“How Should the Law Respond to HIV Transmission Through Sexual Intercourse: Issues with Criminalisation and Consent”

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Abstract

This dissertation seeks to explore how the legal system should address the public health issue of the transmission of HIV through sexual intercourse. This issue is important, as it requires a balancing act between the policy of protecting public health and the protection of a highly discriminated group of society who deserve a right to sexual autonomy. While HIV is a potentially fatal virus that can easily be prevented by a change in behaviour, there are fears that criminalisation discriminates against HIV-positive persons and could deter citizens from getting tested for the virus.

The principal aim of the dissertation is to assess whether criminalisation is the most effective and appropriate approach to controlling the spread of the virus, whilst also adequately protecting both the victim and the perpetrator. The dissertation argues that the Criminal Law has a legitimate function in controlling the virus, and is a more appropriate avenue than Public Health Law. The dissertation also explores whether the existing offence of section 20 of the Offences against the Person Act 1861 is suited to criminalising reckless HIV transmission, and argues that it is to a limited extent. Rather, it is submitted that a new offence specifically tailored to the aim of reducing the spread of the virus would be more appropriate. The dissertation concludes that the refusal for legislation on the matter indicates that further clarification by the Courts is needed on the defence of consent in order to ensure that the offence operates more effectively.
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List of Statutes and Cases

Statutes

- Offences Against the Person Act 1861

Cases

- Enhorn v Sweden (2005) 41 EHRR 633
- R v Brown [1994] 1 AC 212
- R v Clarence (1888) 22 QBD 23
- R v Cuerrier (1998) 127 CCC (3d) 1
- R v Dica [2004] 2 Cr App R 28
- R v EB [2006] EWCA Crim 2945
- R v Ireland; R v Burstow [1998] 1 Cr App R 177
- R v Konzani [2005] 2 Cr App R 198
- R v Mabior [2012] 2 SCR 584
- R v Wilson (Clarence) [1984] AC 242
Chapter I: Current Legal Responses to HIV Transmission

I will begin by outlining the current law on HIV transmission in sexual relationships. HIV transmission is considered to amount to the offence of grievous bodily harm, under section 20 (s 20) of the Offences of the Person Act 1861 (OAPA). A defendant is guilty of this crime if they infect the complainant, while the defendant is aware of the risk of infection and the complainant is ignorant of the defendant’s HIV status. This was established by the courts in the *Dica*,¹ and was further explored in the later case of *Konzani*.

A person will be guilty of a criminal offence if, knowing they suffer from HIV, they recklessly transmit the virus through consensual sexual intercourse, and inflict grievous bodily harm on a person from whom the risk is concealed and who is not consenting to it.

² *R v Konzani* [2005] 2 Cr App R 198.
Chapter II: The Validity of Criminalisation

One of the main issues of criminalisation is the fear that it will drive people living with HIV/AIDS (PLHA) underground, and create stigma and discrimination. There is already widespread discrimination against PLHA, particularly in areas such as employment, education, housing and insurance. Beyond this, it is commonly accepted that there is a stigma against PLHA. In particular, Grigg states that women with HIV suffer from a much higher level of stigma than men. Studies by Bunting have shown that women also respond very differently to a diagnosis of HIV, they are often ashamed of their virus and much less willing to openly discuss it. As such, PLHA are already wary of disclosing their status to potential partners. Academics argue that by criminalising their behaviour, the Courts would effectively drive them to hide their condition from partners. This could have many negative effects: firstly, it would not help curb people from engaging in protected and responsible sex. In fact, it could drive PLHA away from seeking treatment that would be essential for controlling the virus and ensuring that they live healthy lives due to fears that it would expose their status to partners.

Moreover, it could act as a serious deterrent for high-risk individuals to get tested for the virus, as without knowledge of their status they would not be at risk of being prosecuted for any transmission. Weait argues, in particular, “the negative social impact of criminalisation has the potential to outweigh any social benefits it may achieve.” Leading medical professionals have spoken out about the inappropriateness of criminalisation for HIV transmission, stating, “Criminal prosecutions for HIV transmission threaten public health”. However, in practice it is arguable that criminalisation has not had such an effect. After the conviction of Kelly in Scotland, an article in the British Medical Journal argued that the decision might risk “a one third increase

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4 Sheila M. Bunting, “Sources of Stigma Associated with Women with HIV” (1996) 19(2) Advances in Nursing Studies 86.
in new HIV infections in Scotland” due to a 25% decrease in testing for fear of prosecution. Chalmers disputes this argument by submitting that the data defeats this deterrence argument: the number of tests actually increased the following year. This is further supported by a study in the US by Burris et al, who found that their data “undermined the claim that such laws drive people at risk of HIV away from health services.” Thus, it is submitted that the deterrence argument should be taken sceptically and not be overly compelling in dissuading away from criminalisation.

Beyond this, there is a fear that by criminalisation places all the burden of responsibility for preventing transmission on PLHA. This again could have serious negative consequences. Deutsche Aids-Hilfe has continually asserted its fears that this could lead to non-infected people not taking proper precautions and partaking in protected sex, due to a presumption that the law will deter PLHA from partaking in unprotected sex. This is supported by Weait, who after the Konzani case speculated that “as a direct result of this people may assume that sexual partners who do not disclose their HIV-positive status are in fact HIV-negative - why would they risk a conviction for a serious offence by not doing so?” Following this argument, the law would have again defeated its very aim of reducing HIV transmission. Chalmers is again sceptical of this argument, submitting that people do not rely solely on the Criminal Law to regulate other’s behaviour to the extent that the Criminal Law “relieves one from responsibility to protect oneself”. He uses the analogy of how it is common to still have house insurance and locks on doors, despite the criminalisation of burglary. Again, it is submitted that Chalmers’ argument is more practical than Weait’s speculations. If the public were not protecting themselves due to a reliance on the Criminal Law, the figures would show a marked increase in infections since the Konzani case, but this is not the case - in fact, there has been a reduction in the number of new diagnoses.

