

HIV Transmission and the Jurisdiction of Criminal Law

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INTRODUCTION

For some time now, the criminalisation of HIV transmission has occupied the attention of courts, legislators, the legal profession more generally, as well as policy advocates. Prosecutions for HIV transmission – and sometimes for exposing another to the risk of HIV – have taken place and been conducted in many if not all of the Australian states and territories. The most recent tally indicates something in the order of 20 prosecutions.¹ Three periods can be discerned in this process of criminalisation: in the early 1990s, the charges and prosecutions did not proceed to trial; in the mid-1990s, the trials resulted in not guilty verdicts; and then at the end of the decade, guilty verdicts and sentences were handed down. We are now in a fourth period: from 2005 onward, there have been an increasing number of prosecutions, guilty pleas, and court hearings at both trial and appellate levels of the criminal courts. These continue to make media headlines, and sometimes legal headlines.

A number of themes inform legal commentary on the criminalisation of HIV transmission. One question that has loomed large is whether the institutions of criminal law or those of public health are the most appropriate venue for responding to the social problem of HIV transmission. The most commonly articulated position has been one which prefers a public health response,

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¹ It is difficult to be exact about the tally. Amongst other reasons, there have been in some instances court prohibitions on publishing the names of the accused, as well as the difficulty of accessing more informal responses that would constitute part of the ‘criminalisation of HIV transmission’. My best estimate of the formal prosecutions is 20, based on court reports in the media and also official judgments.

with criminal law relegated at best to a secondary role. Given this reliance on criminal law, a second question that has gained some traction in the legal commentary and policy debates concerns the most appropriate legal technology: if criminal law is used, then should criminalisation proceed by way of the general offences of criminal law or should it be a matter of creating offences specific to HIV? In Australia, a few HIV specific offences do exist. Most prosecutions have however been under the general provisions of criminal law. A third strand in the legal commentary turns its attention to the details of the application of criminal law to the social problem of HIV transmission. Hence, a considerable degree of commentary has attempted to elaborate problems with the legitimacy of particular interpretations of judicial rulings and legislative will.

This chapter is situated in the vicinity of the last two strands of commentary. It proceeds by retracing the judicial and legislative elaborations of the law in this area of criminal law. My starting point is that the performance of criminal law displays considerable difficulty holding onto HIV transmission as a question of law. This is not simply a personal predicament, although it is one to which I want to respond. It is also, I suggest, the predicament that structures the juridical experience of HIV transmission as a crime.

When we analyse and represent HIV transmission as a problem of the governance of crime, how can criminal law be rendered lawful in the criminalisation of HIV transmission? One common response to this question of jurisdiction, or legal speech, is to frame the authority and power of criminal law in terms of a normative narrative of moral principles and policies of responsibility. In the context of the criminalisation of HIV transmission, this issues in a debate about whether the response is best engaged as a social problem of public health or as a legal problem of criminal justice. Although I don't want to get into the details of this debate, I have no doubt that community regimes of public health are more apt. This is so because as a matter of policy the community of people living with HIV/AIDS has a greater chance of ownership of the plural issues that come up, and hence having their lived experience represented in the response to and conduct of governance. Yet as Matthew Wait has forcefully argued and demonstrated, public

health regimes are not the panacea that they are often represented to be in the debates on criminalisation.² This is in part because public law with its liberal tradition of individual responsibility has few if any resources (of argument) to model the sexual relations of people living with HIV/AIDS in terms of shared responsibility.³ Nevertheless, as already mentioned, the dominant approach is to use a public health regime and leave criminal sanctions as an option of 'last resort'. Criminalisation remains – like a 'mop up' strategy for the exceptional or extreme cases – to address the failures of public health regimes in effectively promoting education, counselling and prevention in recalcitrant individual cases. Yet, in this context, it is far from clear what criminalisation might mean as a question of law. Hence, my starting point in this chapter: *if and when the social problem of HIV transmission is brought before the order of criminal law, the performance of criminal law displays considerable difficulty holding onto HIV and its transmission as a question of law*. In part, this predicament is because – in making sense of HIV and its transmission – the discourse of criminal law repeatedly finds itself using a rhetoric that depends for its meaning and legitimacy on other forms of knowledge – whether medical, epidemiological, or sociological, or the even the general cultural repertoire of images about drugs, bandits, grim reapers, sexual practices, and so on. In part, it is because the jurisdiction of criminal law is itself riven by rival and incommensurable traditions of legal argument. It is these distinct yet plural traditions that order the social problem of HIV transmission as an issue of *the legal grammar* of crime. And short of a revolution, it is these traditions which institute the structure of experience which we have come to think of as 'the criminalisation of HIV transmission'.

RIVAL TRADITIONS

The enterprise of criminal law orders social problems in terms of *legal* classifications and their *legal* categories. Legal classifications however emerge out of a number of different traditions. In

² Matthew Weait (2007) *Intimacy and Responsibility: the criminalization of HIV transmission*, London: Routledge-Cavendish, at pp. 11-21.

³ See Weait, *Intimacy and Responsibility*, at 21, and chapter 6. See also Rob Lake, "Don't ask, don't tell: disclosure and HIV" *HIV Australia* vol 6 no 4 commenting at p. 21 that "Whether it's legal obligation, social marketing or other education strategies, the change in emphasis has moved us away from a community norm about shared responsibility in the face of HIV. Instead, strategies and practices that more explicitly place the responsibility for managing risk on the positive partner."

an Australian context, two have dominated the form and idiom of the government of crime. One is the common law of crime and its narratives of adjudication organised around the institution and image of the court. Another is (modern) criminal law which is formed around a narrative of legislation and the role of the state.

The objects that criminal law constructs for its knowledge of social problems are different in each of these traditions. Where the common law of crime takes the *conduct and circumstances* of an event as the basis on which to construct criminal liability, modern criminal law constructs a regime of liability predicated on a representation of the event in terms of the *results* of the *behaviour* of individuals. This differentiation of the grounds of liability is one way into the predicament of law in understanding and responding to the criminalisation of HIV transmission. To the extent that our knowledge of HIV transmission and exposure is ordered around the calculation and management of risks⁴, then the criminalisation of HIV transmission does not sit comfortably with either of these two traditions (either the common law of crime or modern criminal law).

To be sure, the cases and legislative debates are replete with often hysterical (but also prosaic) invocations of the dire consequences of HIV transmission, as much as repeated representations of the circumstances and conduct of particular 'lifestyles'.⁵ But in these arguments the conduct or circumstances of HIV transmission function to index *risk*. This is incommensurable with the common law tradition of crime, in which the conduct and circumstances of HIV transmission would obtain their meaning as a sign of wrongdoing and an icon of a breach in an organic community of value, rather than as an index of risk to and for a heterogeneous population of typical groups and identities. A similar disparity exists for modern criminal law: this tradition takes up and understands the results or consequences of behaviour as its ground of liability. Yet

⁴ The calculation and management of risk is taken up more directly in other chapters in this collection. For example, John Rule addresses the management of risk in terms of 'governmentality' and the HIV sector; Michael Hurley addresses the experience of risk in terms of practical ethics and media discourse.

