# Unprotected sex: who's responsible?

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Recently a friend of mine I'll call Jason* told me of a four-hour marathon encounter with a sex partner he had met on the Internet. At this encounter, and following several moths of “chatting” Jason resisted constant attempts to “bareback” despite prior agreements that only safe sex would occur. I was surprised that Jason could be so patient with someone who was clearly quite happy to put them both at risk (they both believe they are HIV-negative) but when you have a desirable sexual partner in the room with you, sometimes people will go to great lengths to make it all happen.

Jason's partner was behaving badly in my opinion, seeking to break their agreement and showing scant respect for his sex partner. Jason fortunately had enough strength of mind to stop him doing something they may both have regretted. He has already endured one bout of taking PEP drugs after another sex partner removed a condom without his knowledge during sex and he was not about to repeat that again.

## Who's responsible?

My thoughts wandered to a discussion I had with a couple of HIV-positive gay men at a workshop held for PLWHA in Melbourne where they put a view about sexual responsibility that I found almost as challenging as the ones mentioned above. Whilst these two guys were in the minority in their views at the event, they put the stance that if they hooked up with a sex partner and there was no discussion entered into about safe sex and the partner proceeded without condoms then they had no further responsibility for whatever consequence may occur. “This person has made a choice, they are prepared to put themselves at risk or they are already positive” I was told. “I only have responsibility for myself sexually—others have to protect themselves in any way they see fit.”

Is that an ethical viewpoint to take, I wondered? Is it acceptable to say that, in some situations, it is OK to look after your own interests when it comes to sex? I have sat on numerous ethics [1](In clinical trials) The process of determining that a proposed clinical trial conforms to a wide range of moral, scientific and ethical standards, to ensure that participants in the trial are not abused, mistreated or unfairly taken advantage of. Before a clinical trial can go ahead, it must be given approval via an independent ethics process. committees looking at the safety of drugs and the proper conduct of clinical trials for HIV- positive people and I thought of the maxim that we follow in those which is, “Do no harm” to participants. Ethics it seems to me is about considering others, treating them with respect and care and expecting similar standards of behaviour in return. It is also about following widely held community values about care of others and protecting them from harm.

I have had further discussions on the viewpoint put by those two positive guys with a number of people and have had a range of responses. Some people (often HIV-negative) have been sympathetic saying that there have been adequate warnings in the gay community (if not, maybe in mainstream society since the Grim Reaper advertisement days) about the dangers of picking up HIV infection, negative guys know they need to take steps to protect themselves and that disclosure in many sexual situations is just not going to happen. Others (mainly HIV-positive) have been reproachful, saying that positive people have a moral and legal responsibility to act with care towards their sexual partners – which means disclosure and/or use of condoms (with opinions divided on the use of condoms for pos-pos sex, given the risks of STIs [2][Sexually Transmissible (or Transmitted) Infection] Infections spread by the transfer of organisms from person to person during sexual contact. Also called venereal disease (VD) (an older public health term) or sexually transmitted diseases (STDs). and superinfection).

We have all heard of recent cases, in a number of states, where HIV- positive people have been charged and convicted with recklessly infecting others with HIV. In most of these situations this has involved people not disclosing their HIV status and being responsible for the infections of partners as a result. Several of these have been men in relationships with more than one women at a time, leading to multiple HIV infections, including of one pregnant woman.

Is deliberate deception and reckless sexual behaviour in a relationship worse than the positive gay guy who has casual unprotected sex, without disclosure, in a one-night stand? Can a gay guy argue that his partner is more aware of the high risks of contracting HIV in the gay scene than a heterosexual woman who has not received the

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same exposure to blanket safe sex messages? After all, positive heterosexual men and women have casual sex too: disclosure and sexual negotiation are possibly more difficult for them because a lot of their partners haven't even thought of factoring HIV into their sex lives.

## HIV transmissions and the law

Where do you go to get guidance on the ethics involved with these questions? The law isn't very helpful, with criminal and public health laws varying state by state. Various Crimes Acts around the country have been unsuccessful so far in prosecuting HIV- positive people because they need to prove “intention to infect” which has been very difficult. Health Acts that attempt to prosecute people for “reckless endangerment” or putting others at risk of a serious disease have been used more often.

In Victoria for instance, the Health Act, which has been used in recent times to prosecute individuals for HIV transmission, makes it clear that “a positive person must take necessary measures to ensure others are not unknowingly placed at risk of infection (clause d of Section 119 of Health Act (Vic) 1958)”. There is a clause that states, “an HIV-negative person must take precautions to avoid infection with HIV” (b) too, but this seems highly unlikely to ever be prosecuted. A positive person accused of a transmission offence may have a defence if “s/he (their partner) knew of and voluntarily accepted the risk” but this would mean a discussion of serostatus or condoms before sex has to have happened. The law makes it clear that there is a duty for a positive person to protect others, and this takes legal precedence over the negative person's duty to protect him or herself.