8 James Chalmers, Legal Responses to HIV and AIDS (Hart Publishing 2008), 151.
Ashford extensively explores another issue of criminalisation.\textsuperscript{14} He has specifically examined the effect that legislative developments have had on homosexual men. This is a high-risk group, with figures estimating that around 45\% of PLHA in the UK are men who have sex with men (or MSM).\textsuperscript{15} He submits that recent case law, such as Brown\textsuperscript{16} and Dica,\textsuperscript{17} has put forth the view that the State determines which sexual activities can be consented to by forcing a label of decency on such activities. He argues that the attitude of condemnation of homosexual sadomasochistic sexual activity has also spread to that of the condemnation of the practice of “barebacking”.

Barebacking is a queer term that refers to anal sex without the use of condoms. Rubin has noted that society has begun to associate HIV and AIDS with the “bad queer” - the “leatherman”, who is hyper masculine and celebrates his promiscuity.\textsuperscript{18} This has established a link between sexual deviancy and the virus. Ashford argues that the role of the State as a moral custodian has been crucial in establishing a barebacking identity, which rejects the State’s insistence on protected sex and controlling the spread of the virus. In doing so, it has fetishized barebacking practices and created “an illicit character which increases pleasure and renders it addictive.”\textsuperscript{19} Ashford argues that as such the Criminal Law is not suitable in dealing with HIV transmission amongst these groups. Judges have isolated themselves by taking on the role of moral custodians and as such they are unable to understand why this risky behaviour is embraced by barebackers, and instead simply condemns it. Unfortunately, this has meant the Criminal Law has distanced itself from its aim of controlling this behaviour and reducing HIV transmission rates.

Despite these issues, there have been strong arguments put forward for the use of the Criminal Law to deal with HIV transmission. The Home Office has acknowledged that “the Criminal Law is not the most obvious or principal means of controlling the virus”,\textsuperscript{20} and it could thus be argued that Public Health Law seems a more appropriate avenue to control the virus. However, it is submitted that in practice the Criminal Law is actually more effective. Baldwin submits, for instance, that it is better to use the Criminal Law than Public Health Law due to the fact that the

\textsuperscript{14} Chris Ashford, “Barebacking and the Cult of Violence: Queering the Criminal Law” (2010) 74(4) JCL 339.


\textsuperscript{16} R v Brown [1991] 1 AC.

\textsuperscript{17} R v Dica [2004] 2 Cr App R 28.


\textsuperscript{20} Home Office, Violence: Reforming the Offence Against the Person Act 1861 (Consultation Paper 421/2, May 1998) para 3.16.
Criminal system is more effective at protecting the rights of PLHA. In particular, he highlights the extreme measures that can be taken under Public Health Law, such as quarantine orders, which would be inappropriate to use in these circumstances and would disproportionately infringe on the PLHA’s rights to liberty and privacy. He uses the example of smallpox, where the government severely restricted the movement of infected persons - they were not allowed to appear in public, use public transport or borrow library books - and as such dismisses the idea of using Public Health Law to regulate PLHA and transmission of the virus.

Weait also considers the downfalls of using Public Health Law as a system to control the spread of the virus. He acknowledges that there have been calls to use this system. While sexual health practitioners have thus far advocated a system of voluntarism, individual agency and shared responsibility in onward transmission, this approach has not had much of an effect in preventing HIV transmission - there is still a high rate of infection and increasing prevalence of the virus. This has caused many in the profession to take a reactionary stance and to perceive the law as a critical mechanism to solve the issue. However, Weait cites a European Court of Human Rights case to demonstrate how the measures available in Public Health Law can be disproportionate to the risk of spreading the virus. This is Enhorn v Sweden - where a HIV-positive man infected a young man with the virus. He was given strict instructions to abide by in order to control the spread of the virus, which severely limited his autonomy. In 1995 the Court ruled that he had not complied with their instructions by failing to attend a meeting with his physician, and he was sentenced to three months of compulsory isolation. This was later extended to six months, and renewed on a rolling basis for seven years. In 2001 he was detained for absconding his isolation, and Enhorn brought an action claiming that this abused his Article 5 right to liberty. He claimed there were no grounds to suggest that he posed a serious risk to spreading the virus and that his rolling compulsory isolation was disproportionate to the risk of spreading the virus. The Court agreed that there had been a violation, and that there was not a fair balance struck between the need to ensure that the virus did not spread and his right to liberty. One can see that Enhorn’s

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21 Peter Baldwin, Disease and Democracy (University of California Press: 2005).
22 ibid 87.
24 ibid 15.
behaviour has effectively been criminalised, but as this has been through the avenue of Public Health Law he has not been afforded the protections that would normally come with the Criminal Law (such as the right to appeal a decision). As such, Sweden has effectively managed to incarcerate Enhorn in his own home for seven years, without affording him the higher level of protection that typically comes from a Criminal prosecution. Clearly, Public Health Law is a dangerous tool, which could be used to control the lives of PLHA, rather than simply achieving the aim of halting the spread of the virus. As such, the Criminal Law does seem a more appropriate avenue to handling such cases.

Beyond this, Mann,26 one of the most influential academics in this field, further acknowledges that the use of Public Health Law has the same negative consequences as the use of Criminal Law. Despite the fact that the two may have different objectives: the objective of Criminal Law would be to stop the type of behaviour that risks spreading the virus, whereas Public Health Law would be to stop HIV-infected persons from spreading the virus, he argues that the Criminal Law may in fact be more effective at achieving its aim. This is due to the fact that when the State criminalises a type of behaviour, it sends out a clear denunciatory message. This would have a greater effect than the measures taken under Public Health Law, which instead could cause HIV-infected persons to attempt to hide their status for fear of compulsory isolation or quarantine. Moreover, Gostin argues that Public Health Law is only justified where “the economic, practical or human rights are not disproportionate to the public health burdens, and the public health power is the least restrictive alternative.”27 It is therefore submitted that by applying Gostin’s criteria, the use of Public Health Law to control the virus would not be justified. This is due to the fact that the case of Enhorn28 has proven that Public Health restrictions are disproportionate to human rights, and it is arguable that prosecutions under the Criminal Law are in fact less restrictive than those under Public Health Law.

On the other hand, one could argue that criminalisation seems fitting for this type of act. Spencer has submitted that the Criminal Law should be prosecuting reckless transmission of HIV, as this

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type of behaviour “is to harm another in a way that is both needless and callous. For that reason, criminal liability is justified unless there are strong countervailing reasons. In my view there are not.”