⁵ In terms of the latter, I am thinking of the ways in which the various institutions of law display a fascination with detailing the various incidents – such as sex-on-premises, promiscuity, conversion parties and so on – which are presented as indicia of lifestyles defining particular group identities.

for it, results obtain their meaning not as an index of risk but rather as a sign of the limits of the state. The results of behaviour are prohibited because consequences represent the limit of law's tolerance in caring for and promoting the health, wealth and security of its citizenry. Hence, the oft-invoked example of murder and the attempts in the legislation and the courts to hold HIV transmission in proximity with the crime of murder.⁶

Risk however is a relatively distinct category with its own history and trajectory. Some of its forms obtain their resonance from taking up the idioms of the 'society of risk'.⁷ Its form of knowledge is neither concrete and experiential (as in the imagistic tradition of the common law of crime), nor realist and empirical (as in the factual traditions of modern criminal law), but rather virtual and indeterminate. The reason of risk is calculative, its technologies are managerial, and its targets are the typical group identities that compose a population. It is neither conduct-oriented nor result-oriented but inhabits a virtual space suspended between the categories of experiential conduct and realist consequences.⁸

This is not to say that risk doesn't appear in the lexicon of contemporary criminal law. It does – its lawful names are recklessness and dangerousness. But with these names the order and meaning of contemporary criminal law is reformed, reshaped, reorganised around *juridical* categories of risk. As the judges have iterated in a plethora of rulings, the calculations and judgments of risk are not reducible to mathematical, statistical, epidemiological or social modes of evaluation. Rather, they are lawful questions and as such, on any given day, questions for the

⁶ Murder represents the taken-for-granted and self-evident limit beyond which no individual can go and still remain part of the community. Mrs Jan Wade, then Victorian Attorney-General, for example lamented that the delayed action of HIV transmission prevents prosecution and liability for murder because death has not taken place quickly enough (Parliamentary Debates, Legislative Assembly, Second Reading of the Crimes (HIV) Bill, *Hansard*, vol 411, at p 1259 (28 April 1993) and p 1892 (12 May 1993)). The suspicion is that this argument (and the more general association between HIV transmission and homicide) displays a veritable will-to-kill: 'if only HIV would kill quickly and so rid those people from our midst'.

⁷ The most prominent thinker associated with understanding the peculiarity of modernity in terms of its ordering around the experience of risk is Ulrich Beck. His most relevant texts in this context are: Ulrich Beck (1999) *Risk Society: towards a new modernity* (London: Sage); Ulrich Beck (1999) *World Risk Society* (Massachusetts, Polity Press); Ulrich Beck and Elisabeth Beck-Gernsheim (2002) *Individualisation: institutionalized individualism and its social and political consequences* (London: Sage)

⁸ Or put differently, between the artificial reason of common law and the scientific reason of modern law.

judge and/or jury. This is so in many crimino-legal contexts concerned with recklessness and danger, but it is especially prevalent in the context of the criminalisation of HIV transmission.

These three traditions of juridical reason give some texture to the predicament of constructing HIV transmission as a question of the legal order of crime. In summary, they are:

1. *A common law of crime.* This tradition fashions its question of liability for HIV transmission by focussing the attention of law on the *conduct (act and circumstances)* in which transmission or infection takes place. In this context, the acts of the accused and the situation in which the person living with HIV/AIDS acts take on an increased significance as lawful questions of liability and responsibility. This goes some way to making sense of the way adjudication in common law courts spend an inordinate amount of time reconstructing and detailing the modes and manners of HIV transmission. It is at this level that common law constitutes norms of ethical comportment, which for criminal law is condensed in the demands of ‘safe sex’.⁹
2. *A modern criminal law.* This tradition refashions the common law of crime by focussing the formal reason of law on the *results or consequences* of individual behaviour in order to differentiate between the licit and the illicit. This tradition gives some sense to the legally iterated remarks that link HIV transmission or exposure to ‘death’ or ‘grievous bodily harm’. But it remains indifferent – for the purposes of legal liability – to the modes and manners of transmission.
3. *Contemporary criminal law.* While current criminal law is engaged through each of the preceding traditions, it is also brings them into relation with the *virtual category of risk*. Legal judgments become fashioned in terms of the juridical calculation and management of recklessness and danger. This makes some sense of the fact that the medical and

⁹ ‘Safe sex’ in the crimino-legal context largely reduces to using condoms; the negative syntagm being ‘unprotected sexual intercourse’. It is arguable that the norms of conduct associated with ‘serosorting’, ‘strategic positioning’ and so on, would become legal categories of conduct – albeit that they remain largely unaddressed by current criminal law.

biomedical constructions of risk do not have the last word in the criminalisation of HIV transmission.

The point of drawing attention to these plural and distinctive traditions of law has been to emphasise two salient features of the order of current criminal law. One, criminal law orders social problems – and specifically the ‘social problem’ of HIV transmission – in legal terms which don’t simply reflect external social and political narratives, but rather obtain their force and power from the jurisdiction of criminal law. And two, that this ordering is riven by plural traditions of legal value such that in any single instance of the criminalisation of HIV transmission, the meaning of HIV transmission will take on its texture from how it is classified or placed in the juridical bestiary of criminal law.

In order to explore the nuances of these features, the remainder of this chapter turns to two vectors of legal classification where HIV transmission is brought before criminal law: the first concerns the *legislative* classification of HIV transmission and the second concerns the classification of HIV transmission engaged by the adjudication of the *common law courts*.

LEGISLATIVE CLASSIFICATIONS: HIV TRANSMISSION IN THE KEY OF HARM, DISEASE, & DANGER

One vector for the legal representation of HIV transmission is through its legislation and its classificatory ordering of the problem of crime. The following provides a brief tabulation of the existing provisions. Its focus is on the general criminal legislation – the Crimes Acts or Criminal Codes – in the various Australian jurisdictions. This admittedly excludes from consideration two kinds of laws involved in the criminalisation of HIV: one, legislation creating quasi-criminal or regulatory offences such as those provisions found in public health legislation; and two, criminal legislation – often also of a regulatory kind – which targets particular activities such as the licensing and practice of sex work.¹⁰ As will become clear, my concern is with the ways in which

¹⁰ For examples of public health legislation offences, consider: *Public Health Act 1991 (NSW)* section 13 (prohibiting persons with a sexually transmissible medical condition having sexual intercourse with another without first disclosing the risk of contraction of the condition and without the other voluntarily agreeing to accept the risk; and extending the prohibition to those own or occupy places for ‘prostitution’ and

general principles of criminal liability are taken up and function in the resort of the criminalisation process to general provisions of criminal law.

Table 1: Criminal Legislation relevant to HIV transmission¹¹

CAUSING HARM OFFENCES
<p>Criminal legislation prohibits a range of offences concerned with causing harm – variously named as ‘harm’, ‘physical harm’, ‘bodily harm’, ‘injury’, ‘grievous bodily harm’ and ‘serious injury’. The legislation in most cases – but not all - defines the harm to include disease, as follows. In defining the harm, none of these prohibitions name HIV.</p>
<p>New South Wales Crimes Act 1900 (NSW), prohibits causing ‘grievous bodily harm’ in sections 33 (intentional) & 35 (reckless), and s 4 defines grievous bodily harm to include ‘any grievous bodily disease’. For example, section 35 was used as the prosecutorial instrument in <i>Kanengele-Yondjo v R</i> [2006] NSWCCA 354 (albeit that is was a slightly earlier version of the section’s current language).</p>
<p>South Australia Criminal Law Consolidation Act 1935 (SA), sections 23 and 24 prohibit acts causing harm and serious harm respectively. Section 21 defines ‘physical harm’ to include ‘infection with a disease’ and ‘serious harm’ to include ‘endangering life’ or ‘serious and protracted impairment of a physical or mental function’.</p>
<p>Northern Territory Criminal Code Act 1983 (NT) prohibits causing harm or serious harm in sections 186 and 181 respectively; and s 1A defines harm to include ‘infection of a disease’.</p>
<p>Western Australia</p>

knowingly permit sexual intercourse that breaches the prohibition); *Public and Environmental Health Act 1987 (SA)* (creating an offence of failing to take all reasonable steps to prevent the transmission of a ‘controllable notifiable disease’ to others); *Public Health Act 1997 (Tas)* section 51 (creating an offence in situations where the person living with the ‘notifiable disease’ fails to take all reasonable steps to prevent transmission and where the person knowingly or recklessly places another at risk of contracting the disease; also providing a defence where the other person knows of and voluntarily accepts the risk of contracting the disease). Sex work legislation and regulations have established licensing regimes which are often dependent on mandatory testing for STIs (including HIV) and sometimes criminalise failure to comply with licensing regulations and working with an STI such as HIV. See for example, *Prostitution Act 1992 (ACT)*, section 25 (under which a male sex worker was charged in 2008) and the discussion in the chapter by Jeffreys and Fawkes in this monograph.

