Criminalisation of HIV transmission:
Understanding the impact

NATIONAL AIDS TRUST

Securing rights
Stopping HIV

Contents

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Introduction

This project explores the impact of criminalising reckless sexual transmission of HIV. Through discussions with people living with HIV, clinicians, and voluntary sector support staff, we gathered stories, views and perceptions on how criminalising reckless HIV transmission is experienced and what it means for those affected. During our conversations, we heard how the harmful consequences of criminalising reckless HIV transmission are felt across a wide range of areas. These include navigating personal relationships, accessing healthcare, quality of life and mental health, people's interaction and trust with the police and criminal justice system, and more broadly in public perceptions and societal stigma about HIV.

A note on definitions and scope:

The words and phrases relating to criminalising HIV transmission matter. For this report, we use the same definition as the HIV Justice Network, 'the unjust application of criminal law to people living with HIV based solely on their HIV status'. We are not talking about the criminalisation of people for having HIV, but for how their HIV status is used under the law for consequences of the act of consensual sex.

Due to there being different laws in place across the UK, this work only focuses on the impact of criminalising HIV transmission in England and Wales.

This report aims to add to the existing research, thinking, and evidence that surrounds the subject of criminalising reckless HIV transmission on people living with HIV by understanding what it means for people today. HIV continues to evolve – with medication improving, and the epidemic changing, the experience of living with HIV in 2024 is not the same as it was five, let alone twenty years ago (when the first conviction for reckless HIV transmission took place). With advancements in treatment meaning that 98% of people living with HIV in the UK cannot pass the virus on, we wanted to find out how the continued impact of criminalising HIV transmission is felt among people living with HIV, at a time when we could be just a few years from ending new HIV transmissions in the UK

How we went about this work

We started out with a review of existing evidence and literature on HIV criminalisation, which was then built on with discussions with experts, so that we could best plan the conversations and questions to explore with participants in the project.

Qualitative research was conducted in the form of focus groups and individual, semi- structured interviews, over the course of two months. The project was advertised within a number of HIV support networks, such as UK-CAB and the HIV Provider's Forum, and via newsletter emails to NAT's mailing lists. Participants responded to these call-outs on a voluntary basis.

Three focus groups were held:

- One with nine members of staff from various HIV support organisations in England
- One with nine people living with HIV, members of Blue Sky Trust, an HIV support organisation in Newcastle, England
- One with six doctors and nurses working with people living with HIV across England and Wales

Eight separate individual interviews were also conducted, all with people living with HIV. Of the participants living with HIV, three shared that they had been investigated by the police for reckless HIV transmission.

It was not a requirement of participation that individuals had direct experience with the criminal justice system, as the overarching aim was to investigate the impact of both the existence and application of the law in this area on people living with HIV. While the purpose of this work was to understand more about how the well-evidenced harm of criminalising HIV transmission impacts people in their daily lives, through the discussions some wider perspectives and observations were also shared by participants which are included so as to provide a full sense of the range of conversations held.

It is important to note that people with direct experience were potentially more likely to come forward to take part, so the proportion of participants in this study who have been investigated or questioned by the police on this subject is not representative of that proportion in the wider population of people living with HIV. Efforts were made to hear from people with a diverse range of identities and experiences in this work, but due to the nature of qualitative research, perspectives reported here are those of the participants involved, rather than fully representative of all people living with HIV.

It was concluded at the outset of the project that those who shared that they had direct experience of the criminal justice system, in regard to reckless transmission, would be interviewed individually. This was done to minimise the possibility of this being shared in an open group, where other participants may have had the opposite experience of feeling unlawfully exposed to HIV, resulting in their acquisition. It was acknowledged that there are diverse perspectives on this topic, and efforts were made to reduce possible harms as a result of discussing polarising experiences in the same room.

Interview questions were developed in line with key issues related to HIV criminalisation that were uncovered during the scoping phase of the project. Comments and edits to draft questions were received from two expert researchers in the field to ensure they would yield optimal answers from participants, and that interviews would flow well. All focus groups and interviews were recorded and transcribed with permission from participants. Transcripts were analysed using inductive coding, with key themes and issues identified in all conversations grouped together into categories. All quotations presented in this report are taken directly from individual interviews and focus groups. They are the direct thoughts of participants involved in this research, including those living with HIV, people working at HIV support organisations or HIV clinicians.

Background to the law, recent updates and public health

HIV and the criminal law

Under the Offences Against the Person Act 1861 (OAPA 1861) the transmission of a sexually transmitted infection can amount to grievous bodily harm (GBH). There are two separate relevant offences in this legislation – 'intentional' (section 18) or 'reckless' (section 20) transmission.

> The first criminal conviction for transmission of HIV took place in 2003. To date, there has been one successful conviction of intentional transmission and 29 of reckless transmission (out of 34 prosecutions) of HIV in England and Wales.

GBH could, in theory, be applied to transmission of any infectious disease – recklessly or intentionally – that is considered to cause significant physical harm to another person. As far as we know, these sections of the OAPA have only been applied to sexually transmitted diseases, not diseases transmitted in other ways, such as COVID-19. In the case R v Clarence (1889), a man was charged under section 20 for 'knowingly' transmitting gonorrhoea to his wife, but due to there being no intent to transmit the infection and the fact that sexual intercourse had been consensual with no 'violent action' leading to the transmission, the conviction was quashed. There have also been two successful convictions for the transmission of herpes, in 2011 and 2024, and one for hepatitis B in 2008.