Judge LJ greatly approved of this reasoning for criminalisation in Dica, quoting the article in his judgment. Chalmers agrees with this, submitting that this type of criminalisation is a straightforward application of established principles and values of the Criminal Law; particularly the principle from R v Ireland that the harm caused recklessly under s 20 can be broadly interpreted.

Taking another approach, the values of the Criminal law are applicable to reckless transmission of HIV under Hoekema’s “breach of trust” model. This states that the law concerned with the preservation of trust in relationships that make life in a society possible, notably those that are key to social functionality, but where it would be inappropriate to dedicate time and resources monitoring them. Thus, the law can legitimately monitor these relationships as a third party and protect individual’s interests. Slater argues that this could be extended to personal relationships due to the nature of the trust in these circumstances. He argues that in these circumstances it would often seem peculiar for a person to monitor another, justifying the role of the Criminal Law as a third party regulator. He uses the example of the crime of bigamy in making this point. It causes both personal harm and social harm (the tarnishing of the socio-legal institution of marriage), and this amounts to a breach of trust that would fit into Hoekema’s model. This argument is supported by Kobrin, who agrees that “bigamy is quite possibly the most personal betrayal of trust”, and by Rose who agrees that in personal relationships are “unlikely to receive close scrutiny” and thus deserve legal intervention. As such, it is submitted that reckless HIV transmission could legitimately be criminalised under a breach of trust argument.

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31 James Chalmers, Legal Responses to HIV and AIDS (Hart Publishing, 2008), 149.
34 James Slater, “HIV, Trust and the Criminal Law (2011) 75(4) JCL 309.
35 ibid 322.
37 ibid 801.
38 Carol M. Rose, “Trust in the Mirror of Betrayal” (1995) 75 Boston University Law Review 531
39 ibid 545.
On the other hand, it is questionable whether the law changes behaviour, particularly sexual behaviour. Orr’s study,\textsuperscript{40} for instance, shows that despite the legislation that attempts to control it, acts such as prostitution, illegal pornography and BDSM sex acts continue. A study by Burris et al.\textsuperscript{41} has shown that in the US, the Criminal Law has had no effect on curbing risky behaviour in high-risk groups. It found that MSM and injecting drug users were just as likely to engage in risky behaviour in States that legislated against the reckless transmission of HIV as they were in States that did not. However, it is submitted that this evidence should be taken cautiously. The empirical study was small in size, and the focus on high-risk groups is not an accurate representation of society as a whole. Still, this evidence could effectively undermine Feinberg’s “harm principle”,\textsuperscript{42} as it demonstrates that here the penal code is not “effective at preventing, eliminating or reducing harm”.\textsuperscript{43} Despite this, Chalmers argues that there is still compelling reason to criminalise.\textsuperscript{44} He argues that while the data suggests that specific criminal laws do not deter certain behaviour, Robinson and Darley’s\textsuperscript{45} investigations prove that criminal justice systems actually deter criminal conduct. Thus, criminal prohibitions do in fact have a deterrent effect. Orr\textsuperscript{46} is perhaps even more critical of the criminalisation of sexual activity. He argues that without proof that criminalisation effectively addresses a specific issue this type of legislation blurs the line between morality and the criminal law, which can damage the public’s respect for the courts. Whilst this argument is compelling, it is clear from Brown\textsuperscript{47} that Judges in fact believe that their role is that of a “moral guardian”, and as such have accepted that their job involves blurring this line. By accepting this role and its consequences, Judges have in effect undermined Orr’s argument against criminalisation.

Overall, there is adequate justification for the criminalisation of HIV transmission. While there has been widespread fear of the negative consequences of criminalisation, studies have shown

\begin{itemize}
  \item Joel Feinberg, \textit{Harm to Others} (Oxford University Press, 1984).
  \item ibid 36.
  \item James Chalmers, \textit{Legal Responses to HIV and AIDS} (Hart Publishing, 2008).
  \item \textit{R v Brown} [1994] 1 AC 212 (Lord Templeman).
\end{itemize}
that this is in fact misguided. Despite the fact that criminalisation may not be as effective in preventing transmission amongst MSM, it is submitted that its effects on society as a whole provide adequate justification for criminalisation. Moreover, criminalisation could be justified under well-established principles of Criminal Law. Therefore, one must now consider whether the current approach of criminalisation under s 20 is effective, and whether it adequately protects both the victim and the perpetrator from the consequences of criminalisation.

Chapter III: The Appropriateness of Prosecuting HIV Transmission under Section 20

There has been widespread criticism of the Court’s decision to use s 20 as a way of prosecuting reckless HIV transmission. After all, it is clear that this legislation was never intended by Parliament to be interpreted in such a way. The OAPA was not passed as a measure to prevent the spread of HIV, as the virus was not discovered until over 100 years after the Act was passed.

Firstly, there are issues with conceiving reckless HIV transmission as a Choate offence, and that the transmission of the virus is the actionable offence. This creates a problem in that causation must be established. Orr\(^48\) argues that this is challenging in cases involving HIV transmission, as one would have to prove that a particular act of sex had in fact caused that particular infection. This makes it far less easy to convict a person for this crime. During sexual intercourse, there is no way of knowing that the “harm” has occurred - transmission is silent, invisible and unfelt - yet, the prosecution must prove to the criminal standard that a perpetrator has caused the victim’s infection. This is made even trickier in cases involving HIV due to the long latency periods before the presence of the virus is detected. The current approach is to use phylogenetic analysis to attempt to establish a relationship between two samples of HIV, taken from both the victim and the perpetrator.\(^49\) By comparing the two samples, scientists can identify differences between the genetic materials and propose a probability of how close the relationship is between the two


strains of the virus. However, HIV is not unique to an individual and mutates inside each person, and therefore this phylogenetic analysis cannot establish definitive proof, merely an estimate. This can bring a number of issues - for instance, even though phylogenetic analysis can be used to establish a relationship between two samples, there is no way of knowing who infected the other first. Moreover, if a link is established there is the possibility that both were infected from the same third-party, or from other people who were also infected by this third-party. While this may seem unlikely, Weait⁵⁰ argues that this is in fact a common occurrence, particularly in close-knit gay and immigrant communities where sexual activity occurs between select groups of individuals.

