

HIV & The Law in Queensland

A Guide for the HIV-Positive and HIV-Negative Person on the Legal Responsibilities for the prevention of HIV Transmission.

Introduction:

HIV is more than just a medical problem. It affects the rights of many people, whether they have HIV or not. The Public Health and Criminal laws outlined below address some of these rights. In addition to these laws are common-law and civil-law requirements which suggest that in any sexual encounter it is the shared responsibility of both the HIV-negative person and the HIV-Positive person to take all reasonable precautionary steps to prevent any transmission of a serious disease (such as HIV) either to themselves or to others.

The Public Health and Criminal laws are subject to legal interpretation by the courts based upon each new case circumstance. In the absence of previous case precedents which may, from time to time, test the law and create a ruling on it, it is difficult to predict legal outcomes for all situations. Limited cases have currently been tried in Queensland, so much within these laws is yet to be challenged or tested in the unfortunate occurrence of any future possible trial. The best and most prudent way to avoid problems with interpretation of the law as it stands, is for both the HIV-negative person and the HIV-positive person to take the utmost of care in safe-sex prevention methods, including proper condom use (and safe-injecting practices, if you do inject) - to ensure that HIV infection is not picked up or passed on. To do otherwise, you may have broken the law. Disclosure of HIV status (even though not specifically required by law in Queensland) MAY NOT BE a defense against a charge if safe-sex and condoms are not used. This extends to the sharing of injecting drug equipment, as well.

Social Implications of Legal Liability

No one wants to stop HIV more than the people most affected. But stopping HIV does not mean your legal, and social, rights need to be taken away. While there may be reasons why a HIV-positive person might want to tell their partner about their status (developing relationships, intimacy with peers or partners, etc.), it is not a stated legal requirement in Queensland, in the presence of safe-sex and condom use.

Because there is no specific law in Queensland which requires HIV status to be disclosed, therefore there is no legally stated way to disclose, even if someone wanted to. People may disclose in many varied ways, from the very subtle, to the quite upfront.

Queensland Positive People (QPP) holds the view that disclosure is a personal choice supported by the law - and isn't required in safe-sex situations. It may be useful to explore your feelings in relation to disclosing and to whom. Non-disclosure, of itself, is not a crime.

For the vast majority of HIV-positive people who always practice safe sex with their partners, these laws provide a reminder of the shared responsibility in preventing HIV infection, but should be of little further concern. One thing that is universal, and perhaps unfortunate, is that these laws place the greatest onus (and perhaps stress) for preventing transmission of HIV

predominantly on HIV-positive people. In combination with the stigma and health or medical difficulties that HIV still brings, this can be a considerable burden.

Disclaimer: This guide is NOT intended as legal advice, but is provided for the purposes of educational familiarity about the law. The law is complex. Reliance on the information contained in this article is not warranted. It is the responsibility of each reader to understand the law as it pertains to them and their own individual circumstances, by seeking professional legal advice and understanding.

What is the Law Says What does this mean or imply?

Criminal Code Act

(Section 317b) states:

"Any person who, with intent to do some grievous bodily harm or transmit a serious disease to any person; is guilty of a crime, and is liable to imprisonment for life".

Criminal Code Act

(Section 320) states:

"Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years".

Grievous bodily harm means:

- (a) the loss of a distinct part or an organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health.

The Crime:

A person who knowingly and deliberately or intentionally infects someone with HIV can be charged with grievous bodily harm, leading to criminal prosecution under this law.

This law focuses on the degree of intentionally infecting someone with a serious disease, and the particular harm or disease which occurs.

This law, or any other law in Queensland, does not mean that you must disclose your HIV status (or any other disease) to another, but it does place a strong onus on the HIV-positive person to take all reasonable preventative measures and precautions, including safe-sex and the proper use of condoms, to prevent another person from contracting HIV. In QLD, neither the Criminal Law, nor the Public Health law specifically states that a person must disclose their HIV status.

The Penalty:

Prosecution under this law is based upon the conscious intent and the circumstances which lead to infecting another person with HIV. The penalty described in the law is the maximum possible sentence, not necessarily the final sentence, for which other factors (e.g. criminal history, repeat crimes, other circumstances, extent of malicious intent, knowingly infecting another, etc) are all taken into account by the prosecution and the courts.

Responsibilities of the HIV-Negative Person:

Public Health Act

(Section 66) states:

"a person at risk of contracting a notifiable condition should take all reasonable precautions to avoid contracting or being infected with the condition."

