

2410

THE CRIMINAL
TRANSMISSION OF
HIV IN AUSTRALIA:
LEGALITY,
MORALITY AND
REALITY

NAPWA Monograph 2009
Sally Cameron and John Rule (Eds)
Foreword

NAPWA MONOGRAPH 2009

THE CRIMINAL TRANSMISSION OF HIV IN AUSTRALIA: LEGALITY, MORALITY AND REALITY

SALLY CAMERON AND JOHN RULE (Eds)

FOREWORD

The Hon. Michael Kirby AC CMG

This monograph addresses a subject that has engaged the national and international community for some time; but with growing urgency in recent years. It concerns the operation of the criminal law in the case of the deliberate or reckless transmission of the human immuno-deficiency virus (HIV), generally during consensual adult sexual relations.

This subject has assumed significance in Australia in recent years because of a number of highly publicised cases involving allegedly intentional transmission of HIV. When such cases get into the hands of tabloid media, they are presented as everyone's nightmare: an infected person with a special capacity to spread an extremely dangerous virus to innocent victims whose lives are then changed dramatically (either actually or potentially) by such wrongful and dangerous action on the part of the perpetrator.

As the chapters in this book indicate, in Australia, the invocation of the criminal law, with the objective of altering human conduct so as to reduce the risk of transmission of HIV from infected persons to the uninfected, will only ever be of tiny significance in the control of the

epidemic as a whole. Nevertheless, prosecutions do occur. A question is: should they?

The prosecutions are based upon penal statutory provisions. And they are sometimes attended by high profile, emotional reporting. A feature of a number of cases is that they have involved African or other foreign men, gay men with several partners, and often heterosexual sex, sometimes in the circumstances of commercial sex work. In comparison with the numbers of persons infected with HIV overall, the fraction of those prosecuted is extremely small. The possibility that an individual might be prosecuted for transmitting the virus is so slight and remote that it appears unlikely that that risk (and the imposition of criminal punishment) would have played a large part (or any part) in the decision-making by the sexual partners at the moment of their decisions to engage in unsafe sexual conduct.

In the early years of the HIV epidemic in Australia, such was the impact of the epidemic upon gay men, so many were the friends who became infected and so frequent were the funerals that we attended, that an urgent message of the need for responsible self-protection arose. The strategies designed to promote prevention of the spread of HIV were concentrated, initially, largely upon the sector of men who have sex with men (MSM). However, strategies were also taken designed to promote safety amongst injecting drug users (IDUs), commercial sex workers (CSWs) and their clients, and other specially at-risk groups. The consequence was not only a significant drop in the number of persons becoming infected with HIV in Australia, it was also a large community movement to promote generally safer sexual activity and to discourage,

or diminish, unsafe activities through which the virus could spread to individuals and, by them, to entire populations.

The basic need for widespread education and enlightenment that lay at the heart of the endeavours to promote safer sexual and other behaviour at that time in Australia emphasised self-empowerment and mutual responsibility. The epidemic has taught, particularly sexual minorities, that it was not good enough, or safe enough, to blame others for the transmission of the virus. If the transmission were to be reduced, it was essential for each and every person, particularly those at special risk, to be familiar with the risks; to be acquainted with the risky modes of transmission; and to take personal responsibility to ensure that precautions were taken aimed at eliminating or minimising the chances of transmission. These precautions might include:

- * The proper use of condoms, especially for penetrative sexual activity;
- * The switch to, and promotion of, non-penetrative sexual behaviour;
- * The empowerment of CSWs so that they would insist upon the use of condoms and safer sexual practices by their clients;
- * The invariable use of sterile needles by IDUs;
- * The promotion of knowledge about the virus, particularly amongst the cohort of new entrants into the categories of MSM, CSWs, and IDUs;
- * The promotion of all of the above across the board throughout the entire Australian community by educational programmes so as to bring the messages home to the heterosexual majority as well as to minority groups; and

- * The enactment of laws designed to reduce stigma, alienation and ignorance, and to promote empowerment, knowledge, self-protection and thus, the protection of others.

The foregoing strategies undoubtedly had a very large effect on the rates of sero-conversion to HIV in Australia. A similar pattern was detected in other countries of the developed world. Occasional prosecution for general or specific offences arising out of HIV transmission would occur. But, substantially, they were a side-show in the large enterprise of containing the virus and preventing, or discouraging, its spread.

In more recent years, in Australia, there has been some evidence, in particular States, of a falling away from the foregoing strategies. Uncomfortable indications have emerged that the tried and true strategies were no longer working, or working as well, amongst those persons who were at special risk of acquiring HIV. Doubtless, there are many causes for those interruptions in the previously steady decline of HIV infections. Amongst the possible causes for the variations have been:

- * A decline in the alarm level, previously reinforced by the death of friends and attendance at their funerals, which the earlier stages of the epidemic presented to the MSM community in particular;
- * After the advent of anti-retroviral drugs (ARVs), an increase in the belief in some quarters, erroneous though it may be, that HIV was “cured” and that acquiring the virus was no longer as serious an outcome as it had previously been;
- * A reduction in the educational messages and, in some cases, in the spending of public moneys to promote awareness of HIV and

of its still gravely serious consequences for those who become infected; and

- * The presentation of “horror stories” by the tabloid media designed to promote alarm, by exceptional cases of irresponsible behaviour, resulting in demands for criminal sanctions to restore the previous attitudes providing protection of oneself and of others in identified risky behaviour.

