

PRESS RELEASE
High Court of Australia Intent in the Criminal Transmission of HIV
For Immediate Release

The involvement of the criminal law in cases of HIV transmission, or alleged transmission, is problematic and runs contrary to optimal public health outcomes. The most important element of reducing the transmission of HIV is the prevention of actual transmission. The evidence shows that the criminal law is a very blunt and ineffective instrument in preventing transmission, and it is arguable that it is itself a driver of HIV transmission.

The criminal law should only be involved in the extreme (and actually very rare) cases where there is a clear malicious intent to cause harm to the other person.

Today in a landmark case, the High Court unanimously held that engagement in unprotected (in this context: condomless) sexual intercourse by a person living with HIV, does not in itself prove that there was intent to cause harm by transmitting HIV.

The High Court held that where proof of intention to produce a particular result is required, the prosecution must establish that the accused meant to produce that result by his or her conduct. The majority reasoned that knowledge or foresight of result, whether possible, probable or certain, is not a substitute for proof of specific intent.

Australia has nationally agreed guidelines for the management of people who may be putting others at risk of infection. These guidelines mandate that counselling and education are the tools to be used in the management of these cases. Formal public health orders for detention are available as the final stage to these interventions if required but their use is rarely, if at all, required.

This system of counselling and education works well with most cases being resolved by low level counselling. For all cases involving possible risk and/or possible transmission of HIV the criminal law should be a last resort only and there should be jurisdictional prosecutorial guidelines put in place to ensure this. Complex social and psychological factors, often fuelled by stigma can lead to some people engaging in behaviour that may endanger their own and their partner's health and are best addressed by health based interventions.

Laws that criminalise HIV transmission or mandate disclosure of HIV status in sexual situations should be repealed as these undermine public health messages of shared responsibility and act as barriers to HIV testing which is a major component of current programs to reduce HIV transmission. These laws also provide a false sense of security to persons who are HIV negative that disclosure will occur, and often endanger the safety of those who do disclose as we know from cases such as the Felipe Flores murder where a young man was kicked to death after disclosing his HIV status to a sexual partner.

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Sex Workers and the Criminalisation of Alleged HIV Transmission

Contrary to public perception there has never been a documented case of HIV transmission in a sex work setting in Australia, and Australian sex workers are reported as having STI rates that are equal to, and often lower than, the non sex working community.

A female sex worker is currently being held in a West Australian male prison on charges similar to those that were the subject of the current appeal to the High Court. Where a trans person living with HIV and sex working is accused of transmitting HIV, an almost perfect storm of negative media ensues and regardless of the final decision of the courts this person's chance of living a normal life has already been eliminated.

As this is a case that is yet to come before the courts we can only comment that as a trans woman she should not be held in a male prison and that there appears to be a presumption of guilt, rather than innocence that operates in cases that involve alleged HIV transmission and that this presumption of guilt seems to operate as a certainty in the minds of police, media and the public when a sex worker or trans person is accused.

More information on the West Australian Sex Worker case; <http://swop.org.au/news/hiv-transmission-should-be-about-public-health-not-criminal-law> and <https://www.facebook.com/WAsexworkers/>

More information on the High Court decision at <https://www.afao.org.au/news/zaburoni-v-the-queen-appeal-success#.VwSK4PI94uU>

About Sex Workers Outreach Project (SWOP)

SWOP is Australia's largest and longest established community based peer education sex worker organisation focused on HIV, STI and Hepatitis C prevention, education and health promotion for sex workers in NSW.

Last year SWOP interacted with over 5,000 NSW sex workers, visited over 440 sex services premises throughout NSW including 44 specific regional and rural areas and distributed more than 270,000 pieces of safe sex equipment. We distributed over 20,000 printed pieces of information and developed 19 new resources; trained 52 non-sex work organisations and held 15 small group workshops for sex workers.

SWOP was established in 1990 after its predecessor the Australia Prostitutes Collective which had been established in 1983 ceased operation. Since 1990 SWOP has been funded by the NSW Ministry of Health (NSW Health) to provide sexual health information and support to sex workers in NSW, specifically in relation to HIV and other sexually transmissible infections. Throughout this period, governance had been managed by ACON, the peak NSW HIV/STI health promotion/prevention NGO.

Since 01 July, 2014 SWOP has been operating independently, as a stand-alone organisation with its own membership base of sex workers and sex worker governing board.

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