This provision relates to the civil responsibility of every HIV-negative Queensland citizen to educate themselves about HIV, and to seek information and understanding of what it means to protect themselves from contracting HIV. Knowingly placing yourself at risk without taking precautions that any reasonable educated person would take, or engaging in behaviour that intentional places you at risk of a serious disease could mean a breach of the Public Health Act. While there are no penalties attached to this section (66) of the Act - which, despite as far we know there have been no instances where anyone has been prosecuted for a breach of the section - to behave contrary to this provision could implicate you further under Section 143, Clauses 3 and 4, of the Public Health Act (outlined in the column to the left).

Responsibilities of the HIV-Positive Person:

Public Health Act

(Section 66) states:

"a person who suspects he or she may have a notifiable condition should ascertain—

- (i) whether he or she has the condition; and*
- (ii) what precautions should be taken to prevent others from contracting the condition."*

Note: the purpose of Section 66 of the Public Health Act "is to protect persons from notifiable conditions through mechanisms that provide an appropriate balance between the health of the public and the right of individuals to liberty and privacy (e.g. unlawful discrimination, privacy, & making informed decisions about his or her medical treatment)."

[Controlled] Notifiable Condition means a medical condition which:

- "(a) may have a substantial impact on public health; and*
- (b) the ordinary conduct of a person with the condition is likely to result in the transmission of the condition to someone else; and*
- (c) the transmission of the condition will result in, or is likely to result in, long term or serious deleterious consequences for the health of the person to whom the condition is transmitted."*

This section suggests that a person with HIV should take all reasonable safe precautions against transmitting HIV. Again, while there are no specific penalties attached to this section (66) of the Act, and depending on the particular circumstances and outcomes for failure to adhere to this law, either Section 143 of the Act could then come into play, or in the worst case criminal proceedings under the Criminal Code Act.

It is reasonable to assume that what is meant by "ordinary conduct" in the definition of a Controlled Notifiable Condition (in the column to the left), is legal jargon for the absence of safe-sex or adequate precautions. "Ordinary conduct" is an inaccurate, imprecisely difficult, and unfortunate insensitive poor use of a word in this context, as it is not customary or usual for the vast majority of HIV-positive persons to conduct themselves in a manner which would allow the transmission of HIV to another. Nonetheless, the word exists as written in the law. However, in this context the word itself is not likely to be used as an instrument of prosecution, but is rather used for the definition of any notifiable conditions, for which HIV is only one of such conditions.

Public Health Act

(Section 143) states:

"(1) A person must not recklessly put someone else at risk of contracting a controlled notifiable condition. Maximum penalty 18 months imprisonment.

(2) A person must not recklessly transmit a controlled notifiable condition to someone else. Maximum penalty 2 years imprisonment.

(3) A person does not commit an offence against subsection (1) if, when the other person was put at risk of contracting the condition, the other person—

- (a) knew the person had the condition; and*
- (b) voluntarily accepted the risk of contracting the condition.*
- (4) A person does not commit an offence against subsection (2) if, when the condition was transmitted to the other person, the*

other person—

- (a) knew the person had the condition; and*
- (b) voluntarily accepted the risk of contracting the condition.*

Note—The Criminal Code, section 317 provides for the crime of intentionally transmitting a serious disease to a person."

This section is about recklessness, not necessarily intentionality. If, however, criminal intent is established instead, the case may progress to provisions under the Criminal Code Act.

Under which Act, or section of an Act, a person may be prosecuted is decided by the Police or the Office of Public Prosecutions. This will vary from case to case, and depend upon the evidence available to prosecute the case. Generally, a person will be charged under an act or section which appears to best fit the circumstances and evidence of the case.

NB: In the case of criminal prosecution for HIV transmission, consent by the HIV-negative person to voluntarily and knowingly accept the risk or transmission of HIV infection

(without practicing safe-sex, or using condoms, after disclosure of status by the HIV-positive person) is NOT LIKELY TO BE A DEFENCE under the criminal law. Knowledge or consent by the 'victim' is no defence to a charge of grievous bodily harm. However, it may be possible to raise knowledge or consent in non-criminal proceedings, depending on the circumstances of each case.

It is worthy to consider a scenario where the infected person denies that consent was ever given. In the absence of any evidence to the contrary and given the serious nature of HIV, the courts are likely to infer that no consent was given.

What cases have there been in Queensland to establish these laws or to set precedents?

Recently, in the first criminal case of its kind in Queensland, a gay man in Brisbane - who did not tell his partner he was HIV-positive (diagnosed in 1987), while repeatedly giving assurances that he was HIV-negative, and did not practice safe sex - was charged with 'committing a malicious act with intent' - a criminal offence maximum 14 year gaol term. This man was sentenced to 10 years gaol for this crime. Under QLD law he will serve a minimum of 80% of his sentence, before parole.

