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Submission to the International Commission of Jurists: Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV

31 March 2019

The National Association of People with HIV Australia welcome the opportunity to make this submission supporting the International Commission of Jurists' development of principles to address the detrimental impact on health, equality and human rights of the criminalisation of conduct related to sexuality, reproduction, drug use and HIV. While recognising that HIV criminalisation regularly intersects with other areas with which we and our members are concerned (particularly issues related to sex work, drug use, migration and Indigenous rights), this submission focuses on the criminalisation of HIV non-disclosure, exposure and transmission, commonly referred to as HIV criminalisation.

What is your interest/the interest of your organization in this work? What specific issues do you work on in relation to the proposed topics covered?

The National Association of People with HIV Australia (NAPWHA) is Australia's peak non-government organisation representing community-based groups of people living with HIV (PLHIV). NAPWHA's membership of national networks and state-based organisations reflects the diverse make-up of the HIV-positive community and enables NAPWHA to confidently represent the positive voice in Australia. NAPWHA provides advocacy, policy, health promotion, effective representation, and outreach on a national level; delivers a range of health and education initiatives promoting the highest quality standard of care for HIV-positive people; and contributes to clinical and social research into the incidence, impact and management of HIV.

NAPWHA has had a long-term commitment to address structural discrimination against people living with HIV, particularly as it undermines the effectiveness of Australia's HIV response. We and our members have undertaken monitoring and analysis of HIV criminalisation cases, organised community meetings to discuss and mobilise around the issue, and have published reports and commentary. Our work has also included advocacy to ensure the inclusion of HIV criminalisation on the national agenda; particularly fighting for its inclusion in successive national HIV strategies and pushing for better communication mechanisms between health and justice arms of government.

The majority of HIV criminalisation cases in Australia have related to alleged non-disclosure of HIV before consensual sex [1], and these form the focus of this submission.

[1] With a small number of cases associated with sexual assault or child sexual assault which are not addressed herein.

In your view, what concepts (human rights, moral/ethical, legal, good governance, harm etc) are helpful in understanding whether the use of criminal law is justified in the context of the select areas? Are there some areas or conduct that should never be criminalized? On what basis?

NAPWHA is greatly concerned about HIV criminalisation in Australia because such cases undermine the national HIV response. They also run counter to legal principles which should be upheld by criminal law.

Public Health/Good Governance

Australia's HIV response is regarded as a model of best practice, with a national HIV incidence lower than many comparable high-income countries.[2] Australia is on track to achieve UNAIDS 90–90–90 HIV treatment targets, with energies now directed to achieving the UNAIDS Fast-Track 95–95–95 global targets to end the HIV epidemic.[3] The national HIV response is driven by public health systems which recognise: human rights; access and equity; a commitment to evidence-based policy and programs; and the centrality of the meaningful involvement of people living with HIV.

Against that backdrop, HIV-related criminal prosecutions make no sense. Prosecutions occur at a rate of approximately one or two each year. Although low in number, those figures have consistently placed Australia in the top 20 countries in the world when considered as a per capita percentage of diagnosed people living with HIV. Although the National HIV Strategy acknowledges criminalisation as problematic, "perpetuating isolation and marginalisation and limiting [a priority population's] ability to seek information, support and health care", prosecutions continue, in part, as a result of the siloing of responsibility in the respective areas of health and justice.

HIV criminalisation cases frequently generate media that is inaccurate and vitriolic in nature. That media completely undermines health promotion efforts to 'normalise' HIV as a means to decrease stigma and discrimination which, in turn, enables disclosure before risk events, increases uptake of testing and treatment, and improves the lives of people living with HIV. Further, law and order rhetoric used by media becomes embedded in community discourse about the state's scrutiny of private, consensual sex - driving people away from health services where testing, treatment and front-line prevention services are enacted.

