Criminal Liability and AIDS

Alan Turner

Joint Winner of the Law Review Prize for 1995

I: INTRODUCTION

Since Acquired Immune Deficiency Syndrome ("AIDS") was first identified in 1981, the fight against the most feared epidemic in modern history has assumed the proportions of war. This is not surprising when one considers the number of people who live under its shadow,[1] and the many more it will affect in the future.[2] Resources are being poured into research projects, while advertising campaigns educate people about the risks of acquiring the virus and promote safer sex.

Legislators too are becoming increasingly active in the fight against AIDS.[3] Various jurisdictions have enacted laws which, among other things, make AIDS a notifiable disease, limit the immigration rights of infected persons, and make HIV/AIDS a ground for divorce.[4] In addition, many jurisdictions have turned to the

1 The World Health Organisation ("WHO") estimates that eighteen million adults and one and a half million children are infected with HIV worldwide. In New Zealand, the number notified as having the HIV virus is 1013, of which 486 have been notified as developing AIDS: AIDS Epidemiology Group, *AIDS-New Zealand,* (25) May 1995.

2 The WHO estimates that by the year 2000, up to forty million people will be infected with HIV worldwide.

3 Fluss, "What Can Legislators Do To Combat AIDS?" (1989) 15(1) Comm LB 283.

4 Kirby, "The Opportunities of AIDS Law, and the AIDS Checklist" (1987/88) Civil Liberty (NSW) 129; reproduced in Buchanan and Godwin, "AIDS - the legal epidemic" (1988) 13 Legal Service Bulletin 111, 116.

criminal law as a means of imposing sanctions on those who transmit the HIV virus.[5] While New Zealand has not enacted specific legislation creating criminal liability for the transmission of Human Immunodeficiency Virus ("HIV"), one person has already been convicted under the existing criminal legislation.[6]

This article will assess the arguments raised by two related policy questions in this area of the law:

(i) should New Zealand introduce specific legislation imposing criminal liability for the transmission of HIV/AIDS in certain circumstances; and
(ii) if such a law is to be introduced, what actions and circumstances should it cover?

To this end, this article will consider in detail those provisions in the Crimes Act 1961 which potentially apply to the transmission of HIV. Only then does the pressing need for reform of the law become apparent.

II: THE MEDICAL NATURE OF HIV/AIDS

In 1983, HIV was identified as the virus which causes the condition known as AIDS. There are four distinct stages of the HIV/AIDS infection.[7]

The first stage is HIV infection. It is currently believed that infection with HIV is incurable, meaning that the host will carry the virus for the remainder of their life. While some individuals experience a brief illness as their body reacts to the intrusion of the virus, others display no physical symptoms at this stage of the disease. During a period of latency of up to three months, the virus cannot be detected by conventional testing techniques, which search for the presence of HIV antibodies in the bloodstream.[8]

By the second stage, the host has developed HIV-specific antibodies, allowing the infection to be detected by conventional testing. This stage is known as seropositivity. Although some seropositive persons do not progress beyond this stage of the disease, it is estimated that up to fifty percent of seropositive persons will progress to the next stages of the disease within seven years.

Many seropositive persons who progress to AIDS will first experience a third

5 Ibid.

6 *Police v Mwai*, High Court, Auckland, 23 December 1994 T 196-94 Robertson J. Mwai appealed both his conviction and sentence before Sir Thomas Eichelbaum CJ, Henry and Hardie-Boys JJ in the Court of Appeal on 26 July 1995. This appeal failed; *New Zealand Herald*, 17 August 1995, section 1, 2.

7 This part is based on information from the following publications: National Council on AIDS, *The New Zealand Strategy on HIV/AIDS* (1990) 10-16; Rickett, "AIDS, Sexually Transmitted Diseases and the Criminal Law" (1990) 20(2) VUWLR 183, 187-188.

8 The polymerase chain reaction test can directly detect HIV even in the absence of antibodies, but it is costly and rarely used.

phase known as AIDS Related Complex ("ARC"), in which some of the symptoms relating to AIDS begin to appear. These may include fever, weight loss, diarrhoea, fatigue and night sweats.

Sadly, individuals who progress to the final stage of the disease will inevitably die, usually within a year. The body's immune system completely breaks down, leaving the host susceptible to a range of opportunistic infections which would rarely be fatal in a person with a functioning immune system. This final stage is known as "full-blown" AIDS.

HIV is not easily transmitted. The virus is thought to be infectious only when present in blood, semen, or vaginal fluids, although it has also been found in saliva, tears, urine, and faeces. The following activities are known to transmit HIV:

(i) Anal and vaginal intercourse. Oral sex carries a lower risk of transmission.
(ii) Sharing of needles used for intravenous injection.
(iii) Blood, organ, and semen donation.
(iv) Exposure of broken skin or mucous membranes to HIV infected blood.
(v) Mother to child transmission during pregnancy.

Although it is difficult to quantify the risks associated with each activity, transmission is possible from a single act, and the risk of infection increases with the frequency of the activity. In practice, sexual activity accounts for the vast majority of cases of HIV transmission. This factor must be considered when determining the appropriate role of the criminal law in this area.

III: THE EXISTING PROVISIONS OF THE CRIMES ACT 1961

There are provisions in the Crimes Act 1961 ("the Act") which potentially apply to cases of HIV transmission. The writer will identify the problems which hinder the use of each of these provisions as the basis of a successful prosecution for HIV transmission.

