

HIV on trial

Keynote overview from the AFAO 'Criminalisation and HIV workshop', November 2006

SALLY CAMERON looks at a number of recent criminal cases involving HIV transmission through sexual contact.

The 1980s' hysteria that followed the identification of the HIV virus on Australian shores included the media's preoccupation with an imagined array of dreadful consequences set to befall 'the innocent'. There was the specter of AIDS spread through child care centres, needle bandits, 'syringes in the sand', and HIV positive people who (for some unexplored reason) would wantonly spread the virus as far and wide as possible. New laws were called for.

Fortunately, our governments responded with integrity. Ignoring the hysteria, they drew on the expertise of public health professionals and those communities most affected and impressive public health laws, strategies and programs were developed and implemented, making Australia's response one of the most effective in the world. Some states relied on existing criminal laws while others developed specific laws to cover HIV transmission.

While public health laws may contain a punitive element, they are generally interventions designed to create behaviour change. They reflect a range of escalating powers, with cooperative strategies at the base and more coercive strategies, such as detention, a 'last resort' in circumstances where other behaviour management strategies have not been successful. Most people who come into contact with public health interventions do so because their behaviour is not extreme enough to warrant police/crime type intervention.

Unlike public health laws, criminal laws are essentially about punishing the offender, with the rationale that such punishment will also act as a deterrent to others. The HIV sector has long argued against HIV specific laws (as these increase stigma against positive people), and for crimes involving HIV transmission to be covered by existing or more broadly inclusive criminal laws. This argument is consistent with the UN's *International Guidelines on HIV/AIDS and Human Rights*¹ which state there is no need for any country to have laws targeting people with HIV because existing criminal laws are adequate for people who deliberately or recklessly harm others. While entirely reasonable, this argument has hit some bumps along the way.

In the 1990s, a number of Victorian convictions involving reckless endangerment through exposure to HIV transmission were overturned². Some would argue that the cases failed on 'a technicality' but they can be more accurately understood as reflecting the intricacies inherent in many areas of law and the importance of ensuring that specific criminal laws are able to support cases of HIV transmission where appropriate. The Victorian cases mainly involved men not warning women of the risk of HIV transmission. The court held that in these instances, unprotected sexual intercourse could not constitute endangerment because the risk of transmission in a single encounter was remote (1 in 200 or less)³ and was therefore not an "appreciable" risk of danger.

Similarly, the NSW criminal law designed to address disease transmission including HIV transmission (section 36 of the NSW *Crimes Act* - to maliciously cause another person to contact a grievous bodily disease⁴) has proven unworkable in its first application. The HIV sector has long lobbied for its removal on the grounds that it stigmatizes positive people, and has asked that the *Crimes Act* be amended if necessary to ensure more generic offences can be applied. The law had not been used when the NSW Attorney-General's Department began calling for submissions on its amendment/removal in mid 2005.

1 available at http://data.unaids.org/publications/irc-pub02/jc520-humanrights_en.pdf

2 including *Mutemeri v Cheeseman*, unreported Supreme Court decision of 29 April 1998, *R v D* unreported Supreme Court decision of 1 May 1996, and *R v B*, unreported Supreme Court decision of 3 July 1995.

3 in Helen Watchirs "Public health, criminal law and HIV/AIDS" in *HIV and hepatitis C - policy, discrimination, legal and ethical issues*, Australian Society of HIV Medicine, Sydney, 2005, p. 82.

4 introduced in 1990

In fact, NSW was unable to use the law in a recent prosecution (see below) because the requirement to prove that the accused's actions were carried out 'maliciously' was too onerous, particularly given that he had had sex on other occasions with women who did not contract the virus. The accused, Kanengele-Yondjo, was convicted under a more generic charge of grievous bodily harm.

What is clear from the case law to-date, is that while criminal laws should be generic in their wording (ie. not HIV specific), they must be written to allow for inclusion of HIV transmission in applicable circumstances.

Public Health vs Criminal Laws

Since the 1980s, debates have ensued involving the tension between criminal and public health laws. While the laws significantly differ from state to state, each state's criminal and public health laws co-exist in a kind of uneasy status quo, because either area of law might be drawn on to tackle specific situations where an individual's behaviour has/or is at risk of causing harm to others. The consequences for the individual would differ (in some cases, dramatically) depending of which form of law they encountered.