¹¹ For those wishing to follow up the citations to legislation and judgments in this chapter, the easiest access is via the online collection of legal materials at the Australian Legal Information Institute: accessible at <http://www.austlii.edu.au>. The citations that I have used for the judgments and case reports are medium neutral – eg [2007] SASC 143 – and will indicate the specific judgment (where there might be more than one in the case). However, some judgments are unreported and as such are not generally available (either because they are not published, or because there are prohibitions on publishing the names of participants).

Criminal Code Act Compilation Act 1913 (WA) contains prohibitions of bodily harm in sections 294, 297, 304. Section 1(4) defines causing or doing 'bodily harm' to include 'causing a person to have a disease which interferes with health or comfort' and defines causing grievous bodily harm to include 'causing a person to have a serious disease'. For example, section 297 was used as the prosecutorial instrument concerning the negligent transmission of HIV in the *Houghton* case.¹²

Victoria

Crimes Act 1958 (Vic) prohibits causing injury or serious injury in sections 16-18 and threats to inflict serious injury in s 21; the definition of 'injury' and 'serious injury' provided in section 15 does *not* include causing a disease. The prosecutorial option has been to use the transmission of a serious disease provision and the endangerment provisions (listed below).

Australian Capital Territory

Criminal Code 2002 (ACT) defines harm as 'physical harm to a person' and includes 'infection with a disease'. The sections in this Act where this definition becomes relevant only relate to property offences and administration of justice offences.

Crimes Act 1900 (ACT) sections 19 & 20, 23-25 prohibits inflicting or causing grievous or actual bodily harm. The definition of 'grievous bodily harm' refers to 'permanent or serious disfiguring of the person' but unlike other definitions in other states, does *not* name disease.

Crimes Act 1900 (ACT): the prohibition of stalking includes a definition in s 35(6) defining 'harm' to mean 'harm to mental health, or disease, whether permanent or temporary'.

Commonwealth

Criminal Code 1995 (Cth) defines physical harm to include 'infection with a disease' and defines 'serious harm' as harm that 'endangers' or 'that is or is likely to be significant and longstanding'. The offences to which this definition could be relevant concern - harm to public officials, serious drug offences, and drug offences harming children under 14.

TRANSMISSION OF SERIOUS DISEASE OFFENCES

While the causing harm offences have in many instances expanded their definitions to include infecting with a disease, these remain general legal provisions of assault. Nevertheless, there are a few transmission of *disease* offences in criminal legislation. Only the Victorian one is considered HIV-specific.

Crimes Act 1958 (Vic) section 19A prohibits 'intentionally causing a very serious disease' and s 19A(2) defines 'very serious disease' to HIV as defined by the relevant Health Act. This section was first used in the infamous prosecution of Neal in 2008, and a subsequent prosecution of another unnamed male is currently ongoing.

Criminal Code Act 1899 (Qld), section 317 (d) prohibits unlawfully transmitting a serious disease with the intention to transmit the disease. Unlike the Victorian legislation, what constitutes a serious disease for the purpose of the prohibition is *not* named. This provision was used, for example, in a number of legally unreported prosecutions in 2005 (guilty verdict, sentence 10 ½

¹² The *Houghton* case went through a number of judicial articulations: the ruling on the bail application is reported at [2002] WASCA 363; the judgment on appeal resulting in a quashed conviction and a retrial is reported at [2004] WASCA 20; the judgment in an appeal against sentence concerned with the relevance for the sentencer of the jury's decision as to the accused's honest and reasonable but mistaken belief (that the virus could not be transmitted if no bodily fluid was exchanged and that, by withdrawing before ejaculation, he could avoid an exchange of that kind) is reported at [2005] WASCA 216. The most extensive and latest judicial articulation is the appeal against sentence reported in *Houghton v State of Western Australia* [2006] WASCA 143.

years) and 2007 (not guilty verdict).

RECKLESS ENDANGERMENT OFFENCES

There are divisions within criminal legislation that take endangering the life of another as their subject matter (for example Part 3, division 6 of the Crimes Act 1900 (NSW)). Here however, I list a variety of specific endangerment offences in the general provisions of criminal legislation relating to offences against the person. These provisions are not HIV specific, yet they have been prominent in prosecutions for HIV transmission.

Crimes Act 1958 (Vic), s 22 (conduct endangering life concerned with risk of death) and s 23 (conduct endangering persons concerned with risk of serious injury) contain prohibitions which have been used to prosecute HIV transmission cases. Max punishment is 10 years (s 22) and 5 years (s 23). This has been used in numerous prosecutions of HIV transmission since the mid 1990s (see later in this chapter).

Criminal Law Consolidation Act 1935 (SA), section 29(1) prohibits acts endangering life or creating risk of serious harm. Max penalty is for a basic offence is 15 years and for an aggravated offence is 18 years imprisonment. As in Victoria, these have been used to prosecute HIV transmission cases in S.A. See for example the judgment in *R v Parenzee* [2007] SASC 143.¹³

Crimes Act 1900 (ACT) section 27 creates a prohibition of intentionally and unlawfully endangering life or causing grievous bodily harm (see s 27(3)(b)). Max punishment is 15 years imprisonment.

Criminal Code Act 1983 (NT) contains offences of recklessly endangering life or serious harm in sections 174C and 174D, and by virtue of s 174B such offences include 'exposing a person to the risk of catching a disease that may give rise to a danger of death or serious harm'.

As this table indicates, there are at least three grammars of classification in the general provisions of criminal legislation that have been invoked in the context of cases of HIV transmission – one, presents the transmission of HIV as a question of causing harm, a second which grounds liability in terms of the transmission of a serious disease, and a third that invokes a legal tradition of endangerment.

In a sense, each of these legislative grammars conform to the demand of the HIV community sector,¹⁴ as well as the human rights guidelines of the United Nations,¹⁵ that governments and

¹³ See also the commentary on this judgment in Matthew Groves (2007) "The Transmission of HIV and the Criminal Law" 31 *Criminal Law Journal* 137-141, at 140-141, characterizing it as a judgment on "AIDS denialism".

¹⁴ See Intergovernmental Committee on AIDS (Australia), Legal Working Party, *Final Report* recommending that 'special, as opposed to existing general criminal law sanctions, should be carefully considered by State governments because of the danger of stigmatizing already alienated groups' (Canberra: Department of Health, Housing and Community Services, 1992, at para 2.5.4)

states should avoid creating HIV-specific offences. Instead, if HIV transmission is to be criminalised, then it should be by way of the general provisions of criminal law. One often unacknowledged effect of this approach is that the meaning of HIV transmission obtains its authorisation from the existing grammars of criminal law. This is particularly the case with the causing harm offences and their grammar of injury.

The causing harm offences have a long history at common law but for present purposes it is sufficient to note a shift in the way they are put together. This will require attention to the form of knowledge they use, the senses in which the legislative provisions are general, and the objects that they constitute in speaking about criminal liability and HIV transmission.