1. Murder and Manslaughter

For those HIV carriers who progress to AIDS, death inevitably results. On this basis, there appears to be some scope for the existing murder and manslaughter provisions to be used in prosecuting a person who transmits the virus. Section 162(1) of the Act, however, will invariably defeat any such prosecution:

> No one is criminally responsible for the killing of another unless the death takes place within a year and a day after the cause of death.

Most HIV infected persons live asymptomatically for years. Only in extraordinary circumstances will death occur within "a year and a day" of infection.[9]

Even if the application of s 162 was avoided, further problems arise in attempting to prosecute persons who transmit HIV for murder. Section 167, which defines the situations in which culpable homicide amounts to murder, requires an intent to cause death, or recklessness as to that result.[10] Clearly, proof of this mental element would be difficult to establish in the context of sexual activity.[11]

While intent does not need to be proved in a manslaughter prosecution, it must still be established that the killing was by "an unlawful act", or by "an omission without lawful excuse to perform or observe any legal duty".[12]

Given these problems, it is unlikely that any prosecution for HIV transmission would be successful under the culpable homicide provisions.

2. Attempted Murder

The offence of attempted murder may be a more viable alternative for prosecuting HIV transmission.[13] Death of the complainant is not relevant to the offence, so the "year and a day" rule is avoided. Moreover, actual transmission of HIV need not occur. However, s 72(1) of the Act requires that the accused must have intended to commit the offence of murder. Consequently, any prosecution for attempted murder encounters the same difficulties in proving intent as culpable homicide.

In other jurisdictions, charges for attempted homicide have occasionally been successfully prosecuted. In Florida, a prostitute who continued to have sex with customers after learning that she was HIV positive was charged with two counts of attempted manslaughter.[14] In *State v Haines*,[15] a man with AIDS Related Complex slashed his wrists in an attempted suicide and then threw blood at a police officer and two paramedics. He was convicted on three counts of attempted murder.[16] Similarly in *Florida v Dunn*,[17] two prisoners were charged with conspiracy to commit first degree murder after they spiked a guard's coffee with HIV positive serum.

9 Sullivan and Field, "AIDS and the Coercive Power of the State" (1988) 23 Harvard Civ Rights - Civ Lib Law Review 139, 166.

10 Section 167(a) and (b).

11 Rickett, supra at note 7, at 201.

12 Section 160(2)(a) and (b).

13 Section 173 provides for a maximum term of fourteen years imprisonment.

14 *People v Sherouse*, Fla Case No. OSCO 87-185679; *AU* 2:6; cited by Ducharme, "Preparing for a Legal Epidemic: An AIDS Primer for Lawyers and Policy Makers" (1988) 26 Alberta LR 471, 492.

15 (1989) 545 NE 2d 834.

16 For comment on the case see Holland, "HIV/AIDS and the Criminal Law" (1994) Crim LQ 279, 283.

17 Union City Cir. Ct., No. 86-66CF; *APL* 2:9 (Oct 7, 1987) 5; cited by Ducharme, supra at note 14, 493.

3. Assaults and Injuries

Several provisions in the Crimes Act which concern non-fatal assaults and injuries to the person may apply to prosecutions for the transmission of HIV. Section 188(2) of the Act provides up to seven years imprisonment for a person who with "reckless disregard for the safety of others" causes "grievous bodily harm to any person". This section was used to charge Peter Mwai, the first person in New Zealand to be held criminally liable for the transmission of HIV. Mwai transmitted the virus to the complainant as a result of unprotected sexual intercourse. A critical issue raised prior to the trial was whether infection with HIV, without any accompanying physical symptoms, could be described as "grievous bodily harm" within the terms of the section. Justice Robertson defined this term as meaning:[18]

> [N]othing more than "really serious" harm. I am satisfied on the basis of the medical evidence which has been adduced that a jury could conclude that HIV could fall within that categorisation. Similarly I am of the view that although the HIV infection itself may be benign, its inevitable development into AIDS could on the totality of the evidence be accepted by the jury as nonetheless constituting really serious harm or hurt.[19]

On this basis, his Honour rejected an application for a discharge under s 347 of the Act. The accused was later convicted on this charge and sentenced to five years imprisonment.

Despite the view of Robertson J, it is still arguable that "grievous bodily harm" requires some physical manifestation of harm.[20] The section also refers to wounding, maiming, and disfigurement, indicating that "grievous bodily harm" should be restricted to similar physical harms. This again illustrates the difficulties associated with prosecuting HIV transmission under provisions which were drafted without the disease in mind.

Section 189(2) imposes a maximum term of five years imprisonment where the accused "injures any person" with "reckless disregard for the safety of others". "Injury" is defined in s 2(1) of the Crimes Act as "actual bodily harm". This again raises the issue of whether asymptomatic HIV constitutes "bodily harm". Clearly, if HIV constitutes "bodily harm" it is certainly of a grievous nature. Therefore, a charge could be brought under s 188(2) or s 189(2) with an equal chance of success.

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18 *Police v Mwai*, High Court, Auckland, 12 October 1994 T196-94, 9. In the Court of Appeal, one ground for appeal of the conviction, ultimately unsuccessful, supra at note 6, was that Mwai was wrongly convicted under s 188(2) because that section did not cover actions which involved infecting others with diseases: *New Zealand Herald*, 27 July 1995, section 1, 13.

19 This view is supported by Rickett, supra at note 7, 205. Rickett relies on two American decisions which dealt with infections of the herpes simplex II virus: *People of the State of California v Johnson* 181 Cal App 3d 1137; 225 Cal Rptr 251 (1986); *Barlow v Superior Court, County of San Diego* 190 Cal App 3d 1581; 236 Cal Rptr (1987).

