracting HIV.<sup>8</sup>

In the UN Political Declaration on HIV in 2006,<sup>9</sup> governments agreed that the way to address HIV transmission while also protecting human rights was to make HIV prevention the primary focus of any national strategies regarding HIV transmission, and to “promote a social and legal environment that is supportive of and safe for voluntary disclosure of HIV ... with full and active participation of people living with HIV”. Criminal sanctions would clearly be in conflict with this stated goal.

### The decision to prosecute

The Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions outline the proper conduct for a responsible prosecutor in NSW. The guidelines state that in making the decision to prosecute, “the general public interest is the paramount criterion”.<sup>10</sup> In a case of HIV transmission where there is at least some evidence of intent to cause infection, a prosecution will almost certainly be brought in the interest of protecting the public from further infection. Although arguably imprisonment would not in fact reduce this risk of transmission, in the most extreme and worst of the cases, the use of criminal punishment may be necessary to publicly condemn the heinous nature of the crime. Only in the most extreme case, where the conduct of concern is truly criminal in nature, should punishment, as a means of cultural signification of wrongdoing, be employed.

As the Hon. Michael Kirby has pointed

out: “Prosecutors have their own discretions to ensure the principled deployment of the criminal law. But once a case is brought, a court can only apply the law as it is enacted. It cannot stay the proceedings or postpone them simply because it might believe that criminal prosecutions are ineffective or even counterproductive as a public health strategy to promote behaviour modification.”

In the United Kingdom, prosecution guidelines specific to different offences have been implemented to guide prosecutors in their decisions regarding whether or not to prosecute. The guidance recognises the tension between public health and criminal justice considerations. For offences relating to the intentional or reckless transmission of sexually transmitted diseases, the guidelines outline the factual, scientific and medical evidence on which to base a prosecution.<sup>11</sup> For example, the Crown prosecution guidelines make it clear that only in the rarest of cases could a person who has actively sought to avoid onward transmission of HIV be successfully prosecuted. This guidance is in line with sexual health promotion practice, encouraging the use of safe-sex practices to prevent transmission of infection.

Criminal liability should only be attached to acts which in fact cause the transmission of HIV, rather than those which merely expose a person to risk of transmission. In *R v Barry* (unreported, Qld CCA, 17 July 1989), a 17-year old, HIV-positive Aboriginal man was charged with wilful exposure of HIV. This was the result of Barry having rubbed his excrement into the face of a police officer. For that charge, Barry received a 12-month sentence. Barry later committed suicide in his cell. This is a clear case where prosecutorial discretion could have been exercised, both due to the almost negligible risk of transmission in a case of contact with faeces, and the fact that no actual transmission occurred. The law should not be used in the context of HIV so as to target vulnerable groups. The public interest in preventing such human rights abuses clearly outweighs the public interest in the perceived need to protect the

public from the accused.

Criminal prosecutions have wide-ranging effects on HIV-positive individuals and their families. Extensive police investigations are required to prove transmission, often involving intrusion into the intimate details of people’s sexual activities and private lives. This intrusion can result in violations of privacy, and stigmatisation of witnesses, the complainant and the accused. Even where name suppression is ordered for complainants and their families, this is often inadequate in an open court where the name of the accused is not suppressed. Recently, a man was charged with infecting his wife with HIV, and although her name and the names of her children (one of whom was HIV-positive and died) were suppressed, the name of her partner (the accused) was not, and so it would not be difficult in a small community to identify all members of the family.

### Conclusion

What alternatives to the criminal law should be considered in relation to the transmission of HIV? The spread of HIV is, like the spread of any other disease, a public health matter. As such, public health initiatives should be enhanced and supported. Public health policies should be used to support HIV-positive individuals, providing them with education, care, and information on how to protect their sexual partners.

No one has the right to transmit HIV, but it is only through creating and implementing law that fosters honesty within the HIV-positive community, that the spread of HIV can be prevented. With the exception of cases where individuals actually intend to do harm, criminalising HIV transmission does not empower people to avoid HIV infection, and in fact may make it more difficult for them to do so, endangering both public health and human rights. Therefore, the implementation and use of the criminal law in the context of HIV transmission must be done with consideration for human rights and one central objective, to prevent the infection of individuals and the spread of HIV within the community. □

### ENDNOTES

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