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The criminalisation of HIV transmission by Dr Matthew
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**BOOK REVIEW: A review of Intimacy and Responsibility:
The criminalisation of HIV transmission by Dr Matthew Weait.**

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A review of *Intimacy and Responsibility: The criminalisation of HIV transmission* by Dr Matthew Weait.
ISBN 978-1-904385-70-7; Routledge-Cavendish, 2007.

To date there have been seventeen 'reckless' criminal HIV transmission cases in the UK. Twelve have resulted in prison terms (eight pleaded guilty, and four were found guilty following trials); four were cleared of the charges (three were dismissed due to insufficient evidence, and another man was found not guilty following a trial); and one man has been detained for an unlimited length of time in a Scottish psychiatric facility. And yet, despite the relatively few prosecutions (at least, relative to the number of transmissions that occur in the UK each year), the spectre of criminal prosecutions has greatly affected the lives of most HIV-positive individuals and the professionals who care for us.

Notably, English law as it stands is unhelpfully unclear when it comes to understanding how to avoid criminal liability. Unfortunately, the people closest to making and enforcing the law think that English law governing reckless HIV transmission *is* clear.¹ It explains why police continue to investigate complaints of unprotected sex with no transmission (which is not against English law) and why the Crown Prosecution Service (CPS) – which recently issued long-awaited guidance on when and how to prosecute cases involving the intentional or reckless sexual transmission of serious infection – has often prosecuted individuals (persuading eight people to plead guilty) even when there has been no conclusive evidence that the accused, and only the accused, had actually infected the complainant.

Although the new CPS guidance has generally been welcomed by the HIV community because it clarifies at least some of the uncertainties that have surrounded prosecutions for reckless HIV transmission, some legal experts say the documents are vague and leave important questions unanswered².

Consequently, almost five years after the first prosecution in England and Wales, we are still trying to figure out what the law actually means, in practical terms. Some people think the law says that HIV-positive individuals have to disclose their status before having any sex that risks transmission. But others

¹ English criminal law suggests that a person who knows their HIV status, and does nothing to prevent onward transmission, is 'consciously taking an unjustifiable risk' and is therefore criminally reckless. It has also been established through two Court of Appeal judgements in the cases of *R v Dica* and *R v Konzani* that 'informed consent to the risk of HIV transmission is the only valid consent' when there is the risk of 'serious harm', such as HIV infection. However, many areas of this law are still open to interpretation.

² For more on the CPS guidance see, Bernard EJ *Guidelines on prosecuting criminal HIV transmission for England & Wales finally published*. aidsmap.com, March 19th, 2008. Available at: www.aidsmap.com/en/news/74FD067D-ED34-42E4-ABF7-13007DA4BC1B.asp

think that disclosure only a retrospective duty if you have sex without condoms, *if* transmission occurs and *if* that person complains to the police.

Then again, what *is* 'risky' sex? Does that include unprotected oral sex, or just unprotected anal or vaginal sex? Does that include sex with condoms? Is it 'risky' sex only with a detectable viral load or if you have a concurrent sexually transmitted infection, as Swiss experts recently suggested³; or is that only if you believe you *might* be infectious?

I do not think it is yet possible to know exactly when the law says there is a duty to disclose. This means that everyone, including HIV clinicians, health advisors, and other professionals working with HIV-positive individuals, are confused, too.

Some think they have to advise everyone not just to use condoms with each new sexual partner, but also to disclose. Others go further, pushing the boundaries of confidentiality. Some think it is their duty to inform others potentially put 'at risk' by their patients or clients, even if those at risk are not their own patients or clients. Most troubling, however, is that some professionals working with HIV-positive people think they should advise, or even persuade, their patients or clients to complain to the police.

Confusion over duties to disclose, however, is not the only unintended consequence of criminalising reckless HIV transmission. It has also resulted in a fundamentally conflicting approach to the issue of responsibility. The criminal law appears to say that individuals who know they are HIV-positive are 100% responsible for keeping their infection to themselves. But sexual health education is based upon the concept that sex may result in unwanted consequences, and that each individual is responsible for protecting themselves from the possibility of these occurring. So, public health messages say that everyone has an equal responsibility for their own sexual health.

