

# HIV transmission as a crime

Criminal prosecutions for HIV transmission threaten public health, argue **Ruth Lowbury** and **George R Kinghorn**

**A**round the world, criminal prosecutions for the transmission of HIV have been in the news recently.<sup>w1 w2</sup> Some countries have adopted a policy of prosecuting certain cases, in which transmission is characterised as intentional, reckless, or negligent. These include 21 countries out of 41 that responded to a European survey, with the number of reported prosecutions in each country between one and more than 30.<sup>w3</sup>

Globally, different types of law have been used to criminalise the transmission of HIV. Some jurisdictions have created new offences specific to HIV—for example, some states in the United States. Some countries have applied pre-existing offences, such as grievous bodily harm in the United Kingdom. Countries such as Sweden have used public health legislation, and others have used a combination—for example, Australia.<sup>w4</sup> In some countries, prosecutions require actual transmission of infection, but, elsewhere, behaviour with the potential for transmission suffices.

There may also be little consistency in the type of person or behaviour selected for prosecution. A recent attempt to introduce standardised criteria for prosecutions in England and Wales is therefore welcome.<sup>w5</sup> But we have serious concerns about the impact on public health of criminalising the transmission of disease.

People infected with HIV who are taking antiretroviral treatment can live relatively healthy lives, but people whose infection remains undiagnosed face serious illness and death. There has never been a stronger imperative to encourage people at risk to come forward for testing so that they can access treatment. In the face of a rapidly

rising prevalence of HIV infection, there is an equally strong imperative for preventing transmission.

## Crucial trust

The UK government has made it a policy priority to increase uptake of HIV testing<sup>w6 w7</sup> and is funding prevention programmes in England for the population groups most at risk. Services throughout the country offer voluntary testing, confidential partner notification, and education and support for affected people and their partners. These measures rely on a crucial relationship of trust and confidence between patients and healthcare professionals.

The sustainability and success of this approach are threatened by the policy of criminal prosecution. Although people with HIV or at risk of infection have had many reasons to be fearful about the impact of HIV, the possibility of appearing in a court of law followed by imprisonment had not until recently been one of them. But 2001 saw the first successful prosecution in Scotland for “reckless injury,”<sup>w8</sup> followed by some in England and Wales for “reckless transmission” of HIV, under the Offences Against the Person Act 1861. The Terrence Higgins Trust, a UK HIV charity, says more cases are in the pipeline.

Already this use of the criminal law is having unintended negative consequences. Awareness is spreading in people with HIV that they face the threat of criminal prosecution. Media coverage has vilified convicted people as “AIDS assassins,” exacerbating the stigma already associated with infection. No wonder people unlucky enough to become infected often choose to keep their status a secret.

People in this situation need help and support to plan how and to whom they will disclose their status, and to find strategies for protecting other people from infection. With a spouse or long term partner, suddenly refusing to have sex or requiring the use of condoms without explanation is unlikely to be effective. But disclosure of HIV status may lead to rejection, physical violence, and financial destitution.

If word gets out into the community, perhaps through a sexual partner, people with HIV risk being ostracised, with their families taunted and their employment and entire existence under threat. Health professionals can

advise and help, but their patients, if fearful of prosecution, may be unwilling even to tell them if they are having difficulties avoiding unprotected sex.<sup>w9</sup>

## Who infected whom?

An estimated 20 000 people in the United Kingdom have HIV infection that is still undiagnosed.<sup>w10</sup> There is a clear disincentive to testing when prosecution relies on defendants knowing they are infected. Meanwhile, people who take the test may not agree to their partners being notified for fear of legal repercussions, thereby jeopardising essential efforts to control public health. In addition, the threat to the confidentiality of data posed by criminal investigations may deter participation (or honesty) in the sexual behaviour research which provides an essential evidence base for HIV prevention.

Doctors need guidance on whether the potential for criminal prosecutions changes their legal and ethical duty of confidentiality and how to advise their HIV positive patients, who may become “victims” or “defendants” if a prosecution occurs. A draft briefing paper can be obtained from the British HIV Association.<sup>w11</sup>

Evidence on the impact to public health of criminal prosecutions for reckless transmission of HIV is limited,<sup>w12</sup> and further research is urgently needed. Uptake of HIV testing in groups at highest risk should be monitored to see whether criminalisation may be leading to reductions.

In England and Wales, the draft policy on criminal prosecution for the “sexual transmission of infections which cause grievous bodily harm,” states that a prosecution will usually take place “unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.” Putting aside the difficulties in attributing who infected whom, we would argue that, in the case of criminal prosecution for reckless transmission of HIV, the public interest is not best served by pursuing justice against the few at the expense of the health of the many.

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References w1-w12 are on studentbmj.com.



A sentence for public health