

# Sexually charged

## The views of gay and bisexual men on criminal prosecutions for sexual HIV transmission

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**Original Research Report**

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# 1 Introduction

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Across the world there has been an increase in criminal prosecutions of people with HIV for passing their virus to someone else. Some jurisdictions have passed laws that specify the transmission of HIV (or exposure to it) as an offence, while others are using existing legislation to bring prosecutions (Burriss *et al.* 2008, Pearshouse 2008).

Criminal prosecutions for the transmission of HIV have occurred since 2001 in England and Wales as well as Scotland. There is no HIV-specific criminal legislation in UK criminal legal systems. Under Scottish common law, cases have been charged with infliction of culpable and reckless infection or injury. The rest of the UK has used the provisions for recklessness causing serious bodily harm in section 20 of the *Offences Against the Person Act (OAPA 1861)*. The crime of *reckless endangerment* within Scottish law makes it possible that someone could be prosecuted where no HIV transmission has occurred but this has not happened yet. In the rest of the UK, there is no equivalent provision for criminally prosecuting behaviour that may have exposed someone to the *risk* of transmission.

There is no system for collating and reporting different types of HIV-related prosecutions in the UK. It is therefore difficult to establish how many criminal proceedings have been undertaken and which have progressed to court. Using press monitoring and soft-intelligence gathering, we estimate that in the past seven years up to twenty cases have progressed to trial in the UK and that many more investigations have been undertaken but dropped before that point.

Most early prosecutions for sexual HIV transmission in the UK involved guilty pleas and resulted in custodial sentences, but it has since been demonstrated that virological evidence alone is unable to prove the direction or timing of transmission (see Bernard 2007 for further details). As a result, where it is necessary to prove that HIV transmission has occurred (as is the case under the *OAPA* but not necessarily in Scots law) a prosecution case is unlikely to be successful in the absence of a guilty plea. Since 2006 in England and Wales, the majority have been dismissed or acquitted (Carter 2006, Bernard 2008). However, Crown Prosecution Service policy states that where there is other evidence for transmission (and where other potential sources of infection have been ruled out) criminal conviction can still be pursued (Crown Prosecution Service 2008).

Gay and bisexual men, like most people in the UK, will not be aware of the decline in successful prosecutions for the reckless transmission of HIV over the last couple of years. Nor will they be aware of the reason for this change, or the subtle policy shifts that have occurred.

Successful prosecutions in all areas of the UK have so far only related to the *reckless* transmission of infection, rather than the *intentional* causing of harm. In this context, *recklessness* (under Section 20 of the *OAPA 1861*) indicates the defendant's ability to foresee that their actions might result in harm, and a successful prosecution carries a maximum sentence of five years' imprisonment on each count. In contrast, *intentional* infliction of serious harm where it can be shown that the defendant's desired outcome was to bring harm to others (under Section 18 of the *OAPA 1861*), carries more severe penalties, including the possibility of life imprisonment. Hence, the legal distinction between *intention* and *recklessness* is significant. This point of legal detail has been consistently confused in press coverage and public discourse about HIV transmission. These often characterise defendants charged with *reckless* transmission as having acted deliberately. For example:

In Cardiff Crown Court in July 2005 a 20-year-old woman from Newport, South Wales, who contracted HIV when 15, was convicted of deliberately infecting her lover. ...

*[later in the same article about a different person]*

His initial conviction, in 2003, made him the first person in 137 years to be convicted in England of deliberately transmitting a disease.

McVeigh, *The Times*, 27 July 2006.

A 'despicable' man who deliberately infected two women with the HIV virus has been sentenced to eight years in prison.

BBC News website, 3 November 2003.

Both of these news items use 'deliberately' to describe convictions for reckless (ie. not intentional) HIV transmission, thereby misrepresenting the convictions. A comparison might be reporting someone convicted of manslaughter as being convicted of murder. The presumption that a failure to successfully avoid risk necessarily implies an intention to inflict harm is deeply problematic. There remain a vast array of social, sexual and contextual barriers to HIV risk reduction, even where a person earnestly hopes to avoid being involved in HIV exposure and transmission.

The rise in prosecutions in the UK is part of a global trend to turn to the criminal law as a solution to the public health challenge of HIV. However, there is also a growing consensus among experts in law and HIV prevention that criminal prosecutions of reckless transmission do not contribute to HIV prevention and may in fact impede it (see Adam *et al.* 2008, Burris *et al.* 2008, UNAIDS 2008, Wainberg 2008, Pearshouse 2008, Weait 2007, Burris *et al.* 2007, Anderson *et al.* 2006, Lowbury & Kinghorn 2006, World Health Organisation 2006, Dodds *et al.* 2005, Elliott 2002). It is argued that prosecutions increase stigma, dissuade people from HIV testing and increase expectations that people with diagnosed HIV will disclose their infection to all sexual partners (and conversely that non-disclosure equals HIV negative, a deeply problematic assumption with widespread undiagnosed infection). South African Supreme Court Justice Edwin Cameron argues:

**Criminalisation assumes the worst about people with HIV. And in doing so, it punishes their vulnerability. The human rights approach assumes the best about people with HIV and it supports empowerment. The prevention of HIV is not just a technical challenge for public health. It is a challenge to all humanity to create a world in which behaving safely is truly feasible, in which it is safe for both sexual partners, and in which it is genuinely rewarding. (Cameron 2008)**

Our research concerns one part of the interface between criminal prosecution for sexual HIV transmission and wider HIV prevention goals, the perceptions and understandings of gay and bisexual men in the UK.

# 2 Research aims and methods

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This chapter describes why we did the research and the way we went about it.

## 2.1 AIMS

We used the *Gay Men's Sex Survey 2006* to elicit the views of a large number of gay men and bisexual men on criminal prosecutions for the sexual transmission of HIV infection in order to better understand how this might impact on their sexual risk behaviour. The survey is an annual community-based collaborative action research intervention that was also used to give men some facts about HIV and prosecution (see Weatherburn *et al.* 2008 for further details).

