

(Ill-Legal) Lust is a battle field: HIV risk, socio-sexuality and criminality

Dr Annette Houlihan
Griffith University
Email : absoulution@iprimus.com.au

Law and Society Association Australia and New Zealand (LSAANZ) Conference 2008
'W(h)ither Human Rights'
10-12 December
University of Sydney

Abstract

This paper examines the criminalisation of HIV infection. HIV transmission offences exist in all Australian states and territories, but the bulk of prosecutions have occurred in Victoria. This paper outlines criminal legal responses to the virus in that state with an overview of the legislation and case law. Victoria has several HIV specific and non-specific offences which may be applied to situations of HIV infection risk. It is the HIV non-specific offences which have been successfully used to prosecute HIV infection risks.

The case law outlines several instances where HIV positive bodies have been charged with offences for placing others at risk of HIV infection. These charges have been applied in several cases regardless of whether the complainants seroconvert. Those charged have been same-sex desiring men or African-born men who engaged in sex with Caucasian women. There are marked differences in the sentences which have been applied to these defendants, which are based on the sexuality of the defendant and complainant. This demonstrates the heterosexist and Eurocentric character of the performance of these laws. These offences do not operate in isolation to sociality, rather this area of law embodies many cultural panics about the Other. HIV transmission offences signal socio-legal panics about sexuality, race/ethnicity and disease, situating certain bodies at greater risk of crimino-legal punishment.

Keywords – HIV, transmission, criminal law, reckless endangerment, Victoria.

Introduction

This paper discusses HIV transmission offences in Australia. Since the identification of the virus in the 1980s, HIV has become a sign of criminality in common law jurisdictions (Weait 2007: 1-36). In Australia, HIV was inserted into criminal and health laws during the 1980s and 1990s. Both of these legal systems define HIV sexual infection as a problem which needs to be addressed through punishment, surveillance and/or confinement of the 'diseased' sexual body (Gibson 1997: 6-9). Although HIV infection may be addressed through public health law, most cases have been processed by the criminal justice system (Hall 1998: 8). The criminal laws applicable to HIV transmission in Australia are quite vast (Godwin, Hamblin, Patterson and Buchanan 1993: 35-62). This paper focuses on criminal offences and prosecutions within the state of Victoria.¹ It will outline the case law and discuss the socio-legal implications of HIV prosecutions. It argues that HIV is a health issue, rather than a crime and that criminal law is ill-suited to HIV infection.

Criminalisation of HIV infection is based on legal misinterpretation of the complex issues of HIV infection and consensual sexuality, but it also includes cultural narratives of culpability based on race and sexuality. The paper will discuss the selectivity of HIV transmission prosecutions according to race and sexuality. It will provide a socio-legal explanation of the over-supply of racially and sexually Other offenders. HIV bodies are punished, not just because of their health status, but due to a conglomerate difference of HIV serodiscordance, interracial and same-sex desire. The HIV criminal body is a projection of cultural, medical and legal panics about miscegenation and queer sexuality.

HIV Transmission Offences in Victoria

HIV infection has been prosecuted in various states and territories. However, most prosecutions have occurred in Victoria (Houlihan 2007: 27-59), where there are two types of offences which address HIV. Firstly, there is an offence that deals solely with HIV transmission. This is a HIV specific offence. Secondly, there are offences that have been amended to be inclusive of HIV within their definitions. These offences are not solely applicable to HIV transmission and are HIV non-specific offences. They reconstruct pre-existing offences against the person to include HIV infectivity as a harm/injury to the crimino-legally defined body. Both the HIV specific and non-specific offences are problematic because they introduce discriminatory and regulatory responses around Other bodies. They are examples of the ways criminal law has embraced social and moral panics around a blood-borne virus.

The HIV specific offence in the Victorian *Crimes Act 1958* is s19A. It states:

s 19A(1) A person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is guilty of an indictable offence.

