



## Prosecution of Michael Neal: Appeal Decision

### Background

This briefing paper was prepared by the Australian Federation of AIDS Organisations (AFAO) and reviewed by the Victorian AIDS Council/Gay Men's Health Centre (VAC/GMHC)<sup>1</sup>. AFAO is the national federation for the HIV community response in Australia. VAC/GMHC is a community based agency providing HIV policy, prevention, care and support. VAC/GMHC has had direct experience of prosecutions for HIV exposure/transmission. VAC/GMHC is a member of AFAO.

### Prosecution of Michael Neal

Michael Neal was diagnosed HIV-positive in June 2000, and was advised to practise safe sex and inform his partners of his HIV status. In November 2001, his doctor notified the Department of Human Services (DHS) of his concern that Neal was likely putting others at risk of HIV infection and DHS began a process of case management. Between November 2001 and April 2006, DHS served Neal with three letters and four public health orders however Neal continued to engage in unprotected sex without disclosing his HIV-positive status.

The arrest of Michael Neal in May 2006 triggered enormous media interest as a result of intersecting factors including an alleged breakdown in the health department's management of people who expose others to HIV and the opportunity for an 'exposé' of areas of gay male sexual culture previously unexplored by mainstream media. The fallout was extensive, generating three official reviews relating to the Victorian health department's HIV management processes, and arguably triggering the dismissal of Victoria's Chief Health Officer. It also created a climate of political fear (influenced by intensive media scrutiny and public anger), which has since influenced the process by which prosecutions have been managed in Victoria and in other jurisdictions.

Neal was originally charged with over 100 offences, although many of those were dropped before the trial. At his committal hearing in March 2007, Neal pleaded guilty to 12<sup>2</sup> charges and not guilty to 34 charges. In 2008, following a 39 day trial, Neal was convicted of a total of 26 charges.

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<sup>1</sup> Prepared by Sally Cameron on behalf of the Australian Federation of AIDS Organisations; reviewed by Michael Williams on behalf of the Victorian AIDS Council/Gay Men's Health Centre.

<sup>2</sup> One of which was later 'dropped' – see footnote 3.

### Verdicts from Neal's trial (pre-appeal)

No. of charges laid	Charge	Plea	Verdict
2	Causing another person to be infected with HIV	Not guilty	Not guilty
14	Attempting to cause another person to be infected with HIV	Not guilty	8 x Guilty
14	Reckless conduct endangering a person	Not guilty	3 x Guilty
1	Administering a drug for the purposes of sexual penetration	Not guilty	Guilty
1	Procuring sexual penetration by fraud	Not guilty	Guilty
2	Rape	Not guilty	Guilty
1	Use a drug of dependence	Guilty	Guilty
2	Introducing a drug of dependence into the body of another	Guilty	Guilty
1	Trafficking in a drug of dependence	Guilty	Guilty
3	Possession of child pornography	Guilty	Guilty
2	Indecent act with a child	Guilty	Guilty
2	Producing child pornography	1 x Guilty <sup>3</sup>	1 x Guilty

Neal was sentenced to 19 years imprisonment, with a non-parole period of 14 years.

### The Appeal Decision: Outcomes

The appeal did not consider new evidence or revisit the credibility of witness testimony. Instead, it considered technical aspects of the trial judge's directions to the jury. Given the lack of clarity regarding criminal law's application to transmission of HIV across all Australian jurisdictions, some of the Court's reasoning may be relevant in other jurisdictions.

**Verdict:** For Neal, the appeal resulted in a number of convictions being quashed<sup>4</sup>:

- two counts of rape (against two individuals)
- two counts of administering a drug for the purposes of sexual penetration (associated with the above rape charges)
- three counts of reckless endangering a person

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<sup>3</sup> Neal originally pleaded guilty to both charges but was rearranged on one count, pleaded not guilty and was acquitted

<sup>4</sup> A summary of charges and verdicts across committal hearing, trial and appeal is at Attachment A.

Given the technical aspect of the appeal, and that many of the grounds of appeal relate to the way the case was argued and directions by the judge, the Prosecution may retry Neal on the charges for which convictions were quashed. It is not yet known whether that will occur.

**Sentencing:** The issue of sentencing was reopened. The Court considered Neal's submissions that 'the individual sentences, total effective sentence and non-parole period were manifestly excessive for a first time offender of Neal's age and ill-health'. The Court found, however, that although this was the first time Neal had been convicted of any such offence, his offending had occurred over a period of years and offences occurring later in that period warranted greater punishment. It also considered his time in prison to be 'particularly burdensome' as a result of his HIV infection but found that 'given the risks of re-offending ... and the consequent need for community protection [no] less than normal non-parole period is warranted'.

Neal's sentence was reduced from 19 years (non-parole period of 14 years) to 12 years (non-parole period of 9 years).

**Precedent/Policy:** What is most apparent from the Neal decision is that criminal law is technical, complex and far removed from the way people understand and negotiate risk taking during sex. It is also far removed from the approach taken during the construction and implementation of HIV prevention education and public health interventions.