We wanted to explore men's perspectives on criminal prosecutions to better understand how prosecutions shape the landscape within which HIV prevention activities occur. Given the paucity of published research on perceptions of criminal prosecutions for HIV transmission in the UK (Dodds & Keogh 2006, UK Coalition 2005), or elsewhere (Burriss *et al.* 2007), we hope this work makes a significant contribution to understanding how prosecutions are interpreted within populations at risk of HIV transmission.

During the period of fieldwork, there was a significant amount of national press coverage of a London woman prosecuted for the reckless transmission of HIV. That same summer brought news of the first conviction where the defendant and complainant were both gay men. Thus, the issue was very current in the mainstream press and the gay press at that time.

## 2.2 METHODS

The *Gay Men's Sex Survey* (GMSS) is an annual self-completion survey of men living in the UK who have sex with men. The questions include demographics, HIV status indicators, HIV risk and prevention behaviours, HIV prevention needs, use of settings in which health promotion can occur and access to interventions. GMSS recruits using two methods: online and through the distribution of seal-and-return booklets by agencies working with gay and bisexual clients.

Men completing GMSS 2006 were told *All of the following statements are TRUE:*

- *Laws that can be used against the sexual behaviour of people with HIV are different in different countries.*
- *Some people with HIV have been imprisoned in the UK for passing their infection to a sexual partner.*
- *People with HIV have been imprisoned in the UK for passing their infection without intending to do so.*
- *No HIV positive person has been imprisoned in the UK for having sex with a negative person who did not get HIV.*

Men were asked *Did you know this already?*, and to indicate one of four options for each statement: *I knew this; I didn't know this; I wasn't sure; or I don't understand this.* Men were also asked *Would you know how to get expert legal advice about HIV transmission if you needed it?* Findings from these questions are in the main survey report, which also gives more details on survey methods (Weatherburn *et al.* 2008). This report concerns additional exploratory questions in the online version of the survey only.

In the online version of the survey, all men were asked: *Do you think it is a good idea to imprison people who know they have HIV if they pass it to sexual partners who do not know they have it?*. The response options were: *Yes; No; Not sure*. This closed-question is referred to below as part A.

Whatever their answer they were then asked: *Why do you say no / yes / not sure?* They were provided with an open box within which to type an answer. This part of the question is referred to as part B below.

Of the 12,155 in the final GMSS 2006 sample, 8,286 (68%) completed the survey online. Of the men completing the survey online, 8,252 answered part A, and 6,718 (81%) went on to provide a response to the open-ended question (part B).

In order to analyse the open-ended responses to part B, two researchers worked independently and then collaboratively to develop a coding framework that could capture all responses. Firstly, the two researchers drew seven major themes from a random sample of 600 responses (200 each from those answering 'yes', 'no' and 'not sure'). They then developed sub-themes to reflect the range of responses within each of the major themes. The complete list of sub-themes was tested against a further random selection of 200 responses to ensure thematic coherence and sample coverage.

All 6,718 open-ended responses to Part B were coded at the major thematic level. Where responses were lengthy, they were coded according to the first theme that emerged. Preliminary results were published at this stage (Dodds *et al.* 2008).

The findings in this report arise from further analysis utilising a random sample comprised of a minimum of 20% of responses (up to a maximum of 200 responses) from each of the seven major thematic categories. Each response was given only one sub-thematic code, the first idea expressed in the case of multiple responses. As a result of this process, 42% of all responses (n=2,844) were assigned a sub-thematic code, in addition to their major thematic codes. Often, a particular sub-theme was related to a particular viewpoint on prosecutions, so within one major thematic category opposing sub-themes could emerge.

### 2.3 THE REST OF THE REPORT

The answers to Part A provide the structure for the rest of the report, with responses to Part B providing most of the content. Chapter 3 presents the overall responses to Part A and the coding frame developed from Part B. The next three chapters (4-6) then deal in turn with those men who responded *Yes*, *No*, or *Not Sure*, and explore the reasons they gave for their position.

Blocks of **bold** text are verbatim quotes from respondents. The quotes selected give an overall sense of a sub-theme, or of diverse matters raised by various respondents, and cannot be taken to be representative of all responses in a single thematic category or sub-theme. Quotes were selected for their clarity and descriptive purpose. We have given brief demographic descriptions after each quote. This is both to illustrate the range of men contributing their perspectives and also to show that men sharing an age, HIV status or place of residence do not necessarily share the same views on prosecutions.

The final chapter summarises the report findings and explores their implications for health promotion planning.

# 3 Results overview

Before looking in detail at men’s responses to the question of prosecutions, this chapter looks at the overall levels of agreement and disagreement, and the kinds of responses that men gave.

## 3.1 WHAT PROPORTION AGREE OR DISAGREE WITH PROSECUTION?

More than half (57%, n=4676) of all respondents said yes, they think it is a good idea to imprison people who know they have HIV if they pass it to sexual partners who do not know they have it. About a quarter (26%, n=2120) were unsure and the remainder (18%, n=1456) thought it was not a good idea.

## 3.2 WHO AGREES OR DISAGREES WITH PROSECUTION?

This section examines how agreement and disagreement with criminal prosecutions varied across key demographic groups. The biggest difference was between men that had diagnosed HIV and those that did not.