At this year's CHAPS (UK HIV prevention) conference, I shared a stage with Dr Catherine Dodds of Sigma Research, who presented important – and worrying – new data from the most recent Gay Men's Sex Survey. She found that criminal prosecutions for reckless HIV transmission are very popular with undiagnosed or uninfected gay men, with between 50% and 86% expecting a partner with diagnosed HIV to disclose their status before sex; and the percentage increased the more they were in favour of criminal prosecutions for reckless HIV transmission⁴. This suggests that many gay men think that criminal prosecutions for HIV transmission will result in HIV-positive men disclosing before 'risky' sex, and that this disclosure will somehow protect them from HIV infection. These confusing and conflicting messages are

³ Vernazza P et al. *Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle*. Bulletin des médecins suisses 89 (5), 2008.

⁴ Dr Dodd's findings are due to be published in *AIDS Care*.

creating a false sense of security, which, I believe, can only result in increased HIV transmissions.

Another insidious consequence of criminalising reckless HIV transmission has been a deterioration of the doctor-patient relationship. Dr Jane Anderson, consultant physician, and lead author of the British HIV Association's (BHIVA) 2006 briefing paper on HIV transmission, the law and the work of the clinical team⁵ recently said⁶ that criminal prosecutions for reckless HIV transmission had impacted upon the way the NHS deals with HIV-positive patients "in terms of care, advice and confidentiality" and that this had created "a great deal of anxiety and concern." She added that many healthcare staff working with HIV-positive patients felt that "the law was looking over people's shoulders". Dr Anderson also highlighted the impact recent prosecutions have had on research. "The rigour of our research has been coloured by prosecutions," she said. "We have had to reconsider whether we ask certain questions whilst researching sexual behaviour in the current climate."

Scotland – with its own laws that also criminalise HIV exposure (although no-one has been prosecuted for this so far) – sent Stephen Kelly to prison for reckless HIV transmission in February 2001, but prosecutions for reckless HIV transmission came relatively late to England. Long before Mohammed Dica's first trial, in November 2003, many other countries and jurisdictions around the globe – including those in our closest cultural allies, the United States, Canada and Australia – had already found a variety of ways to criminalise HIV-positive individuals who did not disclose their HIV status and had unprotected sex that (sometimes, but not always) resulted in the previously HIV-negative partner becoming HIV-positive.

In fact, Mr Dica's conviction under section 20 of the Offences Against the Person Act 1861 (commonly known as 'reckless' grievous bodily harm) at his first trial (he subsequently had two abortive retrials following appeal, and was found guilty again in a fourth trial at the Court of Appeal) came as something of a surprise to most people in the HIV sector. Until then, it had not been possible for the existing law to be used in order to prosecute a person for the transmission of a sexually transmitted infection, and so the Dica case set a new precedent. So, it was even more of a surprise that the House of Lords refused to hear an appeal against Mr Dica's Court of Appeal conviction, particularly because it had been government policy until that point not to criminalise reckless HIV transmission.

Early on in Dr Matthew Weait's remarkable book, *Intimacy and Responsibility*:

⁵ This paper is currently being revised, but the current edition can be found at: www.bhiva.org/cms1191673.asp

⁶ Dr Anderson was speaking at the central London launch of Matthew Weait's book, *Intimacy and Responsibility: The criminalisation of HIV transmission*. Reported in Bernard EJ *Decriminalise reckless HIV transmission, argues HIV legal expert*, aidsmap.com, February 22nd, 2008. Available at: www.aidsmap.com/en/news/FA3D622C-044B-47C7-8699-DAA3C2E7EAEC.asp

The Criminalisation of HIV Transmission, Dr Weait quotes previously unpublished correspondence between the Home Office and various interested parties in the government's 1997/8 Consultation into reforming the law governing non-fatal offences. It presents clear evidence that the Labour government had no intention of criminalising reckless HIV transmission, primarily due to concerns about the potentially negative public health consequences.

This is no dry, academic treatise on law and policy; once that only examines how we got from there to here. Rather skilfully, Dr Weait critically examines and deconstructs the English criminal law's seemingly haphazard approach to criminal prosecutions for reckless HIV transmission. That he does so with a great deal of empathy for the HIV-positive individual on both sides of the dock, is, quite frankly, miraculous. In one of the book's most revelatory chapters, he uses transcripts from the 2004 trial of Feston Konzani to support the book's leitmotif that the criminal law has no place in HIV prevention. His astute analysis of the lived experience of the trial – for the defendant, the various complainants, the defending and prosecuting barristers, the judge and the jury – illustrates how the criminal law is required to reduce complex and messy human thoughts, feelings and interactions to, as he puts it, “over-simplified accounts of responsibility and irresponsibility, of guilt and innocence” in order to get its pound of flesh – a conviction.