Penalty: Level 2 imprisonment (25 years maximum)

(2) In sub-section (1) very serious disease means HIV within the meaning of the *Health Act 1958*.

This offence was enacted by an amendment to the *Crimes Act 1958* (Vic) in May 1993. It was created in response to a perceived 'growing trend' in needle-bandit crimes at that time (Magnusson 1996: 397). This offence has not been successfully used to prosecute HIV transmission. This is probably because the mens rea of intent is extremely difficult to apply to cases of HIV and because most HIV infections in Australia are through sex. This offence requires that the complainant contracts HIV and the prosecution must also prove that the defendant intentionally caused this infection. It is difficult to prove beyond reasonable doubt that a person intentionally caused someone to contract HIV.

In Victoria, prosecutions for HIV transmission have been dealt with through the criminal legal category of reckless endangerment. HIV transmission crimes have been prosecuted using ss22 and 23 of the *Crimes Act 1958* (Vic), which was amended in 1985 in relation to offences of reckless endangerment, commencing operation on 24 March 1986. This amendment was designed to create a general endangerment offence to replace several offences which were previously found within it. It should be noted that although HIV transmission has been successfully prosecuted using ss22 and 23, these offences were not created or enacted in response to the issue of HIV. These offences are more inclusive and have reckless as their mens rea, which has a less stringent test. For example, s22 provides:

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence.
Penalty: Level 5 Imprisonment (10 years maximum).

This section is the more serious of the two offences and refers to placing a person in danger of death, rather than injury, with a maximum penalty of 10 years imprisonment. The other offence is very similar. It provides:

s23 A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence.
Penalty: Level 6 imprisonment (5 years maximum).

These offences have analogous characteristics and applicability, especially when applied to the abstract legal notion of HIV transmission. This means that both offences were considered interchangeably within HIV transmission case law. This occurred until one of those charged, Samuel Mutemeri, appealed the crimino-legal definition of HIV as death. This case is discussed below.

Overview of the case law

The first criminal charges for HIV transmission in Victoria occurred in November 1992, prior to the enactment of s19A. This case was prosecuted in the Melbourne Magistrates Court in May 1993 using reckless endangerment offences (Ceresa and Lewis 1993: 5). The charges related to a male defendant who had unprotected sex with a woman, but failed to disclose his HIV status. The complainant tested HIV positive in July 1992. The defendant pleaded not guilty to charges under s23 and was ordered to stand trial in the

County Court (Pegler 1993: 4). The case was not prosecuted because the defendant died from an HIV-related illness before the trial commenced (Ward 1994: 4). Since that case, many of the charges have related to the mere risk of HIV.

Early prosecutions of HIV transmission risks amalgamated ss22 and 23. For example, in *R v B* the defendant was charged under ss22 and 23 of the *Crimes Act*. In that case, two male prisoners engaged in sex during April 1994. The complainant said he consented to oral and anal intercourse and that no condoms were used. He said the defendant informed him that he was HIV negative. The complainant later learnt that B was HIV positive. The case does not state whether the complainant seroconverted. The accused acknowledged oral sex had occurred, but denied anal penetration and ejaculation. This case was unsuccessfully prosecuted. Teague J decided that for the offence in s22 to be proven there should be an ‘appreciable danger of death’, rather than death being a likely or probable consequence. Furthermore, he discussed the difficulties of measuring what an ‘appreciable danger of death’ might be, offering no solution other than that it did not cover the circumstances where death is a remote or mere possibility.

The next case prosecuted was *R v D*. The defendant was a 28-year-old man charged with having unprotected sex with two women in January 1994 (*The Age* 1994: 3). He tested HIV positive in August 1993. The charges related to sexual relationships he had with two female complainants during 1993. Neither of the women tested HIV positive. He was alleged to have engaged in unprotected sexual intercourse with the two women on four separate occasions. He was charged with several counts under ss22 and 23. He claimed that he used condoms with both women, but they claimed he had not used condoms on all occasions. This case was also unsuccessfully prosecuted, with similar arguments being staged around the low probability of viral transmission in the sexual activities involved. The defendant was acquitted on all counts.