What is reckless transmission?

For transmission of HIV to be deemed reckless under OAPA (1861), guidance from the Crown Prosecution Service [1] sets out five criteria that all need to be met:

- The accused knew they had HIV
- They understood how HIV is transmitted
- They engaged in a behaviour that risked transmission of HIV
- HIV transmission occurred
- The person who acquired HIV didn't know the accused was living with HIV at the time of transmission (this is because prior knowledge of HIV status by the person the virus is transmitted to can constitute a defence that negates reckless behaviour)

The key difference between reckless and intentional transmission is that, under reckless transmission, there is an absence of intent or malicious behaviour; instead, there is a knowledge of HIV (status, modes of transmission) and a demonstrable lack of mitigating behaviour to prevent transmission occurring (e.g. wearing a condom or being on effective antiretroviral therapy, see below).

1 **Crown Prosecution Service, "Intentional or Reckless Sexual Transmission of Infection," 29 March 2023. [Online]. Available at:** www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection. [Accessed 2024].

2 **A. Rodger, V. Cambiano, T. Bruun, P. Vernazza, S. Collins, O. Degen and e. al, "Risk of HIV transmission through condomless sex in serodifferent gay couples with the HIV- positive partner taking suppressive antiretroviral therapy (PARTNER): final results of a multicentre, prospective, observational study,"** The Lancet, vol. 393, no. 10189, pp.2428-2438, 2019.

3 **United Nations Development Programme, "Global Commission on HIV and the Law Risks, Rights & Health,":** United Nations Development Programme, New York, 2012.

U=U and updates to procedural guidance

Advances in HIV research and treatment have led to the discovery that when someone living with HIV is on effective anti-retroviral therapy (ART), they cannot pass the virus on to anyone else.[2] ART reduces the viral load in the individual's body to a level where it becomes undetectable. This concept is known as Undetectable = Untransmissible, or U=U.

In 2023, the CPS updated their prosecution guidance to include specific references to U=U and recognise the impact it has on any potential investigation. The Association of Chief Police Officers has also published guidance, in collaboration with National Aids Trust, that is aimed to mitigate harms that many investigations cause for people living with HIV. Guidance such as this is important, as there can be real and negative impacts resulting from how investigations and prosecutions are carried out beyond their procedural requirements.

HIV criminalisation and consensus on harm, implications for public health, and impact on stigma

This research recognises that there is a broad consensus opposing the criminalisation of unintentional HIV transmission from HIV advocacy organisations, public health experts and clinicians worldwide on both public health and human rights grounds. We aim to add to this body of knowledge the experiences and stories of people living with HIV today and show the impact it has on individual's health-seeking behaviours, wellbeing, and confidence in being open and safe in their relationships.

The Global Commission on HIV and the Law, in 2012, determined that HIV criminalisation is warranted only when transmission is both intentional and can be proven beyond reasonable doubt that the defendant was responsible for the complainant's acquisition of HIV. Broader forms of HIV criminalisation, such as prosecuting reckless HIV transmission as well as criminalising HIV non-disclosure or exposure, is considered "disproportionate and counterproductive to improving public health".[3]

UNAIDS has clearly set out its position on the application of criminal law and public health, stating that the "evidence consistently shows that the criminalisation of people living with HIV and key populations reduces service uptake and increases HIV incidence" and describes laws which criminalise HIV exposure, non-disclosure or transmission as "punitive and discriminatory laws and policies".[4] In 2017, a re-analysis of 25 empirical studies in the USA concluded that "HIV criminalisation laws were associated with both a lower rate of diagnosis and higher HIV prevalence".[5]

In the UK, the HIV Commission [6] recommended in 2020 that "the government must review and assess the impact of current policies and legislation which act as a barrier to HIV progress... this must involve reviewing laws that criminalise HIV transmission". Additional published research highlighted that prosecutions for transmission perpetuate misinformation about how HIV is transmitted, contribute to pre-existing HIV-related stigma, put the most vulnerable groups of people living with HIV at risk and pose a barrier to sharing of HIV status with sexual partners.[7] Ensuring that advances in science are applied to cases of criminal law is also important to reducing unreasonable arrests, prosecutions and convictions.[8]

In addition, the British HIV Association (BHIVA) – the leading UK association representing professionals in HIV care – sets out an organisational position that "the use of criminal law in relation to HIV transmission does not contribute to public health aims of reducing the number of new infections or reducing stigma".[9]

National AIDS Trust has long-held concerns about the criminalisation of HIV transmission, believing that the treatment of reckless transmission of HIV as a criminal issue does more harm than good – it does not reduce transmissions, threatens individual rights, and adds to stigma and discrimination. We believe the existence of these laws and prosecutions hinder the efforts of the UK Government to achieve the goal of ending new transmissions of HIV by 2030.

4 **UNAIDS, "Global AIDS Strategy 2021-2026 — End Inequalities. End AIDS.,"** UNAIDS, Geneva, 2021.