At common law, the assault offences had been defined concretely and specifically by reference to the person, their actions, and the circumstances in which they acted (and sometimes the status of the victim¹⁶). This generated a plurality of discrete offences, such that the common law of assault was composed of a patchwork of overlapping and situationally discrete jurisdictions. In the late 19th century, these diverse jurisdictions of assault were consolidated and the criminal law of assault emerged as a formal set of general offence definitions. The definitions were general in a number of senses. One, their definitions were constructed out of the settled general principles of criminal responsibility. The architecture of the general principles (and consequently the definitions of each offence) is structured around a division between on the one hand psychological criteria of responsibility and on the other hand behavioural criteria of liability.¹⁷ In

¹⁵ See UNCHR (1998) *HIV/AIDS and Human Rights: International Guidelines* (United Nations: New York and Geneva). The Guidelines state in part that ‘criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases.’ (para 29a, at p 14). However, see Weait (2007) *Intimacy and Responsibility*, at 10-11 discussing how there is a lack of commitment to the import and consequences of these guidelines in the more recent enunciations of the Council of Europe’s Parliamentary Assembly.

¹⁶ For example, criminal legislation still includes a discrete crime of assaulting a police officer, where the only difference between the general assault offences and this offence is that the victim is a police officer.

¹⁷ The psychological criteria are referred to as the mens rea or mental element, and the behavioural criteria are referred to as the actus reus or physical and external element. The mens rea can be either intention, recklessness or negligence. Malice is the term of the common law, and it survives in New South Wales. This survival caused problems in the context of HIV transmission prosecutions, until amended by legislation to permit recklessness. The actus reus concerns itself with causing the consequences of actual bodily harm and grievous bodily harm (or in Victoria, the terminology is injury and serious injury).

this division, the primary standard for evaluating criminal liability is provided by the mens rea, the mental or interior element of the definition of the crime. Hence, the focus of prosecutions in this legislative regime of assault gravitates towards whether the accused intentionally, recklessly or negligently did acts which caused the prohibited consequences (such as transmission or exposure). However, there is a second sense in which the provisions of the criminal legislation are considered to be general: namely that, being defined abstractly, they would thus apply to an extensive range of different factual situations which were not specified in terms by the legislation.¹⁸

The definitions are general in the sense that they are generally applicable to a range of different factual situations. It is this sense that is primarily understood when policy advocacy exhorts governments to use the general provisions of the criminal law to criminalise HIV transmission. What is less examined or interrogated is the first sense of generality: namely, the fact that the general provisions are also general because they rely on the legal architecture of general principles of criminal responsibility in defining the crimes they prohibit. But it is this reliance on the general principles – and the shift in the form of knowledge of criminal law – that has a number of effects which still reverberate in the context of the criminalisation of HIV transmission. One effect concerns the role of psychological liability in HIV transmission cases: namely, the mental state of the accused person becomes all important. These mental states have ranged across intention, recklessness and negligence.¹⁹ Intention however is a very high standard to prove; it is more onerous for the prosecution to establish proof of intent than recklessness or negligence. And apart from the intentional transmission of disease offences, the legislation makes it possible in the causing harm offences for prosecutors to rely on the less onerous standard of recklessness

¹⁸ See Peter Rush (1997) *Criminal Law* (Sydney: Butterworths) chapter 2, for the contours of this dual approach (general *principles* of criminal responsibility and definitions of general *application*) as well as the detailed structure and categories of the general principles.

¹⁹ A fourth category is less common now: 'knowingly'. It is a kind of intention now used in low level of regulatory offences, and so - in the HIV transmission context - crops up in disclosure offences under public health legislation.

(in NSW)²⁰ – and in some instances negligence (in WA). It is here that the criminal grammar of injury (causing harm) latches onto the management imperatives of public health: proof of the accused’s knowledge that he is HIV positive and of the risks associated with it – which is necessary to proof of recklessness at least – is often established by recourse to the counselling and notification regimes of the various state health departments.

A second effect derives from the fact that at the same time that standards of mental liability are privileged, the grammar of action in the law of assault is oriented towards the consequences of our behaviour rather than our conduct (acts and circumstances in which we act). In criminalising HIV transmission, Australian criminal legislation – like the English, and other common law jurisdictions - did not abandon this structure of classification but simply made explicit that harm (or its various analogues and aggravations) could include reference to disease. ‘Causing harm’ thus comes to include, by subsumption, ‘infecting with a disease’. This is the case, for example, in New South Wales, South Australia, Western Australia, the Northern Territory, when amending legislation was introduced in the 1990s. But even then this depends on transforming the action and circumstances of disease into a logic of harm: for the purpose of liability ‘disease’ becomes the cause and ‘infection’ the prohibited consequence of the (unspecified) acts of the accused. How the accused acts and the circumstances in which she or he acts is a matter of indifference for criminal liability: whether you assault by hitting, kicking, spitting, penetrating, shooting is not to the point. Or in the context of disease, the manner of transmission is not determinative of criminal liability – the act of transmission could be stabbing with a needle, anal intercourse, vaginal penetration, etc; and the circumstance of transmission could be the fact that the sexual intercourse is ‘unprotected’, or that there are reduced or zero viral loads, or that the penis is uncircumcised, and so on. The general effect that I am emphasising here is that, although ‘disease’ appears as a term in the legislation, it is authorised and given meaning by the legal

²⁰ In the context of the causing harm offences in NSW, the initial problem concerned the fact that the legislation required proof of ‘malice’. With legislative amendment in response to debates about the criminalization of HIV transmission, malice erased from the relevant text of the legislation. The effect is to put to one side the common law tradition. The modern law of crime is also displaced when recklessness, rather than intention, becomes the required standard of liability.

classification and history of assault offences rather than by any specific medical or health logic. And to the extent that HIV is understood as a disease (typically on analogy with other sexually transmitted diseases), HIV *disappears* in a general legal grammar of injury focussed on the harmful consequences of actions and the recklessness or negligence of the accused in relation to those consequences. In short, disease – for better or worse – is a legal category and in the grammar of injury (causing harm) it gets its meaning from the consequence of infection.²¹

‘Disease’ also appears as the specific referent of the second legislative classification. Again reliance is placed on the form of general legislative provisions. But, rather than simply amending the definition of existing (harm) offences to include disease, the approach in this second grammar has been to create discrete offences which specifically criminalise the intentional transmission of a disease – or more technically, a ‘very serious disease’ in Victoria and a ‘serious disease’ in Queensland.²² Consider the Victorian legislation. Section 19A of the *Crimes Act 1958* (*Vic*) states:

19A (1) A person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is guilty of an indictable offence.

Penalty: Level 2 imprisonment (25 years maximum)

(2) In subsection (1) very serious disease means HIV within the meaning of the Health Act 1958

This is the section with which Michael Neal was charged, prosecuted and convicted (amongst other offences) in Victoria. It is regarded as the only HIV-specific crime in Australia. And in a sense it is: it is not an offence of general *application*. It only applies to very serious diseases and

²¹ It is the analogy between ‘causing harm’ and ‘infecting with a disease’ that links the criminal law disputes to the administrative legal history of notification (in the late 19th century context of the regulation of venereal disease generally and sex work in particular). This is the often unacknowledged context of the return to the judgments in *R v Clarence* (1889) LR 22 QBD 23 by judges and legal commentators. *Clarence* involved a prosecution of a husband who, knowing he had gonorrhoea, had sex with his wife and infected her with the disease. He was charged with assault causing grievous bodily harm and assault causing actual bodily harm. For commentary on the case and its take up by the judiciary in HIV transmission contexts, see Matthew Groves (2007) ‘The Transmission of HIV and the Criminal Law’ 31 *Criminal Law Journal* 137-141. The history that ties the debates to regimes of notification is however obscured somewhat by the tendency to treat the legal links between harm and disease as an issue of *consent* in *sexual* relations.