It has long been recognised by many in public health and community health settings that legal sanctions are not the best way to handle recalcitrant behaviour by those few individuals who are reported as regularly putting others at risk of HIV infection, including lying about their status. Counselling and help with mental and other health issues are public health interventions that are best promoted to bring about behaviour change around sex. Most people (including most HIV-positive people, I think) would agree with this approach and with the right of the law to intervene in extreme cases, nevertheless is the issue raised by those two positive guys at the forum mentioned above in the same league? Does the context – a one-night stand, a sex on premises venue or beat, make any difference?

This point of view involves an assumption that a sex partner has made a judgment to place themselves at risk which they think absolves the positive person of responsibility. However, surely silence from your partner does not mean consent. You can't be sure that no offer of condoms means that your prospective partner is HIV- positive as well – when HIV- negative guys may well assume it means you are also negative. Research has shown that some negative guys believe that positive guys wouldn't put them at risk like that. Some believe that the law would stop such behaviour and that they wouldn't hesitate to dob in a positive guy who had put them at risk.

There is no doubt, as shown in the Victorian Health Act example, and in other similar legislation around the country, that an HIV-positive person having unprotected sex, without disclosure and consent, is illegal and that there is a greater legal responsibility on the positive partner to prevent transmission of the virus [3]A small infective organism which is incapable of reproducing outside a host cell.. Even so, these kinds of cases are difficult to prosecute. Anonymous sex and fleeting five-minute encounters, usually without corroborating witnesses, hardly make prosecutions easy. And there is no denying a responsibility on the part of the negative person to be careful as well. When it comes to this kind of sexual behaviour, it seems to me, it comes down a question of personal ethics.

## Role of positive people in prevention

AIDS Councils have long used messages of “shared responsibility” for HIV transmissions to make it clear that both partners in sexual situations have responsibility for looking after the welfare of the other – regardless of status. In recent times though, with HIV transmissions rising and social researchers showing us that increasing numbers of positive (and negative) people are risking unprotected sex with partners of unknown HIV status, it is perhaps not surprising that governments have sought out PLWHA groups to develop campaigns to deliver specific prevention messages to positive people. PLWHA NSW, PLWHA Victoria and Queensland Positive People have recently been given some funds by their respective State governments to develop campaigns to more effectively involve positive people in the prevention response. NAPWA has had a coordinating role in supporting some common strategies with PLWHA organisations around the country.

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These PLWHA organisations have been happy to be involved in such campaigns because they know that the majority of their members want to protect others, and that a set of values exists within the positive constituency that strongly supports the prevention of further transmissions. Feedback from their constituencies have generally supported moves in this direction, although there have been concerns in some states that “positive in prevention” initiatives are given more funds and attention by government than the health promotion needs of positive people.

## Dealing with temptations

We all need reminders about our sexual responsibilities to others, positive people included – it is very tempting to have unprotected sex (with difficulties using condoms, maintaining erections and handling disclosure situations, for instance). It is perhaps not surprising that some positive people take the view, “Well I'm positive now, I've nothing to lose, let the other person look after themselves”. Deep down though few of us can live with such an amoral stance, and messages that ask us to respect others have to be supported. After all, we all were HIV-negative once – we know what a transformation HIV brings into your life and how a diagnosis affects you physically and emotionally. A negative person has little or no idea of this. You have the knowledge: he (or she) doesn't.

These messages to HIV- positive people need to be carefully designed to not further increase the stigma of being positive in the community or to place an unrealistic and unfair burden on positive people to be the sole initiators of disclosure and safe sex. But the era where positive people were left out of the prevention message altogether is starting to change in most states.

In a sexual culture where “bareback” DVDs are now the most popular selling items on X rated sites, where exhortations to “bareback” are common for anyone who spends time on the Internet chat sites (often coming from supposedly HIV-negative individuals) the temptations for gay men, including positive men, to engage in this behaviour are significant and if you add drugs and alcohol into the mix, sexual responsibility and safe sex negotiation can be affected.

I believe that the view articulated by those two positive guys that they can have unprotected sex with people of unknown status without disclosure or negotiation should be challenged. We have to develop campaigns for positive people that raise these questions about the ethics of sexual behaviour and to have the debates. At the same time we need to provide workshops and peer groups that assist people to develop the skills to disclose or negotiate sex that puts no one at risk. I only have to think back to my HIV-negative friend Jason, and his trials with that guy who wanted to ignore the safe sex rules they had supposedly agreed. From my ethical standpoint, no one has the right to assume someone else's HIV status is the same as their own and therefore a presumption of their right to unprotected sex with that same person — without discussion of any kind. I welcome others' point of view on this – including the heterosexual readership of Positive Living, for different perspectives on this issue.

*David Menadue is the Convenor of the NAPWA Education Portfolio, and the Deputy Editor of Positive Living. These views are his own and do not necessarily represent those of NAPWA.*

* Names used are fictional.

- HIV and the law
- disclosure
- Gay and bisexual men
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- Negotiation
- positive in prevention
- Safe sex
- Sex and relationships

**Links:**
[1] http://napwa.org.au/glossary/term/498
[2] http://napwa.org.au/glossary/term/188
[3] http://napwa.org.au/glossary/term/125

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