5 **D. Harsono, C. L. Galletly, E. O'Keefe and Z. Lazzarini, "Criminalization of HIV Exposure: A Review of Empirical Studies in the United States,"** AIDS Behav, vol. 21, no. 1, pp. 27-50, 2017.

6 **HIV Commission, "HIV Commission: How England Will End New Cases of HIV - Final Report and Recommendations,"** HIV Commission, 2020.

7 **C. Dodds, M. Weait, A. Bourne and S. Egede, "Keeping confidence: HIV and the criminal law from HIV service providers' perspectives,"**Critical Public Health, vol. 25, no. 4,pp. 410-426, 2015.

8 **F. Barre-Sinoussi, S. S. A. Karim, J. Albert, L.-G. Bekker, C. Beyrer, P. Cahn, A. Calmy, B. Grinsztejn, A. Grulich, A. Kamarulzaman, N. Kumarasamy, M. R. Loutfy, K. M. E. Filal and e. al, "Expert consensus statement on the science of HIV in the context of criminal law,"**Journal of the International AIDS Society, vol. 21, no. 7, 2018.

9 **British HIV Association, "BHIVA Position Statement on HIV, the law and the work of the clinical team," 2022.** [Online]. **Available:** www.bhiva.org/BHIVA-position-statement-on-HIV-the-law-and-the-work-of-the-clinical-team. [Accessed 2024].

Key findings

Knowledge of HIV criminalisation and experience of stigma

Key points from participants

- Reckless transmission was not well understood both by people living with HIV and many support staff - the majority of participants did not know about, or understand, the difference between intentional and reckless transmission
- The HIV related stigma that exists means that many people living with HIV are already disadvantaged when it comes to navigating difficult situations, including matters of the law and engaging with the police. Participants highlighted the negative impact a new diagnosis can have on their mental health, and spoke about stigmatising experiences within the healthcare setting

In the 2022 Positive Voices survey

1 in 8

Respondents had shared their status with most people in their lives

1 in 10

Respondents had not told anybody apart from healthcare staff

1 in 7

Respondents had avoided accessing healthcare services because of their HIV status

Almost half of all respondents felt ashamed of their HIV status and over a quarter reported having ever experienced physical violence.

Knowledge of HIV criminalisation

It was striking that the majority of participants were not aware that HIV could be prosecuted under the two separate offences of intentional and reckless transmission. Most participants had heard of prosecutions for HIV transmission in the media, and understood these to be intentional in nature, leading to the understanding that this was the only criminal offence.

Many had previously thought that the term 'reckless' was being used to describe instances of intentional transmission and that the terms were interchangeable, rather than being part of a separate category of the OAPA. This misunderstanding of the law was held by both people living with HIV and those working in HIV support services, including those who have previously supported service users through accusations and investigations related to reckless transmission.

Those who did have an understanding of the distinction between intentional and reckless transmission said that the knowledge had come through direct experience – either through an arrest for reckless transmission, or because they felt that they had acquired HIV through recklessly transmission themselves.

It is crucial that reckless transmission is well understood as distinct from intentional transmission, so that healthcare staff and community organisations can appropriately support someone who may be the subject of an investigation, and so that people living with HIV are fully aware of their rights. This would hopefully lead to a reduction in harmful investigations and mitigate the negative impact for those involved.

Experiences of HIV-related stigma

A theme that we heard repeated across conversations was how criminalisation of HIV transmission interacted with and added to the experience of stigma. Many participants said that it was impossible to separate out the impact of criminalising HIV transmission from the impact of stigma more widely – that they were inherently connected.

In interviews and focus groups, participants acknowledged the different forms of stigma they have felt in their daily lives. They shared a view that people living with HIV who are dealing with the criminal justice system would already be existing in a context of ignorance and negativity, providing a rocky foundation for being treated fairly and equally under the law.

> **"You keep it to yourself because you fear that there's going to be a before and after kind of moment, that you are going to have a different identity from the one you have always had with that person, just because you are HIV-positive"**

These experiences are backed up by data from the 2022 Positive Voices survey, the largest national survey exploring the lives, experiences and healthcare needs of people living with HIV in the UK.[10] This research shows that only 1 in 8 respondents had shared their status with most people in their lives, and 1 in 10 had not told anybody apart from healthcare staff. Almost half of all respondents felt ashamed of their HIV status, and 1 in 7 reported avoiding accessing healthcare services because of their HIV status in the year prior to being surveyed. Over a quarter of respondents reported having ever experienced physical violence. When thinking about the impact of criminalisation of HIV transmission, it must be remembered that an arrest or investigation is likely to be experienced by someone who has faced stigma many times in their life which will have undoubtedly affected them.

10 **UK Health Security Agency, "Positive Voice 2022: survey report,"** UK Health Security Agency, 2024.

Key findings

The experience of people living with HIV

Key points from participants

- Participants who had previously been arrested for reckless HIV transmission shared that they had been stigmatised and mistreated by the police force and the media, leading to worsening mental health and long-lasting impacts on day-to-day life
- Participants who felt that HIV had been recklessly transmitted to them spoke to the difficulties around not being able to prove their experience and hold people accountable

Three participants shared that they had previously been arrested for recklessly transmitting HIV to someone else. All three of these participants felt that the law had been applied inappropriately to their situation, and that they had not done anything illegal or wrong. None of these arrests developed into the individuals being charged, as the evidential threshold set out in the CPS guidance was not met. All three participants experienced stigma during their respective investigations and felt that they were stigmatised by the police for living with HIV, subject to investigations unnecessarily despite no transmission taking place, and treated unfairly by the media, their workplaces and social circles. Their individual stories are shared here as A, B, and C.

