

# Criminal Transmission of HIV – A Guide for Legal Practitioners

FOREWORD  
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# **CRIMINAL TRANSMISSION OF HIV – A GUIDE FOR LEGAL PRACTITIONERS**

## **FOREWORD**

**THE HON. MICHAEL KIRBY AC CMG\***

In the mid-1980s, soon after the human immuno-deficiency virus (HIV) had been identified, I attended, and addressed, an international conference on the subject in Paris. I declared that, in addition to HIV, a new virus had been detected that was sweeping the world. It was HIL. Highly ineffective laws. Even the President of the French Republic, who was in the audience, smiled at the remark. However, the rash of criminal laws and prosecutions, designed to punish persons convicted of transmitting HIV to others, is no smiling matter. The adoption of a large number of such laws in the past five years or so, in countries as different as Australia and Zimbabwe, has added a new factor to the HIV epidemic which is attracting a great deal of attention from those who have the responsibility of monitoring and responding to it. These include local health and criminal justice officials, but also international civil servants and experts working in the primary United Nations agencies with responsibilities in this area: UNAIDS (the UN joint program); WHO (the World Health Organisation); and UNDP (the United Nations Development Program).

Early in this epidemic, it was realised that, in the absence of a cure that would expel the virus from the body of those infected and a vaccine that would prevent infection in the first place, the most effective strategy available to combat HIV was, paradoxically, to protect people who were infected, or at risk of infection, so as to promote behaviour modification. The countries that have embraced these strategies, including Australia, have witnessed success by adopting novel initiatives: condom supply, needle exchange, decriminalisation of consensual adult sex work; removal of criminal offences addressed to same-sex activities; anti-discrimination laws and public education. Virtually from the start, and under differing governments, Australia

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\*Formerly Justice of the High Court of Australia (1996-200(9)).

has adopted these strategies. The result has been considerable success in reducing the rates of sero-conversion.

The intervening decades have not produced a cure for, or vaccine against, HIV or AIDS. But two developments stand out. One positive and the other negative. On the positive side, at about the turn of the century, combinations of anti-retroviral drugs were found to control the deadly progression of HIV in most patients. Although available in Australia to reduce bodily levels of HIV virtually to zero, such drugs were not at first available worldwide. The creation of the Global Fund and initiatives of UNAIDS and WHO have led to the spread of availability of these drugs, despite their high cost. The consequence has been dramatic for people under treatment.

The negative developments have included a rising anger in society at the continuance and cost of the epidemic; increases, even in Australia, in sero-conversions amongst people who wrongly think 'the epidemic is over'; and the enactment of specific criminal laws to enhance the punishment of those who intentionally infect others with HIV.

This book is addressed to the last of those and is concerned with the response of criminal law to persons who intentionally infect others with HIV. It addresses to the last-stated development, but its subject can only be fully understood and evaluated, against the background of the history of this epidemic to date and the enormous toll it has taken on populations and individuals in all parts of the world, including Australia.

Civil implications of HIV came before me twice, during my service on the High Court of Australia. In *IW v. City of Perth*<sup>1</sup> and *X v. The Commonwealth*<sup>2</sup>, elements of irrationality were evident in the conduct examined in each matter. The criminal transmission of HIV came before the Court on a special leave application against the

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<sup>1</sup> (1998) 191 CLR 1.

<sup>2</sup> (199) 200 CLR 1.

conviction entered in the case of the accused in *R v. Reid*<sup>3</sup>. Special leave was refused.

*Reid's case* illustrates some of the problems explored in this book. It is all very well to propound global and national strategies for combating the spread of HIV on a macro basis. But where there is a suggestion of wilful, deliberate or completely reckless transmission of HIV to a sexual partner, infection with HIV is such a life-changing event that people get angry at such conduct. They look for retribution and punishment. As this book shows, the criminal law provides a number of general and specific offences that can be deployed, depending on the circumstances.

Unfortunately, a glance at the cases recorded in this book tends to indicate that particular offenders seemed to be singled out disproportionately. Especially foreigners who infect local women. Particularly those who come from different lands and alien cultures. Prosecutors have their own discretions to ensure the principled deployment of the criminal law. But once a case is brought, a court can only apply the law as it is enacted. It cannot stay the proceedings or postpone them simply because it might believe that criminal prosecutions are ineffective or even counter-productive as a public health strategy to promote behaviour modification.

This book is addressed to the law in New South Wales. Criminal and public health laws differ significantly across the several jurisdictions of Australia. In the face of the gradual apparent increase in such prosecutions, it is very useful to have a handy text that identifies the epidemiological background; lists the offences and their ingredients; notes relevant cases; and suggests issues that a lawyer and the client must address.

I congratulate those who have been working in this epidemic since it first arrived in Australia. As this book demonstrates, some of them, for a very long time, have been lawyers. HIV/AIDS is not an ordinary medical condition. It is an extraordinary global pandemic with many social and legal implications, some of which are explored in these pages.

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<sup>3</sup> (2006) 162 ACrimR 377, SLR

MICHAEL KIRBY

Sydney  
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