20 Robertson (ed), *Adams on Criminal Law* (1992), CA188.05.

In addition, s 190 of the Act provides for up to three years imprisonment where a person injures another "in such circumstances that if death had been caused he would have been guilty of manslaughter". Once again, this charge is dependent on "actual bodily harm" having occurred.

It is unlikely that the legislature intended the general assault and injury provisions of the Crimes Act to apply to the transmission of disease. This view is reinforced by s 201 which specifically provides that:

> Every one is liable to imprisonment for a term not exceeding 14 years who, wilfully and without lawful justification or excuse, causes or produces, in any other person any disease or sickness.

This section requires actual transmission of HIV and the wilfulness of the accused to cause that result. A charge under s 201 was dismissed in *Police v Mwai*[21] due to the lack of evidence with respect to intent. Justice Robertson clarified the nature of the intent to be proved:[22]

> The issue in Mr Mwai's case as presented was *not* whether the act which caused the sickness or disease was wilful or deliberate. The issue was whether the *causing* of the sickness or disease was wilful.

Proof of the requisite mens rea under s 201 will present an insurmountable difficulty in most cases where HIV is sexually transmitted. This section may, however, still have application in some non-sexual contact cases.

4. Consent to Assaults and Injuries

A complication which arises in relation to non-fatal assaults and injuries is the issue of consent.[23] In considering this matter, it is necessary to distinguish between two different types of consent.[24] On the one hand, there is the situation where the victim, fully informed, consents to the risk of infection. On the other hand, the victim may merely consent to the activity by which transmission is risked.

The general rule is that an act must be contrary to the will of a victim to constitute an assault.[25] In situations where an individual gives informed consent to the risk of HIV infection, a defence to assault may arise. However, it is well established that there are limits to this proposition. In *Attorney-General's Refer-*

21 High Court, Auckland, 19 December 1994, T 196-94 Robertson J.

22 Ibid, 5.

23 The issue of consent does not arise in relation to homicide prosecutions because of s 63 of the Act, which provides that no person may "consent to the infliction of death upon himself".

24 Bronitt, "Criminal Liability for the Transmission of HIV/ AIDS" (1992) 16(2) Crim LJ 85, 88.

25 *Adams on Criminal Law*, supra at note 20, at CA196.13.

ence (No 6 of 1980),[26] and more recently in *R v Brown*,[27] it was authoritatively stated that where the degree of harm was considerable, and the activity involved was of no public benefit, the Court would not permit the apparent consent of the victim to be heard as a defence. While freedom to conduct consensual sexual relations is a right worthy of protection, consent to the risk of acquiring HIV affects other public interests. Courts may attach importance to the potential cost to the health system, and the risk of the person consenting to the act subsequently transmitting the virus. For these reasons, it is possible that the courts will not recognise informed consent as a defence to an assault or injury charge for the transmission of HIV.[28]

The second type of consent is where the individual has no knowledge of the risk of HIV infection, but merely consents to engage in the activity with the infected person. The proposition that this type of consent will negative liability lacks merit and commonsense.[29] Consent to unprotected sexual activity is not consent to be infected with a deadly virus. Consequently, it would not be a successful defence to an assault or injury charge.

5. Criminal Nuisance

Section 145 of the Act provides a maximum term of twelve months imprisonment for persons who omit to discharge a legal duty, knowing that it would endanger the "life, safety, or health of any individual." In *Police v Mwai* the accused was convicted on five charges laid under this section, and sentenced to six months imprisonment in respect of each. The offence can be applied relatively straightforwardly to situations of sexual transmission once a common law duty of disclosure is recognised. However, the relatively low penalty is not commensurate with the degree of culpability of an offender who risks passing the HIV virus on to another person.

IV: SHOULD HIV TRANSMISSION ATTRACT CRIMINAL LIABILITY?

The previous section illustrates the difficulties under the existing provisions of the Crimes Act which inhibit bringing prosecutions for HIV transmission. The transmission of HIV raises special concerns that could not have been foreseen by Parliament. For this reason, a strong case can be made for the enactment of

26 [1981] QB 715.
27 [1992] QB 491 (CA); [1993] 2 WLR 556 (HL).
28 Cf *R v Ssenyonga* (1993) 21 CR (4th) 128 (Ont Ct).
29 Cf *R v Clarence* (1888) 22 QBD 23.

criminal legislation which specifically addresses the issues raised by HIV transmission. Many jurisdictions have already taken this path.[30] The critical question is whether New Zealand should now follow the same course.

1. Arguments against Criminal Liability

The following arguments raised by those who object to HIV-specific criminal legislation are generally premised on a "Criminal Law Keep Out" philosophy.[31]

(a) Inability to modify behaviour

The limited value of the criminal law as a means of modifying behaviour in order to limit the spread of AIDS must be recognised. The vast majority of persons infected with HIV conduct themselves responsibly and with respect for the welfare of others. They do so out of a sense of moral duty,[32] not out of a fear of punishment. Society should encourage this attitude among infected persons through such mediums as education, rather than through the threat of criminal liability. As one commentator has said:[33]

> [E]xperience has shown that the promotion of responsible sexual behaviour ... is better left to a climate of openness and education than to one of prohibition and punishment.

However, this argument overlooks two things. First, the criminal law can play a useful role in reinforcing messages conveyed by educational media. Education and criminalisation are not mutually exclusive. Second, the criminal law plays an important part in shaping values and social conduct in the long term, even if it does little to modify behaviour in the short term.

(b) Invasion into private sexual relations

Sullivan and Field, questioning the efficacy of coercive state action in this area, note that:[34]

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30 For a list of these mostly American jurisdictions, see Holland, supra at note 16, at 310-313. Australia, Canada and the United Kingdom have not yet followed suit.