All respondents (n=8132, missing 134)		Do you think it is a good idea to imprison people who know they have HIV if they pass it to sexual partners who do not know they have it?		
		% agree	% not agree	% not sure
All respondents (n=8132)		57.4	26.0	17.9
by HIV testing history	Never tested (n=3369)	63.5	12.9	23.6
	Last test negative (n=4218)	56.3	17.0	26.6
	Tested positive (n=565)	19.6	49.4	31.0

Men with diagnosed HIV were much less likely to support prosecutions, most probably because they regard prosecution from the viewpoint of being a potential defendant. On the other hand, men who have never had an HIV test were most likely to agree with prosecutions. We know from previous research (Keogh *et al.* 2006) that men who have never had an HIV test are less likely to personally know anyone with diagnosed HIV, and often feel HIV is not present in their social circles or other parts of their everyday life.

It is not surprising that men who have had an HIV negative test result maintain a middle-ground position in relation to prosecutions. As a group, men who have had an HIV negative test are more likely than those who have never tested to consider what it might be like to be diagnosed with HIV – and they are also more likely than men who have never tested to have personally encountered HIV in their lives (through friendships, with sexual partners and in their reflection about HIV and sexual risk). However, men who have tested negative were still significantly more likely to support criminal prosecutions than men with diagnosed HIV.

Below we have removed the men with diagnosed HIV from the other sub-group comparisons. This does not alter the pattern of significant effects, nor fundamentally change the extent of agreement, but it helps demonstrate that among men not diagnosed with HIV, agreement with criminal prosecutions is the norm. In every sub-group comparison except one, more than half of all negative and untested men support prosecutions.



The following table shows how agreement with prosecutions varied by country, and region of residence for men living in England.

<b>All men participating online who had not got diagnosed HIV</b>		<b>% agree</b>	<b>% not agree</b>	<b>% not sure</b>
<b>All men who had sex with a man in the last year who did not have diagnosed HIV</b> (n=7587, missing 36)		59.5	15.2	25.3
<b>Area of residence</b>	<b>All England (n=6424)</b>	58.7	15.5	25.8
	<b>East of England (n=358)</b>	59.8	13.4	26.8
	<b>East Midlands (n=290)</b>	56.9	12.8	30.3
	<b>London (n=2054)</b>	55.2	18.3	26.5
	<b>North East (n=153)</b>	70.6	11.1	18.3
	<b>North West (n=548)</b>	59.5	14.6	25.9
	<b>South Central (n=310)</b>	61.3	14.2	24.5
	<b>South East Coast (n=406)</b>	59.4	14.5	26.1
	<b>South West (n=358)</b>	60.3	13.7	26.0
	<b>West Midlands (n=328)</b>	62.5	13.1	24.4
	<b>Yorkshire &amp; Humber (n=326)</b>	61.7	16.3	22.1
	<b>Wales (n=302)</b>	62.6	13.9	23.5
	<b>Scotland (n=659)</b>	63.9	15.0	21.1
	<b>Northern Ireland (n=202)</b>	66.3	9.9	23.8

Agreement with criminal prosecutions was widespread among gay and bisexual men throughout the UK, but there were country level differences. Overall, men living in England were most likely to disagree with prosecutions and least likely to agree (15.5% and 58.7%), compared to men living in Northern Ireland (9.9% and 66.3%), Wales (13.9% and 62.6%) or Scotland (15.0% and 63.9%). Among English-resident men, agreement with prosecutions was more common among men living in the North East (70.6%), West Midlands (62.5%) and Yorkshire & Humber (61.7%). Men living in London were least likely to agree with prosecutions, though more than half (55.2%) did so.

The following table shows how agreement with prosecutions varied by age, ethnicity, educational achievement, the gender of respondents' partners in the last year, whether they had a current relationship with a man and their numbers of male partners in the last year. As above, men with diagnosed HIV are excluded from this analysis.

<b>All men participating online who had not got diagnosed HIV</b>		<b>% agree</b>	<b>% not agree</b>	<b>% not sure</b>
<b>Age</b>	< 20 (n=626)	64.9	11.2	24.0
	20s (n=2435)	65.3	11.2	23.5
	30s (n=2056)	55.6	16.9	27.5
	40s (n=1441)	54.1	20.1	25.9
	50+ (n=1020)	58.1	16.9	25.0
<b>Ethnicity</b>	White British (n=6144)	59.4	14.9	25.6
	White other (n=926)	58.5	16.6	24.8
	Black (n=59)	66.1	15.3	18.6
	Asian (n=127)	63.0	17.3	19.7
	Mixed or dual (n=169)	60.4	16.0	23.7
	All other groups (n=155)	61.9	16.1	21.9
<b>Education</b>	Low (n=1167)	64.8	12.4	22.8
	Medium (n=1777)	63.3	12.3	24.3
	High (n=5256)	57.0	16.8	26.1
<b>Gender of sexual partners</b>	Men and women (n=664)	66.3	13.9	19.9
	Men only (n=6356)	58.7	15.3	26.0
<b>Regular male partner</b>	Single (n=3469)	61.3	13.7	24.9
	Partnered (n=4114)	57.9	16.5	25.5
<b>Number of male sex partners last year</b>	None (n=522)	60.5	15.3	24.1
	One (n=1698)	63.4	12.8	23.9
	2, 3 or 4 (n=2134)	63.5	12.3	24.2
	5 to 12 (n=1759)	58.4	14.4	27.2
	13 to 29 (n=802)	53.1	20.0	26.9
	30+ (n=618)	45.5	27.5	27.0

Agreement with criminal prosecutions was apparent across the age range but was most common among men under 30. Men in their 40s were least likely to agree with prosecutions, and most likely to disagree, but differences among men over 30 were not substantial. Men who agreed with criminal prosecutions were younger (mean = 34.1, median 32) than men that did not agree (mean = 37.0, median 37).

Agreement with criminal prosecutions did not vary across the ethnic groups. However, it varied greatly by education, with men with low and medium levels of education significantly more likely to agree and less likely to disagree, compared to men who had been to university.

Agreement with prosecutions was less common among exclusively homosexually active men, compared to those that had sex with men and women. Similarly men with a current regular male partner were significantly less likely to agree with prosecutions than men with no current regular male partner, and more likely to disagree.