What is particularly disappointing in the Australian context, is that prosecutions occur while there is an alternative, formal public health management system in place to address cases where a person living with HIV may be engaging in behaviours that put others at risk.[4] In those unusual instances when a person's risk taking behaviour may be of concern, there are a series of interventions which may be applied by health care practitioners or health department staff, with the least restrictive measures to be adopted first. Such measures may include individualised and intensive case management responding to health and other social service needs, escalating (in a tiny number of cases) to court orders restricting particular

[2] The Kirby Institute. (2000–2017). HIV, viral hepatitis and sexually transmissible infections in Australia, Annual Surveillance Reports 2007–2017. University of New South Wales (UNSW) Sydney: Sydney.
[3] Australian Government. Eighth National HIV Strategy. 2018-2020. Commonwealth of Australia: Canberra.
[4] Guided by the *National Guidelines for the Management of People with HIV Who Place Others at Risk,* Department of Health and Ageing, 2008.

behaviours (individuals can even be deprived of their liberty on health related grounds without the need to involve criminal sanctions). Very few people require such intervention but importantly, this process has consistently evaluated as cost effective and as delivering effective modification of individual's risk taking behaviour.

Human Rights

Human rights should inform the use of criminal laws, particularly whether the use of criminal law is justified. HIV criminalisation undermines the human rights of people living with HIV and affected communities despite being a guiding principle in the National HIV Strategy:

> People with HIV have a right to participate fully in society, without experience of stigma or discrimination. They have the same rights to comprehensive and appropriate information and health care as other members of the community, including the right to the confidential and sensitive handling of personal and medical information.

HIV criminalisation undermines the human rights of people living with HIV, creating an environment where people resent the state's intrusion into the private sphere, including scrutinising the way people conduct their sexual relationships. Contrary to our efforts to communicate a message that community and government are working in partnership to address HIV, HIV criminalisation decreases trust in HIV services, driving people away from effective public health measures. As outlined above, the media generated by HIV criminalisation cases generates appalling media which increases stigma and discrimination. Those who are prosecuted experience loss of privacy, loss of freedom and, sometimes, deportation.

HIV criminalisation cases generally relate to alleged HIV non-disclosure before sex but otherwise encompass diverse circumstances, including 'exposure' cases where HIV is not transmitted. In an environment where there are approximately 1000 cases of HIV transmission each year, and many times that number of risk events, it is difficult to identify why a tiny minority of risk events are deemed 'criminal' when the many thousands of others are not. Of particular concern, is the high proportion of HIV criminalisation cases against people from marginalised populations, particularly African migrants, sex workers and people who are transgender. The profile of accused is completely at odds with the demographics of Australia's HIV epidemic suggesting the likelihood of criminal prosecution is directly influenced by endemic discrimination. This practice both reflects and entrenches discrimination against vulnerable populations. It also suggests that criminal law is not being applied in a manner that is fair or consistent.

Legal Principles

Australian criminal laws come under the jurisdiction of its eight states, with HIV criminalisation cases usually tried under general criminal laws of assault.[5] NAPWHA is concerned that lack of knowledge about, and stigma relating to, HIV is undermining basic principles informing the practice of criminal law. Of

[5] Australia's last HIV-specific law, Section 19A of Victoria's *Crimes Act* (Intentionally causing a very serious disease [HIV]), was repealed in 2014 although numerous other laws had also been applied in HIV criminalisation cases in that state.

particular concern is the interpretation of 'intent', the interpretation of 'harm', and the way these two concepts relate to each other.

HIV criminalisation cases have tended to consider the actions of a person living with HIV, and to then conflate the desire to have sex with an intention to transmit HIV. Explorations of both *mens rea* or 'intent' (as named in specific laws) have relied on a definition of intention which might be best summarised as the accused's awareness that HIV transmission was possible. Only one case has alleged that an accused hoped to transmit HIV, and that case failed on that particular charge[6]. Similarly, section 35 of NSW's *Crimes Act* was repealed after the state found it would be unlikely to be able to prove a charge of 'Maliciously inflict grievous bodily harm' in relation to HIV transmission.

