



## Précis Paper

### Issues in the Criminalisation of HIV Transmission

This is an interesting discussion regarding the criminalisation of HIV transmission and public health and policy considerations that arise.

#### Discussion Includes

- Material facts and background
- Offences under s 317(1)(b) of the *Criminal Code 1899* (Qld)
- Lessons from the High Court decision
- Challenges in prosecuting and sentencing offenders for the transmission of HIV
- Limitations of the decision
- Public health and human rights implications
- Lessons learned

# Précis Paper

## Issues in the Criminalisation of HIV Transmission

1. In this edition of BenchTV, Alexander Stratigios (Principal Solicitor, HIV/AIDS Legal Centre, Sydney) and David Buchanan SC (Forbes Chambers, Sydney) discuss the recent decision of the High Court of Australia in *Zaburoni v The Queen* [2016] HCA 12.

### Background and Material Facts

2. *Zaburoni v The Queen* [2016] HCA 12 is a case about HIV and the criminal law. HIV, or Human Immunodeficiency Virus, is a disease that has attracted significant attention over the past decades. Once a person contracts HIV infection, if the virus is not controlled by medication, the person can contract AIDS. These days, in rich western countries, AIDS is quite rare because, when taken regularly, anti-retroviral drugs manage the infection to the point where the virus itself can be undetectable in a blood test.
3. Criminal offences relating to HIV transmission fall into three broad categories: non-disclosure offences (where a person fails to disclose their HIV status to a sex partner); exposure offences (engaging in conduct which exposes a person to the risk of contracting HIV); or transmission offences (where the disease is actually transmitted).
4. Mr Zaburoni was convicted of unlawfully transmitting a serious disease to another with intent to do so following a trial in the District Court of Queensland before Dick DCJ and a jury. The offence is created by s 317(b) of the *Criminal Code 1899* (Qld) and carries a maximum penalty of imprisonment for life. The disease that Mr Zaburoni transmitted to the complainant was HIV, a serious disease for the purposes of s 317(b).
5. Mr Zaburoni had tested positive to HIV and had been told he must use condoms for sex. The evidence was that he understood that advice, however when he took up a relationship with a woman, he told her he had been tested for HIV and was not HIV positive. He had unprotected intercourse with her, telling her that he found condomless sex more pleasurable.
6. After about 21 months, the relationship broke down. About a year afterwards, the woman was diagnosed with HIV and when she confronted Zaburoni about it, he admitted he was infected and said that he found out after they had broken up.
7. Later, in both a conversation with the complainant monitored by police and in interviews with police, Zaburoni lied about when he knew he was infected and the extent of his unprotected sex with the complainant. Subsequently, Zaburoni, who had migrated to

Australia many years previously, admitted having submitted a blood sample from an uninfected friend in order to satisfy Immigration authorities that he did not have HIV.

The Criminal Charge under s 317(1)(b) of the *Criminal Code*

8. Although there was objective evidence that, given the length of the relationship (21 months), the risk of the complainant contracting HIV were about 14 per cent, there was no subjective evidence that Mr Zaburoni knew what the statistical likelihood was of the transmission of HIV as the result of unprotected heterosexual sex. This was significant because, as it was framed by the Criminal Code, the offence was one of specific intent. This meant that, in order to be found guilty of the offence of unlawfully transmitting a serious disease with intent to transmit it, the jury had to establish that the accused actually intended to bring about the prohibited result – in this case, the transmission of a serious disease.
9. The High Court held that, if the evidence had established Zaburoni's awareness of the probability that his conduct would result in his girlfriend contracting HIV, it would have been open to the jury to infer that Zaburoni meant to bring about that result. However, the evidence did not rise to that level.
10. The High Court distinguished between the intention, on the one hand, and desire or motive, noting that a person can intend a result without desiring it. The plurality judgment determined (at [19]):