²² The Queensland legislation remains ambiguous on this front in as much as it simply transliterates ‘do some grievous bodily harm’ with ‘transmit a serious disease’. It seems to want to have it both ways: situating itself as both a variation on a causing harm offence but creating an intentional transmission offence.

until amended the only very serious disease that is specified by the legislation is HIV. But it is also the case that the legislative provision is a general provision in as much as it takes up the general principles of criminal responsibility: and once again, the definition is structured by reference to a legal grammar of injury or consequential harm.

This becomes clear if we consider the placement of the offence in the legislation. It appears in the division of the *Crimes Act 1958 (Vic)* concerned with the so-called offences against the person, and specifically in that part of the legislation that legally creates and defines the assault offences and their logic of consequential injury (or harm). In this respect, the transmission of HIV (as a very serious disease) is simply represented as the means used by people to achieve a harmful end. HIV is instrumentalised: you intended to transmit, HIV was transmitted, and your acts were the cause of the transmission of the disease. This becomes even more explicit if we recall that the legislation presents the intentional HIV transmission offence as a variation on the pre-existing offence of ‘administering substances’ which are ‘capable of interfering substantially with the bodily functions’ of another.²³ Transmitting HIV is like spiking a drink, or using Rohypnol to effect date rape.²⁴ Or, as the comments of Jan Wade the then Attorney General iterated ad nauseam during the Parliamentary Debates on the *Crimes (HIV) Bill* in 1993, the situation targeted by the legislative provision is one of needle bandits.²⁵ In short, the transmission of HIV as a serious disease obtains its legal meaning from a series of associations

²³ *Crimes Act 1958 (Vic)* s 19.

²⁴ The use of drugs such as Rohypnol to effect rape is covered by s 53 of the *Crimes Act 1958 (Vic)* and comparable provisions in other Australian jurisdictions. These provisions are concerned with *administering* a drug in order to sexually penetrate, and so provide a sexualized variant of the administering a substance offence of assault.

²⁵ This is the legislative bill which introduced s 19A into the general provisions of criminal law contained in the current *Crimes Act 1958 (Vic)*. As Jan Wade stated from the outset of the debates, ‘The purpose of the Bill is to respond to community concern about the use of hypodermic syringes filled with blood as weapons in cases of robbery and assault.’ (Parliamentary Debates, Legislative Assembly, Second Reading of the Crimes (HIV) Bill, *Hansard*, vol 411, at p 1259 (28 April 1993); and see the vitriolic response to Wade by Mr Cole a Labor minister, at p 1871-1879, and especially at p 1872 (12 May 1993)). In addition, in rejecting opposition to the bill on the ground that it is discriminatory, Wade stated that the bill ‘does not include consenting sexual activity’ (at p 1892) at the same time that she argued that it may cover people who deliberately infect another during rape and those who deliberately spread HIV to others without warning them of the dangers (at p 1893). Apart from the evident confusion in using a standard of consent to run together gay sex, rape, and spreading a disease, it is ironic that the only prosecution under s 19A did involve sexual transmission – and it was only conducted some 15 years after the section was introduced into law.

(conjunctions and distinctions) with factual situations and legal categories: substances, drugs, blood, semen, sexual assault, causing injury or harm, robbery (understand as theft by violent means), murder. To the extent that anything holds these disparate lexicons together in law, it is that they hold people responsible for the harmful consequences of their actions and in doing so they situate people living with HIV/AIDS in an instrumental relation with those consequences by reference to the legal categories of intention, causation, and disease. In this sense, HIV disappears into a means-end relation. And once again the *manners* of transmission disappear.

A third grammar of classification concerns itself with dangerous offences. These are also general provisions of the criminal law and, like the causing harm offences, are formed out of the attempt to replace concrete and situationally discrete legislation with statutes containing general offences of general application. As with the causing harm offences, psychological responsibility is measured not by the legal standard of intention but by the standard of recklessness. In terms of the grammar of action which structures the offences, the endangerment provisions are usually presented in terms of the consequences which have the acts of the accused as their antecedent cause.²⁶ But the legal problem that then arises is simply where the legal category of *danger* is to be placed within this grammar of mentality and action. I will return to this below, but here I want to briefly note that the contemporary ordering of criminal law has increasingly been reshaped since the 1970s around the standard of dangerousness. This has been particularly evident in the context of sentencing and punishment²⁷, and to some extent in the reformation of policing practices, but it is less remarked in the context of the statutes and courts concerned with the trial and verdict stage of criminal justice. In terms of the trials, danger has emerged as an order-word in a number of ways – the increasing prominence of recklessness at the expense of intention, the inclusion of dangerousness as an element of an offence (as in the endangerment offences, or as

²⁶ The most explicit statement of this structure was recently provided in *The Queen v Rajaa Abdul-Rasool* [2008] VSCA 13 at para 30, per Redlich JJA: ‘The endangerment offences are concerned with the consequences of action – that is to say which follows as an effect or result of something antecedent.’

²⁷ For the emergence and renaissance of dangerous in punishment practices, see John Pratt (1997) *Governing the dangerous: dangerousness, law, social change* (Leichhardt: Federation Press) and Mark Brown and John Pratt (eds) (2000) *Dangerous offenders: punishment and social order* (London: Routledge). In the latter collection, the essay most pertinent if not quite on point is Pat O’Malley’s essay situating risk in relation to three moments of liberal ideology in the 20th century.

in some of the causing harm offences), and the consequent restructuring of the entire field of offences against the person (from homicide and specifically manslaughter to common assault of the least serious kind) into offences addressing the dangers to individuals and the community. Given this, the use of the endangerment provisions in Victoria and elsewhere to prosecute HIV transmission and exposure is not that surprising, albeit that it is not without its considerable difficulties for the legal profession as much as the HIV community sector.

In summary, three points of emphasis about the manner in which criminal law reorders and shapes both itself and the meaning of HIV transmission:

1. HIV transmission is situated in a *plural field of legal signification* – disease, drugs, needles, substances, bandits as much as assault, rape, murder and endangerment. What the placement of HIV transmission in criminal legislation illustrates is that criminal law and the criminalisation process unceasingly tries to pin down the meaning of HIV, to fix its meaning. Yet it is continually being displaced by rival traditions in the ordering of criminal law, as much as by references to the social, the medical, the cultural and so on. In a very real sense, the criminalisation of HIV transmission is not about HIV at all – at least if criminalisation involves a question of the jurisdiction of criminal law. To the extent that it does involve a question of law, HIV disappears into a grammar of injury (harm) and a logic of danger. This disappearance is one effect of using general provisions of the criminal law to criminalise HIV transmission – even if only as a ‘last resort’. This, I think, raises a real question as to how to advocate for the proper representation of HIV within the criminal law (without necessarily committing ourselves to criminalisation).
2. A grammar of injury (or harm) has been the main way of authorising the criminalisation of HIV transmission in Australia, even when law is seemingly speaking a medical language of infection, exposure and disease. This results in a presentation of transmission as fundamentally a relation of means to end; on analogy with using guns to shoot, drugs to rape, needles to rob, bombs to endanger, sex to injure, and so on. The

identities of people living with HIV are thus situated instrumentally in relation to HIV by way of the legal language of recklessness, causation and disease.

3. A grammar of danger has come to supplement the logic of injury in terms of a specifically legal form of risk. The criminalisation of HIV transmission is at the sharp end of this supplementation – and expansion – of criminal liability.