Despite these shortcomings, Weait submits that often this scientific evidence which the prosecution has relied upon to establish causation is rarely cross-examined, nor evaluated for its effectiveness by a Jury.⁵¹ Moreover, instead of challenging the scientific evidence to undermine the prosecution’s argument, in past cases the defence has solely attempted to argue the defence of consent to the risk of transmission. In doing so, it seems that the Court has found a way around the challenges posed by establishing causation, by unfortunately not evaluating the limitations of scientific evidence, and instead relying on the broader narrative of sexual history. Weait argues that this is a serious issue as it could undermine the legitimacy of convictions for HIV transmission - by not thoroughly examining the scientific evidence, there is the possibility that wrongful convictions could occur, and that the perpetrator’s right to a fair trial is undermined. In fact, an unreported 2006 case has demonstrated the serious consequences that can occur by not properly considering the validity of the phylogenetic analysis.⁵²

In this case, the victim asserted that the perpetrator gave him the virus, despite having had sexual relations with other HIV-positive men. The Judge had originally simply accepted the prosecution’s use of phylogenetic evidence to link the perpetrator to the victim’s infection, and had sent the jury to retire and consider their verdict. However, while they were doing so, the Judge acquitted the perpetrator after receiving evidence by a virologist that it was impossible to

⁵¹ ibid 103.
⁵² ibid 104.
tell, due to a chain of transmission, whether the infection was caused by one particular individual. This is a great example of why the Courts should be paying more attention to evaluating the evidence, and establishing causation to the criminal standard of proof. Slater supports this\textsuperscript{53} by arguing that by conceiving it a Choate offence, the Criminal Law might have undermined its aim of reducing the spread of the virus. Smith\textsuperscript{54} has also been vocal in lobbying for an offence that targets behaviour, rather than infection. He states that “the offence’s principal purpose is to encourage a shift in social attitudes and behavioural changes which will significantly decrease the risk of infecting others. The pure chance of whether or not the virus is actually transmitted on a particular occasion should not be relevant to liability.”\textsuperscript{55} In particular, he submits that this would target those who may be willing to take the risk in the hope that infection will not occur. The Court has created this difficulty in proving causation by requiring an actual transmission to have occurred, when it would be much easier to control the spread of the virus by focusing on, for instance, exposure to the risk of transmission. Many countries have taken this approach to tackling the spread of the virus, for instance Sweden and France. However, attention must be made to the argument that an inchoate offence may be disproportionately over-inclusive.\textsuperscript{56} On balance, it is submitted that the Courts should be more critical of scientific evidence when proving causation in order to adequately protect perpetrators, and ensure that there has not been a miscarriage of justice. However, it is accepted that this would not address the issue of causation. It is submitted that because of this issue of causation, it is inappropriate to use this offence to criminalise HIV transmission.

Another problem is that the use of s 20 requires that HIV infection be conceived as grievous bodily harm. Many scholars see this as inappropriate. For instance, Slater argues that current medical advancements in retroviral drugs and the long life expectancy of people living with HIV question whether HIV infection can even be classed as a form of corporeal harm, let alone one that amounts to the level of grievous.\textsuperscript{57} He further questions whether future medical discoveries will make this conception even less appropriate. This is an important point, as it affects whether

\textsuperscript{53} James Slater, “HIV, Trust and the Criminal Law” 74(4) JCL 309.
\textsuperscript{54} K Smith, “Risking Death by Dangerous Driving and the Criminal Law” in R Lee and D Morgan (eds.), Death Rites (Routledge, 2003).
\textsuperscript{55} ibid 265.
\textsuperscript{56} M Weait, Intimacy and Responsibility: The Criminalisation of HIV Transmission (Routledge-Cavendish, 2007), 88-89
\textsuperscript{57} James Slater, “HIV, Trust and the Criminal Law 74(4) JCL 309
or not HIV transmission can even be criminalised. The current rationale behind criminalising the transmission of the virus is that it is a positivist legal rationality for public health causes. Thus, HIV infection needs to be conceived as causing harm to someone in order to justify the law intervening and punishing a perpetrator for spreading it. As such, if medicine were to develop in order to be able to suppress the virus, it is questionable as to whether or not its transmission could still be criminalised, and it would arguably not be justified in imposing criminal liability simply on the basis that such transmission is wrong or irresponsible.

However, Weait takes a different approach. He argues that the “harm” felt from HIV transmission, is not the infection itself. Rather, it occurs much later when the victim discovers their HIV status - it is anxiety, fear, and a sense of betrayal and a feeling of time stolen. This type of emotional harm is irrelevant to the offence, which instead looks at the technical question of when and how the transmission occurred. Thus, Weait argues that the harm is not the fact of the infection itself, which s 20 requires it to be. As such, it ignores the context of transmission and the meaning of infection - the very thing that Judges have used to legitimise its criminalisation. Furthermore, Weait argues that by conceiving HIV infection as this type of harm, it further reinforces the negative social consequences that come with criminalisation - and solidifies the stigmatisation of HIV-infected persons. Thus, the use of s 20 does not avoid one of the key arguments against criminalisation. On the other hand, Judges have interpreted s 20 to include mental harm in *R v Ireland*, and as such it could be argued that s 20 will still be relevant despite future medical advances rendering the physical harm negligible. However, as Weait has submitted, this would require a move away from making the transmission of the virus actionable. Yet, this would again run the risk of being over-inclusive and undermine the benefits of criminalisation. As such, it seems inappropriate to use this offence to criminalise HIV transmission due to the potentially illegitimate conception of HIV infection as grievous bodily harm.