This definition of intent (knowledge that a harm may result) is applied to acts of condomless sex in the same way it might be applied to an assault with a weapon such as a knife or a gun, however, those acts are fundamentally different in nature. Even a punch requires a person to form an intention to cause some injury with some likelihood of hurt or injury resulting. The recent High Court decision, *Zaburoni v The Queen,* has improved legal precedent by finding that proof of intention requires proof that at the time of the risk event, the accused has the transmission of HIV 'as a purpose'. This finding is particularly useful given the court found that the fact the accused had lied numerous times about his HIV-positive status is not enough to infer any intentions to transmit HIV.[7] This finding, which should limit the use of criminal laws against people living with HIV is welcomed by NAPWHA although it remains to be seen how this precedent will be applied in future cases.

Further, the application of this understanding of HIV transmission misrepresents the reality of sexual intercourse and places the blame for HIV transmission solely on the HIV positive partner. The principle of shared responsibility adopted by successive Australian Governments and Departments of Health clearly articulates that HIV positive and HIV negative people are both responsible for their own sexual health and for the sexual health of others. Where HIV transmission through sex occurs, it is generally the result of the consenting acts of two people. However, in common law jurisdictions such as Australia, it is usually the case that the criminal law prevents consent to the risk of 'harm' above a certain level. This undermines the principle of shared responsibility by allowing people to consent to sex but preventing them from consenting to any of the risks that always accompany sex, such as the risk of transmission of an STI. The criminal law has developed certain exceptions to this rule in other areas, such as the ability to consent to the risk of foreseeable harms in cases of surgery or implied consent to possible sporting injury. An exception to the obvious risks accompanying sex has yet to be developed with the result that a person with HIV is always vulnerable to the risk of prosecution if they engage in sex with a person who is HIV-negative.

NAPWHA also remains concerned about the way outmoded perceptions of HIV are influencing the courts. It was precisely this concern that prompted a group of eminent scientists and physicians to author the *Sexual transmission of HIV and the law: An Australian medical consensus statement* (the Australian Medical Consensus Statement).[8] In that statement, the authors note:

> Most people recently infected with HIV are able to commence simple treatment providing them a normal and healthy life expectancy, largely comparable to their HIV-negative peers. Among people who have been diagnosed and are receiving treatment, HIV is rarely life-

[6] *Neal v The Queen* [2011] VSCA 172; 32 VR 454

[7] *Zaburoni v The Queen* [2016] HCA 12 6 April 2016 B69/2015

[8] Boyd M et al. Sexual transmission of HIV and the law: an Australian medical consensus statement. Med J Aust 2016; 205 (9): 409-412.

> threatening. People with HIV can conceive children with negligible risk to their partner and low risk to their child.

A similar statement outlining the limited 'harms' of HIV for those who can access treatment has now been authored by 20 of the world's leading HIV-expert scientists, with endorsement by more than 70 leading scientists from all over the world.[9] This point is particularly important because effective treatment is available to all Australian residents living HIV at marginal cost, and should certainly be made available immediately to any person who comes into contact with the criminal justice system, including as a witness. On this point, it is relevant to point out that post-exposure prophylaxis is also available to anyone who identifies they may have engaged in behaviours that include a risk of HIV transmission within 72 hours of the event.

Rather than argue that HIV infection does not cause harm, this paper argues that the idea of HIV is so loaded with fear and drama to those who work outside the HIV health response, that consequently criminal law treats HIV differently from other diseases which cause 'comparable' harms (which are not generally ever the subject of a prosecution). It is both surprising and disappointing that HIV related prosecutions appear to be increasing at a time when the potential harm resulting from HIV infection has significantly decreased.

The outmoded perception of harm influences whether charges are laid but it is also relevant as it intersects with the risk of transmission associated with an event. The Australian Medical Consensus Statement notes that:

> Scientific evidence shows the risk of HIV transmission during sex between partners of different HIV serostatus can be low, negligible or too low to quantify, even when the HIV-positive partner is not taking effective antiretroviral therapy, depending on the nature of the sexual act, the viral load of the partner with HIV, and whether a condom or pre-exposure prophylaxis is employed to reduce risk.