To date, there have been no other cases, that we are aware of, which have been tried and sentenced.

Prosecutions have occurred in other states (and countries). However, court decisions in another state (or country) are not binding on Queensland courts. However, they can provide some guidelines and can even be persuasive, but a Queensland court is not bound to follow them. It is therefore dangerous to rely on a non-Queensland decision when trying to work out what the law might be in this state.

What to do when something goes wrong

What is Pep?

Post-Exposure Prophylaxis (PEP) is a course of combination drug treatment that may prevent HIV infection after possible exposure through sex or injecting drug equipment. PEP is available on emergency to anyone who thinks they may have been exposed to HIV within the last 72 hours (within three days of exposure). Ideally, PEP is commenced within the first 24 hours of a risk exposure.

Where do I get PEP?

PEP must be prescribed by a doctor and is available from Sexual Health Clinics, Family Planning Clinics, and Major Public Hospital Accident and Emergency Departments.

The doctor will assess the probable level of risk, based upon:

- what is known about the person/s who are the possible source of infection; and
- the type of exposure. For example:
 - HIV can be more easily passed from person to person through unprotected receptive anal sex than through vaginal sex or

insertive anal sex. HIV can be passed from person to person through oral sex but the risk is much lower and extremely rare.

- Sharing needles or injecting equipment is generally associated with a high risk.
- Standing on a used needle at the beach, or a public park, is associated with an extremely low risk.

What PEP is not?

PEP is not a morning after (unsafe sex) treatment for repeated or regular prevention, in the absence of proper condom use or safe injecting. Should an otherwise HIV-negative person regularly present to a doctor or hospital for PEP - although treatment will not likely be withheld (for a probable risk) - a serious public health alert could be raised, which if unabated could lead to possible prosecution under the Public Health Act for failure to take reasonable precautions against HIV infection. This scenario is very different to the odd slip-up (e.g. condom breakage).

PEP does not protect against repeated or long term exposure to HIV (i.e. it does not make you immune to HIV, and is not a guarantee that HIV will be prevented). Additionally, the treatments used, daily over 4 weeks, can have unpleasant side effects including diarrhoea, nausea, loss of appetite and headaches.

The way the law is written, it would be reasonable to assume that in the case of an accidental condom breakage between two people (one of whom has a known HIV infection) that BOTH individuals would discharge their legal duty if they inform the other about and pursue access to PEP.

Further Information about PEP, Safe-Sex, and Sexual Health Clinic Locations:

- Queensland Health Website:
http://www.health.qld.gov.au/sexhealth/factsheets/Panic_PEP.shtml
- QAHC
Statewide toll-free 1800-177-434,
or Brisbane (07) 3017-1777.
- Queensland Positive People (QPP):
Statewide toll-free 1800-636-241,
or in Brisbane (07) 3013-5555.
- Spiritus Positive Directions:
(07) 3900 8000.

Major Public Hospital Locations:

- The front of the telephone White Pages, under "Hospitals", or
- Queensland Health Website: www.health.qld.gov.au



Comments and Notes:

The laws outlined in this article apply to Queensland only. When visiting or traveling in other Australian states it is important to be aware of other state laws. For example, disclosure of HIV status to any sexual partner is required by law in NSW - whether such a law is stooled in social reality is subject to wide community debate and opinion. Further information on various state laws is available from the website: www.thinkagain.com.au, or contact other services listed in this article.

Age of Consent Law:

The Age of Consent is the age you are legally allowed to have sex, or when someone else can have sex with you. Age of consent laws vary from state to state in Australia. In Queensland the age of consent is 16 for gay, lesbian and straight sex (except for anal intercourse you must be 18).

Further Information:

- Queensland Positive People (QPP): Statewide toll-free 1800-636-241, or in Brisbane (07) 3013-5555
- Queensland Association for Healthy Communities (QHAC) Statewide toll-free 1800-177-434, or Brisbane (07) 3017-1777
- National Association of People Living with HIV/AIDS (NAPWA): Ph: (02) 9557-8825 or Freecall 1800 259 666 or website: www.napwa.org.au

Legislation Online:

- Queensland Parliamentary Council Website: www.legislation.qld.gov.au

Acknowledgements & References:

- Rob Martin, Solicitor, R.D. Martin & Company, New Farm. QLD.
- Queensland Health Website: www.health.qld.gov.au