To date, public health laws and policies have dominated HIV/AIDS management in Australia. This is partly in recognition that HIV education is most effective in, and positive people benefit most from, a supportive enabling environment which includes protections against breaches of confidentiality, discrimination and human rights. Generally it is argued that criminalising HIV transmission:

- discourages people from becoming aware of their status and thereby reduces the likelihood of their accessing testing and treatment
- further stigmatises positive people by placing blame on one party
- reduces the likelihood that positive people will disclose their HIV status in a sexual setting

A reliance on criminal laws about HIV transmission make bad public health policy because they divert attention from the main issue, which is that people with or at risk of HIV must address the way they have sex or inject drugs.

Criminal laws employed

Despite HIV now having over 20 years history in Australia, criminal law prosecutions have been rare. Aside from the failed Victorian cases in the 1990s, there were virtually no cases until very recently, with a spate of cases (oddly enough, one in each of a number of states) in the last 12 months. Why? No one is sure although it appears that prosecutions for HIV transmission have also been on the increase throughout Europe. The recent *Criminalisation of HIV transmission in Europe* report⁵, which aims to be a 'starting point' for understanding the issues and trends involved, reveals that at least 36 of the 45 European countries surveyed had legislation making the actual or potential transmission of HIV a criminal offence. Fourteen of those countries had HIV-specific legislation, while the others applied general criminal law. At least one person has been prosecuted in each of 21 European countries, with more than 130 convictions for exposing or transmitting HIV recorded Europe-wide.⁶ A large majority of convictions (around 90 percent) were applied to alleged transmission during consensual sex.⁷

Review of recent Australian case law

Western Australia

In 2004, Ronald Houghton was convicted of causing grievous bodily harm to a teenage woman by infecting her with HIV. Houghton met his partner via the internet. In 1999, they had a sexual relationship for a four month period. The woman found out she was HIV

5 by The Global Network of People Living with HIV/AIDS Europe and the Terrence Higgins Trust

6 Edwin J. Bernard, "Prosecutions for HIV exposure and transmission on the rise throughout Europe", 18 July 2005 at <http://www.aidsmap.com/en/news/9FFE7EA6-2E16-4376-8FC4-A8E82B6325A2.asp>

7 Edwin J. Bernard, "Prosecutions for HIV exposure and transmission on the rise throughout Europe", 18 July 2005 at <http://www.aidsmap.com/en/news/9FFE7EA6-2E16-4376-8FC4-A8E82B6325A2.asp>

positive after donating blood in January 2000. She confronted Houghton who denied having the virus, even producing false test results.

Houghton gave evidence that when he was diagnosed in early 1990, counselling by medical practitioners about safe sex practices was an important aspect of his treatment. He said that he understood he ought to avoid passing bodily fluids to another and he was told that if he did not ejaculate semen into a sexual partner, thereby reducing the bodily fluid exchange, he would not pass the virus on. He maintained an active sexual life, initially with his then wife, who conceived a child in 1993.⁸ (Both his then wife and the child remained HIV negative). He said that he believed it was safe to have unprotected sex if he did not ejaculate and only wore a condom when he intended to do so.

Houghton was originally convicted of the charge in October 2002 but successfully appealed. The Court of Appeal quashed his conviction and granted a retrial, at which he was (again) convicted of causing grievous bodily harm. Houghton was sentenced to four years and eight months imprisonment.

New South Wales

In December 2005, Stanislas Kanengele-Yondjo was found guilty of two counts of causing grievous bodily harm by knowingly infecting two people with HIV in early 2003. The women, one from Ireland and the other from Germany, testified that Kanengele-Yondjo (originally from Africa) told them he did not have HIV, and pressured and coerced them into having sex without a condom. The Irish woman told police that he convinced her not to use condoms by saying things like “I would never do anything to hurt you. I don’t have anything... because I go back to the Congo so much, I get tested.”⁹ Both women became HIV positive as a result of having unprotected sex with Kanengele-Yondjo.

Kanengele-Yondjo was sentenced to 12 years imprisonment.