That is, a single act of unprotected sex is unlikely to result in HIV transmission. While degrees of risk and interpretations of harm are important, more attention is required to the *intersection* of harm and risk which informs whether cases of HIV exposure merit criminal law attention. As the severity of a possible harm decreases; the risk of harm must increase or criminal prosecution is not warranted.

Health and policing departments are also at cross-purposes in the management of potential HIV transmission. As noted above, under the National Guidelines for the Management of People with HIV who Place Others at Risk, health departments are required, to intervene at the earliest opportunity to prevent future HIV transmissions. However, when the criminal law is involved because police suspect possible HIV transmission, a suspect may be placed under surveillance, with police only intervening once they have established evidence of risk behaviours that satisfies a criminal law standard: failing to intervene earlier to prevent risk behaviours and possible transmission occurring.

Finally, the routine absence of an intention to do harm, the low to absent possibility of HIV transmission associated with sexual behaviours, and the limited harms resulting from HIV transmission beg the question of proportionality: whether the use of criminal law is an appropriate and proportional response to the behaviours of the accused person living with HIV. The consequences of prosecution are enormous, whether or not a person is convicted. If convicted, they regularly include incarceration or deportation.

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[9] Barré-Sinoussi, F et al. Expert consensus statement on the science of HIV in the context of criminal law. Journal of the International AIDS Society, 2018.

NAPWHA submits that criminal law is not fit for purposes in cases where a person has put another at risk of HIV. That should remain the domain of the state's public health response.

Ethical/Moral Arguments

HIV is highly stigmatised which results in heightened arguments about the ethics and morality of behaviours associated with HIV transmission. In particularly, it is often presumed that people living with HIV should disclose their status before sex. Unfortunately, stigma makes disclosure extremely difficult, and indeed dangerous, for many people living with HIV. As noted in the Australasian Society for HIV Medicine's legal guide:

> It is important to realise that disclosure of HIV-status to a potential or current sexual partner may be very difficult as doing so not only enables the possibility of rejection (sexually or more broadly in terms of relationship) but also the loss of confidentiality of highly sensitive, personal health information. Further, it can be intimidating and exhausting to acknowledge and then address others' concerns about an HIV diagnosis associated with illness (and even death). Unfortunately, to date the law has paid little regard to these issues.[10]

Although people may want to know a potential partner's HIV status (as well as information about other health issues, current or former relationships, existing children, history of violence, issues of addiction, and many other factors which could influence whether sexual acts occur) HIV disclosure should not be mandated by law. Firstly, we know that mandating disclosure does not work, does not increase disclosure rates, and does not decrease risk-taking behaviours. Secondly, NAPWHA is actively working towards creating an environment in which people living with HIV can more easily disclose their HIV status. Finally, NAPWHA does not endorse a position in which people living with HIV must become responsible for all people's sexual health. As outlined in Australia's National HIV Strategy, "individuals and communities share responsibility to prevent themselves and others from becoming infected and to inform efforts that address education and support needs". That position is taken on ethical grounds but also because the practice of shared responsibility for (sexual) health is a far more effective HIV prevention strategy.

What would your topline recommendations be to States on the use of criminal law in the areas you work in?

NAPWHA's topline recommendation to Australian state and territory government is to cease using the criminal law to address cases of HIV non-disclosure, exposure or transmission.

How do you think a set of principles will help support the work you do? How will you use them?

A set of principles authored by esteemed jurists will be very helpful in our efforts to engage with state governments, particularly influencing offices of public prosecutions to reconsider the practice of prosecution people living with HIV for alleged HIV non-disclosure, exposure or transmission.

[10] Australasian Society for HIV Medicine. Guide to Australian HIV Laws and Polices for Healthcare Professionals.