Another of the issues that the Courts have encountered is how to conceive culpability for this crime. The current law takes the approach that a perpetrator is guilty if they knew about their

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HIV status and did not disclose this information to their partner. Figures estimate that one third of PLHA are not aware of their HIV status.\textsuperscript{60} As such, it seems ineffective to the aim of preventing the spread of the virus by requiring that the perpetrator had knowledge of their status. Moreover, there is previous law that could be relied upon to overthrow the requirement for knowledge. In the case of R v Boyea,\textsuperscript{61} the perpetrator did not intend to cause the victim harm, or realised that he had done so, when they engaged in rough sexual activities. However, as harm occurred he was convicted for assault. However, academics have argued that it would be inappropriate to prosecute someone for an act where the perpetrator was unaware that such an act could result in harm being caused. This is due to the fact that it would defeat one of the main principles of the Criminal Law - that mens rea is needed alongside actus reus. Cherkassy, Ryan and Weait\textsuperscript{62} all agree that the current requirement for knowledge is the correct approach and that it would be unfair to place culpability on a perpetrator who was unaware of his status. In particular, Spencer\textsuperscript{63} argues that a defendant must have knowledge of his status in order for liability to arise, and Judge LJ in Dica\textsuperscript{64} explicitly referenced his work when conceiving how to prosecute for reckless transmission of HIV.

Beyond this, there is the issue of previous case law that is at odds with this decision. Clarence\textsuperscript{65} first addressed the issue of whether transmission of a sexually transmitted infection could amount to assault under s 20. In this case, a man infected his wife with gonorrhoea; he was aware of the infection, while she was not. No assault was found to be committed as the act that brought about the harm, sexual intercourse, was not unlawful as it was consented to by his wife. This was based on a fear that creating such a policy could lead to over-inclusiveness. Firstly, Wills J\textsuperscript{66} emphasised that it could mean that if an offence was found, any fraud perpetrated to induce a woman into agreeing to sexual intercourse could negate consent and render the intercourse an assault (possibly eventually conceiving it as a rape). He reasoned that this would be too over-inclusive and an abuse of the law. Secondly, he found that there is in principle no distinction

\textsuperscript{61} [1992] 156 JPR 505.
\textsuperscript{63}JR Spencer, “Retrial for Reckless Infection” (2004) 154 NLJ 762
\textsuperscript{64} R v Dica [2004] 2 Cr App R 28, [55] (Judge LJ)
\textsuperscript{65} R v Clarence (1889) LR 22 QBD 23
\textsuperscript{66} ibid (n 27), (Wills J).
between sexually transmitted infections and other contagious diseases, and thus far no one had been convicted for transmitting any other kind of contagious disease.\textsuperscript{67} Stephen J\textsuperscript{68} reaffirmed this, despite referring to the transmission as “abominable”,\textsuperscript{69} he feared that it could be over-inclusive and be used inappropriately in other cases of disease transmission, as he could see no clear distinction between the two. He used the example of a man with scarlet fever, who shook the hand of his friend and in doing so transferring the virus, being convicted of assault.\textsuperscript{70} Wills J believed that Parliament did not intend for s 20 to cover such a situation, and thus it would be inappropriate for the Courts to develop the offence into such a situation.\textsuperscript{71} Stephen J went so far as to say that this would “be an abuse of language to describe such an act as assault”,\textsuperscript{72} and that this was properly a matter for Parliament.

It has been argued that general changes in legal principles have meant that s 20 can now be applicable to the reckless transmission of HIV. Judge LJ has argued that the case of \textit{R v Wilson}, where it was ruled “there can be an infliction of grievous bodily harm contrary to s 20 without an assault being committed”\textsuperscript{73} has “undermined, indeed destroyed, one of the foundations of the reasoning of the majority in Clarence.”\textsuperscript{74} Furthermore, Weait\textsuperscript{75} submits that developments in the joint cases of \textit{R v Ireland; R v Burstow}\textsuperscript{76} which removed the need for the application of physical force, directly or indirectly, to the body for a s 20 offence, allowed the Judges to overrule Clarence. This seems to fall in line with Judge LJ’s reasoning in Dica, where he stated, and “if psychiatric injury can be inflicted without direct or indirect violence, for the purpose of s 20 physical injury may be similarly inflicted it is no longer possible to discern the difference identified by the majority in Clarence.”\textsuperscript{77} While, it is accepted that this is sound reasoning, it is hard to conceive why this was not sent to Parliament to debate. This seems particularly necessary after Wills has explicitly stated that the extension of s 20 to sexually transmitted offences should

\textsuperscript{67} Ibid , [32] (Wills J)
\textsuperscript{68} Ibid , [39] (Stephen J)
\textsuperscript{69} Ibid , [40] (Stephen J)
\textsuperscript{70} Ibid , [38] (Stephen J)
\textsuperscript{71} Ibid , [31-32] (Wills J)
\textsuperscript{72} Ibid , [45] (Stephen J)
\textsuperscript{73} R v Wilson (Clarence) [1984] AC 242, [260]
\textsuperscript{74} R v Dica [2004] 2 Cr App R 28, [26] per Judge LJ
\textsuperscript{75} M Weait “Criminal Law and the Sexual Transmission of HIV: R v Dica” 68 MLR
\textsuperscript{76} [1998] 1 Cr App R 177
\textsuperscript{77} [2004] 2 Cr App R, [30] (Judge LJ)
be a matter for only them to consider. While The Law Commission has identified that reckless transmission of disease should be capable of constituting an offence against the person, Parliament has still not given any opinion on how transmission should be criminalised. It is submitted that this still does not provide enough guidance to allow Judges to decide on such an issue, and as such it may seem inappropriate that Judges have chosen to now include transmission of HIV within the s 20 offence, without waiting for further guidance from the legislature.

Therefore, there are many defects with the inclusion of the inclusion of HIV transmission within the s 20 offence. A Report conducted by the Law Commission has suggested that the creation of a new offence would be the most appropriate course of action. Cherkassy, Ryan, Slater, Warburton and Weait all agree that a new offence would be the most effective approach to tackling the spread of the virus, as it could be specifically tailored to deal with some of the shortcomings that I have discussed in this dissertation. However, the Government could solely conceive such an offence. The Home Office issued a Consultation Paper on the issue, and following this, the Government rejected the recommendation that such an offence should be prosecuted. They argued that this was due to a concern that the law “would discriminate against those who were HIV positive, have AIDS or viral hepatitis, or who carry any kind of disease.” They also justified a refusal to legislate on the issue on the grounds that a proposed change could deter individuals from testing for the virus and that they “doubt as to the feasibility and desirability of any new offence.”