Queensland

Only a week after the NSW conviction, Queensland recorded its first ever conviction for ‘transmitting a serious disease with intent’ to injure (R v Reid [2006] QCA 202). Mark Reid (HIV positive since 1987) met his former lover at a gay bar in early 2003 and they had a sexual relationship that lasted approximately two months. Reid’s lover claimed that Reid repeatedly assured him that he was HIV negative. Reid denied he misled his lover, saying he had informed his lover of his positive status and his partner had knowingly taken the risk. Reid blamed the unprotected sex on the couple’s excessive drinking. Reid’s lover contracted HIV as a result of their sexual relationship.

Reid was jailed for 10 and a half years.

South Australia

In January 2006, Andre Chad Parenzee was convicted of endangering the lives of three women and infecting one of them with HIV. Parenzee was diagnosed HIV positive in 1998 and married one of the women shortly after. He was advised by medical staff to discuss his condition with his wife (who did not contract the virus).¹⁰ She has testified that Parenzee told her he was dying of cancer. He deliberately arranged medical appointments relating to his HIV treatment so that she could not accompany him. Parenzee infected his next girlfriend, a mother of two. He testified that he did not tell her he was HIV positive because he was afraid he would lose her. He also admitted that he had previously lied to the court about the third woman (who did not contract the virus), and that he had had sexual intercourse with her.¹¹

⁸ Houghton v The Queen [2004] WASCA 20 (12 February 2004) Supreme Court of Western Australia – Court of Appeal

⁹ Natasha Wallace, ‘Case throws HIV laws into question’, *Sydney Morning Herald*, 9 February 2005 @ <http://www.smh.com.au/news/National/Case-throws-HIV-laws-into-question/2005/02/08/1107625210032.html>

¹⁰ R v PARENZEE [2006] SASC 127, Supreme Court of South Australia

¹¹ “HIV positive man guilty of endangering women”, ABC South Australia Online, 31 January 2006 @ <http://www.abc.net.au/news/items/200601/1559253.htm?sa>

His former wife testified that she was furious when she eventually learned Parenzee had HIV after they had broken up. She said that she asked whether a woman he has since started seeing had HIV. She testifies that Parenzee stated "he couldn't give a shit". Parenzee testified that he didn't tell the women he was HIV positive because he feared rejection. "I had lost friends and close friends by telling them I had HIV and I was afraid of losing her. ... I thought she would turn around and leave me like everyone else. ... I was in love with her at the time."¹²

The case gained some note as a result of the evidence Parenzee's lawyer, Kevin Borick, called which he claimed "casts doubt on mainstream medical opinions about HIV". He said research showed that differences in testing methods between countries means there was an "inherent risk" of a "false reading" for the virus. He will call evidence at sentencing from a group of Perth-based scientists¹³ who will testify that there is no proof HIV is sexually transmitted. Mr Borick said that in light of the so-called new evidence, there was a real issue about whether Parenzee himself had the HIV virus.¹⁴

Parenzee is currently awaiting sentencing, with prosecutors apparently investigating whether he will face further charges of having unprotected sex with a fourth woman.

Victoria

In May 2006, 47-year-old Melbourne man Michael Neal was arrested and charged with 35 offences including attempting to infect others with HIV, rape and possessing child pornography between October 2000 and May 2006. The case has not yet gone to court so the only available information is from media and police reports (and some skepticism is required). The charges relate to five victims, one of who has tested positive to HIV. Another is awaiting test results. Police say Neal was previously in a relationship with one of his victims, who he allegedly drugged and had unprotected sex with for two hours. Police claim Neal had unprotected sex with men between 2000 and 2005, and that the investigation is likely to identify further victims. A police official has stated that Neal boasted about the number of people he had infected with HIV and that he asked another victim to help spread the virus.

This case has highlighted the gap between public health and criminal laws and their administration. A report on ABC radio alleges that the Victorian Department of Human Services received several complaints that Neal was "deliberately spreading HIV" in 2001. The Department reportedly failed to tell police or use its authority to detain Neal.¹⁵ Neal was not interviewed by police until May last year, almost a year after the Department of Human Services issued the first of four orders against him in July 2004. Neal failed to comply with the orders, the most recent of which was issued in April this year, and required him to stick to a curfew and not frequent particular venues.