In the next section of the chapter, I want to take up again this legal supplement of danger by turning to the second vector of legal classification – namely, adjudication in the common law courts.

DANGER BEFORE COMMON LAW COURTS

The common law tradition proceeds incrementally in response to contingent situations. Proceeding case-by-case according to their particular merits, the form of knowledge it generates is ordered around what can be thought of as *snapshots* – condensed images or short stories that bring with them already constituted subject-positions, transitive relationships, forms of unfreedom and fetishised objects.

Nine individuals have been prosecuted under the Victorian endangerment provisions. These account for almost 50% of all the Australian prosecutions for HIV transmission (infection or exposure), whether under the endangerment provisions or under some other criminal legislation.²⁸ In all of the Victorian prosecutions under the general endangerment provisions the conduct prosecuted involved situations of sexual transmission, and specifically scenes of unprotected sexual intercourse by a person living with HIV/AIDS. These scenes have involved sex workers, prisoners, musicians, hotel managers, amongst others. Sex took place as part of their employment or in their personal lives. They have involved men having sex with men as well as men having sex with women. The sexual relations have been casual, sometimes conducted over the relatively short term, and sometimes the sexual partners have been husband and wife. The

²⁸ That is, 9 out of a total of 10 individuals prosecuted in Victoria for HIV transmission offences (infection or exposure), or 9 out of a total of 20 individuals prosecuted throughout Australia. The endangerment provisions in South Australia have been used to prosecute 2 individuals.

sexual conduct has involved single acts, but also several acts with different partners on separate occasions. The ages of the accused have varied, as have the ages of the complainants, although most have been in their 20s and 30s at the time of the prosecutions. The ethnic or cultural background of the accused as well as the complainants has been mainly white or Anglo-Australian, but the accused have also included men from Zambian, Sudanese and West Indian cultures. The accused have contracted HIV in a variety of ways: not only sexual relations, but also intravenous drug use, and contaminated blood transfusion. And at the time of the prosecution, the complainants have tested negative as well as positive, some have seroconverted or have been diagnosed with the AIDS syndrome. The complaints against the accused have been initiated in a number of ways. Sometimes they are intelligible as part of a turf war between the police and the independent prosecution service; at other times, they have been initiated by way of prison authorities (a fellow prisoner complaining to a guard and then having the complaint passed onto detectives), and at yet other times through the concerns of workmates and even the involvement of the relevant AIDS Council. In addition, police have identified several accused as a result of public health officials mistakenly handing over files to the police in response to a police warrant for the file of a different person being investigated. And finally, in most instances, there had been prior communication between officers of the Department of Health and the eventual accused notifying the latter of the diagnosis, the risks associated with sexual intercourse while HIV positive, and various obligations concerning disclosure and unprotected sexual intercourse.

The charges in these cases were brought under sections 22 and 23 of the Crimes Act 1958 (Vic).²⁹ The former (s 22) prohibits ‘conduct endangering life’ or more specifically conduct which places or may place another in danger of *death*. If found guilty, punishment is imprisonment – and specifically, a maximum of 10 years. Section 23 varies section 22 slightly to create a less serious offence – it prohibits ‘conduct endangering persons’, that is creating a danger

²⁹ Sometimes the prosecution has alleged the section 22 offence, and in the alternative the section 23 offence. Sometimes – as in *R v Mwale* (County Court, Judge Hampel, unreported, April 2008) – section 23 was charged.

of *serious injury* to a person. The punishment is again imprisonment, but the maximum is 5 years.³⁰ Apart from this differentiation between danger of death (s 22) and danger of serious injury (s 23), and a corresponding differentiation in the available sentence, the elements of the two offences are the same.

In terms of adjudication, evidence and judgment by the legal profession is presented as a matter of relating the grammar of the legislation to the evidence narrated in the court.³¹ This is conducted by way of a so-called ‘elements analysis’, in which the formal elements of the statutory definition are broken down into their constituent parts (and given a meaning authorised by the text of the legislation and preceding judgments interpreting that text in the light of the common law tradition and its modern variants). These elements are:³²

1. The accused *voluntarily engaged in conduct*.

In HIV transmission cases, the disputes have not concerned themselves with the voluntariness requirement. There have however been disputes about the *legal character of the conduct* of the accused – here, the acts and circumstances of sexual transmission. In one case, there was a brief dispute over whether the alleged act of anal penetration took place.³³ In another case, considerable time at committal and trial was given over to

³⁰ These specified punishments are the maximum available to the sentencing judge. For example, in the most recent case where the accused had pleaded guilty to a charge under s 22 (maximum of 10 years), the judge described the accused’s conduct as “represent[ing] a shocking example of a serious offence”. The sentence imposed by the judge was 5 years imprisonment (with a minimum of 3 years). See the court report in “HIV husband spun web of lies”, *The Age*, March 13, 2009.

³¹ In Victoria, committal hearings are heard in the Magistrates Court. If the case goes to trial (and there are many reasons why it may not, and not only because the accused pleads guilty), the trial will be heard in the County Court. Appeals from the County Court have gone to the Supreme Court of Victoria (and these have been limited to questions of law). No appeals (whether from Victoria or elsewhere) have been taken to the High Court of Australia in the HIV transmission cases.

³² The following listing relies on but slightly varies the listing in *The Queen v Rajaa Abdul-Rasool* [2008] VSCA 13 at para [19], the most recent authoritative restatement of the elements of the endangerment offences in Victoria. This is not a HIV transmission case; it concerns a woman dousing herself with petrol while in a school principal’s office and distraught about the whereabouts of her children. It is at an appellate level. A later case – *R v Mwale* (County Court, Judge Hampel, unreported, April 2008) – is a HIV transmission case; it is a judgment at first instance which relies on *Abdul-Rasool*.

³³ See *R v B*, Supreme Court of Victoria, Teague J, June/July 1995, Unreported, BC9507977. This was the first trial for HIV transmission under the endangerment provisions. The prosecution concerned two prisoners on remand in the City Watchhouse in Melbourne (the building has since been condemned, and replaced by the Melbourne Custody Centre). Although classified as ‘separates’, the two prisoners were

narrating whether or not the accused was wearing a condom since the conduct alleged, as it often is, an act or acts of ‘unprotected sexual intercourse’.³⁴ Despite the relative lack of legal dispute, the legal articulation of the prosecutions are redolent with narratives of the conduct of HIV transmission. In these narratives, the courts can be seen fashioning codes of sexual deportment for people living with HIV.

2. The conduct placed another in *danger of death* (or in s 23, in danger of serious injury).

In HIV transmission cases, this has created the most difficulty for the courts – namely, the meaning of danger and how it relates to the risks of the actual conduct of the accused. The evidence narrated in court has been primarily – but not exclusively – biomedical and specifically epidemiological.³⁵ The legal definition of danger has however also been the subject of much argument. The current approach is to insist that the danger must be a real and not hypothetical danger; and to legally define dangerous

placed in the same cell for one night by duty police. One prisoner complained to the duty sergeant the next morning after apparently hearing from ‘mainstream prisoners’ that the accused ‘had AIDS’. The accused was charged and tried, but the judge directed the jury to acquit, of one count alleging anal penetration. At committal and early in the trial, there was also some discussion over an act of oral sex but this was removed from the indictment (see *R v B*, Transcript of Proceedings, Supreme Court of Victoria, pp 5 and 8). Two earlier prosecutions for HIV transmission under the endangerment provisions did not get beyond committal: in a 1991 case, the charges against a sex worker were eventually dropped and public health legislation was used to keep her in protective custody. She eventually died of a drug overdose some three years later. See B. Calder (1991) “Setting an Ugly precedent” *Outrage* (may 1991), pp 7-8, John Godwin et.al. (1993) *Australian HIV/AIDS Legal Guide*, 2nd edn (Sydney: Federation Press), at p. 55; and *The Age*, 3 December 1994 at pp 18 & 28. In another 1991 case – that of *Queen v PD* (Prosecution Case File Y833; Committal Proceedings, Melbourne Magistrates Court, Barrow M) – the accused died of an AIDS-related illness before the trial date was set.

