

# HIV and the law – recent developments in public health and criminal laws

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In 1991 Justice Michael Kirby of the High Court of Australia, as he was then, stated:

‘There will be calls for “law and order” and a “war on AIDS”. Beware of those who cry out for simple solutions, for [in] combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of the criminal law.’ (Justice Michael Kirby, High Court of Australia, ‘The Ten Commandments’, *National AIDS Bulletin*, March 1991.)

As anticipated, the ‘war on AIDS’ began and criminal penalties were applied to cases of HIV transmission and, in some states, non-disclosure and exposure (where there was no transmission of HIV) under both public health and criminal legislation. In 1991 NSW Public Health legislation introduced a requirement that people with HIV and other sexually transmissible infections were required to disclose their HIV status to sexual partners *before* engaging in sexual intercourse. In addition, the *Crimes Act 1900* makes the transmission of HIV (a grievous bodily disease) an offence within grievous bodily harm provisions.

## Recent amendments to the *Public Health Act 2010*

On 18 October 2017, section 79(1) of the *Public Health Act 2010* (NSW), (**‘the Act’**) as amended by the *Public Health Amendment (Review) Act 2017*, came into force. The requirement to disclose HIV status has been replaced with a requirement to take ‘reasonable precautions’ to prevent transmission of HIV. The Act does not define ‘reasonable precautions’, however the NSW Ministry of Health has released guidelines as to what would constitute ‘reasonable precautions’. For HIV, ‘reasonable precautions’ include: use of a condom *or* having an HIV viral load of less than 200 copies/mL (usually resulting from being on effective treatment), *or* seeking and receiving confirmation from a sexual partner that they are taking HIV pre-exposure prophylaxis (PrEP - a drug that protects a person from contracting HIV). This is in line with scientific evidence and recommendations of HIV medical experts (Boyd et al ‘Sexual Transmission of HIV and Law: An Australian medical consensus statement’, (2016) 205 (9) *Medical Journal of Australia* 409-41 (**‘Boyd’**)).

## Snapshot

- In recent amendments to the *Public Health Act 2010*, the requirement to disclose HIV status has been replaced with a requirement to take ‘reasonable precautions’ to prevent the transmission of HIV.
- In *Zaburoni v The Queen* [2016] HCA 12 the High Court considered for the first time the issue of when a person has the requisite intention to transmit HIV to their sexual partner.
- As the spread of HIV is a public health issue, a public health approach should be the first and preferred option, with the criminal law only being utilised for cases where a person intentionally transmits HIV.

The amendment also increases the penalties - doubling the existing fine to 100 penalty units, and adding a six month term of imprisonment where a person is found guilty of not using reasonable precautions to prevent the transmission of HIV, even where there is *no* transmission of HIV.

The removal of the requirement to disclose HIV status is in line with other states and territories and international best practice. The UNAIDS Guidance Notes 2013, *Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, state:

‘34...There are many reasons why people may not disclose their HIV-positive status and/or may engage in unprotected sex, including fear of abandonment, discrimination or violence; shame or embarrassment; and/ or the psychological

inability to accept one’s HIV-positive status... None of these reasons indicate an “intent to transmit HIV” or a desire to harm their sexual partner on the part of the HIV-positive individual.

35. [P]eople may also lie about their positive HIV status for the reasons highlighted above. Thus, active deception—including lying when asked about one’s HIV status—may not indicate, on its own, intent to transmit HIV or to cause harm... Rather, care should be exercised to determine the nature, context and material circumstances of any alleged deception’ (at [22]).

The application of criminal penalties for exposure and non-disclosure of HIV status is counterproductive to the public health focus on safer sex practices and taking reasonable precautions to prevent transmission of HIV, and serves to increase stigma by criminalising people with HIV. There is no evidence that requiring people to disclose their HIV status reduces the spread of HIV, and in fact may have the opposite effect by discouraging people from seeking testing for HIV. It also fails to recognise that around one third of new HIV infections in Australia result from people who have not yet been diagnosed with HIV.

## Is this change enough to bring NSW into line with international guidelines?

The fact remains that the Act still criminalises people with HIV, and the use of criminal laws to punish people with HIV has neg-

ative consequences for both individuals affected and the broader community.

The NSW Ministry of Health's *Final Report on the Statutory Review of the Public Health Act 2010* tabled in November 2016 recognised that the disclosure requirement was 'a blunt and ineffective tool for protecting public health' (at [37]). The report recommended that s 79 of the Act be replaced with a statement of principles that highlighted the principle of mutual responsibility – all individuals have a responsibility to avoid contracting or transmitting a sexually transmissible infection, including HIV. Victorian Public Health legislation has included such a statement of principles since 2008. However, this recommendation was not adopted.