This position was taken in 1992, and unfortunately there has been little change since then, with the Government still refusing to legislate. It is submitted that the creation of a new offence would

78 R v Clarence (1888) 22 QBD 23[31-32] (Wills J)
79 Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles (Law Com Report No 218, Cm 2370,1993)
80 Ibid.
82 Home Office, Violence: Reforming the Offences against the Person Act 1861 (Consultation Paper 421/2, May 1998).
83 Ibid para 3.16.
now be much more feasible than in 1992. The Government could learn from the problems with the current approach, as discussed in this dissertation, and use the suggestions by academics on how to address this. The rising criminalisation of reckless HIV transmission across the globe would also provide the Government with some excellent comparisons that would allow them to conceive a truly effective offence. Furthermore, it is submitted that it would be a desirable change. As discussed in the first chapter, Chalmers has shown that, in practice, criminalisation has not acted as a deterrent for testing. Thus, the Government should hesitate to legislate on a new offence - it could operate much more effectively to protect both victims and perpetrators. However, until this occurs there needs to be clarification by the Judges on a particularly disputed area - the defence of consent.

Chapter IV: Assessing the Defence of Consent

Helen Law has submitted that the Court has used the defence of consent in an attempt to strike a balance between the need for public protection from contracting HIV, and the right to personal autonomy in the private setting of sexual intercourse.85 There are some benefits to the requirement for disclosure. Giesecke et al. argue that partner disclosure can actually be more effective at identifying HIV-positive individuals than large-scale screening efforts.86 Sobo agrees, by submitting that partner disclosure offers a way to identify the possibility of infection in people who might not otherwise suspect that they have contracted this virus.87 Thus, this requirement for disclosure could be effective in that it would allow people who would otherwise be unaware of their condition access to treatment, and encourage them to use protection, further stopping the spread of the virus. However, there have been criticisms that in practice the Courts have not successfully protected PLHA. Ryan argues that the emphasis on verbal disclosure of HIV status in order to prove consent can bring up a vast range of issues.88 This is namely due to the fact that it separates HIV transmission from the complex social, psychological and health realities. Thus, it is submitted that there is a need for a critical assessment of the defence of consent to avoid the negative consequences of an ineffective and inappropriate defence, and maximise the benefits of an effective defence.

The Court has created a distinction between “taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse and giving an informed consent to the risk of infection with a fatal disease.”89 Both Ryan and Weait consider this problematic.90 Weait argues that this is a case of faulty logic - a person agreeing to have unprotected sex consents to the risk of transmission by simply agreeing to have unprotected sex, and the Court is illegitimate.

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85 H Law, “Offences against the Person: Reckless Transmission of HIV” 69(5) JCL 389
89 R v Konzani [2005] 2 Cr App R 198. [41]
in distinguishing between the two situations. The Court has, unfortunately, kept the reasoning behind this distinction very unclear. In Dica, it was asserted that “the ultimate question is not knowledge, but consent” which theoretically could allow for possibilities where the perpetrator could rely on this defence without explicitly disclosing his HIV-status. However, in Konzani the Court attempted to limit these circumstances, specifically to cases in which a third party informed the victim of their partner’s HIV-status. Still, this creates a situation of implied consent, where the perpetrator does not need to explicitly disclose their HIV-status.

Cherkassy finds issue with this idea, which she dubs a “loophole”. She argues that this takes too much responsibility away from the perpetrator, allowing him to be completely reckless, while instead placing a burden on the victim to investigate their partner’s sexual history. Cherkassy goes beyond this to question what level of disclosure is needed, and argues that the threshold for establishing the defence is far too low. She quotes Konzani, where Judge LJ stated that a perpetrator is “not to be convicted if there was, or may have been an informed consent” to the risk. She submits that this gives the perpetrator too much freedom to disclose, which constrains and unnecessarily burdens the victim. Cooper and Reed agree with her apprehensions about this “loophole”. They argue that it is wrong that a perpetrator may evade conviction simply because the victim had knowledge of their condition. In their opinion, the perpetrator would regardless have acted with moral culpability and blameworthiness. He would have been unaware that the victim had knowledge of his HIV-status, and as such would still have recklessly transmitted the virus. They go so far as to state that “his conduct is, arguably, deserving of the stigma of a criminal conviction.”

On the other hand, it is submitted that the Court’s approach may have been appropriate. Weait, in fact, argues the Court has not gone far enough. He submits that the Court should not have been so limiting in Konzani, and instead considered “general knowledge about the risks associated

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91 R v Dica [2004] 2 Cr App R 28, [59]
92 R v Konzani [2005] 2 Cr App R 198, [44]
93 L Cherkassy, “Being Informed: the complexities of knowledge, deception and consent when transmitting HIV” 74(3) JCL 242, 254
94 R v Konzani [2005] 2 Cr App R 198, [43]
95 S Cooper and A Reed (2007), “Informed Consent and the Transmission of Sexual Diseases: Dadson Revived” 71(5) JCL 461
96 Ibid , 464
with unprotected sexual intercourse"\textsuperscript{98} enough to amount to consent. He believes that the scope should include situations where a person “advertises consciously to the possibility that a non-disclosing sexual partner may be HIV positive.”\textsuperscript{99} There is some benefit to Weait’s arguments and a consideration of an approach that is not focused on disclosure. Studies have shown that disclosure may have serious consequences, and thus it is important to conceive other ways in which consent could be established. As I have previously discussed, discrimination against PLHA is widespread, and there is much stigma attached to the virus. Therefore, PLHA are often wary about disclosing their status due to a fear that they will be rejected. Green and Sobo\textsuperscript{100} have argued that disclosure creates a “double stigma”:\textsuperscript{101} a stigma of the virus coupled with a stigma stemming from the association of HIV with high-risk groups and culturally disdained actions. In particular, Green and Sobo submit that there is also a fear that this private information will be spread, which would lead to greater social isolation and rejection from friends and relatives. Their studies have shown that PLHA regularly experience discrimination, and even hate crimes, due to the disclosure of their HIV-status.

