What is the legal duty?

**Crimes Act 1961 s156 Duty of persons in charge of dangerous things**

Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without legal excuse to discharge that duty.

⇒ All people in New Zealand have a duty to take care when they are in control of something that can endanger life, health or safety of other people. Infectious bodily fluids of HIV positive people are considered to be something HIV positive people are in control of. This means that legally they must take reasonable precautions to avoid transmitting HIV to other people.

Where HIV has been transmitted

**Crimes Act 1961 s181(2) Wounding with intent - (or reckless disregard)**

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.

⇒ If HIV is transmitted and it cannot be shown that there was some concern taken by the positive person for the safety of their partner (for example: by wearing a condom) the positive person will be criminally liable and may be sentenced to up to 7 years in jail.

Where HIV has not been transmitted

**Crimes Act 1961 s145 Criminal nuisance**

(1) Every one who commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of any individual.

(2) Every one who commits criminal nuisance is liable to imprisonment for a term not exceeding one year.

⇒ Criminal nuisance means that when health or safety is put at risk people have to comply with legal duties.

What cases have there been in New Zealand to establish this is the law?

There have been 6 men charged and successfully prosecuted in New Zealand for not disclosing their HIV positive status (no condoms were used). In 2005 we had the first charge laid (we believe anywhere in the world) in which there was no disclosure but a condom was used. This charge was not upheld.

It has been established by this 2005 case that properly used condoms are sufficient to discharge your legal responsibility as a person that is HIV positive. This means that it is not legally necessary for people who are HIV positive to disclose their HIV status to sexual partners where a condom is properly used.

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**NO CRIMINAL LIABILITY**

- Condom + Disclosure OR NO disclosure

**CRIMINAL LIABILITY**

- NO condom + NO disclosure

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- The law in NZ is clear that people that are HIV positive are not criminally liable when there is condom use and disclosure or condom use and no disclosure.

- Condoms + water-based lubricant for anal and vaginal sex are the most effective way of preventing HIV being transmitted sexually. Encouraging condom use has always been the primary response of public health experts to prevent the transmission of HIV.

- To support the public health campaign against transmission of HIV the law must provide an incentive for people to use condoms, it must not treat condom use as an irrelevant consideration.

- People have greater access to casual sex since the advent of internet dating. In this casual sex environment it should always be assumed that there is a risk a partner is HIV positive and the response should be employ the universal precaution of using condoms + water-based lubricant.

- When there is no condom used and no disclosure a sexual partner that is HIV positive exposes himself or herself to the risk of criminal liability under NZ law.

- In casual sex situations many people will not have sex with someone they know is HIV positive. For a person that is HIV positive there is an array of reasons why he or she would choose to not disclose their status.

- Disclosure of a negative HIV status does not stop the virus being transmitted as we know that up to one-third of people that are HIV positive are not aware of their HIV status, and cannot disclose. In the first months of becoming infected with HIV people are more infectious than at later stages of the disease, this early stage is also the time when they are least likely to be aware of the fact that they have become infected.

- Legally requiring disclosure would create a disincentive for people to be tested for HIV and place responsibility for safe sex entirely on the person living with HIV/ AIDS.

- If the 2005 Wellington case had decided that the law turns entirely on disclosure and that using a condom did not matter it would have meant that there is no legal incentive to use condoms and that the law would have contradicted the fundamental public health message of consistent condom use to prevent HIV transmission.

- Even for those that are aware of their HIV positive status we cannot assume that they will always feel able to disclose this to others.

- By disclosing an HIV positive some people may be putting themselves at risk of violent assault, for example sex workers and people in violent relationships.

- It is vital that condoms are used to prevent the transmission of HIV, whether disclosure occurs or not.

- Relying on the law to protect you from HIV is a risky strategy • Disclosure does not stop HIV transmission, condoms + lubricant do.