As mentioned above, Samuel Mutemeri was convicted of 12 charges under s22 at the Magistrates’ Court of Victoria in December 1997. He was sentenced to 6 months imprisonment. However, the conviction was successfully appealed to the Supreme Court of Victoria in April 1998 (*Mutemeri v Cheesman*). The defendant was an African man who had unprotected sex with a Caucasian woman during March 1997. She did not contract HIV. The appeal was allowed because Mandie J concluded that the magistrate had been wrong in determining, without evidence, that the appellant’s conduct exposed Ms AB to an ‘appreciable risk’ of death, ‘something more than a “mere possibility”’ (*Mutemeri v Cheesman*: 492). Mandie J was not satisfied that the magistrate could find beyond reasonable doubt that Ms AB had been placed in danger of death. The conviction in the Magistrates’ Court was quashed and the charges were dismissed.

In the appeal, there were questions as to whether the correct test of recklessness was applied and whether the appellant foresaw that the probable consequences of his actions would be to place the complainant in danger of death. The consequence of the appeal, which considered both ss22 and 23, was that HIV sexual transmission was removed from s22 (danger of death) and placed within s23 (danger of serious injury).

Following the prosecution of Samuel Mutemeri, the next HIV transmission prosecution was *DPP v F* at the County Court at Morwell on 6 March 1998. The defendant was found guilty of 10 counts under s22 through unprotected oral and anal intercourse with three complainants, two of whom seroconverted. In the case, the defendant was described as a 52 year-old “‘closet” bi-sexual’ with four children. He was sentenced to 8 years imprisonment. Two of the complainants in the case were intellectually disabled. The defendant committed suicide following imprisonment, denying the possibility for an appeal (Ward 1998: 6).

Following the Mutemeri appeal, the first successful prosecution under s23 was *R v Dirckze* on 13 August 1999. Dirckze, who contracted HIV from a male lover, pleaded guilty to one count. The complainant was his wife. They had unprotected sexual intercourse during the period of March 1994 to January 1997. He used condoms on some, but not all, of the occasions that they had sex. She did not seroconvert and their child was also HIV negative. Dirckze was sentenced to four years and two months imprisonment.

In the Victorian County Court in May 2001, an HIV positive man received a 15-month suspended sentence after he pleaded guilty to one count under s23 (*R v Thomas*). The complainant met the defendant at gay nightclub in November 1990 and they formed a sexual relationship. The accused was diagnosed HIV positive in July 1990 and in 1991 the complainant tested HIV positive. Evidence was given that the complainant had a history of injecting drug use and the defence argued his seroconversion was the result of drug use rather than from his sexual relationship with the defendant.

This is an overview of the Victorian cases.² In these cases, the level of harm appears to be dependant on the (moral) innocence of the victim, rather than on scientific calculations of HIV risk. A suspended sentence was given to a gay male defendant whose ‘victim’ was a gay male who had a history of illicit drug use. The complainant was HIV seropositive. A ‘bisexual’ male, whose heterosexual wife did not seroconvert, was sentenced to four years and eight months jail. Another ‘bisexual’ defendant, who has sex with intellectually disabled bodies who became HIV positive, received an 8 year sentence. An African man received a 6 month sentence. Several heterosexual Caucasian men escaped convictions. There is great disparity between the punishments imposed on HIV bodies, which seems to be based on race and sexuality.

HIV, sexuality, race and criminal law

Consensual sexuality appears as crime within current and historical laws, through such offences as those associated with homosexuality (Dalton 2007: 83-106), HIV transmission and sadomasochism (Weait 2008: 63-84 and Weait 2005: 97-122). Criminal law mostly speaks about sexuality as aberrance, through interpretations and translations of a moralistic jurisprudential model of socio-sexuality which is heteronormative and procreative (Dalton 2007: 83-106 and Hubbard 2001: 51-71). When desires and pleasures are spoken about in criminal law, they most often represent deviance, anomaly and difference.