31 Kirby, "AIDS Legislation - Turning Up The Heat?" (1986) 60 ALJ 324, 331.

32 Gillett, "AIDS: The Individual and Society", in Legal Research Foundation, *Legal Implications of AIDS* (1989) 101, 106.

33 Rickett, supra at note 7, 192.

34 Sullivan and Field, supra at note 9, at 161.

> [T]he regulation of AIDS inherently involves the regulation of sex, and thus raises concerns about excessive government intervention in a realm that is presumptively private.

When the criminal law intrudes into private consensual sexual relations, the implications for civil liberties are great. Many believe the state has no business in the bedrooms of the nation; but this principle is not absolute. Inevitably, it must be weighed against other concerns such as public protection.[35] It is arguable that when one party's HIV status is undisclosed, sexual relations are in a sense non-consensual, and therefore a legitimate target of state intervention.[36] While the legislature should pay regard to the private nature of the acts by which HIV is transmitted, this is not a factor which should preclude their intervention altogether.

(c) Potential for selective prosecution

In New Zealand, homosexual and bisexual men, and intravenous drug users currently comprise the vast majority of HIV infected persons.[37] Undoubtedly, the virus will increasingly affect the heterosexual community, but the speed with which it will do so is the subject of much debate.[38] Until this occurs, the public mis-perception that AIDS is a disease afflicting only drug addicts and gay men will remain.

If criminal liability were to attach to HIV transmission, there would be the potential for selective enforcement and prosecution. An HIV-specific offence could become a tool of official persecution and intimidation of persons who are already stigmatised by their lifestyles.[39] It is probable that this concern can only be addressed by a commitment to even-handedness by the law enforcement agencies themselves. Certainly, it would be unwise to blindly enact an HIV-specific offence without considering the potential consequences.

(d) Prosecution difficulties

The effectiveness of an HIV-specific criminal offence is questionable given the inherent difficulties which might accompany attempted prosecutions.

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35 Hodgson, "The Legal and Public Policy Implications of Human Immunodeficiency Virus Antibody Testing in New Zealand", in Legal Research Foundation, *Legal Implications of AIDS* (1989) 39, 72.

36 Ibid, 72.

37 In New Zealand, of those HIV-infected persons who disclosed their 'risk-behaviour' group, eighty-four percent were homosexual or bisexual men: AIDS Epidemiology Group, supra at note 1.

38 Sullivan and Field, supra at note 9, at 142. In Africa, HIV is becoming equally prevalent among heterosexuals.

39 This phenomenon was evident in the United States in the context of criminal sodomy laws: ibid, 189-191.

First, there would be a problem of detection. Most breaches of an HIV-specific offence would occur in the private sphere. Even if the police had accurate knowledge of a person's HIV-status, surveillance of their sexual activities would be practically impossible. Enforcement would, therefore, be contingent upon complaints from persons who become infected with HIV. The problem is that persons infected with HIV will only become aware of their status if they are tested. Otherwise, these persons may only become aware of their infection when the symptoms of AIDS begin to manifest themselves years later. Consequently, enforcement rates would probably be low, with the implication that the offence would have little deterrent effect.

The second difficulty in prosecution is establishing that the accused was in fact the cause of the complainant's infection.[40] Causation would be complicated by both the latency period of the virus, and the possibility that the complainant had other sexual partners or potential risk contacts.[41]

In response to these arguments, some would reply that the symbolic value of a law criminalising the transmission of HIV is of greater importance than the number of prosecutions arising from it.[42]

(e) Deterrence to voluntary HIV testing

If an offence relating to the transmission of HIV were based on knowledge of one's HIV-status, this may deter potential carriers from seeking testing. While one remains unaware of their HIV status, they cannot "knowingly" transmit the virus. Voluntary testing programmes are of critical importance to the containment of the virus. Any disincentive to the taking of such tests would threaten the effectiveness of these programmes. Justice Michael Kirby[43] has suggested that:[44]

> Submitting to the HIV test may itself sometimes be a useful educational step in a course of behaviour modification designed to promote self protection and the containment of the AIDS infection.

However, it is unclear whether criminalisation would in fact have any deterrent effect on voluntary testing.[45] The decision to discover one's HIV-status is surely dominated more by fear of AIDS, than fear of potential criminal conviction.

40 Gillett, supra at note 32, at 106.

41 Orr, "AIDS: Adapting The Law" (1987) 138 New LJ 388, 391.

42 See text, infra at Part IV, 2(a).

43 President NSW Court of Appeal; Member of the WHO Global Commission on AIDS.

44 Kirby, "Legal Implications of AIDS" (1990) 16(2) Comm LB 620, 622.

45 Sullivan and Field, supra at note 9, at 183.

(f) HIV transmission as a public health issue

The transmission of HIV is essentially a problem relating to public health. Any legislative response to the problem, therefore, should not be in the form of criminal offences, but in public health "quasi-crimes".[46] These offences generally carry minimal penalties, reflecting their purpose of defining acceptable behavioural standards, rather than punishing culpable acts.[47]

Although HIV transmission is a public health issue, the potentially fatal nature of the virus sets it apart from other diseases which are currently covered by public health legislation.[48] To recognise that certain conduct of HIV carriers is socially unacceptable, but to then impose minimal penalties for such conduct, trivialises the consequences of HIV infection.

2. Arguments for Criminal Liability

These arguments are based on the premise that the criminal law has a valid role to play in the context of HIV transmission, and should fulfil this role through legislation specifically designed for the problem.