It is the authors' view that the law continues to create uncertainty in the community and stigmatises people living with HIV (and other STIs). It provides no legislated guidance as to what constitutes 'reasonable precautions' to prevent HIV transmission and contains no provision for circumstances where a sexual partner is aware of a person's HIV status and the risk of transmission, and agrees to the risk of sexual intercourse without taking reasonable precautions. Finally, the law fails to highlight the important public health message of mutual responsibility.

### When is the use of criminal laws appropriate?

UNAIDS states that 'any application of criminal law to HIV non-disclosure, exposure or transmission should require proof, to the applicable criminal law standard, of intent to transmit HIV' (UNAIDS Guidance Notes 2013, *Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations*, at [26]). The difficulty with this proposition is that 'the applicable criminal law standard' varies significantly by jurisdiction, and mental culpability for HIV transmission to a sexual partner is difficult to ascertain.

Intent in a criminal law setting is not to be confused with motive. The relevant criminal law test for intention is whether the person meant to cause the charged result, directed his mind to that result, or had that result as his purpose or design (*R v Willmot (No 2)* [1985] 2 Qd R 413 at 418, *R v Reid* [2007] 1 Qd R 64 at 71). Awareness that a result is a *probable* consequence of their conduct alone is not sufficient to prove intent (*Crabbe v The Queen* (1985) 156 CLF 464 at 469, *He Kaw The v The Queen* (1985) 157 CLF 523 at 570, *R v Woollin* [1999] 1 AC 83). Awareness that the result is a *certain or near certain* consequence of their conduct itself is not sufficient to prove intent at law (*R v Matthews & Alleyne* [2003] 2 Cr App R 30 at [43]).

### Intention to transmit HIV

There have been around 38 criminal prosecutions in Australia for HIV transmission or exposure since 1991.

In 2016, the High Court considered for the first time the issue of when a person has the requisite intention to transmit HIV to their sexual partner in the matter of *Zaburoni v The Queen* [2016] HCA 12 (*Zaburoni*)\*. The Court agreed with the ap-

pellant's case that he did not intentionally transmit HIV to his sexual partner and found that:

- 'foresight of risk of harm is distinct in law from the intention to produce that harm' (at [10]);
- 'Where proof of the intention to produce a particular result is made an element of liability for an offence under the Code, the prosecution is required to establish that the accused meant to produce that result by his or her conduct... knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code.' (at [14])

The High Court's findings draw Australia closer towards UNAIDS guidelines, noting that there can be many reasons why a person may not disclose their HIV status to a sexual partner. The UNAIDS publication, *Judging the epidemic – A judicial handbook on HIV, human rights and the law*, states that: 'A medical diagnosis of HIV-positive status, accompanied by post-test counselling regarding HIV transmission, is usually necessary to establish mental culpability for HIV exposure or transmission... [E]ven if a person living with HIV has been advised on the risk of HIV transmission, challenges such as language barriers, shock about the diagnosis or other issues may prevent them from completely understanding the transmission risks associated with different activities.' (at [53])

Thus, there needs to be something more than denial or lies regarding HIV-positive status to a sexual partner to bring about a charge of intentional transmission. Rather, an accused must have foreseen 'that his or her actions would have an inevitable or certain consequence' (*Zaburoni* at [66]). In *R v Reid* [2006] QCA 202, the Court relied upon evidence that: (i) the defendant had publicly taunted the complainant with the fact that he had contracted HIV as a result of sexual contact with the defendant; and (ii) he had an appreciation of the risks of transmission, as demonstrated by his comment that he felt like he was 'carrying a loaded gun'.

### Conclusion

Medical and scientific evidence shows that the risk of transmission of HIV is generally low, and negligible where a person with HIV is on effective treatment. Clinicians agree that the vast majority of people with HIV want to protect their sexual partners from contracting HIV (Boyd *et al* 409–41).

Australia has a robust public health management protocol for people with HIV who might be placing at others at risk. Section 62 of the *Public Health Act* allows for a person to be ordered to comply with appropriate case management health interventions, including detention and referral to the police. The spread of HIV is a public health issue, and as such a public health approach should be the first and preferred option, with the criminal law only being utilised for those unusual and exceptional cases where a person intentionally transmits HIV. **LSJ**

\*The authors appeared for the appellant in *Zaburoni v The Queen*.