A

Participant A shared that despite there not being enough evidence to follow through with a charge of reckless transmission, an individual police officer assigned to their case attempted to pursue a charge of rape instead, resulting in the participant being given a sexual risk order that will remain on their personal record. For this individual, this process was extremely taxing, with the police searching their home, suggesting that their HIV medication was being used to 'drug' partners and treating them like a sexual predator. Reckless transmission can be used as an aggravating factor in a situation where rape or sexual assault does occur but cannot. be used to constitute a rape charge in itself. Participant A feels that the law was applied incorrectly to their situation and is representative of stigma, misinformation and weaponisation of HIV status within the police force. This experience has had significant knock-on effects for this person, including the sexual risk order being flagged when they tried to undergo a DBS check for volunteering positions and employment opportunities since the arrest occurred.

B

"When you are accused or known to have HIV, I think to larger society you are filthy... The way the article came out was really bad... It had all the negative things about the story. Dealing with that was really hard"

Participant B shared their experience of how the media reporting of their case had lasting negative impacts on many areas of their life. They were reported to have recklessly transmitted HIV to their ex-partner after their relationship broke down, despite there being no way to prove who transmitted HIV to who, and when HIV was originally acquired by whoever had it first. Despite there not being enough evidence to charge, this individual was still mandated to attend court more than once, where the media picked up the story and "portrayed them as a monster", releasing their name, date of birth and workplace on a public platform. This participant feels that they were not afforded the privilege of anonymity by these publications and that the treatment they experienced from the media had racist undertones. This participant shared that they felt guilty immediately upon their arrest, and that this experience caused them to lose friends and become isolated – they considered moving countries and even contemplated suicide to escape the humiliation they felt. The articles about them were circulated around their workplace, and starting new relationships has been difficult – any new partner could find information about the investigation online, despite a reporting restriction eventually being imposed on the case. This participant also shared that the police officers assigned to their case, despite being supportive and kind, openly admitted that they did not know what to do in the situation, as they hadn't dealt with anything similar previously. This individual described HIV criminalisation as "a fallacy, just harassment, to be honest".

C

"I need this lifting from me - I wake up with this in the morning, and I go to bed with it at night. I need to be in a place where I can live again. It's just constant... I've been treated appallingly. From day 1, I was treated like a dirty, HIV-carrying queer - there's been no apology".

Participant C is a police officer themselves and experienced an arrest (by a police service other than the one by which they are employed) for reckless transmission that has had lasting effects on their employment, mental health, and day-to-day life. They shared that from the outset, their arrest was extremely stigmatising – multiple police units – far more than was necessary – came to their home to arrest them, and during the arrest they were told that they were being arrested for 'attempted grievous bodily harm' between two dates, with no relaying of the circumstances of the arrest or confirming whether it was related to intentional or reckless transmission. The participant had no idea what they were being arrested for, so was not afforded the opportunity to provide a reply to caution or ability to challenge the necessity or proportionality of the arrest. The arrest will now be on their record permanently, although they are seeking record deletion as this can affect future employment and international travel. The participant shared that in this sort of situation, someone could simply be invited voluntarily to the police station to answer questions under caution, which would have been a more appropriate course of action and would not have generated an ID number on the Police National Computer. They shared that the line of questioning by the police was more along the lines of an investigation into a serious sexual offence, rather than simply confirming their undetectable HIV status. While the investigation was ceased when it was clear there was no evidence to charge, this experience has had lasting effects – this individual still had to be accompanied by a colleague when visiting some protected sites until their DBS was eventually cleared. The participant reports feeling humiliated and stigmatised each time they see police in the relevant district to their arrest, feeling betrayed by those who are supposed to be their fellow colleagues in service. Despite not doing anything wrong, being on medication that means they are undetectable and can't pass HIV on, and telling the sexual partner who made the initial reckless transmission allegation that they were living with HIV, this experience has impacted their daily life for almost 18 months, though their fight for personal justice and organisational change continues.

While the focus of the research was on the impact of criminalisation for those who have had direct involvement with the criminal justice system in regard to reckless transmission, and the wider consequences of this, it is important to note that some participants felt that they themselves had acquired HIV through reckless transmission and wanted to share how this experience had impacted their lives. Participants with this experience either chose not to report their situation to the police, or if they did, there was not enough evidence to follow through with a charge. Despite this, the impact of the experience was still felt – one participant shared that it had been difficult to come to terms with their ex-partner not being held accountable for their actions, and a clinician shared that they still see patients who had reported their HIV acquisition to police, but that the investigation had not resulted in a charge.

> **"It's affected them hugely, mentally, that they were infected and the people who infected them are still out there".**

The consequences of the existence of HIV criminalising laws have a continued impact – for those who experience being accused of reckless transmission, but also for those who feel they were recklessly transmitted to.