(a) Clear definition of socially acceptable behaviour

If the AIDS epidemic is to be effectively contained in western society, the adoption of responsible attitudes and conduct by both carriers and non-carriers alike is required:[49]

> A traditional way by which legal systems attempt to inculcate individual responsibility is by the operation of the criminal law.

The criminal law is well suited to this role because it clearly defines the boundaries of unacceptable behaviour. Individuals who know in advance whether a particular act will be tolerated by society and the legal system, cannot complain if their conduct later attracts criminal liability. As one commentator has described it:[50]

> By drawing a bright line around the behaviours that pose serious public health risks, the law gives clear notice of the conduct which will be subject to criminal penalty.

46 Rickett, supra at note 7, at 194.

47 Ibid, 195.

48 See the Health Act 1956.

49 Kirby, supra at note 44, at 621.

50 Gostin, "The Politics of AIDS: Compulsory State Powers, Public Health and Civil Liberties" (1989) 49 Ohio State LJ 1017, 1038; cited by Rickett, supra at note 7, at 193.

As there is no legislation in New Zealand which deals specifically with the problem of HIV transmission, the criminal law fails to send clear messages as to the limits of acceptable behaviour in this area. Clarity can only be achieved by the enactment of such legislation.

Further, the mere existence of a particular criminal offence can have a symbolic value, which helps to shape general patterns of social conduct, regardless of the extent to which the offence is enforced.[51] The law provides a reason for acting in a certain way, even if there are those who believe that they can escape punishment for a breach of it.

(b) Deterrence

The criminal law reinforces its definition of socially unacceptable behaviour with enforceable punitive sanctions. An HIV carrier who does not share this view of unacceptable behaviour may be induced to act in conformity with the law, due to the threat of punishment. The criminal law would be a general deterrent to HIV infected persons acting in ways which are damaging to the public health. In particular, those who offend and are subsequently convicted may be deterred from acting similarly in the future by their experience of punishment.

However, the deterrent effect of any criminal offence is directly related to the likelihood of detection and conviction upon its breach. As previously recognised,[52] laws criminalising the transmission of HIV would probably suffer from a low enforcement rate. Further, the deterrent effect of an HIV-specific offence will be minimal for those persons suffering from full-blown AIDS.[53]

(c) Spreading HIV is a cruel, anti-social act

Conduct should be stigmatised by the criminal law if that conduct will result in harm to others. Therefore, the transmission of HIV should be made a criminal offence due to the potentially lethal nature of the disease. Knowingly spreading HIV is cruel, anti-social behaviour, which is comparable to other behaviour already proscribed by the criminal law.[54]

The failure to include the transmission of HIV within the criminal code would be an anomaly. Public faith in the criminal justice system could be undermined if carriers of HIV were not punished for acts which were seen to be morally culpable. This is not to suggest that the criminal law in this area should be subject to public opinion. It simply recognises the legitimate concern that the law should not unnecessarily conflict with community expectations.

51 Sullivan and Field, supra at note 9, at 160.

52 See text, supra at Part IV, I(d).

53 Holland, supra at note 16, at 287.

54 Hodgson, supra at note 35, at 72.

3. Conclusions as to Criminal Liability

Criminalisation of HIV transmission cannot alone provide the solution to the increasing spread of the virus. The problem can only be addressed by the modification of attitudes to sexual activity and other high risk contacts. The critical question is whether the criminal law can assist in this process of behavioural modification, or whether its interference might be counter-productive in containing the virus.

The arguments against criminalisation of HIV transmission are unconvincing. Such arguments are founded on social values, such as the autonomy of private sexual relations, and the freedom of high risk groups from discriminatory treatment. These concerns are outweighed by the seriousness of the HIV/AIDS problem. Despite the fact that an HIV-specific offence would probably suffer from under-enforcement and prosecution difficulties, this does not justify the abandonment of criminalisation altogether. Although it is possible that criminalisation would deter potential carriers from undergoing voluntary testing and therefore be counter-productive, this effect will probably be minimal. The motivation for HIV testing is generally a fear of the virus itself.

The criminal law would be a valuable tool for assisting and reinforcing education in this area. The criminal law clearly defines the standards of behaviour which society deems to be unacceptable, and imposes sanctions on those persons whose conduct falls within these bounds. Knowingly transmitting HIV is a cruel, anti-social act which is deserving of stigmatisation by the criminal law. Criminalisation can also be justified on the basis that individuals, and society as a whole, are entitled to be protected from harmful behaviour. It would be anomalous if the law did not prohibit conduct which is generally viewed as being morally culpable by society.

For these policy reasons, the intervention of the criminal law in certain instances of HIV transmission is justifiable and desirable.

V: WHICH ACTIONS AND CIRCUMSTANCES SHOULD BE CRIMINALISED?

It is necessary to consider which actions, accompanied by what state of mind, and resulting in what consequences, should attract criminal liability. The wide range of legislation enacted in other jurisdictions shows that there are many possible answers to this question. The best course may be to create a range of offences to cover the transmission of HIV in different circumstances. These offences could attract different penalties according to the degree of culpability of the conduct.

1. Should Actual Transmission of HIV be Necessary, or should Mere Endangerment Suffice?

In general, the criminal law proscribes conduct which results in actual harm. There is, however, a range of offences which operate as exceptions to this rule. These include attempts to commit crimes, as well as various types of conduct which create a grave risk of injury, such as reckless driving. The question arises whether criminal liability in relation to the transmission of HIV should extend to conduct which creates a grave risk that the virus will be transmitted, or only to actual transmission. The former type of liability would punish those persons who cause no tangible harm, while the latter would leave liability to hinge on the lottery of actual infection with HIV occurring.