By far the strongest association with agreement on criminal prosecutions was with numbers of male sexual partners in the last year. Disagreement with prosecutions increased with increasing numbers of partners. In both the preceding tables showing data for tested negative and untested men, men with 30 or more male partners in the last year were the only group among which less than half (45.5%) agreed with criminal prosecutions.

### 3.3 WHY DO MEN AGREE OR DISAGREE WITH PROSECUTIONS?

The following text-box describes the major themes and sub-themes that were drawn from the reasons men gave for agreeing or disagreeing with prosecutions.

#### **Major thematic categories and their sub-themes**

**Responsibility** – Responses focusing on the duties and obligations of sexual participants, and their associated rights.

- Person with diagnosed HIV has primary responsibility to:
  - avoid transmission,
  - disclose their status.
- Both partners share responsibility to avoid transmission.
- Person without diagnosed HIV has primary responsibility to avoid transmission.

**Contingency** – Responses that indicated that particular aspects of a case and the context within which transmission had occurred would influence the respondent's view on prosecution.

- It depends on the circumstances.
- Only prosecute those who:
  - did not use condoms;
  - intended to transmit HIV;
  - lied about their HIV status when asked;
  - had unprotected anal intercourse on multiple occasions;
  - did not disclose their HIV status prior to anal intercourse;
  - took advantage of a vulnerable sexual partner.
- There can be compelling reasons not to prosecute, such as:
  - impairment / lack of competence on the part of the person with HIV;
  - fear of the negative impact of disclosure;
  - emotional turmoil or denial of HIV diagnosis.

**Appropriateness of using the criminal legal process** – Responses that considered the extent to which the criminal law was an appropriate and effective means of addressing HIV transmission.

- Prison is appropriate / effective:
  - because punishment is required;
  - because transmission is a crime;
  - it will give the person convicted time to reflect on their offence;
  - and it should also be applied to other STIs.
- Prison is inappropriate / ineffective:
  - alternative penalties / interventions would be more useful;
  - prison will not change behaviour;
  - prisons are already overburdened;
  - prison should only be used for more serious crimes;
  - if prison is used for HIV, then all infections may be prosecuted, and this is illogical;
  - private sexual morality is not a matter for the court.
- The criminal justice system will not be able to deal with cases appropriately, due to:
  - problems with virological evidence;
  - a lack of witnesses in relation to HIV disclosure;
  - incapacity to deal with the fact that disclosure can be non-verbal and contextual;
  - the orientation on outcome – where transmission does not result, the very same behaviour will not be criminalised;
  - the likelihood of bias against defendants.

**HIV prevention impact** – Responses that focused on the extent to which prosecutions were likely to contribute to, or detract from, efforts to reduce HIV transmission at a population level, and the broader social context within which such efforts take place.

- Imprisonment will:
  - incapacitate those who transmit HIV;
  - deter similar behaviour by others in the future;
  - increase social norms for sexual responsibility.
- Imprisoning people with HIV will increase the prevalence and incidence of HIV in prisons.
- Imprisonment impedes the aims of HIV prevention by:
  - treating people with HIV in a discriminatory manner and increasing HIV-related stigma;
  - dissuading people from wanting to know their HIV status;
  - increasing the expectation that a person with HIV will disclose their status prior to having intercourse;
  - decreasing the likelihood that people with diagnosed HIV will disclose their status.

**Harmfulness of transmission** – Responses that focused on the presumed physical, social and psychological outcomes of infection.

- HIV is a harmful consequence:
  - it increases the risk of death;
  - it is a long-term physical illness;
  - it carries long-term psychological and socio/sexual impact;
  - it increases prevalence of HIV infection in the population.
- Transmitting HIV is a harmful action:
  - it is the same as murder /manslaughter;
  - it is the same as wounding / assault.
- There is a moral harm committed when HIV is transmitted, including:
  - violation of trust;
  - breach of the human right of informed consent to risk;
  - selfishness / evil.

**Not sure** – Responses that were unable to offer a definitive rationale in relation to Part A.

- Too difficult and complex an issue to give a judgment.
- Sometimes accidents just happen.
- Unsure how to answer based on the limited facts given in the question.
- It is possible to see both sides, so it is difficult to give an answer.

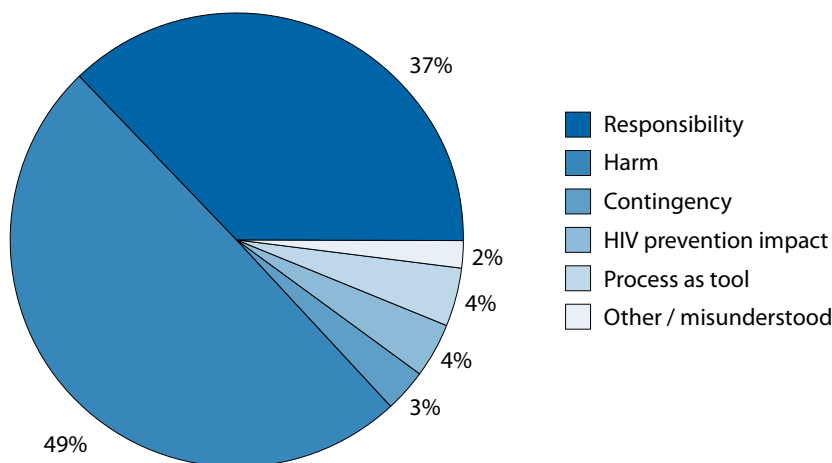
**Question misunderstood** – The low number of responses in this category gives us some assurance that the question itself was not problematic.