In terms of legal precedent, some factors considered in the appeal are particular to Victorian criminal law. The court did, however, consider a range of issues relating to consent, risk taking and awareness of infectivity which may have precedent value outside Victoria. These include findings that, in relation to particular charges:

- The Crown must prove that an accused believes him/herself to be infectious;
- a person may consent to risk of HIV infection, i.e. to the risk of harm resulting from consensual sexual conduct (but not to the risk of 'intentional HIV infection');
- the risk of harm from unprotected anal intercourse<sup>5</sup> represents an 'appreciable risk' of HIV infection;
- the risk of harm from unprotected anal intercourse is sufficiently immediate and connected with the offence of 'intend to infect'. As long as a person hopes to infect another and believes there is some chance of doing so, it does not matter that the likelihood of infection is 'improbable'.

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## The Appeal Decision: Summary<sup>6</sup>

The appeal was based on the following discrete grounds:

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<sup>5</sup> estimated at between 1 in 33 and 1 in 200 per episode

<sup>6</sup> The full appeal decision, 'Neal v The Queen [2011] VSCA 172 (15 June 2011) is available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2011/172.html>.

### **1. Severance: Separating the rape charges**

Neal's counsel argued that the judge had erred by refusing to 'sever' charges of administering a drug of dependence for the purpose of sexual penetration and rape of one person from a charge of rape of another person, as those two incidents were separate 'in time and circumstance'. The Court disagreed, finding the two counts of rape (one by penis, the other using an object) were cross-admissible because in both cases Neal used his relationship with the complainant to take advantage of the complainant's inability to refuse consent as a result of the effects of crystal meth.

Neal's lawyers also argued that the sexual assault charges prejudiced consideration of all other charges which related to consensual sexual conduct, and that they should be tried separately. The Court disagreed, finding that the two rape charges related to two individuals to whom other charges related (causing to be infected with HIV, attempting to cause HIV infection, and reckless conduct endangering the person) and bespoke were indicative of the nature of Neal's relationship to the individual.

### **2. Neal's belief about infectivity (Charge of Attempting to Infect)**

Neal's lawyers argued that the judge erred in his directions to the jury regarding the charges of attempting to cause a person to be infected with HIV. They argued that the jury had to be satisfied that Neal believed he was infectious but instead the judge twice incorrectly directed the jury to establish that Neal believed 'that he may be infectious'. This argument by Neal's lawyers raises the question of Neal's beliefs, and importantly also locates issues of viral load and infectivity as central to the case.<sup>7</sup>

The Crown attempted to argue that in all 14 charges of attempting to cause another person to be infected, Neal was infected with HIV and was aware of his status, and that the jury must have appreciated that he knew he was infectious. The defence argued that in eight of those 14 cases, Neal had a low or undetectable viral load and therefore the Crown had not established that he believed he was capable of infecting others<sup>8</sup>. The Court found that the defence applied only to five of the eight counts, as it was 'not at issue' that Neal knew he was capable of infecting sexual partners in the other three cases.

### **3. Risk of transmission 'immediately connected to the offence' (Charge of Attempting to Infect)**

Neal's lawyers argued that the judge had erred in his directions to the jury and had consequently precluded their consideration of whether, by having unprotected anal sex, Neal had engaged in behaviour which was immediately connected with the offence of attempting to cause a person to be infected with HIV. The Court disagreed, holding that this argument was based on a misconception that an act must be likely to produce an intended consequence before it may be regarded as immediately and not remotely connected with the offence. Instead, it must only be sufficiently

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<sup>7</sup> Although it had seemed likely viral load would have been argued during the initial trial, that could not previously be confirmed due to the court having been closed and full suppression of the trial records.

<sup>8</sup> This is an important point as it relates to many individuals' belief that undetectable viral load precludes HIV transmission. It suggests that in some instances, that belief may preclude criminal culpability although importantly, only in relation to specific criminal charges.

connected with an intended consequence if it is physically or otherwise 'proximate' to the intended consequence, 'even if it is very unlikely to produce the intended consequence'. The judgment then gives an example of a person shooting at a police car tyre from a great distance, even though hitting the tyre is unlikely 'or a thousand to one'.

Further, the judgment states that:

short of injecting HIV into the bloodstream of a complainant, it is difficult to conceive of anything more immediately connected with infecting a complainant with HIV than an HIV infected man having unprotected anal intercourse with a complainant, especially when the HIV infected man is fitted with a Prince Albert piercing. As there was an appreciable risk that the complainant would become infected, the act was immediately connected with the commission of the offence.

The judgment then emphasises the key point for consideration was not the likelihood of infection but the intention to infect:

As to the element that the applicant intend [sic] to infect a complainant with HIV, it must be established that the applicant's purpose was to produce the consequence or result that the complainant be infected with HIV. Provided the applicant hoped to infect a complainant with HIV and believed that there was some chance he might be able to do so, it matters not that the applicant may have believed it was improbable that having unprotected anal intercourse with the complainant would result in the complainant becoming infected with HIV.