Perhaps more serious, research has shown that HIV-positive women can be at a high risk of violence when a partner discovers their HIV-status. Grigg has explored this issue, and found that this is often due to the lower status of women, which makes them more psychologically and physically vulnerable.\textsuperscript{102} This means that they often suffer from low self-esteem in comparison to men, which does not allow them to confidently disclose their status. In particular, Griggs’s studies have identified that partners often abuse women physically and emotionally after they disclose their HIV-status. Similar issues were identified by Ryan: women often seek to hide their condition due to a fear that their partner will suspect infidelity, and thus reject and leave them.\textsuperscript{103} Often, they find that it is easier to remain silent and hope that criminal charges will not be brought against them. Moreover, Bunting argues that in Britain women and men are held to

\textsuperscript{98} Ibid, 767
\textsuperscript{99} Ibid, 768
\textsuperscript{100} G Green and E Sobo, \textit{The Endangered Self: Managing the Social Risks of HIV} (Routledge, 2000)
\textsuperscript{101} Ibid, p. 103
\textsuperscript{102} E Grigg, “Post HIV/AIDS Emergence of a New Morality” in H Heath and I White (eds.), \textit{The Challenge of Sexuality in Health Care} (Blackwell Science Ltd, 2000)
different accounts for their sexual behaviour.\textsuperscript{104} Studies by Bunting have found that male promiscuity is much more celebrated and accepted, whereas female promiscuity is often referred to as deviant and intolerable. Therefore, women are often afraid to disclose their HIV status due to the fact that they fear they will be perceived as licentious, and the negative consequences of this - including violence from their partner. A Study by Green have also found that women feel more stigmatised than men - they feel tarnished by the “dirty” virus and its connotations with drug use and promiscuity.\textsuperscript{105} As such, they are at a greater risk of hostility upon disclosure. Therefore, it seems that in some circumstances disclosure, and thus the current law’s construction of consent, may be inappropriate.

Furthermore, there have been calls for the approach to be focused more around condom use than disclosure of status. After all, condom use achieves the purpose of preventing the spread of HIV and would avert some of the difficulties that come with disclosure. This approach would more effectively strike a balance between the protection of both the victim and PLHA. Research by Perry et al. has shown that disclosure of HIV-status will not always lead to protected sex, and as such they recommend that it is more important to promote safer sex than disclosure.\textsuperscript{106} Interestingly, recent cases in Canada have shown that disclosure does not necessarily need to be the main focus for establishing consent in reckless HIV transmission cases. Cuerrier\textsuperscript{107} was the first to take another approach, which specifically considered whether or not condom use could be taken into account. Here, the Court decided that in some circumstances failure to use condoms could be considered sufficiently fraudulent behaviour to constitute turning consensual sex into aggravated sexual assault, but that in others disclosure of HIV-status was necessary - particularly where there was “significant risk of suffering serious bodily harm.” Unfortunately, this vague explanation resulted in inconsistent prosecutions until it was refined in the much later Mabior case.\textsuperscript{108} Here, the Court identified that “significant risk of bodily harm”, and the requirement of disclosure, is nullified if “(i) the accused’s viral load at the time of sexual relations was low, and

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\textsuperscript{104} S Bunting, “Sources of Stigma Associated with Women with HIV” 19(2) Advances in Nursing Science 66
\textsuperscript{105} G Green, “Attitudes towards people with HIV: are they as stigmatising as people with HIV think they are?” 41 Social Sciences and Medicine 557
\textsuperscript{106} S Perry, J Ryan, K Fogel, B Fishman and L Jacobsberg, “Voluntarily informing others of positive HIV test results” (1990) 41 Hospital and Community Psychiatry 549
\textsuperscript{107} R v Cuerrier (1998) 17 CCC (3d) 1, [138]
\textsuperscript{108} R v Mabior [2012] 2 SCR 584
\end{flushright}
(ii) condom protection was used.”

This means that there is no need for a perpetrator to disclose his HIV-status.

Chalmers has praised this approach as being pragmatic. This seems more appropriate than the clear-cut British approach of relying solely on disclosure, and could potentially avoid issues such as stigmatisation, fear of rejection and violence towards partners. Ryan, in particular, agrees that this is the most appropriate approach. She submits that if criminalisation is based on preventing the spread of HIV, there is therefore no justification for punishing those who have taken precaution against transmission and that this would be a miscarriage of justice. On the other hand, Warburton still questions whether condom use is in fact appropriate. He argues that most people would still refuse to partake in intercourse with a PLHA and reject them, even when a condom was used, and as such disclosure is still an important aspect in assessing consent. However, Smith makes a valid point in that condom use is a more appropriate approach than disclosure as it strikes a more effective balance between a right to sexual freedom and protecting victims from contracting the virus, stating that it is “a proper and necessary concession to human nature.”

Beyond this, it may seem inappropriate that there has been much focus on consent. It is commonly accepted that consent is irrelevant when the perpetrator is aware that harm may be caused. This was clarified in Attorney-General’s Reference where Lord Lane CJ stated that as harm had been intended, the victim’s consent was completely irrelevant. Omereod further submits that an act done to another with consent is an assault even if harm is unforeseen - and this seems applicable to HIV transmission, where the harm is invisible and there is a lack of certainty as to whether or not the virus has been transmitted. This was reiterated in Brown

109 Ibid., [68]
110 J Chalmers, Legal Responses to HIV and AIDS (Hart Publishing, 2008)
113 K Smith, “Sexual Etiquette, Public Interest and the Criminal Law” (1991) 42 Northern Ireland Legal Quarterly 309, 328
114 Attorney-General’s Reference (No. 6 of 1980) [1981] QB 715
115 D Omereod, Smith and Hogan Criminal Law (11th Ed, Butterworth’s 2002)
where the House of Lords ruled that the infliction of bodily harm in sado-masochistic practices was harmful to society and thus there should be no defence of consent to such activity.\textsuperscript{116} Cherkassy identifies that HIV transmission may have contributed to their rationale, and that the Courts may have been attempting to preclude the defence of consent for HIV transmission.\textsuperscript{117} There has been criticism of the Court’s approach in Brown and the effect it has had on HIV transmission. Bamforth has identified that this decision seems out-dated, paternalistic and confusing.\textsuperscript{118} He argued that this decision seemed to suggest that as partners could not consent to unprotected sex with a HIV-infected person, any unprotected sex could thus be classed as rape, even in the context of sex between married couples. Warburton also heavily criticised this insinuation, describing it as “distasteful” and “startling”.\textsuperscript{119} Fortunately, this was clearly addressed and overturned in Dica, where Judge LJ commented that such an act would not be considered rape.\textsuperscript{120} This was further reiterated in \textit{R v EB}\textsuperscript{121} - Latham LJ held that the act of intercourse remains a consensual act, while the transmission of the virus is not consented to.\textsuperscript{122}