The criminalisation of HIV also carries cultural narratives of HIV infection culpability, in which certain bodies are deemed to be vectors of disease. Since the sociological and scientific inception of HIV, a cultural tale of 'transmission' has become folklore. This tale describes HIV infectivity as a hydraulic and unidirectional passage of transmission from identified HIV 'carriers' into the 'general' community. In this tale, the culpable villains are deemed to be same-sex desiring men and Africans based on early epidemiological narratives (Patton 1985, Sontag 2001 and Treichler 1999). The innocent victims of these risky HIV bodies are deemed to be heterosexual Caucasians (Grimwade 1998: 56-77). This tale continues to be translated as a (legal) truth through criminal prosecutions for HIV transmission. Criminal law assumes a responsibility to control and manage the virus for the greater good of the community. HIV is legally defined as a modern day evil with innocent victims (who are projected through the imagery of 'community') who need protection.

HIV and male same-sex desire are uncomfortable elements within law and society. It was the homo/bisexual body that was initially most troubling for medicine, society and law because this body was originally identified with HIV/AIDS. 'Homosexuality' is most often posited as the highest risk factor for HIV infection because 'anal sex' is positioned as the sexual 'real' between men. Yet in Western countries, men who have sex with men often play out their desires according to rules of safer sex. Further, sex between men is not always phallic-anal penetrative intercourse (Patton 1997: 245). Gay/bisexual men are statistical figures of HIV, the Other from where disease comes from.

Race has a similar history in HIV transmission narratives, whereby Africa is seen as a primary source of HIV. Globally, African bodies have received significant attention regarding the impact HIV has had on local and international communities. This knowledge extends to African diasporas in western countries which have increasingly linked Africans with HIV risks (Bhatt and Lee 1997: 203-10). Africa and Africans have become powerful symbols in cultural, health and media discourses about rising rates of HIV infection. In countries like Canada and Australia, African men have increasingly been positioned as symbols of HIV risks, especially within criminal law when they engage in interracial serodiscordant sexuality (Miller 2005: 31-50 and Newman and Persson 2008: 632-46).

These processes produce the meaning that consenting bodies are unequal within law according to differences in race/ethnicity and sexuality. These categories identify and mark specific HIV bodies as socially, criminally and medically pathological, but also as responsible for HIV infection. Within the narratives of crime, sexual bodies are judged according to their HIV status, their race/ethnicity and their sexuality. HIV transmission offences embody panics about the Other.

The origins of HIV were set within the identification, by the US Centre for Disease Control (CDC), of the 4 Hs: Haitians, Homosexuals, Haemophiliacs and Heroin addicts (Donovan 1995: 114, Farmer 1995: 4-5, Patton 1990: 17, 65-6 and 83 and Petty 2005: 77). These four identity categories were linked to HIV 'transmission' by science and medicine and dispersed within socio-cultural myths about the virus. Early accounts

somehow set the virus within ‘foreign’ identities, the vectors of disease, the Other/s from which this monster had emerged and spread. Because these identities are socially foreign characters who brought the virus from another space, it is ‘their’ fault that this virus exists in ‘our’ world. All consensual sexuality is played out within multiple possibilities, meanings and understandings, yet law compacts ‘sex’ to create HIV sexual transmission crimes. Within criminal case law, it is the identity of Other (bi-sexual, homosexual, African) that has been cast as the prototypical HIV transmission offender.