#### **4. Consent to risk (Charge of Reckless Conduct)**

The defence argued that the judge erred by failing to direct the jury that the Crown had to establish that it was not reasonably possible that the 'victim' was aware of the risk of HIV infection and had voluntarily assumed the risk, or that Neal had believed they had consent to the risk. Neal's lawyers argued that the Crown had to show that it was not reasonably possible that the complainant was aware of the risk of HIV and voluntarily assumed to run it (or that Neal had believed they had consent to the risk) and that the judge failed to direct the jury of the Crown's obligation. Their Honours considered whether it is possible under UK and Australian law to consent to harm.

The Court also examined English, Canadian and New Zealand cases regarding criminal provisions against 'consensual taking of risks' in HIV exposure/transmission cases. The Court found that no previous Australian case had ruled on the matter and added that:

it has not been thought necessary to criminalise those who recklessly take or accept the risks associated with consensual sexual intercourse. To do so would have ramifications which extend well beyond the criminal law to considerations of social and public health policy and is more appropriately a matter for Parliament.

The Court decided that 'informed consent is capable of providing a defence to a charge of recklessly endangering a person with HIV through unprotected sexual intercourse, as long as the consent is communicated to the offender'. It follows then that, 'the Crown must prove beyond reasonable

doubt that the complainant did not give informed consent to the risk or that the accused did not honestly believe that the complainant had given informed consent to the risk’.

The Court ruled that the trial judge should have directed the jury to exclude beyond a reasonable doubt:

- a) The possibility that the complainant knew that [Neal] was infected with HIV and consented to the sexual intercourse with [Neal] knowing that it might result in the complainant becoming infected with HIV; and
- b) The possibility that [Neal] honestly believed that the complainant knew that [Neal] was infected with HIV and consented to the sexual intercourse with [Neal] knowing that it might result in the complainant becoming infected with HIV.

Importantly, the Court differentiated between consent to risk in relation to reckless conduct (which can be a defence) and consent in relation to ‘intentional infection of a complainant with HIV’ (which can never be a defence).

#### **5. Belief in consent (Charge of Rape)**

Their Honours found that the trial judge erred by instructing the jury that even if Neal believed the complainant was consenting, but the jury believes beyond reasonable doubt that Neal was aware of the possibility that the complainant was not consenting, he may nonetheless be found guilty of rape. Those instructions reflect notes from the *Victorian Charge Book* which have since been changed as the result of a 2010 case which held that, if an accused believes a person had consented, rape cannot be established.

#### **6. Not giving thought to consent (Charge of Rape)**

The Court ruled that the judge erred in directing the jury to consider that rape would be established if at the time of penetration Neal ‘was not giving any thought to whether the complainant was or might not be consenting’. The law from which that instruction was drawn commenced in January 2008, some time after the offences were alleged to have occurred.

#### **7. Unsafe and unsatisfactory**

The appeal argued that given the evidence, it was not possible for the jury to be satisfied beyond reasonable doubt that Neal was guilty of the offences charged because:

- The evidence of the complainants was unsatisfactory. The judges rejected that argument, saying it was up to the jury to assess the credibility and reliability of the witnesses.
- The risk of unprotected anal sex was so low that it ‘was not ‘immediately and not remotely connected with the commission of the offence’. The court found that the probability of infection was not relevant, as the focus of the charge was whether Neal had acted with the purpose or intention of infecting the person (see above at 2.).
- The risk of infection was so low that there was not an appreciable risk of infection with HIV. The Court relied on expert scientific evidence that the risk of infection was between one in

33 and one in 200 from a single act of anal intercourse, and that risk could increase with the number of occasions of anal sex. The Court found that did represent an ‘appreciable risk’.

- In relation to the charges of ‘reckless conduct endangering life’, it was not clear that Neal believed it probable he was exposing the complainants to the appreciable risk of HIV infection. That argument failed based on evidence from healthcare practitioners who had previously treated Neal and advised him of the risk of transmission from unprotected sex.
- In relation to charges of rape, drug taking prior to intercourse with the two complainants with whom he had a continuing sexual relationships meant that it was impossible to exclude beyond reasonable doubt that Neal believed the complainants consented to intercourse which was alleged rape. The Court rejected this argument.

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## Attachment A:

### Summary of charges at hearing and upon appeal

No. of charges laid	Charge	Plea	Initial Verdict	Appeal Verdict
2	Causing another person to be infected with HIV	Not guilty	Not guilty	Not guilty
14	Attempting to cause another person to be infected with HIV	14 Not guilty	8 Guilty	3 x Guilty
14	Reckless conduct endangering a person	14 Not guilty	3 Guilty	Not Guilty
1	Administering a drug for the purposes of sexual penetration	Not guilty	Guilty	Not Guilty
1	Procuring sexual penetration by fraud	Not guilty	Guilty	1 x Guilty
2	Rape	Not guilty	Guilty	Not Guilty
1	Possession of a drug of dependence	Guilty		
1	Use a drug of dependence	Guilty		
1	Introducing a drug of dependence into the body of another	Guilty		
1	Trafficking in a drug of dependence	Guilty		
3	Possession of child pornography	Guilty		
2	Indecent act with a child	Guilty		
2	Producing child pornography	1 Guilty		