Several American states have enacted statutes which specifically deal with HIV transmission.[55] Generally, they make it an offence to knowingly engage in conduct which carries the risk of infection. The following provision is one such example:[56]

> A person who knows that he or she has or has been diagnosed as having [AIDS] ... or who knows that he or she is [HIV] infected, and who engages in sexual penetration with another person without first having informed the other person that he or she has [AIDS] or is [HIV] infected is guilty of a felony.

There is merit in having an HIV-specific offence which requires only endangerment as opposed to actual transmission of the virus.[57] First, if an HIV-specific offence requires proof of actual harm, evidential difficulties arise relating to causation of that harm by the accused.[58] If it becomes an offence to engage in conduct which carries the risk of transmission, then it is only necessary to prove that the accused in fact engaged in that conduct. There is no need to analyse the consequences of the conduct.

Second, an offence of endangerment is more consistent with the policy reasons which support the involvement of the criminal law in this area. One of the principal reasons for the criminalisation of HIV transmission is to assist and reinforce education programmes which encourage behavioural modification and aid containment of the virus. The law must target the behaviour of HIV infected persons, rather than consider the consequences of such behaviour in any particular instance. Therefore, criminal liability should attach to conduct which carries the risk of HIV transmission, regardless of whether actual transmission occurs.

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55 For example, Arkansas (ARK. CODE ANN. #5-14- 123); Illinois (ILL. ANN. STAT. Ch.38 #12-16.2); Michigan (MICH. COMP. LAWS ANN. #333.5210); Texas (TEX. PENAL CODE ANN. #22.012 (WEST SUPP. 1991)); cited by Holland, supra at note 16, at 310.

56 Michigan Public Health Code, s 5210 (MICH. COMP. LAWS ANN. #333.5210).

57 See Hodgson's recommendation, supra at note 35, at 73.

58 Smith, "Sexual Etiquette, Public Interest and the Criminal Law" (1991) 42 Northern Ire LQ 309, 324.

Finally, the act of endangerment is itself a morally culpable act. Sanctions should be imposed on those HIV infected persons who repeatedly endanger others, but have not yet infected anyone simply by virtue of chance.

For these reasons, it is submitted that it be made an offence to engage in conduct which carries a grave risk of transmitting HIV. Such conduct could be defined to include the following activities:[59]

(i) sexual intercourse;
(ii) the transfer or donation of blood, semen or organs to another; and
(iii) the transfer of used, non-sterile intravenous drug paraphernalia to another.

2. Should it be Necessary for Carriers to Know that they are HIV Infected?

Most commentators argue that the criminal law should only impose liability on those persons who are aware of their HIV infection and continue to engage in proscribed conduct.[60] Nonetheless, the arguments in favour of a more expansive definition of knowledge should be considered.

One argument is that to restrict liability to those persons who know of their infected status would discourage others from undergoing voluntary testing for HIV.[61] This is not a strong assertion. A more tenable argument for disregarding the knowledge of infected persons, is that an inestimable, but probably large, number of people are unaware of their asymptomatic infection, and so pose a significant threat to the spread of the virus.

The arguments which support the accused knowing of their infected state are much stronger. It would be unfair to punish a person on the basis of mere ignorance.[62] Further, it is unrealistic to expect the criminalisation of HIV transmission to modify the behaviour of an individual who is unaware of their infection. If knowledge is not required to constitute the offence, the shadow of criminal liability would hang over the head of every person who has not received a negative HIV test result. This would make the testing procedure virtually mandatory.[63]

It is difficult to define what actually constitutes knowledge of HIV infection. Clearly a person who has tested positive for the virus, and has been informed of that result, will have the requisite knowledge for the offence. The position of a

59 This definition is based on the relevant Illinois statute (ILL. ANN. STAT. Ch.38 # 12-16.2), referred to in Holland, supra at note 16, at 311.

60 For example, Schultz and Reuter, "AIDS Legislation in Missouri: An Analysis and a Proposal" (1988) 53 Missouri LR 599, 623; Bronitt, supra at note 24, at 90; but cf the views of Burdt and Caldwell, "The Real Fatal Attraction: Civil & Criminal Liability for the Sexual Transmission of AIDS" (1987-8) 37 Drake LR 657, 696; and Smith, supra at note 58, at 325.

61 See text, supra at Part IV, 1(e).

62 Sullivan and Field, supra at note 9, at 178-183.

63 Ibid.

person who has progressed to the symptomatic stage of AIDS, but who has not undertaken a confirmatory test, is less clear. In extreme cases, the courts may be willing to imply knowledge on the basis that the accused "must have known" of their infection. This is akin to the general criminal law principle of "wilful blindness".[64]

The position of a person who has engaged in high risk activities, such as needle-sharing or unprotected anal intercourse, is also unclear. It involves asking whether certain lifestyles in themselves make it possible for courts to imply knowledge of HIV infection. It is submitted that this would be an unreasonable extension of the concept of "knowledge". As one commentator has suggested:[65]

> An attempt to infer knowledge from evidence of lifestyle should be avoided here ... [T]he inference is, at best, very weak, while the potential for prejudice is extremely high.

If knowledge could be inferred on such a basis, it would be possible for juries to discriminate against certain sectors of the community, for reasons which are independent of the question they are supposed to be considering.[66]

Criminal liability should only be imposed on those persons who have actual knowledge of their HIV-status at the time the proscribed act is committed. Evidence of such knowledge should be based on information of a positive test result or, in extreme cases, be implied when the accused is so afflicted by the physical symptoms of AIDS that he or she must have known of the infection. In the latter circumstance, the decision to prosecute would be questionable, given the limited life expectancy of those suffering from full-blown AIDS.