Across the interviews and focus groups, individuals who have experience of investigations and arrests – whether they have been accused of reckless transmission or feel that HIV was recklessly transmitted to them – told us about the impact it has had on them: struggling to move on with their lives due to poor mental health, and feelings of fear and shame that negatively influence their ability to enter into new relationships. Alongside this, people shared a number of examples of the additional consequences of arrest and questioning, including prohibitions in the workplace, searching of homes, long-term legal restrictions to their rights and freedoms such as a sexual risk order, and the lasting impact of negative media stories. People living with HIV report lower levels of life-satisfaction than the general population and have substantially higher prevalence of mental health conditions.[10] They experience stigma in all areas of life, whether in health care settings, at work, or from family and friends. When the impact of an arrest, investigation, and potential prosecution is added, the cumulative experience is profound.

10 **UK Health Security Agency, "Positive Voice 2022: survey report,"** UK Health Security Agency, 2024.

Experiences reported by those working with people living with HIV

HIV support staff shared a range of instances in which service users had been arrested, or questioned, for reckless transmission, often when transmission had not occurred or when they had not been acting recklessly. One support staff worker told the story of a service user who was 'beaten up' by someone they were on a date with when they shared their status with them. When they reported the assault to the police, they were themselves taken in for questioning around their sexual behaviours and HIV status, rather than being helped with the initial problem they reported. They felt that their reporting of a physical attack was ignored and not taken seriously.

In another situation – a case of custody over children – an ex-partner claimed that HIV had been recklessly transmitted, even though they had been informed of the individual's status at the point of diagnosis, and it was unclear who had acquired HIV first. Members of the group shared the view that HIV can be weaponised in situations and wholly inappropriately used in unconnected legal proceedings, stigmatising and disadvantaging those who have not committed any offence.

It's also important to consider that while increased acceptance of U=U has driven huge progress for reducing stigma and transmissions, there are some people living with HIV in England and Wales who have not achieved undetectability, and these may be the same individuals who would likely not have the emotional, financial or mental capacity to defend themselves if they were accused of reckless transmission. All support staff felt that these individuals need help and support to reach U=U, and the potential of arrest, investigation, and possible prosecution is not conducive to ending transmissions, eliminating stigma or reaching the UK's 2030 goals. As has been the case for a lot of people living with HIV in the fight to reach no new HIV transmissions by 2030, it is often the most marginalised who are left behind in terms of testing, treatment and prevention, leading to increased stigma, and the support staff interviewed agree that criminalising reckless transmission would exacerbate these inequalities.

Clinicians also provided examples they had seen among their patients. In one instance, a number of vulnerable women diagnosed with HIV were naming the same person as their contact, who was eventually diagnosed himself but struggled to adhere to treatment. Two of the women who acquired HIV from him reported him to the police, and he is now in prison having been convicted of reckless transmission. In another example, someone who the clinician considered to be 'very depressed' and 'in denial' about their HIV status was sent to prison for reckless transmission, which the doctor felt "seemed very harsh – I don't see how there was any public health benefit to her being in jail".

The stigma that people living with HIV experience in their daily lives is exacerbated by the existence of criminalising reckless transmission of HIV, whether an individual is accused of recklessly transmitting it themselves or feel that they have acquired HIV from someone else in this way. Participants reported increased feelings of shame, poor treatment from the police and media, barriers to performing optimally at work and judgement within social circles, and difficulties navigating new relationships after feeling the impacts of reckless transmission being punishable under law in England and Wales.

Key findings

Reflections on HIV and the law: where next?

Key points from participants

- Perspectives about criminalising reckless transmission of HIV varied - some felt that trying to apply an age-old piece of legislation to HIV is unhelpful, that we need to stop transmission of HIV being criminalised as it is currently, and questioned whether any prosecution should be able to be brought in the future
- In any potential prosecution, there could be an individual who is aware of their status but is not on effective treatment. Most commonly, the cause of this is stigma, poverty or poor mental health, and this person's wellbeing and adherence to treatment should be prioritised when entering into an investigation, rather than further adding to their marginalisation in society through punishment and prosecution, should they transmit HIV to someone else
- Current CPS guidance states that sharing of one's HIV status can act as a defence of consent in reckless transmission investigations, but this is very difficult - often impossible - to prove that status was shared and when
- HIV support staff felt that criminalising HIV transmission adds to the inequalities that people living with HIV face, creating a feeling that they need to continually defend themselves, and makes a comment on the morality of HIV-positive people wanting a fulfilled sexual life
- There was an agreement from all that education and training is vital within the Crown Prosecution Service and the police force, to ensure knowledge of advances in HIV prevention and treatment is up-to-date, and avoid erroneous arrests and prosecutions

Perspectives on HIV criminalisation

Everyone involved in the project agreed that intentional transmission of HIV should remain punishable under law, as the transmission of HIV with malicious intent is not appropriate under any circumstances and perpetrators of this crime should be held accountable. Many participants said that it is 'just common sense' that any deliberate act to harm others should have consequences.