³⁴ See *R v D*, Supreme Court of Victoria, Hampel J, May 1996, Unreported judgment, BC9607711. This was the second trial under the endangerment provisions. The prosecution of D concerned four counts of unprotected vaginal intercourse; two of the counts related to sex with one woman, the other two counts with a different woman on separate occasions. As Hampel J stated in his charge to the jury, ‘each of the counts deals with one specific act of intercourse. We don’t look at this matter generally ... It is inappropriate to take a global view of the general conduct.’ (*R v D*, Supreme Court of Victoria, trial transcript, at p 310). The accused was found not guilty on all counts.

³⁵ This takes place in all the cases. The most extensive and recent elaboration of the legal construction of biomedical and epidemiological constructions is illustrated by the judgment in the South Australian case of *R v Parenzee* [2007] SASC 143.

conduct as that which carries with it an ‘appreciable risk’ (not merely a risk, nor merely a remote possibility) of death or serious injury.³⁶

3. The accused engaged in that conduct *recklessly*.

The legal disputes on this element have concerned both the definition of the category, and how to relate recklessness to the danger of death (and to a lesser extent, how to relate the conduct and knowledge of the accused to the meaning of recklessness). In relation to the first dispute, it is pretty much settled now that the accused must foresee the probability of the danger of death and nevertheless go ahead with the alleged conduct. As this indicates, the legal grammar of recklessness is concerned with the careless individual – it provides a snapshot of the knowingly careless individual. This places recklessness somewhere³⁷ between intention and negligence in the pantheon of criminal minds. In many instances in the HIV transmission cases, this would arguably mean that the person living with HIV/AIDS is under a duty to have sex with latex and to disclose their HIV positive status to their sexual partner (and relatedly, to inform themselves of the risks of transmission, if only by reading the relevant Health Department letter).

4. The *reasonable man* in the position of the accused would have *realised* that she or he had placed another in danger of death (or serious injury in s 23)

³⁶ In the context of HIV transmission cases, the standard of ‘appreciable risk’ was set initially in the unreported judgment of *R v B* (Supreme Court of Victoria, Teague J, June/July 1995, Unreported, BC9507977). This was obtained on analogy with the more serious offence of unlawful and dangerous act manslaughter. Subsequent cases have largely iterated the appreciable risk standard. Most recently, see *R v Mmale* (County Court, Judge Hampel, 3 April 2008, Transcript of Proceedings, at pp 529-534).

³⁷ It is noteworthy that the standard of recklessness here is arguably less than the standard of recklessness used in other but similar offences against the person. This is because what must be foreseen in the endangerment offences is the probability of an appreciable risk (of death or serious injury), rather than simply the probability (of serious injury or death). This has caused some technical or logical problems for the judges and legal commentators, which stem from the analytical demand to relate, in a cascading series, the concept of recklessness to the concept of danger and then to the categories of death or serious injury.

The ‘reasonable man’ standard is a staple of criminal law. In the HIV transmission context in Victoria³⁸, it functions as a threshold standard – if the reasonable man would have realised the risks of transmission, then the legal inquiry and dispute can move onto the recklessness question. It also functions implicitly as a way of elaborating the meaning of danger (the second element above). This focuses the court’s attention on the regime of notification (counselling and prevention) in public health.

Much more could be said about each of these elements – and legal argument and judicial reasoning ranges across them with some degree of alacrity – but it is the legal structure of the offence that I will follow up here.

The offence structure pivots on the concept and category of dangerousness; it is the lynchpin that holds all the elements together. The acts of the accused must be legally related to it; the consequences of those acts must be related to it; and the psychological states of the accused must be related to it. Hence, although the legal adjudication proceeds by breaking down the offence into its component parts, it is also taken for granted by the legal profession that they must be unified if there is to be a crime. Dangerousness is that which *legally unifies* HIV transmission *as a crime*.

Nevertheless, what is especially evident in the adjudication of the HIV transmission cases is the way in which dangerousness pulls the legal profession and its judgment of conduct *in two directions at once*.

In one direction, the courts address dangerousness as if it is *an intrinsic* quality of the *conduct*. The narrative is both moral and factual: unprotected sexual intercourse is an inherently risky activity when the accused is HIV positive. Danger inheres in either the act itself or the circumstances which give character to the act per se – the fact that it is unprotected, or that it is anal

³⁸ In South Australia, the legislature and courts have not required the use of the reasonable man standard in endangerment prosecutions (whether concerned with HIV transmission and exposure or not). The question of risk is thus carried solely by the legal concepts of recklessness and danger. See *Criminal Law Consolidation Act 1935 (SA)* section 29 and judicial commentary on it. This classificatory difference has however not created any substantive difference between Victoria and South Australia.

penetration, or that the penis is not circumcised, or that it is sex, or that it is HIV, or in how many times there was sexual intercourse between the partners, and so on. What becomes legible as the legal experience of HIV transmission is a legal narrative which arranges people living with HIV/AIDS as intrinsically dangerous: since after all a person is what he does and the context in which he does it!

In a second direction, the legal meaning of danger is determined by the end or result of the conduct rather than the conduct itself; it is attributed to the consequences of behaviour. The law requires proof of a danger of *death or serious injury* and it is this that makes dangerousness resonate in the bestiary of law. Hence, the repeated emphasis by prosecutors and defence lawyers, as much as the judiciary, on the necessarily fatal effects of HIV. In fact, the evidential narrative – including the biomedical evidence – in both *R v D* and *R v B* is arguably structured entirely around the image of death as that which makes anal and vaginal intercourse dangerous when the accused is HIV positive.³⁹ But for brevity and recent illustration, Hampel J's remarks in *R v Mwale* will suffice.⁴⁰ In her ruling on a 'no case' submission by the defence, she summarises the epidemiological and biomedical evidence as being

that HIV, once transmitted, caused a serious illness for which there was no cure, no prospect of spontaneous recovery and which would inevitably progress to AIDS and then to death.⁴¹

Having made the ruling, she returns to this theme in directing the jury to acquit the accused of the charges. She says to them:

³⁹ *R v B*, Supreme Court of Victoria, Teague J, June/July 1995, Unreported, BC9507977; *R v D*, Supreme Court of Victoria, Hampel J, May 1996, Unreported judgment, BC9607711.

⁴⁰ *R v Mwale*, County Court, Judge Hampel, Unreported Judgment, 3 April 2008. There are a number of striking features of this case. One, the accused was identified by police as a result of the health department mistakenly handing over his file (and many others) to the police in response to a police warrant for the file of Michael Neal (who was later prosecuted for intentional transmission of a serious disease under s 19A Crimes Act 1958 (Vic)). Two, the female complainant in the prosecution was 'outed' as a sex worker albeit that the sexual conduct alleged in *Mwale* was not part of her sex work activity. In any event, and more generally, the occupational health and safety practices of the sex industry in Australia render her employment as a sex worker irrelevant in the context of prosecutions for sexual transmission. See the chapter by Elena Jeffreys and Janelle Fawkes in this monograph.

⁴¹ *R v Mwale*, Transcript of Proceedings, at p 536, lines 16-20.