The case has prompted calls for mandatory reporting of 'risky sex' because, although it is a crime to knowingly infect someone with HIV in Victoria, doctors and government departments are not legally obliged to report allegations of deliberate HIV transmission to police. AIDS organisations have rejected the proposal for a number of reasons including that:

- it might discourage people from testing and/or accessing medical care
- it is not consistent with the message that gay men must take responsible for their own sexual health and not rely on others to do that for them
- it might discourage people having some difficulty practicing consistent safe sex and from seeking assistance from professionals about how they might better manage their sexual practices

¹² "HIV man 'endangered lives'", *Sydney Morning Herald*, 31 January 2006 @ <http://www.smh.com.au/news/national/hiv-man-endangered-lives/2006/01/31/1138590501852.html>

¹³ see The Perth Group's website @ <http://www.theperthgroup.com/>

¹⁴ "SA lawyer seizes on new research in HIV infection case", ABC News Online, 9 February 2006 @ <http://www.abc.net.au/news/newsitems/200602/s1566229.htm>

¹⁵ reported by Ian Gould in "Victorian Govt accused in HIV case" in *Sydney Star Observer*, 25 May 2006 @ <http://www.ssonet.com.au/display.asp?ArticleID=5376>

Heterosexual transmission

The number of criminal prosecutions is small, but it is interesting to note that the majority of cases involve heterosexual transmission. That is perhaps surprising given that HIV is disproportionately concentrated among men who have sex with men. Dr Helen Watchirs, ACT Human Rights Commissioner, suggests that the discrepancy between the number of transmissions and the number of prosecutions may be partly due to the gay community's attempts to internalize the norm of individual responsibility for a safer sex culture, with less of an expectation that a partner discloses HIV status in a casual relationship.¹⁶ Whatever the reason, the cases involving heterosexual transmission involved the accused going to considerable lengths to hide their HIV status and/or pressure the witnesses into having unsafe sex.

Although there is a general acceptance that everyone should be responsible for their health/safety and should practice safe sex, there is a question about the easy applicability of the 'mutual responsibility' model outside the gay community - particularly its relevance within many heterosexual relationships, given gender inequalities, a lower perceived risk and the actual lower degree of risk of HIV transmission. There is the issue that most women do not consider themselves at risk, especially if they are in a long term monogamous relationship. Of course, a pro-criminal law model assumes the criminal law is an effective mechanism to meet the concerns of women, which it frequently is not: the decision whether to lay charges remains with the police, and many women find their experience as 'witness' to be anything but empowering. The fact remains, however, that denying access to criminal prosecution fails to recognise the plight of positive women who have been victimised by men who have transmitted the virus through intention or recklessness.

Male to Male transmission

The two recent cases involving transmission as a result of male to male sex may raise new questions for the gay/HIV communities - questions which will benefit from being addressed by those communities long before the broader population gets a hold of them.

The first case (Reid) involves a positive man who met his partner in a gay bar in Brisbane and began a sexual relationship lasting two months. The court found he had lied about having HIV on a number of occasions and had had unsafe sex with his partner who contracted the virus. The case is notable not only because the circumstances of meeting and commencing a relationship are not atypical of many gay relationships, and also because the evidence came down to the credibility of different versions of conversations that had occurred in the bedroom (or in private at least), and whether the choice to have 'unsafe' sex was really a choice or not.

The second case (Neal) involves a positive man arrested in Melbourne. The accused is alleged to have committed at least 35 offences including rape, attempting to infect others with HIV, and possessing and making child pornography. At least some of these offences are against a man with whom he was in a relationship, and it's reported he boasted about the number of people he had infected with HIV. This case reads like the antithesis of the image of responsible sexual practice which the HIV sector has so successfully promoted to individuals and to the public.

These cases all raise the centrality of criminal (over public health) laws in certain circumstances. To quote Helen Watchirs, "irresponsible behaviour in which harm is intentionally or recklessly inflicted upon others should not be treated exceptionally, just because HIV/AIDS or other diseases are involved".¹⁷ These convictions also mean that after many years of debate about the appropriateness of different criminal law models, (unfortunately) the HIV sector now has a number of examples upon which to base their discussions and further submissions.

¹⁶ Helen Watchirs "Public health, criminal law and HIV/AIDS" in *HIV and hepatitis C – policy, discrimination, legal and ethical issues*, Australian Society of HIV Medicine, Sydney, 2005, p. 71.

¹⁷ Dr Helen Watchirs, *ANCAHRD Position Paper – Reforming the Law to ensure appropriate Responses to the Risk of Disease Transmission*, ANCAHRD, May 2002, p.2.