While the change of approach may seem logical, Brown still remains good law. As such, Giles submits that this decision should be applied to all harmful sexual activities, including that of HIV transmission.\textsuperscript{123} Davies, in his article on Dica, disagreed with the Court’s approach to the introduction of the defence of consent and argued that the rationale in Brown would have instead been more appropriate.\textsuperscript{124} Cherkassy agrees that the difference in approach seems irregular, stating that it seems “strange that the law can articulate when a person cannot consent to certain behaviour but can consent to other serious harms.”\textsuperscript{125} She criticises the illogical reasoning that the public policy explanation used in Brown was not seen to be relevant to the spread of HIV, and that the judgment in Dica does not giving a tangible rationale as to why. In fact, Judge LJ

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\item \textsuperscript{116} \textit{R v Brown [1994]} 1 AC 212
\item \textsuperscript{117} L Cherkassy, “Being Informed: the complexities of knowledge, deception and consent when transmitting HIV” 74(3) JCL 242
\item \textsuperscript{118} M Bamforth, “Sado-masochism and Consent” (1994) Crim LR 661
\item \textsuperscript{119} D Warburton, “A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour by HIV+ Individuals” (2004) 68 JCL 55, 64
\item \textsuperscript{120} \textit{R v Dica [2004]} 2 Cr App R. [39]
\item \textsuperscript{121} \textit{R v EB [2006]} EWCA Crim 2945
\item \textsuperscript{122} Ibid., [17]
\item \textsuperscript{123} M Giles, “R v Brown: Consensual Harm and the Public Interest” (1994) 57 MLR 101
\item \textsuperscript{124} M Davies, “R v Dica: Lessons in Practicing Unsafe Sex” (2004) 68 JCL 498
\item \textsuperscript{125} L Cherkassy, “Being Informed: the complexities of knowledge, deception and consent when transmitting HIV” (2010) 74(3) JCL 242, 250
\end{itemize}
stipulates that personal autonomy, and the right to consent to serious harm, is an issue for Parliament to decide. Yet, the Judges have seemingly ignored this and ruled that in these situations the public should have a right to autonomy. This was further solidified in Konzani, where Judge LJ then considered that there was instead a “public interest” that “requires that the principle of personal autonomy in the context of non-violent sexual relationships should be maintained.” This has led Cherkassy to argue that perhaps the law on HIV transmission should, instead of focusing on the public interest, apply law that will address public policy issues, as the Court had done in Brown. She argues that the rationale in Brown was to prohibit sexual activities that were dangerous, and that the spread of HIV is as equally dangerous as sadomasochistic sex. Thus, the Courts should be attempting to limit the risk of the public contracting HIV as much as possible - and Cherkassy suggests that perhaps the only way of doing so would be to limit the use of the defence of consent to sexual intercourse between married couples, as it is highly unlikely that they will engage in sexual intercourse with other parties and further spread the virus.

The approach taken in Sweden goes even further, and has criminalised any HIV transmission, even where there has been consent. It is submitted that this is an extremely strict measure. However, it has been effective in increasing conviction rates for the crime. In a report conducted in 2010, Sweden had the highest number of convictions per person living with HIV of any country - 6.12 convictions per 1000 PLHA. This is far greater than the rate of the UK, which stood at 0.16 convictions per 1000 PLHA. However, it could be argued that this strict law has, in practice, not helped to prevent the spread of the virus. In the UK, new diagnoses of HIV have dropped slightly from 2004 (the year of the Dica case and criminalisation) and 2010 - from 7784 to 6660 new diagnoses per year. In the same period, new diagnoses in Sweden have remained at a stable rate of just under 500 per year. Despite the fact that Sweden has harsher laws, this

126 R v Dica [2004] 2 Cr App R, [52]
127 R v Konzani [2005] 2 Cr App R 198, [42]
128 L Cherkassy, “Being Informed: the complexities of knowledge, deception and consent when transmitting HIV” (2010) 74(3) JCL 242, 250
130 Ibid.
132 World Health Organisation, UNAIDS Epidemiological Fact Sheet - Sweden (2012)
has not had a greater effect in curbing transmission rates, and thus the law could be deemed ineffectual. Therefore, it is submitted that in order to deal with the negative consequences of a strict legal approach (as discussed in Chapter I), the existence of a defence of consent is essential in order to adequately protect PLHA. Nevertheless, it is clear that the law is not working as effectively as it could be. Until the Government legislates on the matter, is submitted that further clarification is needed on the defence of consent in order to address some of the issues and successfully protect both perpetrator and victim.
Chapter VI: Conclusion

In conclusion, while there are undoubtedly issues that come with criminalisation, I believe that the Courts are justified in using the Criminal Law to attempt to control HIV transmission. Unfortunately, they have been limited in their capabilities to prosecute such behaviour and as such have had to conceive it as falling under s 20. In attempting to fit this modern medical phenomenon into a statute that is over 150 years old, the Courts have encountered a number of issues and negative consequences that need to be addressed.

It is submitted that the most appropriate approach would be for the Government to legislate on the issue and create a new offence. However, the refusal by the Home Office to do so has meant that for the foreseeable future reckless HIV transmission will be confined to the s 20 offence. As such, the Courts should now turn their attention to addressing some of the issues explored in this dissertation. In particular, there needs to be a discussion on the appropriateness of phylogenetic analysis and the extent to which it can be used in such cases. There also needs to be extensive analysis on the defence of consent, in order for greater clarity and direction to be established, and an approach that will hopefully adequately protect both the victim and the perpetrator. Finally, the Courts need to pay heed to the future of the virus. Medical advancements could mean that HIV will no longer adequately fit within the Law’s understanding of harm, and as such nullify the applicability of s 20. However, once again the Government would perhaps be the best branch to debate these issue and determine a practical solution.
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