Conclusion

The prosecutorial landscape of HIV transmission offences details narratives of reckless vectors that are responsible for bringing HIV into the heterosexual, Caucasian community. Folklores about HIV transmission inform law. HIV crimes are staged around risk (as a type of legal harm) to extend control and governance of HIV bodies. Prosecutorial success seems dependant on the socio-sexual difference of the offender and the socio-sexual sameness of the ‘victim’ to Eurocentric, heteronormative ideals. Punishment is calculated around normative ideals about sexual relationships which promote monogamy, heterosexuality and intra-racial Eurocentric desirability.

Criminalisation of HIV ‘transmission’ creates particular ways to speak about HIV infectivity. As Worth, Patton and Goldstein (2005: 3) outline:

Examining criminalization practices allows us to explore the myriad issues that intersect around the growing number of HIV-seropositive citizens in nations around the globe: immigration and xenophobia; the widening social gap between seropositive and seronegative members of affected communities; gender and race as they shape the experience of AIDS; the role of HIV education and support; the relation of AIDS organizations to their communities and the state; and the impact of culture on health decision making; moral regulation, and the policing of sexuality, public health, and the judicial delineation of specific populations. All of these are woven through HIV/AIDS criminalization cases.

They highlight the impetus of the law to create blame, fear and punishment of HIV bodies. They reject the notion of culpability, stating that this ‘calculation is too simplistic and denies the actual, real-life context. Further, the need to find the vector of infection demonstrates our human obsession with origins and causation’ (Worth, Patton and Goldstein 2005: 4). Social issues heavily impact on how we understand and interpret HIV infection. The courts create templates of causality and blame that are based around social mythologies, rather than medical or social scientific data. Criminalising HIV bodies may placate a disgruntled lover and temporarily relieve social anxieties about HIV risk, but placing HIV bodies within the criminal justice system impinges on the human rights of those living with the virus. Prosecution involves financial burdens and psychological stress, along with the time involved defending charges. For those who plead guilty, a prison sentence is possible, where access to HIV medications and prophylaxis are limited.

Cases

DPP v F (Unreported Victorian County Court, McInerney J, 6 March 1998).

R v B (Unreported, Supreme Court of Victoria, Criminal Division, Teague J, 3 July 1995).

R v D (Unreported, Supreme Court of Victoria, Hampel J, 1 May 1996)

R v Dirckze (Unreported Victorian County Court, Anderson J, 12 August 1999).

R v Thomas (Unreported Victorian County Court, Pilgrim J, 4 May 2001).

Mutemeri v Cheesman [1998] 4 VR 484.

References

Books/articles

Bhatt, C. and Lee, R. (1997) 'Official Knowledge: The Free Market, Identity Formation, Sexuality and Race in the HIV/AIDS Sector' pp. 198-234 in J. Oppenheimer and H. Reckitt (ed.s) *Acting on AIDS: Sex, Drugs and Politics*, London: Serpent's Tail.

Ceresa, M. and Lewis, J. (1993) 'Man on HIV Infection Charge', *The Age* Melbourne, 21 May: 5.

Dalton, D. (2007) 'Genealogy of the Australian Homocriminal Subject: A Study of Two Explanatory Models of Deviance' *Griffith Law Review* 16(1): 83-106.

Donovan, R. (1995) 'The Plaguing of the Faggot, The Leparising of a Whore: Criminally Cultured AIDS Bodies and Carrier Laws', *Journal of Australian Studies* 43: 110-24.

Farmer, P. (1995) 'Culture, Poverty, and the Dynamics of HIV Transmission in Rural Haiti' pp. 3-28 in H. ten Brummelhuis and G. Herdt (ed.s) *Culture and Sexual Risk: Anthropological Perspectives on AIDS* (1995) pp 4-5.

Gibson, S. (1997) 'Knowingly and Recklessly: The Policy and Practice of Managing People who Place Others at Risk of HIV infection' *HIV/AIDS Legal Link* 8(3) September: 6-9.

Godwin, J., Hamblin, J., Patterson, D. and Buchanan, D. (1993) *Australian HIV/AIDS Legal Guide*, 2nd edn. Sydney: The Federation Press.