Opinions on reckless transmission were more divided among participants. This raises cause for concern as most participants, at the beginning of the project, were not aware of the distinction between intentional and reckless transmission under the OAPA. If it is 'common sense' to all that intentional transmission remains punishable under law, but that the concept of reckless transmission is more nuanced and has negative impacts on those living with HIV, it is crucial that the complexities of each are well understood so they can be conceived separately. It is only once this knowledge is gained that it will not be assumed that all instances of HIV criminalisation are intentional, and we can begin to unpack how criminalising reckless transmission can negatively affect wellbeing and relationships for those living with HIV.

Now that HIV medication and prevention is so effective, those on anti-retroviral therapy cannot pass the virus on, and HIV is no longer considered a death sentence, participants questioned whether transmitting HIV to someone should continue to be considered as Grievous Bodily Harm.

It was raised as a concern among participants that a lack of knowledge or belief in the scientific fact of U=U among police can lead to individuals being arrested for reckless transmission, despite being undetectable. Some of the participants who had more knowledge of the CPS guidance – mostly those who had learned of it during direct experience of an investigation – questioned why investigations are continuing when an individual has an undetectable viral load, which, for some, was the case. While U=U is now acknowledged in the CPS guidance, it does not feel that this has contributed to changes in practice; investigations are still occurring despite someone having an undetectable viral load, and the concept of U=U as a means of preventing transmission has not become widely accepted within the criminal justice system.

Some participants shared their opinions on whether changing the law around reckless transmission would be beneficial or not. Some felt that a transition to an HIV-specific law – whilst potentially further clarifying or limiting the use of the law – would further add to HIV- related stigma and damaging experiences of investigations. There were a few participants who felt there should be some accountability for those who recklessly transmit HIV, as "contracting HIV from someone who is aware can feel like assault". There was also consideration given as to how any potential change to the law would need to be communicated effectively to ensure that it did not lead to any adverse consequences or that add to stigma. Existing literature published since the early 2000s has explored varying perceptions around challenges with making legal changes regarding this topic[11], and this project echoes those findings. Further, previous global research states that while decriminalising reckless transmission may both deter some and encourage others to participate in behaviours that may ultimately transmit HIV, the harms outweigh these considerations. The contribution of criminalisation to a stigmatised environment – which, as we have illustrated, is large – as well as discouraging voluntary HIV testing, means that these prosecutions must be eliminated, or at the very least, reduced.[12]

"If the person who transmitted HIV to me was reckless, part of me wants them to be held accountable for their action. But at the same time, I want to be safe, and I want to protect myself. If I was in that situation, I wouldn't want to go through the courts and for all of that stuff to be stirred up".

11 **C. Dodds, P. Weatherburn, F. Hickson, P. Keogh and W. Nutland, "Grievous Harm? Use of the Offences Against the Person Act 1861 for sexual transmission of HIV,"** Sigma Research, 2005.

12 **R. Jurgens, J. Cohen, E. Cameron, S. Burris, M. Clayton, R. Elliot, R. Pearshouse, A. Gathumbi and D. Cupido, "Ten reasons to oppose the criminalization of HIV exposure or transmission,"** Reproductive Health Matters, vol. 17, no. 34, pp. 163-172, 2009.

What does ‘reckless’ mean?

Some participants questioned what the term ‘reckless’ really means and highlighted that if an individual isn’t aware of the details of the reckless transmission charge, the word is subjective. Someone could behave in a way that is considered ‘reckless’ but not fit the criteria spelled out in the guidance.

It was discussed during the interviews that as it stands, the reckless transmission law and the criteria associated with it do not allow for more nuanced situations, or for support to be given to those who may have been accused of reckless transmission but could not prevent it for complex reasons. An example of this would be an individual in an unsafe relationship, who may not feel safe to share their HIV status with their partner in case they reacted in an abusive manner towards them in response. One participant shared that there was a possibility that they could have recklessly transmitted HIV to an abusive ex-partner, which became apparent after the relationship had ended. If this participant had received their diagnosis while still in this relationship, it would have been extremely difficult to take precautions to prevent transmission, like suggesting use of condoms when unprotected sex had already taken place with this partner. Questions around this, and sharing of status, would have risked this participant’s safety.

> **“I feel tremendous amount of guilt that I didn’t feel able to say anything... He’d left me in fear of my life... I thought that any indication he might have got HIV from me, I might be at risk... If we’d still been together when I’d fallen ill, then I would be in the situation of dealing with the shock of my own diagnosis, plus what on earth to say to him. I can’t imagine it”**

Many participants suggested that if any individual recklessly transmits HIV, they may well be in the throes of dealing with a new HIV diagnosis themselves, which, as previously discussed, can be an extremely difficult and challenging time mentally, physically and emotionally. Participants noted that someone who is struggling in this way will need help and support – and that priority should be given to their wellbeing and adherence to effective treatment rather than subject them to an investigation or even a conviction that is likely to have multiple long-term impacts.

Clinicians commented that in situations they had seen, people exhibiting 'reckless' behaviours tend to be those who are experiencing multiple vulnerabilities and pressures in their lives, and who may not be managing these very well. Their view is that it isn't in the public interest for them to go to prison instead of getting the support they need to live well with HIV. The point was raised that it's very difficult to unpick the nuanced differences between legal definitions of intentional compared to reckless transmission. Coming to terms with many aspects of an HIV diagnosis and navigating actions around these – knowing you could pass the virus on to someone else, not looking after yourself in terms of treatment and actions – are, in the words of one clinician "so much to do with their own psychology and reaction to their HIV, and how they cope with that".