As Professor John de Wit and his colleagues note in Chapter 7 of his work, the present period has been marked by naive and ignorant reliance by sexual partners upon assertions (or the appearance) of healthiness on the part of an infected person as justifying the abandonment of safer sexual practices. These developments, and the resumption of “bare-backing” (and even cases of ‘gifting’ HIV) may have contributed to an increase in sero-conversion in recent times by conduct that would have specially alarmed those who lived through the first phase of the HIV epidemic. But it also alarmed politicians, media and sections of the general public.

Is the proper response to these new problems the introduction of new criminal laws targeting deliberately unsafe sexual and other practices? Is it likely that such laws would have a salutary effect on the epidemic? Would an occasional high-profile conviction, on the front page of the tabloids, impact on the mentality of those who expose themselves and others to unsafe behaviour? Or is the proper response to such conduct an insistence that, as at the start, everyone engaging in sexual behaviour, injecting drug use and other potentially risky activities must protect themselves and always take responsibility for doing so?

Views on these subjects differ in our community. Indeed, they differ both in the general community and in the gay community which, from the start, has felt the brunt of HIV on its members. Whereas there are some in the community of MSM who complain that criminal law is a very blunt instrument of no significance from an epidemiological point of view, there are others who have reached a different conclusion. They know, or remember too vividly, the impact which HIV has had over time on those who are infected. They recognise the life-changing character of the infection. They are aware of the side effects of the ARVs. Some are aware of the uncertain potential of such drugs to have long-term effectiveness. Moreover, they are conscious of the expense and inconvenience of such therapies. They therefore regard at least deliberate or reckless infection of others with HIV as such a seriously wrongful act that it calls for a response from the community as a whole. Such a response is normally expressed in terms of the criminal law.

Whilst the criminal law may be heavy-handed, it is intended to reflect the moral judgment of society that deliberately or recklessly spreading a life-threatening infection should not be ignored but should be punished if the prosecution can convince a judge or jury, beyond reasonable doubt, that what has occurred was done with the necessary intent or with reckless indifference to the grave consequences.

These are the debates that are recounted in these pages. Not only are they important debates for Australia. They are of great significance for the entire world.

From the point of view of epidemic control, the best steps that could be taken in many of the countries which are on the front line of the HIV

epidemic (especially in Africa, Latin America and South-East Asia) would be to *repeal* the old colonial laws against MSM and many of the more recent harsh laws against IDUs and the traditional statutes targeting CSWs. However, a glance at the recent legislative responses of developing countries indicates that most of them are not willing to take such useful measures. In 41 of the 53 countries of the Commonwealth of Nations, formerly the British Empire, the old anti-sodomy laws remain resolutely in place. It is these countries that refuse to remove the old laws. Instead, they salve their consciences by *enacting* new laws to criminalise and penalise those who are found responsible of infecting another person with HIV. On a global level, this wave of criminalisation is not only an ineffective strategy. It is positively undesirable because it often distracts the countries that initiate such laws from the strategies that might help empower those at risk and promote preventative conduct to diminish the scale of the epidemic.

In short, from an epidemiological viewpoint, what is needed in most countries is the *repeal* of criminal laws on MSM, CSWs and IDUs. Instead such countries are *enacting* new laws on criminal transmission. In this, they are moving in what is generally the wrong direction. So much as has been said by UNAIDS, by WHO, by UNDP and other agencies of the United Nations. However, securing *repeal* of criminal laws is difficult for social, religious and political reasons. *Enacting* ineffective laws, targeted at HIV transmission, is so much easier. It looks to be doing something, however ineffective that something may turn out to be.

This, then, is the debate considered in this monograph. It is one of liveliest debates in the international response to HIV at this time. I

congratulate the National Association of People Living with HIV (NAPWA) on the publication of this work. NAPWA has collected knowledgeable and informed commentators who have a great awareness of the epidemic in Australia. Without exception, the chapters are thoughtful, balanced and informative. I hope that they will be read in Australia. Indeed, I hope that they will be available overseas to bring enlightenment that is the first step in an effective response to the epidemic.

It remains true as Jonathan Mann taught in the earliest years of HIV, that paradoxically, the best way of fighting the HIV/AIDS epidemic is by empowerment of the people who are most at risk. Until we have a cure and a vaccine, knowledge and education are the best ways of preventing the spread of HIV. The role of criminal law is much more confined. Whether there is a limited role and what it should be is the proper subject of informed debate. And that is the debate that is recounted in these pages.



Sydney

1 October 2009.