# 4 Men that agreed with criminal prosecution

This chapter focuses on the responses given by men who felt that imprisonment for sexual transmission of HIV was a good idea. Altogether there were 4,676 men who fell into this group, representing 57% of respondents who gave an answer to Part A. As summarised in the previous chapter, those agreeing with prosecutions were diverse, yet this view was most common among men who were younger, had never had an HIV test, had lower levels of education, lived outside of London, reported sex with both men and women in the previous year, were not in a relationship with a man, and had lower numbers of male sexual partners.

Of those men who thought imprisonment for HIV transmission was a good idea, 3,962 (85%) explained why they felt that way. The analysis and findings discussed in this chapter relate only to this group of men.

Main themes among men who supported prosecutions



The major thematic categories were all represented among men who agreed with prosecutions. However, two themes accounted for the vast majority of answers.

Accounting for half (49%) of responses, the harm caused by HIV transmission was most common, while a further third (37%) employed notions of responsibility as a reason why people should face imprisonment for sexual transmission of HIV. Since these two themes represented nearly all responses given by men supporting prosecutions, this chapter will focus in-depth only on notions of responsibility and of harm.

## 4.1 HARM

This section focuses on the ways in which respondents who favoured imprisonment used the harmfulness of HIV to explain their position. Justifications fell into three conceptually distinct but complementary categories, emphasising: the consequences and impact of infection, the conduct of the person transmitting HIV, and finally, the moral culpability of the person transmitting HIV.

### 4.1.1 Harmful consequences

Where responses focused on harm, about a third of those sampled framed their reasons in terms of the consequences and impact of infection. Many emphasised the risk of death resulting from infection and / or its innate seriousness.

**Potentially, the HIV positive guy is killing the other guy.**

[aged 57, never tested, South West England]

**Because HIV is a serious disease and having unprotected sex without advising someone of the risk has serious consequences.**

[aged 24, never tested, East Midlands England]

For some, such risk-taking was particularly heinous because it appeared to be no more than a game.

**It's like Russian roulette!!**

[aged 32, never tested, London]

While others considered those who transmitted HIV to be acting as judge and jury in matters of life and death.

**Because they are giving someone a potential death sentence.**

[aged 25, never tested, area of England unknown]

A number of respondents, while not focusing on the risk of death, nevertheless expressed the view that imprisonment was justified because of the impact it would have on the remainder of a person's life.

**...because they are causing trauma in others' lives and passing on the evil they have suffered.**

[aged 24, never tested, area of England unknown]

These responses reveal the perception that there is little capacity for living well or longevity among people with diagnosed HIV. Getting HIV is regarded as utterly disastrous. Apart from the physical and psychological harms expressed above, others framed the harm as a violation of another person's rights and liberties.

**Because until there's a cure, then knowingly infecting someone is a wilful neglect of their civil liberties and future.**

[aged 30, never tested, Scotland]

Although they do not make up the majority of the responses in this sub-theme, those who discussed harms against liberty reflect a rather different approach than those who consider HIV infection to be invariably fatal.

### 4.1.2 Harmful action

Another third of those who discussed notions of harm in their support of prosecutions considered culpability to be a direct result of what they regarded to be criminal activity. This reasoning is consistent with the notion that no one can be criminally liable and punished unless she or he commits a criminally wrongful act or engages in criminally wrongful conduct.

For many who gave such answers, transmission was a form of murder – an offence where a

defendant has caused the death of another person. Some were categoric in comparing HIV transmission with murder (intentional killing).

**Because this is clearly wrong and amounts to nothing short of murder.**  
[aged 37, last test negative, London]

While others considered the same outcome (death) in slightly less categoric terms.

**If they knew they had the virus and knowingly passed it on then as far as I am concerned it is tantamount to attempted murder.**  
[aged 35, last test negative, East of England]

For those who did not believe that transmission was the same as killing, there was still a sense that it amounted to a serious assault.

**It's as much a crime as inflicting any other sort of bodily harm.**  
[aged 50, last test negative, London]

**It's assault with a deadly weapon – might as well beat them with a baseball bat.**  
[aged 41, last test negative, Northern Ireland]

A smaller number of those focussing on conduct did not use legal language, but nevertheless expressed the view that transmission was like other forms of assault.

**In my view, it's the same as spiking a drink with a nasty disease.**  
[aged 26, last test negative, East of England]

Respondents that considered the transmission of HIV to be equivalent to murder or manslaughter employed emotive analogies, despite the existence of highly effective treatments for HIV. In contrast, those who equate the act of transmission to a physical assault (which is how it is actually treated in English law) focus less on the risk of mortality, and more on the impact of having a physical illness.

### **4.1.3 Moral harm**

One fifth of those sampled whose support of prosecutions related to the harm caused by transmission considered culpability in relation to the moral wrongdoing that such behaviour represented. For some, this fault lay explicitly in non-disclosure of HIV status.

**To have sex with someone when you know that you are HIV+ without telling them is one of the worst things that could ever be done. These people should be given life sentences.**  
[aged 22, never tested, Wales]

While for others fault was expressed in terms of knowledge, deception, irresponsibility and selfishness.

**They have been deceitful and caused their partner suffering.**  
[aged 21, never tested, Yorkshire and The Humber]

**Because that person is being knowingly irresponsible and selfish.**  
[aged 53, last test negative, North West England]

Finally, some justified imprisonment on the basis of the flaws that they perceived in the characters of those who transmit HIV.

**As it's evil and horrible to willingly cause someone that suffering.**  
[aged 17, never tested, London]

In many of these responses, there is a sense that the moral harm lies in the individual's awareness that they risk infecting another person. Here, uses of concepts such as will, knowledge and deceit lay at the centre of the respondents' concerns.

## 4.2 RESPONSIBILITY

Explanations regarding responsibility were employed by a third of all men who thought imprisonment for sexual transmission of HIV was a good idea. The overwhelming majority felt that people with HIV held exclusive or at least primary responsibility for preventing the onward transmission of HIV, most of whom felt that this entailed disclosing an HIV diagnosis to all sexual partners. While some acknowledged that both sexual partners must take some responsibility for their actions, there was a strong belief that knowledge of their HIV status confers primary responsibility on the infected partner.