3. Should Liability be Strict, or should there be a Mens Rea Requirement?

It is necessary to consider whether an HIV-specific offence should have a further requirement of mens rea. Sullivan and Field have suggested that strict liability, subject to certain defences, is the best approach to take if the criminal law is to be involved in this area at all.[67] It is submitted, however, that this would cast the net of the criminal law too widely. Consider the case of an HIV carrier who has wrongly been informed by their doctor that there is no danger of transmitting HIV through oral sex. On this advice, the carrier continues to engage in such acts. If endangerment was a strict liability offence, this person could be held guilty without any apparent blameworthiness. Therefore, some mens rea requirement should be adopted in addition to the requirement of knowledge of HIV infection.

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64 Note that this is different from saying that the person *should have known* that they were infected.

65 Schultz and Reuter, supra at note 60, at 623.

66 Ibid, 626.

67 Supra at note 9, at 184. But the authors conclude, at 186-194, that even the best-tailored criminal statute for the transmission of HIV should ultimately be rejected.

If the proscribed act has to be accompanied by an intention to transmit HIV, liability will be limited to a few cases. Intention generally means that the accused meant to bring about the consequence in question, or knew that the consequence was a highly probable result of the act. Most acts which carry a risk of transmitting HIV are sexual acts, making it difficult to prove an intent to infect the other person.[68] It is unlikely that HIV carriers engage in sexual activity for the purpose of infecting their partner. Further, the risk of HIV transmission falls short of high probability.[69]

Engaging in dangerous conduct, with the deliberate intent of transmitting the HIV virus, is a deplorable act which deserves punishment.[70] An offence to cover this situation would be only one essential part of any criminal statute dealing with HIV transmission. However, there could be many instances of endangerment which are morally culpable, but which are not accompanied by an intention to infect.

A requirement of recklessness is most compatible with the concept of endangerment. In New Zealand, the courts have construed the term "recklessness" to mean the "foresight of dangerous consequences that could well happen, together with an intention to continue the course of conduct regardless of the risk."[71] Therefore, an offence of reckless endangerment, with respect to HIV transmission, would require both knowledge of infection, and knowledge of the risk involved in the conduct in question. The latter requirement would mean that the ignorant or ill-advised HIV carrier, who honestly believed that the conduct in question was safe, could be excluded from liability.[72] On this basis, it is submitted that liability should extend to high-risk conduct as defined above,[73] which is accompanied by the accused's knowledge of infection, and recklessness as to the consequences of the conduct. This offence should carry a lesser penalty than an offence of endangerment with an intention to transmit HIV.

If liability was extended to negligent acts of endangerment,[74] HIV infected persons could be held criminally liable if they breached the standard of care expected of a reasonable person with HIV. A person who has been informed of an HIV positive test, but who has not been told of the risks of transmitting the virus, may be considered to be negligent for failing to seek out such essential information. There are also circumstances in which a person who is unaware of their

68 Gillett, supra at note 32, at 106.

69 Although expert opinions vary, it was suggested at the depositions hearing of *Police v Mwai* that the risk of transmission from an infected male to a female, from one episode of vaginal intercourse, was one in a thousand.

70 Section 36 of the NSW Crimes Act 1900 punishes such conduct with up to 25 years imprisonment.

71 *R v Harney* [1987] 2 NZLR 576 (CA). Cf UK approach to recklessness: *R v Caldwell* [1981] 2 WLR 509.

72 As most persons who test positive for HIV are informed of transmission risks, the second requirement would exclude few cases.

73 See text, supra at Part V, 1.

74 This would include heedlessness (ie *Caldwell* recklessness) under the current New Zealand approach.

infection could still be described as negligent.[75] However, liability for negligently endangering another person appears to be unduly harsh. The criminal law in this area should be restricted to subjective fault-based provisions.[76]

4. What Defences, if any, should be Available?

As previously argued, "uninformed" consent should not be a valid defence for an offence of HIV transmission.[77] It would be completely untenable to allow such a defence to negate liability in almost all instances of endangerment:[78]

> Consent to sexual activity itself should not constitute consent to [the risk of] contracting AIDS - or any other serious sexually transmissible disease - if one did not know that one's partner was infected.

On the other hand, "informed" consent should prima facie negate liability for conduct which might otherwise constitute an offence. There are, however, strong public policy arguments in favour of a more paternalistic approach with respect to HIV transmission.[79] First, a person should not be able to consent to the risk of such serious harm.[80] Second, the state has a legitimate interest in controlling the spread of the virus in order to reduce the costs to the health system. Finally, the law must protect not only the person immediately at risk of infection, but also the future contacts of that person.

It is arguable, however, that if "informed" consent were not a good defence, then HIV carriers would have no incentive to disclose their infection to potential contacts. The degree of culpability is seen as substantially less where an HIV infected person discloses their condition prior to the endangering act. Further, most of the conduct in question could be regarded as socially beneficial; "[s]exual interaction, unlike fisticuffs, does have social utility".[81] The same could not be said of intravenous needle-sharing.

On balance, it is proposed that New Zealand should recognise a defence of informed consent.[82] Some limitation on this defence may be desirable however,

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75 Smith, supra at note 58, at 325-327. For example, a person may be engaged in a high-risk lifestyle with known HIV-carriers, and begins to suffer AIDS-related symptoms. It is arguable that a reasonable person would have realised that they were infected with HIV and would stop engaging in high-risk acts.

