



Application of Australian Criminal Laws in Cases of HIV Sexual Transmission and Exposure

Key Points:

1. **The use of Australian criminal laws to prosecute people in relation to sexual transmission of HIV is inconsistent with UNAIDS policy guidance.**
2. **The Commonwealth should consult with State and Territory Attorneys-General to identify mechanisms to ensure criminal prosecutions are undertaken only when a person has intended to transmit HIV.**
3. **Jurisdictional prosecutorial guidelines should be developed to clearly distinguish between the intention to transmit HIV and the act of having unprotected sex.**

Background and context

- Public health responses to HIV have been central to Australia's response to HIV. Criminal prosecutions for HIV sexual transmission undermine HIV public health strategies by weakening public health messages of shared responsibility for sexual health. Criminal prosecutions for HIV transmission suggest individuals can rely on others to disclose their HIV-positive status (although status is frequently unknown) instead of acting to protect their own and their partners' sexual health (such as by using condoms). Prosecutions also can discourage disclosure of HIV status in intimate relationships, resultant stigmatisation making people fear their HIV status may become 'a legal matter'.
- Australia's *Seventh National HIV Strategy 2014-2017* notes that criminalisation 'impacts on priority populations through perpetuating isolation and marginalisation and limiting their ability to seek information, support and health care. It is important that the health sector enters into a respectful dialogue with other sectors to discuss impacts of wider decisions on the health of priority groups.'
- The UN Political Declaration 2011 commits Australia 'to review, as appropriate, laws and policies that adversely affect the successful, effective and equitable delivery of HIV prevention, treatment, care and support'.
- HIV continues to attract stigma that is disproportionate to its actual impact on individuals and on the Australian community. Stakeholders must continue to advocate for multi-faceted, human rights based HIV prevention strategies which recognise HIV as a virus requiring a public health response, and which do not fuel stigma.
- Criminal prosecutions create fear of government 'surveillance' of individuals' sexual behaviours. They also undermine confidence in healthcare practitioners' capacity to provide confidential and non-judgemental therapeutic services, and create barriers to accessing health services for people with HIV and others among key communities affected by HIV – including gay men and other men who have sex with men, people who use drugs, sex workers, people from countries with high HIV prevalence, and Aboriginal and Torres Strait Islander people.
- Prosecutions for HIV exposure and transmission send contradictory and confusing messages. Some individuals have been found 'guilty' of crimes when HIV has not been transmitted and others 'not guilty' when HIV has been transmitted. Scientific knowledge of transmission risk (including viral load) and actual transmission (based on phylogenetic analysis) is not widely understood and is contested among scientists themselves.
- The financial and human resources spent on policing, prosecuting and defending those involved in HIV-related criminal trials has had no discernible beneficial impact on Australia's HIV response. Such funds would be better directed towards strategies to increase the effectiveness of HIV prevention efforts and to addressing emerging and enduring issues affecting people living with HIV.