

CRIME AND PUNISHMENTS

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HIV/AIDS Legal Centre

CRIME AND PUNISHMENTS: DEPORTATION PROCEEDINGS AGAINST PEOPLE CONVICTED OF CRIMINAL TRANSMISSION OF HIV

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The HIV/AIDS Legal Centre Inc (HALC) is a specialist legal centre in Sydney, Australia that provides a free legal service for people with HIV related legal matters.

BACKGROUND: A significant portion of people convicted of HIV transmission in Australia are not Australian citizens. Due to not holding citizenship, those convicted of serious criminal offences (being a legally defined term which includes facing a prison term of 12 months or more), are at risk of having their visas cancelled and being removed from Australia. The HIV/AIDS Legal Centre (HALC) has represented a number of these clients in their criminal matters as well as in their subsequent immigration proceedings to prevent their removal from Australia.

WHEN IS PERSON CONVICTED OF CRIMINAL TRANSMISSION OF HIV AT RISK OF THEIR VISA BEING CANCELLED?

Where a person is not an Australian citizen and commits a criminal offence, they are at risk of detention and removal from Australia.

Section 501 of the Migration Act 1958 provides that immigration can cancel or refuse a visa where a person does not pass the character test for the visa they hold. Where a person is sentenced to prison for 12 months or more (including where the sentence is suspended), they are deemed to have failed the character test.

Australian criminal laws across all states and territories have criminal penalties for doing or inflicting grievous bodily harm to another. This includes where a person recklessly, negligently or intentionally transmits HIV to another person. The maximum penalty for intentional transmission of HIV is life imprisonment. All successfully prosecuted cases in Australia involving charges for reckless, negligent or intentional transmission of HIV have resulted in a prison term or suspended sentence of at least 3 years. This means that where a person is not an Australian citizen and they are convicted of recklessly, negligently or intentionally transmitting HIV to another person, then they will fail the character test for their visa (or visa application) and immigration will take steps to cancel or refuse their visa on character grounds.

HOW HAS THE LAW BEEN APPLIED?

In two recent case studies of people with HIV convicted of HIV transmission, following the completion of their custodial sentence, steps were then taken to cancel their visas and they were placed in immigration detention. Both clients had their visas cancelled and had to take steps to appeal the decisions. The primary reason for the

cancellation was the perception of ongoing risk to the Australian community.

In the case of *Zaburoni v Minister for Immigration and Border Protection*, the Minister for Immigration personally made the decision to cancel Mr Zaburoni's visa. The act of the Minister personally intervening further limited Mr Zaburoni's appeals options and removed his ability to seek a merits review of the decision to an administrative tribunal. The Minister found that:

"although there is a low risk of Mr Zaburoni placing others at risk of contracting HIV, he cannot be considered a zero risk because previous behaviour is a predictor of future behaviour."

I therefore find that there is an ongoing risk that Mr Zaburoni will re-offend, albeit a low risk.

I find that the Australian community could be exposed to great harm should Mr Zaburoni re-offend in a similar fashion. I could not rule out the possibility of further offending by Mr Zaburoni. The Australian community should not tolerate any further risk of harm.

In reaching my decision I concluded that Mr Zaburoni represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any countervailing considerations...."

In the case of *Palmer and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* the Minister for Immigration asserted before the tribunal on merits review that *"even though the risk is low, the nature of the offence and the nature of the harm should similar offences be committed are such that no risk should be tolerated."*

The assertions and findings of the immigration department, were unfounded given the circumstances of the clients:

- Neither client had been convicted of intentionally transmitting HIV to their sexual partner.
- Both clients were not on treatment at the time of the commission of the offence.
- Both had claimed that they had struggled to deal with their diagnosis which had affected their ability to be open and honest about their HIV status to their sexual partner.
- Both clients were from culturally and linguistically diverse backgrounds making them particularly vulnerable and placing them at increased risk of stigma and discrimination in the community.

- Following the criminal proceedings and their subsequent criminal sentencing they had both better come to terms with their HIV diagnosis and were aware of the importance of following the directions of their HIV doctor and consistently taking treatment; not only for their own health but for that of their sexual partners.

- The treating doctors of both clients had given evidence that they were confident that the client knew the importance of taking treatment and were committed to doing so.

- At the time of the immigration decision both clients were on treatment and had an undetectable viral load and were therefore effectively incapable of reoffending in a similar way unless they decided to cease treatment.

One of these clients exhausted all their appeal options and has been deported from Australia and the other was successful in their appeal to the Administrative Appeals Tribunal.

WHAT HAVE WE LEARNT FROM THESE CASES?

There are often many and varied reasons for HIV non-disclosure and from HALC's experiences, following criminal and public health interventions it is unlikely that a person with HIV would continue to place their sexual partners at risk of contracting HIV. Decision makers in primary migration proceedings appear to be unwilling to accept that a person with HIV would no longer place their sexual partner at risk of HIV transmission as the immigration department asserts that they there remains a risk to the community if a person has previously offended.

Criminal transmission laws often disproportionately affect already marginalised communities, including people from culturally and linguistically diverse communities, and therefore places them at greater risk of facing this 'double' punishment of criminal penalties plus possible deportation if they are not citizens.

These cases demonstrate the need for ongoing advocacy and law reform in the removal of offences for HIV non-disclosure, exposure and transmission, except where actual intent can be established to a criminal law standard. The cases also demonstrate the ongoing need for continued robust representation of those, often vulnerable migrants, who are facing visa cancellation.

¹ *Zaburoni v Minister for Immigration and Border Protection* [2017] FCA 654

² *Palmer and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 88 (30 January 2020)