

HIV and the LAW

Take Home Messages

1. Each state and territory in Australia has differing laws concerning HIV transmission.
2. In all states and territories criminal law can be used in cases of reckless HIV transmission.
3. Disclosing your HIV status is now not legally required in any part of Australia, provided you take “reasonable precautions” to prevent the transmission of HIV.
4. Condoms as a ‘reasonable precaution’ in HIV criminal cases has precedent in Australia.
5. Treatment as Prevention (TaSP)/undetectable viral load (U=U) - not yet tested legally.
6. Sex with someone on PrEP does not currently qualify as a ‘reasonable precaution’ as the legal liability lies with the HIV positive partner.
7. We continue to operate in an area of considerable legal uncertainty.

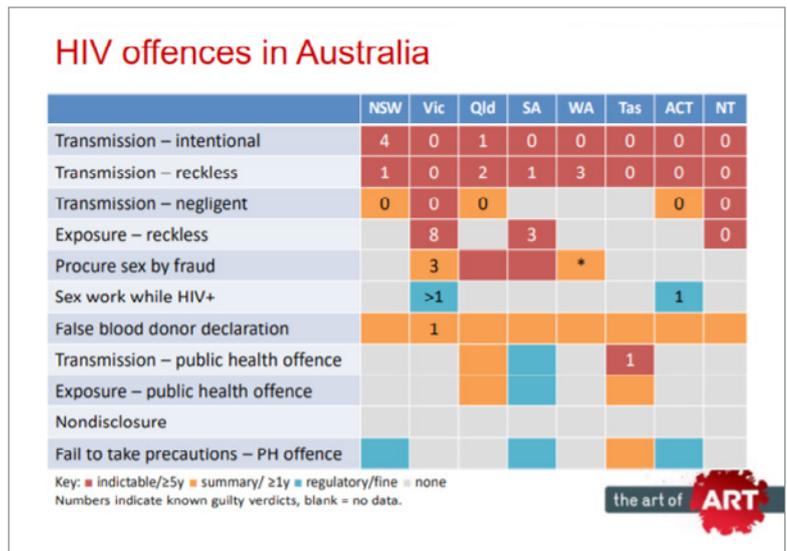
HIV: The biomedical evidence

- Three studies have provided data evidencing TaSP, *HPTN 052*, *Opposites Attract* and *Partners Study*.
- PrEP is proven to be 99% effective in prevention of HIV transmission when taken daily.

What are the laws today?

In every state and territory intentional or reckless transmission of HIV is a crime.

- **Intentional** transmission means where the accused person has the infection of the other party as their desired and intended outcome, and transmission actually occurs;
- **Reckless** transmission is where the accused knew the transmission of HIV was a possible or probable consequence of their actions, and they failed to take adequate precautions to prevent it occurring.
- In Victoria, SA and the NT, prosecutions are also possible for endangerment/‘reckless exposure’ — merely for placing another person in danger of contracting HIV.
- Procure sex by fraud: specifically applies to a situation where someone lies about their HIV status. There doesn’t need to have been any risk, just need to show complainant was deceived and that they wouldn’t have given consent if they had known of HIV status.
- About 40 prosecutions and 20 convictions in Australia.
- In HIV, it is consent, not disclosure, that makes the sex lawful. Disclosure of HIV status is generally considered the most reliable way to ensure consent.
- Disclosure is not required if reasonable precautions to prevent HIV transmission are taken.
- No court in Australia has ruled that undetectable viral load alone (U=U) is enough to satisfy the “reasonable precautions” test. This may change in the future, but in the meantime there’s a risk someone living with HIV might fall foul of the law if they don’t disclose and don’t use condoms.
- It is not clear at present what the courts will say about PrEP.



HIV transmission as a crime - concerns

- HIV is the only sexually transmitted virus that is criminalised.
- Criminal laws place all of the burden for HIV transmission on the HIV positive person. This makes it particularly difficult in relation to PrEP, which relies on the HIV negative partner.
- Prosecutions are harmful for the HIV+ person and can counteract public health messaging.
- Consent to sex and disclosure are different.
- To the law, consent means free and voluntary agreement, given without coercion, and in knowledge of all the relevant facts. The reality is that sexual consent is incredibly complex and shared trust is central.
- The criminalisation of HIV in the law is based on the assumption that people with HIV want to use their HIV as a weapon.
- Courts assume that nobody wants to be exposed to the slightest risk of harm: that HIV infection is such a profound risk that it is assumed no one would willingly put themselves in such harm's way.
- There is no such thing as 100% risk-free sex but this is the standard that the courts apply.
- The criminalisation of HIV has made no difference to epidemic of HIV in Australia.

Health education and awareness

- HIV is a health problem and should require a health response, however, the law is what it is.
- Refer people to community standards through your local AIDS Council. Be aware disclosure is always hard and can be difficult for individuals.
- Be clear when giving advice on U=U and seek data: When talking about U=U, clinicians should talk about the risk being NEGLIGIBLE - so low that there is virtually no chance of transmission - NOT low risk. Language is important as the law deals in certainty.
 - » Links:
 - ♦ [Read the Australian Medical Consensus Statement on HIV and the Law](#)
 - ♦ [U=U - prevention access campaign](#)
 - ♦ [Australian contact tracing guidelines](#)

[View the plenary presentation video.](#)

[View the workshop slides with their discussion of cases studies.](#)