**Although both have a responsibility to themselves, knowledge of infection status for me, implies more of a responsibility to the other person.**  
[aged 48, last test negative, Scotland]

The responsibility itself was constructed in one of two ways. Some men felt that the person with diagnosed HIV should assume responsibility for the sexual health and well-being of their sexual partners. It was their responsibility to protect the other people from harm.

**The carrier has a duty of responsibility for the other person's health.**  
[aged 40, last test negative, East Midlands England]

Others talked more broadly about it being the responsibility of those with diagnosed HIV to prevent further transmissions for the sake of the wider public health. This ranged from a belief that men with diagnosed HIV should take steps to prevent further spread of the virus *per se* to men who felt people with diagnosed HIV should be part of HIV prevention efforts more broadly.

**Once you contract HIV it is your responsibility to ensure that you do not transmit it.**  
[aged 27, last test negative, South East Coast England]

**They have a duty to stamp out HIV and AIDS.**  
[aged 40, last test negative, London]

For some, this narrative of the responsible individual was embedded within perceived societal expectations. Being responsible for preventing onward transmission was a social duty, one which helped to maintain common social values.

**Respect and responsible behaviour is an individual's common duty.**  
[aged 55, never tested, East of England]

Others went further to contend that those with diagnosed HIV had a moral duty to ensure that no other individuals became infected, thereby placing the onus of responsibility for sexual safety on only one partner.

**Because the HIV person has a responsibility to be the 'moral high-ground'.**  
[aged 37, last test negative, area of England unknown]

Many felt that responsibility was only enacted when a person with diagnosed HIV disclosed their status prior to engaging in sex. It was expected that such a disclosure should be proactive and should not come only in response to being asked. Some men talked broadly of the values of openness and honesty with sexual partners.

**The person who has HIV should tell the other person before they have sex. That way the person they are having sex with is in no doubt that they are HIV positive. Honesty counts for a lot.**  
[aged 31, never tested, South West England]

Some men constructed positive disclosure as a social or moral duty, part of a responsibility to reduce transmission of the virus.

**An HIV positive person has a responsibility to all sexual partners to disclose their status to minimise risk and stop the spread of infection. Not doing so would be morally wrong.**  
[aged 23, last test negative, Yorkshire and the Humber]

A large number of men felt that being informed by those who know that they are infected with HIV prior to sex was a central feature in helping others to assess risk, and avoid it (by avoiding sex with that partner).

**If you are aware you are HIV positive you should notify the other person to give them a choice.**  
[aged 30, never tested, North West England]

Some men went further to suggest that any individual had the right to know the HIV status of their sexual partner. They believed it was never acceptable for this information to be withheld.

**Because if you have a disease and you are about to have sex then you have to tell the other person. It is their right to know and you could be putting them in danger.**  
[aged 17, never tested, North West England]

Some respondents recognised that stigma and discrimination were significant problems for men with diagnosed HIV, but still believed that diagnosed HIV infection should always be disclosed.

**... someone who is HIV positive, regardless of stigma attached to the disease, has a responsibility to notify sexual partners in order to prevent transmission of the disease. Essentially I agree with the legal precedent that it amounts to GBH.**  
[aged 24, last test negative, London]

The recognition that discrimination against people with HIV was not acceptable did not over-ride most men's assertion that HIV was a very serious condition.

**I strongly agree that a person should disclose their status to their sexual partners as it is putting their life in danger. I don't agree that a person should be discriminated in any other form (ie. employment) but this is very serious and should not be taken lightly.**  
[aged 27, last test negative, London]

### **4.3 SUMMARY**

A substantial proportion of men who supported prosecutions felt that HIV transmission represents a substantial infliction of harm – with many considering HIV to be a fatal disease, the transmission of which they represent as being akin to murder. Rather than being 'complacent' about HIV, this demonstrates how very seriously most men treat the possibility of HIV infection. At the same time, equating HIV with ill-health and death means that many have overlooked the positive benefits of anti-HIV treatments, which in itself indicates HIV prevention need. Men focused on the harm caused, considered the consequences of infection, the conduct of the transmitter, and his moral culpability.

Those who focused instead on responsibility were almost uniformly of the view that it is the exclusive responsibility of the person with diagnosed HIV to avoid participating in sexual exposure and transmission.

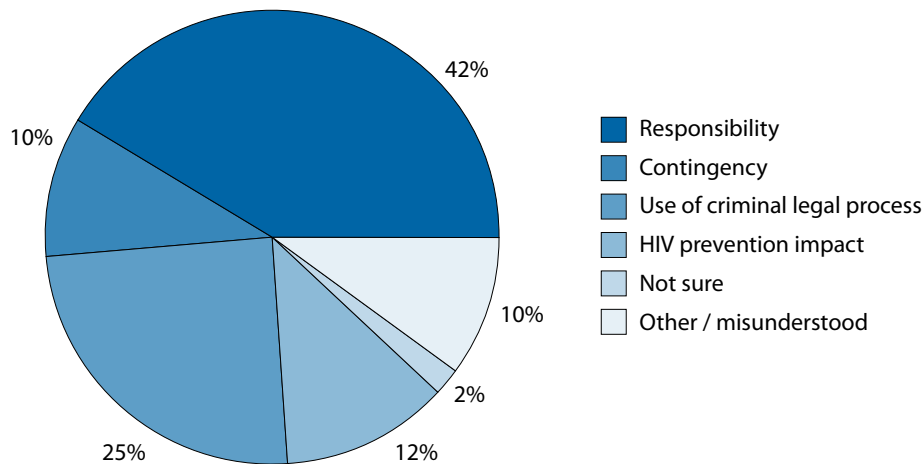
The final chapter offers further discussion on the ways in which some of these findings relate to HIV prevention goals.



