

# **Criminal Prosecution of HIV Transmission**



## **AFAO Position**

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## **Background**

The emergence of HIV/AIDS during the 1980s elicited a legal response from governments seeking to prevent transmission of the virus.

Australia's comparatively successful response to HIV/AIDS has been achieved primarily through effective health education and engagement with affected communities. This approach is underpinned by a legislative framework which has sought to address discrimination against people living with HIV while also using public health measures and, in extreme cases, criminal sanctions to respond to cases of HIV transmission or exposure which involve negligence, recklessness, or deliberate attempts to harm.

Public health laws are designed to effect behaviour change amongst those who knowingly expose others to the risk of HIV transmission. They typically involve a series of escalating powers, beginning with cooperative strategies such as counselling, before progressing towards coercive and punitive measures such as court orders and detention. Criminal sanctions serve a different purpose and are designed to punish offenders for a proven offence.

In Australia both public health and criminal law fall under the jurisdiction of the States/Territories. While each State and Territory has public health and criminal responses to HIV these vary according to jurisdiction. Some states, for instance, have developed criminal legislation specifically relating to transmission of HIV while others have sought to address transmission of HIV within existing legal frameworks through offences such as reckless endangerment or grievous bodily harm.

Throughout the 1980s and 1990s, criminal prosecutions relating to HIV transmission were rare. In recent years, however, reflecting an international trend, there has been an increase in such

cases<sup>1</sup>. Australian cases have involved various charges in different states. For example, in 2005 Stanislaus Kanengele-Yondjo was sentenced to 12 years gaol for two counts of grievous bodily harm in NSW, while in Queensland Mark Reid was sentenced to ten years jail for 'transmitting a serious disease with intent'.

## Public Policy

AFAO and its member organisations favour the use of public health interventions over criminal sanctions in responding to HIV/AIDS, wherever this is possible and appropriate. This is consistent with guiding principles expressed in the UNAIDS policy options paper, '*Criminal Law, Public Health and HIV Transmission*'<sup>2</sup>. We believe that prevention of HIV transmission should be the primary goal of public policy in forming responses to HIV/AIDS. While AFAO recognises the rights of victims of crime to seek justice, these rights need to be balanced against the public health policy objective of reducing HIV transmission.

There is no evidence that the presence of laws which criminalise HIV transmission function to prevent or deter HIV transmission<sup>3</sup>. Further, AFAO is concerned that prosecution of individuals may, in fact, have a negative effect on public health by increasing the stigma and discrimination faced by people living with HIV/AIDS and discouraging individuals to undergo HIV testing or to engage with health services. AFAO is also concerned by the potential for random or selective use of criminal sanctions.

AFAO and its member organisations do not support the institution of criminal offences specifically relating to transmission of HIV/AIDS or other diseases. Where a person with HIV/AIDS deliberately or recklessly inflicts harm on another by exposing them to the risk of transmission, existing criminal sanctions can be applied.

Instead, AFAO urges the continued use of evidence-based public health interventions to combat HIV/AIDS, with coercive measures employed only as a last resort. Engagement with individuals and communities affected by HIV is essential to prevent onward transmission and to this end, AFAO urges continued provision of appropriate counselling and support services for all people living with HIV/AIDS.

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<sup>1</sup> Bernard, E. (2005) 'Prosecutions for HIV exposure and transmission on the rise throughout Europe', *Aidsmap News*, 18 July 2005

<sup>2</sup> UNAIDS (2002) '*Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*', Best Practice Collection, Geneva, Switzerland.

<sup>3</sup> Lazzarini, Z et al. (2005) 'Do criminal laws promote disclosure of HIV status to sexual partners?', Conference Proceedings, Pan Pacific Regional HIV/AIDS Conference, 2005, p. 83.

## **AFAO Position**

The Australian Federation of AIDS Organisations (AFAO) is the national federation for the HIV community response. We provide leadership, coordination and support to the national policy, advocacy and health promotion response to HIV/AIDS.

- Evidence shows that the vast majority of people with the Human Immunodeficiency Virus (HIV) are extremely responsible and take all appropriate precautions to prevent others from being infected with HIV.
- AFAO believes that it is everybody's responsibility to ensure that HIV and other sexually transmissible infections (STIs) are not passed on and that both HIV positive and negative people must take responsibility for protecting themselves, as well as their sexual partners, from HIV and STIs. Assumptions about another person's HIV status are not a sound basis for decisions about safe sex or injecting.
- AFAO believes that all people, including those with HIV, have a right to enjoy a full and satisfying sex life.
- We believe that people, including those with HIV, need to be able to easily access support and counselling to assist them with HIV prevention issues. These services must be provided in a safe and confidential environment.
- AFAO is concerned that sensationalist publicity about criminal prosecutions relating to HIV transmission have the potential to undermine public health interventions by increasing stigma and discrimination for all people with HIV. This can have a negative impact on people with HIV who may be less likely to come forward to discuss or seek help if they have difficulty maintaining condom use. Criminal prosecution is not an effective public health intervention. Public health interventions should be used to prevent HIV transmission wherever possible.
- We believe that people with HIV should not be expected to disclose their HIV status to potential sexual partners if they have safe sex - i.e. they use condoms and water based lubricant during penetrative sex or do not engage in penetrative sexual activity. (We acknowledge that in NSW the law requires people with HIV to disclose their status to sexual partners, even if they use condoms). If the condom breaks or slips off during sex, then people with HIV should advise their partner of their serostatus in order that post-exposure prophylaxis might be accessed as soon as possible. In such circumstances we do not believe that the potential threat of criminal penalty is either useful or equitable.
- AFAO believes that criminal prosecution may be appropriate in situations where a person deliberately misrepresents their serostatus and/or deliberately or recklessly exposes others to the risk of HIV transmission. AFAO does not condone the behaviour of HIV positive people who behave in an irresponsible or unethical way in relation to HIV transmission.
- AFAO supports the rights of victims of crime, which include access to appropriate counselling and support services.