*The complainant said the appellant preferred unprotected sexual intercourse because it was more pleasurable. Accepting that the appellant engaged in unprotected sexual intercourse because it gave him pleasure is not necessarily inconsistent with proof that he also had the intention thereby of transmitting HIV to the complainant. It is the identification of evidence from which the latter inference could be drawn to the criminal standard that is the issue in this appeal. Its resolution requires reference to the evidence given at the trial in some detail.*

11. On this issue, the plurality concluded (at [44]):

*A rational inference open on the evidence is that the appellant engaged in regular unprotected sexual intercourse with the complainant because it enhanced his sexual pleasure and he was reckless of the risk of transmitting HIV to her. The existence of that inference lessens the force of reasoning to a conclusion that the appellant intended to transmit the disease from the fact of frequent unprotected sexual intercourse. Apart from frequent unprotected sexual intercourse, there is no evidence to support the inference that the appellant had that intention. And the evidence fell well short of proving that the*

*appellant believed that it was virtually certain that he would pass on HIV by regular unprotected sexual intercourse.*

12. In particular, none of the lies which Mr Zaburoni had told proved that he knew that it was virtually certain that he would infect his partner with HIV if he had unprotected sex with her.
13. Whilst Mr Zaburoni's conduct was described as a form of 'callous deception', what this meant, as Justice Gageler put it, was that the evidence left open (at [63]):

*a reasonable hypothesis that the appellant, not knowing the degree of risk, was extremely reckless and also callous. As appalling as his selfish recklessness was, it cannot be equated with a subjective, actual intent to transmit the HIV virus. In the absence of evidence of malice or knowledge of the degree of risk, a subjective intent to inflict the HIV virus was not proven beyond reasonable doubt.*

14. The conviction for intentionally transmitting a serious disease was quashed and a verdict of guilty of unlawfully doing grievous bodily harm substituted. Mr Zaburoni had already entered a plea of guilty to the alternate offence of unlawfully doing grievously bodily harm when the matter was before the District Court, and the matter was returned to the District Court for sentencing. Mr Zaburoni's original sentence of imprisonment for nine and a half years was replaced by a five year wholly suspended sentence.

#### Lessons from the High Court Decision

15. The High Court decision provides some important takeaway points for criminal lawyers. In particular, where a crime is a result offence, and requires proof of intention to bring about a result, the test is whether the person meant to cause the charged result, whether or not he or she directed their mind to that result or had that result as his purpose or design. Awareness that a result is a probable consequence of a person's conduct is not sufficient alone to prove intent, nor is awareness that the result is a certain or near certain consequence of their conduct.
16. As the plurality of the High Court said (at [10]), "foresight of risk of harm is distinct in law from the intention to produce that harm", and (at [14]):

*Where proof of the intention to produce a particular result is made an element of liability for an offence under the Code, the prosecution is required to establish that the accused meant to produce that result by his or her conduct ... knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code.*

17. Mr Buchanan commented that the same analysis is likely to apply in non-Code jurisdictions such as NSW. *Zaburoni's case* has also been cited in a civil case for the proposition that where intention is an element of an offence, it must be proved. It is not sufficient to rely on foreseeability, likelihood and probability, but must be affirmatively established that the offender meant to produce the particular result: *Bragdon v Director of the Fair Work Building Industry Inspectorate* (2016) 242 FCR 46.
18. There are, however, limitations to the application of the decision. In particular, the decision has limited application where there is a statutory definition of intention. One such instance of such a definition is in the *Criminal Code Act 1995* (Cth). Under s 307.1(1) of the Commonwealth Criminal Code, for example, the fault element specified for the conduct of importing a substance is intention, while the fault element for the substance being a border-controlled drug is recklessness. In *Smith v The Queen* [2016] NSWCCA 93, the NSW Court of Criminal Appeal rejected a challenge to a conviction which referred to *Zaburoni's case*, where the appeal ground was that the trial judge misdirected the jury with respect to the fault element of intention.