# 5 Men that did not agree with criminal prosecutions

This chapter focuses on the reasons given by men who did not think that imprisonment for sexual HIV transmission was a good idea. Altogether, there were 1,456 men in this group, representing less than one fifth (18%) of the entire sample who gave a response to the first part of the question. As summarised in section 3.2, people with diagnosed HIV were most likely to disagree with prosecutions, although their limited numbers mean that they do not make up the majority of men in this category. Other factors associated with this view included living in England, especially London, being older, having university-level education, and a high number of male sexual partners in the previous year. Among those who disagreed with prosecutions, more than three quarters (77%) went on to explain why they felt that way.

Main themes among men who did not support prosecutions



A substantial proportion (42%) of men employed notions of responsibility when explaining why they thought that putting people in prison in such circumstances was not a good idea. One quarter (25%) raised queries about the appropriateness (and the potential flaws) of using the criminal legal process in such situations. A further eighth (12%) suggested that prosecutions could negatively impact on public health outcomes. Together these three response categories accounted for more than three quarters (79%) of all responses from men who felt that imprisonment was not a good idea, and are described in detail in this chapter.

## 5.1 RESPONSIBILITY

Men whose responses focused on responsibility put forward two key arguments. A sizeable proportion felt that people who engage in consensual sexual activity should share responsibility for the consequences of their actions. Even more common (expressed by more than half of those sampled) was the related notion that the person acquiring HIV has responsibility for his own actions, including a responsibility to avoid becoming infected. This provides a direct contrast with the dominant construction of responsibility – resting primarily with the diagnosed partner – held by those who supported prosecutions (section 4.2). When men disagreed with prosecutions, their

discussion of responsibility usually focused on its shared aspects, or the duty of the individual at risk of acquiring HIV to avoid exposure and transmission.

### **5.1.1 Shared responsibility**

Men whose answers fell into this category tended to express the ideal that all sexual partners should share responsibility for any harm resulting from their sexual activities, regardless of the nature of their relationship. Remarks ranged from the glib to the more philosophical.

**It takes two to tango.**  
[aged 35, last test negative, London]

**It is the responsibility of everyone to ensure they are comfortable with the sex they have.**  
[aged 36, diagnosed with HIV, Scotland]

Many of these responses offered insight into men's broader views on sex and sexuality. In particular, a number of comments reflected an egalitarian political stance that men understand as being central to the sexual encounter.

**Every person in a sexual relationship is equally responsible in practicing safe sex.**  
[aged 41, last test negative, London]

Others inferred that social responsibility is extended to all sexual and social beings.

**Sexual health is everyone's responsibility.**  
[aged 25, last test negative, West Midlands England]

These responses illustrate the view that in any search for a blameworthy individual, the criminal law is unable to recognise the shared responsibilities that are inherent in sexual relations. Some responses in this category were less concerned with mutuality and interdependence, and more reflective of a highly liberal independence. In such cases, men identified that each person having sex should be looking out for himself, and that ultimately, this splits responsibility in the sexual dyad equally.

**Protection and self-preservation are the responsibility of both parties ...**  
[aged 35, last test negative, South East Coast England]

Yet here, the outcome is ultimately the same, whether men are seen as ideally caring for one another, or ideally caring for themselves, this places them into a position where sexual partners share responsibility for the outcome of their actions.

### **5.1.2 Responsibility of the partner who becomes infected**

Where responsibility is attributed exclusively to the person acquiring HIV, responses range from the very general to the highly specific. The majority simply highlight that the partner who acquires HIV through sex should accept responsibility for what has happened to them.

**Everyone is responsible for their own health.**  
[aged 34, diagnosed with HIV, area of England unknown]

Other men went further to suggest that uninfected people are the only ones who can ensure that they remain so, and that people without HIV should either insist on condom use or instigate discussions that prompt positive disclosure.

**If you do not want to get HIV then you need to insist on protection.**  
[aged 26, last test negative, London]

**Because it is up to the non-HIV person to ask the status if they wish to have unprotected sex.**  
[aged 49, last test negative, London]

Others simply re-iterated the mantra that everyone should assume that all their sexual partners are potentially infected with HIV.

**Everyone should take responsibility for themselves. If you choose to have bareback sex then you should always assume the [other] person is positive.**  
[aged 31, diagnosed with HIV, West Midlands England]

When compared to the responses about shared responsibility above, the tone of these responses suggest that the person acquiring HIV is blameworthy. The onus is on the person whose 'negligence' or 'ignorance' results in a change in their own body (ie. HIV infection).

**You should always assume you are not safe, and if you take the risk then it is in your hands.**  
[aged 53, last test negative, East Midlands England]

In some cases, respondents indicated the frustration they felt about those involved in making a criminal complaint after getting HIV – they were portrayed as having abdicated moral responsibility for their own situation.

**That was their decision, it's about time we all took responsibility for our actions and not pass on the blame to others for our own downfalls.**  
[aged 22, last test negative, South East Coast England]

Those men who consider the person acquiring HIV to hold primary responsibility for transmission are still seeking a location for blame. This is not altogether different from those described in the previous chapter who consider the partner with diagnosed HIV to hold exclusive responsibility for its transmission. There is a categorical simplicity in these responses which does not attend to the myriad social, sexual and emotional processes that mean that sexual partners often do not communicate fully, or do not consider potential risks associated with sex, or push consideration of risk to one side until the sex is over. Looking to attribute blame rarely helps to reduce the risk of HIV transmission, because blame decreases the likelihood that an individual considers the possible outcomes of his own future choices.