76 Rickett, supra at note 7, at 212.

77 See text, supra at Part III, 4.

78 Sullivan and Field, supra at note 9, at 168.

79 See Smith, supra at note 58, at 327.

80 See *Attorney General's Reference (No 6 of 1980)*, supra at note 26; *R v Brown*, supra at note 27.

81 Holland, supra at note 16, at 315.

82 This has been done in some Australian state jurisdictions, although these do not relate to HIV-specific offences: s 13(1) of the NSW Public Health Act 1991; s 48(2) of the Queensland Health Act 1937-88 as amended by the Health Act Amendment Act 1988.

given the persuasive public policy arguments outlined above. In particular, there is a strong case for adding the requirement that condoms be used before the defence of informed consent can be relied upon.[83] Imposing this limitation would mean that the defence of informed consent could only operate in cases where HIV was transmitted by sexual acts. There is little support for allowing a defence of informed consent to apply to other endangering acts, such as needle-sharing. These acts do not have sufficient social utility to warrant such a defence.

Allowing the defence of informed consent to be effective only where precautions have been taken, recognises that the risk of transmitting the virus, with all its attendant costs and health consequences, has been reduced in that particular instance.

It has been suggested that the use of condoms should, in itself, provide a defence to a charge that the HIV infected person recklessly endangered another through sexual activity.[84] It has also been argued that the use of condoms may negate the mens rea requirement of recklessness.[85] This argument is flawed, however, for the simple reason that condoms fail. Studies analysing the effectiveness of condoms as a birth control device have concluded that the failure rate may range anywhere between two and twenty percent, due to either product malfunction or incorrect use.[86] Therefore, an HIV infected person who does not disclose their infection to their sexual partner, but uses condoms, would nonetheless be reckless if they were aware of the risk of transmitting the virus as a result of condom failure. Nor should there be explicit recognition of an independent defence for HIV infected persons who use condoms:[87]

> [E]ven if the AIDS carrier believes he can shield his partner from risk by silently taking precautions, he should nonetheless disclose the truth and allow his partner to make the choice.

5. Conclusions as to the Nature of Criminal Liability

Criminal liability for the transmission of HIV should require the accused to have actual knowledge of their infected state. Generally, this would require proof of a positive test result, but in extreme cases, knowledge could be implied if a person is suffering from the physical symptoms of AIDS. In either case, the inquiry is aimed at the accused's actual knowledge, not what they should have known.

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83 Sullivan and Field, supra at note 9, at 182.

84 For example, Smith, supra at note 58, at 328. In Australia, the Legal Working Party of the Intergovernmental Committee on AIDS has made a similar recommendation: Legislative Approaches to Public Health Control of HIV Infection (February 1991); discussed in Bronitt, supra at note 24.

85 Bronitt, supra at note 24, at 92.

86 Fisch et al, "Evaluation of Heterosexual Partners, Children and Household Contacts of Adults with AIDS" (1987) 257 J.A.M.A 640; cited by Holland, supra at note 16, at 315.

87 Sullivan and Field, supra at note 9, at 182.

Liability should not be dependent on actual transmission of the virus. An offence based on endangerment is more consistent with the policy objective of behaviour modification.

It is submitted that there should be an offence designed to cover endangerment accompanied by an intention to transmit the virus, although it is unlikely that this will apply to many cases. A further offence of reckless endangerment would cover culpable acts, without punishing those HIV infected persons oblivious to the risk inherent in their conduct.

A defence of "informed consent" should be made available to those HIV carriers who inform their sexual partners of their HIV status and engage inprotected sexual activity.

Clearly, this proposal would impose criminal liability on a wider class of acts by HIV carriers than is currently proscribed by the law in New Zealand.[88]

VI: CONCLUSION

The criminalisation of HIV transmission will not save the world from the threat posed by AIDS. Indeed, the role which the criminal law can play in the fight against AIDS is relatively small. But that is not to say that it has no role at all. Presently, the only vaccine we have for HIV is knowledge.[89] Spreading that knowledge through education programmes, and thereby changing social behaviour, is the principal means of tackling the disease.

The criminal law can assist and reinforce these educational messages by determining standards of behaviour which society deems to be unacceptable. Persons who engage in conduct which endangers another, intending that the other be infected by HIV, or being reckless as to its transmission, engage in conduct which clearly falls outside the bounds of socially acceptable behaviour. Such conduct should attract criminal liability.

In New Zealand, the existing criminal law provisions are inadequate in dealing with culpable conduct by HIV carriers. Legislation is needed to specifically address the unique issues which arise at the interface between HIV/AIDS and the criminal law. New Zealand is still in a position to be able to rationally consider the details of such legislation, and arrive at an appropriate response. If the legislature continues to defer enacting HIV-specific legislation, the inadequacies of the existing criminal law will be exposed in future prosecutions for HIV transmission. Public pressure for change could easily result in the hasty enactment of ill-considered and inappropriate legislation.

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88 Commentators have argued that the Crimes Bill 1989 would extend liability for HIV transmission much too far. The Bill creates endangerment offences which do not require proof of actual harm (cls 130 and 132), but fails to specifically address the unique issue of HIV transmission: Rickett, supra at note 7, at 208-211; National Council on AIDS, supra at note 7, at 64-65.

89 Minister Gertrud Sigurdsen at the IVth International Conference on AIDS, Stockholm, Sweden, June 1988; quoted by Kirby, supra at note 44, at 627.

New Zealand cannot, and should no longer, isolate itself from the problem of AIDS, and nor should it continue to shut its eyes to the implications that HIV has for the criminal law.