It was also clear from what Professor Grulich said that, a person – once you’ve got HIV you’ve got HIV and although anti-retroviral drugs can significantly slow down the rate of progression in most people, there’s no cure, you can’t take drugs to take it away, it will always be in your system and it will inevitably progress through those stages and to AIDS. But once you’ve got it you’ve got it, that’s the significant part of that part of his evidence and it doesn’t go away.⁴²

As this indicates, even if infection is understood as the danger, then still the danger of the infection obtains its meaning from a narrative of fatality in which death is the intrinsic consequence of HIV transmission.⁴³

In sum, the meaning of danger is legally indeterminate: it is suspended between being a property of our conduct or a property of the consequences. And to the extent that the common law courts hold it together it is the *circumstances* which structure the legal experience of people living with HIV/AIDS. This, I suggest, is one reason that the circumstances in which people living with HIV and accused of a crime provide so much of the object of the adjudication’s time and energy. But the anxiety is that this attention to the dangerous circumstances of sexual transmission (unprotected, uncircumcised, viral loads, and so on) relates a fundamentally juridical story: you are either a dangerous person or you are dying. In this, the common law judgment of conduct is somewhat parsimonious in its practices of mourning.

To end, then, I want to link the legal indeterminacy of danger to a striking feature of legal procedure in the endangerment cases. In many of the HIV transmission cases, the defence lawyers have presented the judge, after narration of the evidence, with a submission of ‘no case to answer’. The submission has been that although the biomedical evidence establishes the risks of unprotected sexual intercourse by the particular HIV positive person who is accused, this evidence is insufficient to establish or even settle the legal question of danger. If successful, this no case submission requires the judge to direct the jury to acquit the accused of the charges.

What is invoked in this procedural gambit is the relation between the judgment of conduct and the conduct of judgment – or, in a more technical idiom, the proper relation between judge and

⁴² *R v Mwale*, Transcript of Proceedings, at p 548 line 28 to p 549 line 12.

⁴³ This association may go some way towards explaining how other STIs are differentiated from HIV in the context of the criminalization of HIV transmission.

jury in a criminal trial. Who is to decide? The role of the judge in a criminal trial is to address the form of law and make sure that its topics (such as danger) have been adhered to properly. The role of the jury is to decide – do we believe your facts or argument? The initial HIV transmission case under the endangerment provisions took this role of decision away from the jury and directed them to acquit. The judicial role became one of decision: the forms of law have not been adhered to, and you could not adhere to them, so I direct you the jury to acquit because there is no evidence by which you could reasonably find that the evidence of risk was sufficient to constitute the legal standard of danger.⁴⁴ Since then, the decision has been returned to the jury: in order that a judgment of HIV transmission can be made (in order that the common law can discriminate between endangerment and HIV transmission), the legal question of danger must be handed over to the jury. As Hampel J put it in *R v Mwale* last year:

In my view, ultimately the notion of appreciable risk, carrying with it value judgments about what is in the circumstances an appreciable risk, is quintessentially a jury question.⁴⁵

In short, not only is the concept of danger legally indeterminate, but the performance of judgment is indeterminate. The best chance, it would seem, of the HIV positive person faced with the criminalisation of HIV transmission lies with the common law jury.⁴⁶ In terms of

⁴⁴ See *R v B*, Supreme Court of Victoria, Teague J, July 1995, Unreported, BC9507977. See the direction or charge to the jury, Transcript of Proceedings, at pp. 185-191.

⁴⁵ *R v Mwale*, Transcript of Proceedings, at pp 533 ll 26-29, rejecting the no case submission on this ground. Judge Hampel did however accept the no case submission on the second ground: this argument concerned whether there was proof by the prosecution that the complainant, who was HIV positive, was put at risk after the date that the accused was diagnosed as HIV positive. Proof of the timing of the transmission or exposure raised issues of causation, as well as the effects of the new science of ‘super infection’, and the relevance if any of the complainant’s prior sexual relations with others. In a welcome note, the sexual history of the complainant – involving, amongst other things, a period of work as a sex worker prior to her diagnosis as HIV positive – was forthrightly declared by Judge Hampel to be irrelevant to the legal question in dispute: namely, whether *the conduct of the accused* was capable of being categorised as placing her at risk of the transmission of HIV (Transcript of Proceedings, at p 541). That said, the judge was somewhat disturbed by the argument that, since the complainant happened to be HIV positive, then the prosecution could not exclude the reasonable possibility that the accused may have infected the complainant *prior to bis* diagnosis, and as such the charge could not be made out. She adds the coda – common in HIV transmission cases where no case submissions have been made – ‘Of course, this [the resulting anomaly] is not a matter for me or for a court, but maybe it is something which parliament should consider.’ (Transcript of Proceedings, at p 542).

⁴⁶ This is despite the fact that several accused have pleaded guilty to charges for HIV transmission under the endangerment provisions. In one case, a Melbourne man – charged with two counts under s 22, for having unprotected sexual intercourse and thus exposing (not infecting) the female complainant – pleaded guilty and was given a suspended sentence of two years jail (he would only have to go to jail if he offended

advocacy, this would mean that considerable educational work needs to be done with the various branches of the legal profession.

THE PREDICAMENT OF CRIMINALISATION

The criminalisation of HIV transmission has difficulty holding onto criminalisation as a question of the jurisdiction of criminal law – understood as the power and authority to perform the judgment of crime and so differentiate the licit from the illicit. This predicament has been retraced on the space of legal classification – both in the criminal legislation, and in the courts of common law adjudication. Perhaps more difficult is to identify what follows from the predicament. By way of conclusion, a number of summary remarks:

1. I have suggested that HIV disappears in the grammar of the general provisions of criminal law. Law misrecognises itself as monolithic and HIV as injury and danger, but it is no less powerful and authoritative for all that it does misrecognise.
2. This might mean that the policy of advocating the use of the general provisions of criminal law is in need of some revision – or at least greater attention to the legal grammars that unsettle and concern so much advocacy in this area. That said, the use of HIV-specific offences promises very little as well, if the ways in which the common law courts give undue attention to the acts and circumstances of HIV transmission is anything to go by: to the extent that common law proceeds incrementally, the institutional impulse has been to supplement and expand the scope of criminalisation as law becomes aware of a different act and circumstance (the most recent being the impact of the science of ‘superinfection’ and viral loads on transmission risks⁴⁷).

again). The accused was identified by police in much the same way as the accused in *Mwale*: public health officials mistakenly handing over files to police in response to the Neal police warrant (see footnote 40 above). The most recent guilty plea by an accused was this year, see the court report in “HIV husband spun web of lies”, *The Age* 13 March 2009. The sentence was 5 years jail.

⁴⁷ ‘Super infection’ was particularly adumbrated in *R v Mwale*, County Court, Judge Hampel, Unreported Judgment, 3 April 2008.

3. No single practice or discourse – whether it is the plural traditions of the law of crime, or the no doubt plural traditions of medicine and social policy - has the final say.
Although some of them seem to want to have the final say, the criminalisation of HIV transmission indicates that they are essentially contestable in a culture of argument. And this may be a good thing. I have simply focussed on the conditions through which criminalisation of HIV transmission becomes the matter and material of legal argument.
4. To the extent that the common law courts suppose that liability for HIV transmission can map the virtue of the person living with HIV/AIDS in terms of the dangerous individual and the common good, then an ethic of ‘shared responsibility’ has little purchase in the legal culture of argument.
5. Policy advocacy could usefully direct its attention towards raising awareness amongst the legal profession – defence lawyers, as much as prosecution lawyers, the judiciary, but also the police – concerning the ethical cultures of meaning-making within the heterogeneous communities of people living with HIV/AIDS, as well as the disconnects and asymmetries between biomedical risk and the legal grammars of injury and danger.