> **"I think the whole notion of reckless transmission just doesn't fit with the public health agenda. All it does is add to stigma, it puts all the onus on the person living with HIV, to prevent transmissions, and that's just nowhere near where we are"**

Sharing of HIV status, privacy, and impact on testing

There is no legal obligation for someone living with HIV to share their status with anyone – partner, friend or family member. If someone shares their status in a healthcare setting, at work or with a police officer, they are protected under the Data Protection Act 2018, which states that an organisation such as an employer or healthcare cannot breach confidentiality by sharing an individual's HIV status without their consent.

Outside of the legislative protection for privacy of HIV status, it is accepted, though not well enough known or understood, that no one should have to share their HIV status, outside of exceptional circumstances.

However, it was remarked on by participants that the principle of privacy and an individual's right to feel completely in control of their HIV status, and who they share it with, could be compromised by people feeling compelled to share their status with a sexual partner. This would be so as to be able to rely on this as a defence should an accusation be made against them of reckless transmission in the future, even if they had an undetectable load and could not in fact pass the virus on. This means that the existence of criminalisation of HIV transmission is likely to force some people to share their HIV status when they would prefer not to and could in fact lead to them being in a vulnerable situation as a result. While unintended, this is a regrettable consequence of the criminalisation of HIV transmission and prosecution guidance.

At the same time, participants recognised that it was important for people to share their status with people close to them, and openness and trust in personal and sexual relationships is a key part of an individual's wellbeing. It was remarked on by participants that the fear of potential criminal investigations for transmission could lead to individuals feeling less secure and safe in sharing their status with a sexual partner, or choosing to not have sexual partners or relationships because of this concern. Clinicians and support staff shared that some individuals living with HIV that they work with have chosen to abstain from sex completely since their HIV diagnosis, out of fear of passing the virus on – for some, this is true despite them having an undetectable viral load. Clinicians observed that the fear of a potential criminal investigation being instigated alongside this may exacerbate these feelings of insecurity and lack of safety, posing a barrier to people living with HIV forming meaningful relationships in their lives.

In addition, some felt that the criminalisation of reckless transmission acts as a deterrent to people getting an HIV test and finding out their status. With one of the criteria for a prosecution being the need for knowledge of having HIV – in most cases by having a formal diagnosis – people may be scared to deal with the consequences of a suspected diagnosis, or scared to deal with any potential accusation of reckless transmission.

The role and responsibilities of HIV clinicians and medical staff

All clinicians involved in the group discussion felt that criminalising reckless transmission of HIV is harmful, supporting previous findings. While the charge remains in law, however, how and when clinicians should responsibly engage with police when they suspect, believe, or have knowledge of a potential instance of reckless or intentional transmission was discussed.

In the same clinical setting, doctors and teams could be treating both an individual who has acquired HIV and someone who is accused or suspected of transmitting HIV through reckless or intentional behaviour. In one case where this occurred, a clinician explained that among their team there was a debate around what course of action to take, and a demand from individuals involved to go to the police. The doctors did not feel that this was their role as they also had a duty of care to this individual, as a patient of the clinic, as well as those that he may have passed HIV on to, which they suspected had been done recklessly.

This example shows that there is uncertainty over appropriate response and actions in clinical settings to potential instances of reckless HIV transmission. Some participants living with HIV in this project also expressed a desire for clinicians, voluntary sector staff, peer support workers and counsellors to have a good understanding of the law, so that they could speak to those newly diagnosed about the law at the point of diagnosis.

It was raised in this group that it was crucial that reckless transmission is discussed with a patient, as well as the basics around how HIV is transmitted and U=U, and that this should be recorded in their notes. However, clinicians discussed that at the point of diagnosis, they are so aware of the prevalence of stigma, that at that moment they are focused on sharing purely positive messaging about living well and adhering to treatment. One doctor shared that it would not be helpful to add to worry and shame by raising the issue of reckless transmission "when I've got someone utterly traumatised in front of me". The 'BHIVA Position Statement on HIV, the law and the work of the clinical team' was discussed at length during the clinician group discussion – with some participants having been involved in writing it – and all members of the group agreed with its conclusion that

> **"A person who is newly diagnosed with HIV needs an understanding of the legal rights around transmission of HIV in order to be able to protect themselves from liability ... Information should be shared sensitively and supportively".**

The importance of education and training

> **"It feels like the knowledge of the police and legal system, in the developments of healthcare, and the media's understanding - that trickles into social understanding ... Knee-jerk reactions of people panicking when they hear HIV and going to the police... There could be a two-pronged approach to addressing the legal side of it, but also public understanding."**

There was general consensus among participants that the police force and CPS need more guidance and training on HIV and the criminalisation of reckless transmission so that individuals who are reported to the police do not experience highly distressing and stigmatising investigations. The participant who is a police officer shared that they had never received any information from the College of Policing about U=U or any other basic information about HIV.

Many participants shared that among people living with HIV there is little trust in the police, with observations that people often avoid contact with the police and feel unsafe in their presence. It was strongly felt that improving knowledge on HIV – on handling cases of criminal transmission, latest medical evidence, data protection, and the rights of people living with HIV under the Equality Act and Data Protection legislation would help to earn some of that trust back.