Grimwade, C. (1998) 'Reckless Sex: The Discursive Containment of Gender, Sexuality and HIV/AIDS', pp. 56-76 in A. Howe (ed.) *Sexed Crime in the News* Sydney: The Federation Press

Hall, A. (1998) 'Risky business: Criminalising HIV Transmission', *HIV/AIDS Legal Link* 9(4): 8.

Author's Name Omitted (2007) *(Ill-legal) Lust is a Battle Field: HIV Risk, Socio-Sexuality and Criminality*, Unpublished doctoral thesis, Brisbane: Griffith University.

Hubbard, P. (2001) 'Sex Zones: Intimacy, Citizenship and Public Space', *Sexualities* 4(1): 51-71.

Magnusson, R (1997) 'Australian HIV/AIDS legislation: A review for doctors', *Internal Medicine Journal* 26(3) 396-406.

Miller, J. (2005) 'African Immigrant Damnation Syndrome: The Case of Charles Ssenyonga' *Sexuality Research and Social Policy Journal NSRC* 2 (2): 31-50.

Patton, C. (1985) *Sex and Germs: The Politics of AIDS*, Boston: South End Press.

Patton, C. (1990) *Inventing AIDS* New York: Routledge.

Patton, C. (1997) 'Queer Peregrinations' pp. 235-53 in J. Oppenheimer and H. Reckitt (ed.s) *Acting on AIDS: Sex, Drugs and Politics*, London: Serpent's Tail.

Pegler, P. (1993) 'HIV Man to Stand Trial for Reckless Sex', *The Age* Melbourne 1 July: 4.

Persson, A. and Newman, C. (2008) 'Making monsters: heterosexuality, crime and race in recent Western media coverage of HIV' *Sociology of Health and Illness* 30(4): 632-46.

Petty, M. (2005) 'Social Responses to HIV: Fearing the Outlaw' *Sexuality Research and Social Policy Journal NSRC* 2 (2): 77-88.

Sontag, S. (2002) *Illness as Metaphor and AIDS as Its Metaphor*, London: Penguin.

Treichler, P. (1999) *How to Have Theory in an Epidemic: Cultural Chronicles of AIDS*, Durham: Duke University Press.

Ward, C. (1994) 'HIV-Positive Man Charged with "Reckless Conduct" after Unprotected Sex', *HIV/AIDS Legal Link* 9 (2) June: 4.

Ward, C. (1998) 'Convictions for HIV Offences followed by Suicide' (1998) *HIV/AIDS Legal Link* 9(2) June: 6.

Weait, M. (2005) 'Harm, Consent and the Limits of Privacy' *Feminist Legal Studies* 13: 97-122.

Weait, M. (2007) *Intimacy and Responsibility: The Criminalisation of HIV Transmission* Abington: Routledge-Cavendish.

Weait, M. (2008) 'Sadomasochism and the Law' pp. 63-84 in D. Langdrige and M. Barker (ed.s) *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* Houndmills: Palgrave Macmillan.

Worth, H, Patton, C. and Goldstein, D. (2005) 'Introduction to Reckless Vectors: The Infecting "Other" in HIV/AIDS Law' *Sexuality Research and Social Policy Journal NSRC* 2(2): 3-14.

Legislation

Crimes Act 1958 (Vic) s19A

Crimes Act 1958 (Vic) s22

Crimes Act 1958 (Vic) s23

* I wish to acknowledge Rosemary Hunter, Derek Dalton and William MacNeil for their generous and informed feedback on my earlier research. I also wish to thank the two anonymous referees for their beneficial suggestions.

¹ This paper is based on my doctoral thesis research and includes all cases prosecuted in Victoria before 2007, which is when I submitted my thesis for examination.

² There have been other cases in Victoria and Australia since I completed my research with very similar characteristics. Those charged have all been same-sex desiring men or African interracial desiring men.