Throughout, in his thorough examination of the concepts of harm, risk, recklessness, consent, and responsibility, Dr Weait strongly suggests that the criminal law is ill equipped to understand these concepts pragmatically. If the primary purpose of the criminal law is to prevent onward transmission, he argues, then it “has the potential to do more harm than good.” Dr Weait knows what he's talking about. Currently senior lecturer in law and legal studies at Birkbeck College, University of London, he has been actively involved in providing legal research support to the HIV voluntary sector for the last decade.

His contributions to the debate on the criminalisation of HIV transmission have been numerous, including hosting a series of seminars entitled, *HIV/AIDS and Law: Theory, Practice and Policy*. These seminars brought together academics, legal and medical practitioners, members of the HIV voluntary sector, graduate students, activists and people living with HIV in order to explore the ways in which the law is having an impact on people living with HIV. I became acutely aware of some of criminalisation's ethical and moral difficulties when I attended the final seminar, held at Keele University over a balmy weekend in June 2006. Many of the HIV-positive individuals attending the seminar - myself included - did not want to be seen to condone the actions of some of the people who had been prosecuted so far, but at the same time we were afraid of the consequences of criminalisation for ourselves and others.

It is thanks to Dr Weait's intellect, empathy and leadership that I was finally able to fit the pieces of the puzzle together and explain to myself – and subsequently to others – that focusing on the bigger picture is what really

matters. Once I started to move beyond thinking about these cases on an individual level; once I had got over the initial, knee-jerk, emotive response that often leads people to rely on the criminal law, with its 'innocent victim'/'guilty perpetrator' paradigm, to deal with the emotional and psychological issues of non-disclosure and blame; I was able to begin to consider whether or not the criminal law is the right tool to contain and mitigate HIV. After just a few minutes of serious thought, the conclusion became blatantly obvious.

One of the areas outside the remit of Dr Weait's book is a discussion of the impact of criminal prosecutions for reckless HIV transmission in the United Kingdom today. However, in an interview I conducted with Dr Weait a couple of years ago, following the seminar series, he posed the questions I often ask myself about the ways that criminalising reckless HIV transmission may harm public health. "Does it mean that people are so afraid of disclosing their status to sexual partners, because of the kind of coverage that people with HIV get in the press as a result of the prosecution, that they're not going to disclose despite the consequences? Does it mean not telling the truth about a sexual history to an HIV or GU clinician, which is critical to contact tracing? Will it make people think twice about voluntary HIV testing, or being honest about the results of that test? If that's the case then we've lost a significant battle in the war against onward transmission," he said.

He went on to state his central concern, which seems to encapsulate why he wrote the book, and why it is necessary for anyone who cares about HIV to read it. "What we should really be concerned about is ridding the world of this virus," he said, "and it seems to me that we need to think of HIV and AIDS socially, and not individually. We need to think of it as something that affects communities and which needs to be responded to at a social and community level, and not in the one-on-one adversarial process that a criminal trial produces, and which only ever sends out the message that one person was responsible and the other was not; that one person is a victim, and one person is a perpetrator. Criminal trials," he concluded, "whatever their other effects, affirm in the public and popular imagination that HIV-positive people can only be understood as vectors of onwards transmission."⁷

Although not everyone will agree with Dr Weait's inevitable conclusion – that the best way to promote, "a more authentic and socially beneficial approach to the meaning, practice and expression of responsibility than that which the law constructs and reinforces is to decriminalise the reckless transmission of HIV" – there is little doubt that after reading this essential book even the most ardent *Daily Mail* reader will come away with fresh insights into one of the most divisive and controversial areas of HIV policy facing us today.

⁷ Quoted in *Safer law: moving from theory to practice*. aidsmap.com, July 19th, 2006. www.aidsmap.com/en/news/77E01E67-43BD-4F84-8CE2-AA11039F9248.asp (accessed 15th April 2008)