

## HIV, consent and the criminal law

Paul Kidd

the art of



the art of





“Sometimes what we want is not fully known to us in advance. The details of desire and satisfaction are often discovered, and produced, **in the sexual moment**. ... ‘Consent’ weaves in and out of sexual encounters in complex and unpredictable ways.”

Heidi Matthews, ‘How Do We Understand Sexual Pleasure in This Age of “Consent”?’  
[2018] *Aeon*





## HIV offences in Australia

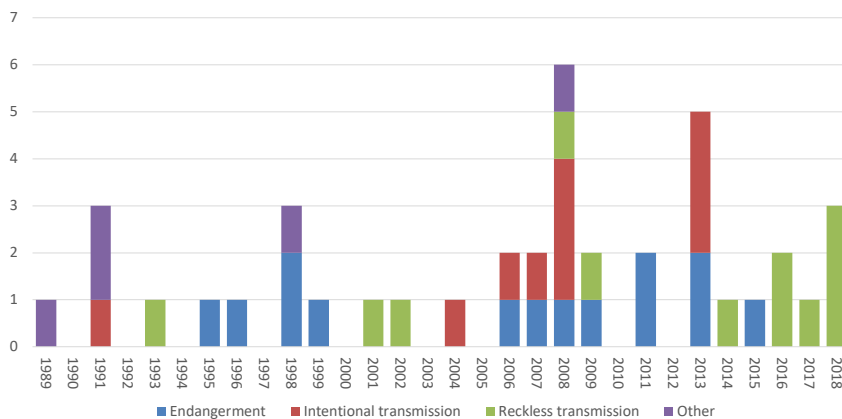
	NSW	Vic	Qld	SA	WA	Tas	ACT	NT
Transmission – intentional	4	0	1	0	0	0	0	0
Transmission – reckless	1	0	2	1	3	0	0	0
Transmission – negligent	0	0	0				0	0
Exposure – reckless		8		3				0
Procure sex by fraud		3			*			
Sex work while HIV+		>1					1	
False blood donor declaration		1						
Transmission – public health offence						1		
Exposure – public health offence								
Nondisclosure								
Fail to take precautions – PH offence								

Key: ■ indictable/≥5y ■ summary/ ≥1y ■ regulatory/fine ■ none  
Numbers indicate known guilty verdicts, blank = no data.

the art of ART



## HIV criminal prosecutions in Australia



the art of ART





## PrEP and the criminal law

- **What do we know about the law around PrEP? Not much.**
- Can a HIV-positive person rely on the other person's disclosure that they are on PrEP as a 'reasonable precaution'?
- Where the law says the positive person must *take* reasonable precautions, does this mean they have to actually do something, not just rely on others?
- If the negative person isn't adherent to PrEP and transmission occurs, who's liable?
- How long does a PrEP disclosure remain effective for?



## U=U and the criminal law

- If a person **is** non-infectious, **they can't be liable** for criminal transmission or exposure.
- If a person **believes (on reasonable grounds?) they are** non-infectious, **they can't be liable** for criminal transmission (or exposure?)
- Transmission cases will presumably never happen, because transmission is presumably so rare as to be practically impossible.
- Exposure (endangerment) cases are still possible but we don't know what the courts will make of U=U.
- The last time a defendant used UVL as a defence was in 2008!
- Courts will use expert evidence to decide. Experts need to get the language right because the law deals in certainties but science deals in probabilities.





## The Consensus Statement

“It has long been recognised that correct use of **condoms** is an effective means of reducing HIV sexual transmission risk to an acceptably low level. We now know that if an HIV-positive partner is on treatment and maintains an **undetectable viral load**, or if the HIV-negative partner takes **PrEP** correctly, risk is reduced to a similar degree. In our opinion, **the use of any one of these strategies reduces the risk of transmission to a negligible level and represents taking reasonable precautions to prevent HIV transmission.**”

Boyd, Mark A et al, 'Sexual Transmission of HIV and the Law: An Australian Medical Consensus Statement' (2016) 205(9) *Medical Journal of Australia* 409



Photo credit: ACON 2013 CC-BY-NC-ND







# Thank you

## Sexual transmission of HIV and the law: an Australian medical consensus statement

Mark Boyd<sup>1</sup>, David Cooper<sup>2</sup>, Elizabeth A. Croxall<sup>3</sup>, Laurence Croxall<sup>4</sup>, Melissa J. Goff<sup>5</sup>, Joanne Gough<sup>6</sup>, Sharon R. Lye<sup>7</sup>, David Fisher<sup>8</sup>, Tracy Vanecko<sup>9</sup>

**A**ustralian states and territories have criminal laws that may be applied in cases of alleged sexual assault. However, these laws are not designed to protect people from sexual assault, but rather to protect people from sexual assault. The purpose of this statement is to provide a consensus statement on the legal and medical aspects of sexual transmission of HIV.

It is the intention of the statement to provide a consensus statement on the legal and medical aspects of sexual transmission of HIV. The statement is intended to provide a consensus statement on the legal and medical aspects of sexual transmission of HIV.

**Key recommendations:** Caution should be exercised when considering a criminal or civil action against a person who has been sexually assaulted. The statement is intended to provide a consensus statement on the legal and medical aspects of sexual transmission of HIV.

**Change in management as result of the consensus:** The statement is intended to provide a consensus statement on the legal and medical aspects of sexual transmission of HIV.

## Please read the consensus statement:

Boyd, Mark A et al, 'Sexual Transmission of HIV and the Law: An Australian Medical Consensus Statement' (2016) 205(9) *Medical Journal of Australia* 409

Also **Beyond Blame 2018** just before the Amsterdam AIDS Conference in July.

Thanks to ASHM for inviting me to speak.  
Contact: Paul Kidd paul@kidd.id.au / @paulkidd