#### Challenges in Prosecuting and Sentencing Offenders for the Transmission of HIV

19. When the matter was returned to the District Court for sentencing, Judge Dick made reference to a report by Mr Zaburoni's treating HIV specialist that highlighted the barriers to people disclosing their HIV status including cultural factors and difficulties adjusting to an HIV diagnosis.
20. Historically in Australia, charges for HIV transmission have been brought where the complainant and the defendant have engaged in sexual intercourse on multiple occasions. As highlighted by Judge Dick, this offence therefore differs from other charges of causing grievous bodily harm that involve a single act or event resulting in the harm. It is therefore also usually impossible to pinpoint the exact event which resulted in the complainant becoming HIV positive.
21. In NSW, there is no offence relating to exposure to HIV, and the non-disclosure offence in the *Public Health Act 2010* (NSW) will shortly be repealed. However, people who expose others to HIV are monitored by a panel of physicians and peers to address offending behaviours, and this panel has the ability to make binding orders.
22. Ms Stratigos explained that human rights advocates and public health experts have for a long time agreed that the use of criminal laws, as opposed to public health interventions, to punish people with HIV who are placing others at risk have negative consequences, not just

for the individual themselves but also for the broader community. Rather, there is no evidence that criminal prosecutions of HIV help prevent new HIV infections, and there are indications that overly broad criminalisation of HIV non-disclosure, exposure or transmission undermines public health and can result in misapplication of the law (see the UNAIDS publication, *Judging the epidemic – A judicial handbook on HIV, human rights and the law*). One of the risks of relying upon the criminalisation of transmission of HIV in attempting to prevent the spread of the disease is that it gives the impression that the risk is from people who are deliberately infecting others, and deters people from taking steps themselves from contracting the disease. In reality, most cases of transmission of HIV are either completely unknowing, negligent, or reckless at worst.

23. *Zaburoni's case* was the first time that the High Court has had the opportunity to examine a criminal HIV transmission case, and consider the issues of when a person may have the requisite intention to transmit HIV to their sexual partner. From a public health perspective, *Zaburoni v The Queen* means that people with HIV who are genuinely intending to transmit HIV to a sexual partner may be prosecuted. At the same time, the decision also protects from criminal prosecution those people with HIV who have not disclosed or lied about their status for those varied and complex reasons. In those instances it would be difficult to prove beyond reasonable doubt that the person with HIV had a genuine appreciation or foresight as to any certainty or inevitability of the transmission of HIV.

## **BIOGRAPHY**

### Alexander Stratigios

Principal Solicitor, HIV/AIDS Legal Centre, Sydney

Alexandra Stratigios is the Principal Solicitor of the HIV/AIDS Legal Centre (HALC) in Sydney. HALC is a specialist community legal centre that provides advocacy, casework and law reform on HIV related legal matters. Alexandra has been involved in a number of successful test cases in the areas of HIV and the law, including on criminal transmission of HIV and health care workers with HIV performing exposure prone procedures. Stemming out of her experiences working in West Africa, South America and Papua New Guinea, and her work on a UNAIDS commissioned report on entry, stay and residence restrictions for people with HIV, she has developed a particular interest in refugee and migration law, particularly in relation to the barriers for migration for people with disabilities.

### David Buchanan SC

Forbes Chambers, Sydney

David Buchanan SC was admitted to practice in 1975. He was called to the Bar in 1977 and appointed Senior Counsel in 1997. His area of practice is criminal law. He has been involved for many years in the community response to HIV/AIDS, both in Australia and overseas. He has a particular interest in the role of the criminal law and of public health interventions in the HIV/AIDS epidemic.

## **BIBLIOGRAPHY**

### Focus Case

*Zaburoni v The Queen* [2016] HCA 12

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/html/benchmark\\_15-04-2016\\_weekly\\_civil\\_law\\_review.html](https://benchmarkinc.com.au/benchmark/html/benchmark_15-04-2016_weekly_civil_law_review.html)

### Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2016/12.html>

### Cases

*Bragdon v Director of the Fair Work Building Industry Inspectorate* (2016) 242 FCR 46  
*Smith v The Queen* [2016] NSWCCA 93

### Legislation

*Criminal Code 1899* (Qld)  
*Criminal Code Act 1995* (Cth)  
*Public Health Act 2010* (NSW)