Further, the concept of voluntary attendance was introduced by our police officer participant. According to the College of Policing, this is an alternative to arrest where an individual is invited to interview under caution at a police station on a pre-arranged date and time, and 'may be more proportionate to the offence under investigation and may reduce the risk of stigma associated with an arrest'.[13]

Some participants provided suggestions as to how reckless HIV transmission could be better handled. It was suggested that a select handful of police officers could be specially trained, stationed around England and Wales and called upon when complex situations arise.

What participants did wholeheartedly agree on was that there must be collaboration between everyone involved in the criminal justice system to drive change in understanding and knowledge.

> **"This isn't just a police matter. This is a public health matter, this is for prosecutors, police, LAs - this is for all these people to sit around a table. If you just take criminal justice, you'll find it's patchy - local police don't understand what HIV is, or U=U. They don't understand that we don't want to criminalise people with HIV because that will stop people coming forward. It's this absolute chasm of knowledge - some people have got it, and some people haven't"**

13 College of Policing, "Investigative interviewing," 26 October 2022. [Online]. Available: www.college.police.uk/app/investigation/investigative-interviewing/investigative-interviewing. [Accessed 2024].

Reflections and recommendations

- U=U should be considered at the very outset of any investigation – if someone has an undetectable viral load, they have no chance of passing the virus on, and so no transmission of HIV is possible. If this is established there is no need to investigate or ask any questions about sexual behaviour
- Concerns around being investigated for reckless transmission – even if on effective treatment – could compel people living with HIV to share their status before being ready to do so, and potentially in unsafe situations
- There is a need for a comprehensive education, awareness and training initiative within the police force to ensure any investigations are not entered into unnecessarily – and those that are progressed follow appropriate guidance and recognise the individual's rights to privacy and fairness
- Priority and preference should be given to 'voluntary attendance' as a valid and appropriate alternative to arrest, wherever possible
- People living with HIV, support staff, and clinicians also need training and greater knowledge of the law on criminalising HIV transmission to be able to best support people and raise awareness of their rights

This research presents human stories that have come from people who have had direct impact of the criminalisation of HIV transmission, and others who are directly involved in their care and treatment. During these conversations we heard a range of views and direct experiences of the impact of criminalising HIV transmission on people's lives. There were areas of consensus and commonality across individual interviews and focus group discussions that demonstrate evidence that continued criminalisation of HIV transmission:

- Is a driver of stigma
- Negatively impacts the wellbeing and mental health of people living with HIV
- Prevents people from being open and secure in sharing their HIV status with sexual partners and relationships with others

The reflections we heard across all groups back up previous evidence and position statements from doctors, public health experts, and researchers, both internationally and here in the UK. These experts argue that criminalisation of HIV transmission causes harm to people who are involved in investigations and prosecutions and has a negative impact on public health by creating a barrier to achieving the end of new HIV transmissions. Instead, what is needed is a focus on ending stigma, protection of the rights of people living with HIV, prioritisation of supporting everyone to stay on effective treatment and raising quality of life across the board for people living with HIV.

While the impacts of criminalising HIV transmission can be somewhat mitigated through better understanding of HIV, the law, and proper investigation and prosecution guidance, harm still persists. The most crucial point, as this research shows, is that having a law criminalising someone solely because they are living with HIV drives significant negative impacts. Criminalising HIV transmission does not reduce HIV transmission, and undermines public health by increasing stigma, victimisation and the discrimination of people living with HIV.

The impact of criminalisation of HIV transmission is not just about 'what the law is', but also what people think the law is, and what they hear about it from media stories, friends, and colleagues. With those views very likely to be based on a misunderstanding of the law and informed by stigmatised perceptions, the impact of the existence of criminal law is much wider than just on those who have direct experience of it. It can impact anyone living with HIV and their experiences of stigma and discrimination.

> **"People are being involved in potential prosecutions that don't end up getting anywhere, but that doesn't mean they're not very distressing or impact on people... With a massive sledgehammer and discriminately banging on wood."**

There is an urgent and pressing need for education, awareness and training to be increased across the police force, as well as for medical and healthcare staff, voluntary sector staff, and the media. It is crucial that HIV is well understood, particularly in regard to how people living with HIV navigate the world in the context of U=U, prevention, testing and stigma and discrimination. Police forces must understand the distinction between reckless and intentional transmission to ensure that people living with HIV are not wrongly investigated or questioned due to a lack of understanding.

Guidance from the College of Policing states that voluntary attendance may reduce the risk of stigma associated with an arrest, and, depending on the offence, may be a more proportional response than immediate arrest. We urge and recommend that this is given preference and priority wherever possible.

The media, similarly, must report responsibly and accurately. Instances of HIV transmission that are reported as 'deliberate' and 'intentional', when not proven to be, contribute hugely to stigma and have long-lasting effects on the individual concerned.

It is clear from this research, and the evidence and research that precedes that the criminalisation of reckless – rather than intentional – transmission of HIV feeds stigma and self-stigma, damages the wellbeing of people living with HIV and affects openness and trust in relationships, and is a barrier to achieving a good quality of life for those affected, and does not reduce HIV transmissions.

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