## **5.2 CRIMINAL LEGAL PROCESS**

A quarter of all men who disagreed with criminal prosecutions stressed that there were problems with the use of the criminal legal system to address the sexual transmission of HIV. Among sampled responses in this category, half considered prison to be inappropriate or ineffective, while just under a fifth suggested that there might be more beneficial alternatives to a prison sentence. These sub-themes are discussed in more detail below.

### **5.2.1 *Prison is an improper response***

A large proportion of comments within this sub-theme revealed a broader belief that prisons are an ineffective means of responding to most criminal activities.

**I think imprisoning people generally is not a good idea. And I do not see what is gained by imprisoning even those who intentionally, or through neglect, infect others.**  
[aged 40, last test negative, London]

Such responses may be motivated in part by a belief that prison does not fulfill the deterrent function with which it is so commonly linked. As such, where criminal prosecutions are often portrayed as a means of prevention, these men take the opposite view.

**I do not believe that a custodial sentence will stop HIV positive individuals from sexual activity. It may encourage a minority to advise a partner of their status, but overall I do not believe it will change people's behaviour.**  
[aged 51, last test negative, London]

Others point out that imprisoning the person who transmits the virus does not undo the harm of the transmission, nor does it decrease the likelihood that the same thing may happen again.

**What does this achieve? Both parties still have HIV.**

[aged 34, last test negative, South East Coast England]

**Two wrongs don't make a right.**

[aged 21, last test negative, North West England]

Some simply asserted that prison was not an appropriate response. Whereas a small number raised the concern that people with HIV in prison may be restricted in their access to adequate health monitoring and anti-HIV treatments, it was more often argued that prison was not the right way to deal with an epidemic.

**It's not a good idea, it's reactionary.**

[aged 36, last test negative, Scotland]

Some felt that the use of imprisonment as a punishment was disproportionate to the behaviour that resulted in transmission.

**Prison is too extreme, we are each responsible for having safe sex.**

[aged 23, last test negative, North West England]

Taken together, these responses reflect men's broader ambivalence about the purpose of incarceration. There is an inference among this particular group of responses that punishment is not a sufficient reason to deprive those who transmit HIV to sexual partners of their liberty, given that it is unlikely to change behaviour (at a collective or individual level), and it is unable to change the fact that transmission has occurred.

### **5.2.2 Alternatives to prison**

There were also those who suggested that there may be other, more effective and beneficial alternatives to incarceration. These were equally distributed across three different themes, described below.

One alternative focused on the fact that individuals accused of HIV transmission were likely to be in greater need of therapeutic interventions rather than punitive ones.

**Prison may not be the answer – the person may have issues around their status and may need mental health support to work these through.**

[aged 43, never tested, area of England unknown]

Thus, it was suggested that 'counselling', 'psychiatric treatment', and 'support' could achieve more beneficial individual outcomes than imprisonment.

Others identified specific educational interventions for people with diagnosed HIV accused of being involved in exposure or transmission. Here the focus was on post-hoc 're-education' for individuals who may have transmitted HIV, rather than population-level health education.

And finally, other responses considered whether alternative sentencing may be a more appropriate and effective means of addressing HIV transmission. Some suggested community sentencing and fines, but most simply said alternative means of punishment would be better.

**I don't think it should be a criminal offence, there should be other ways to deal with people who are acting irresponsibly.**

[aged 64, last test negative, Wales]

Those who considered alternatives to prison were either convinced that a different form of punishment could reduce the likelihood of further negative outcomes, or that punishment was not

what such cases called for. In this latter case, consideration was given to what might cause people with HIV to participate in transmission, and to tackle those root causes at an individual level rather than placing all of the focus on redressing previous transmission events.

### 5.3 HIV PREVENTION IMPACT

The final major theme relates to responses from men who considered the way that prosecutions might impact on the HIV epidemic in general, representing one eighth (12%) of those who did not agree with imprisonment. In the context of their disagreement these men argued that the potential negative outcomes of prosecutions outweighed any potential benefits. The issues raised here demonstrate a broader concern to foster a social and legislative environment that supports the work of health promotion. Men who disagreed with prosecutions were the only group to give any significant consideration to the broader repercussions of prosecutions. Among sampled responses falling into this major thematic category, two fifths focused on the role of prosecutions in increasing stigma and discrimination against people with diagnosed HIV, a fifth considered the likelihood that people would be dissuaded from seeking an HIV test in order to limit their liability; and a slightly smaller proportion considered the extent to which imprisoning people with HIV would influence HIV incidence in prisons.

#### 5.3.1 *Increases stigma and discrimination*

A significant proportion of those considering the broader impact of prosecutions felt that identifying and isolating the sexual behaviours of people with diagnosed HIV meant that all members of this group would feel they were under suspicion. This was represented as being 'unfair', 'wrong', and 'not acceptable', perhaps even amounting to a legal assault on all people with diagnosed HIV. The following respondent considers the extent to which those with HIV are treated differently than those who may transmit other illnesses, concluding that such inequality amounts to prejudice.

**Living with the virus is bad enough without locking people up who have it. We do not lock up people who pass on colds, flu or even more serious viruses. The approach of the courts / CPS is another example of prejudice toward HIV sufferers.**  
[aged 33, diagnosed with HIV, East Midlands England]

Some men felt that the undeniable increase in HIV-related stigma that results from media coverage of such prosecutions was also likely to have a negative impact on efforts to reduce HIV incidence.

**[Criminalisation] increases stigma in already marginalised and vulnerable groups. It may dissuade people with HIV from disclosing or people of unknown HIV status from testing. [It] does nothing to protect public health or to better the health of people with HIV.**  
[aged 27, last test negative, London]

This approach draws a direct parallel between increased stigma and impaired prevention outcomes such as less inclination to test. Stigma functions against openness and fosters an environment where 'certain' people are regarded as 'deserving' of their infection, which in turn reduces people's capacity and motivation to seek out interventions that reduce their risk of being involved in HIV transmission. Thus, the argument here is that criminal prosecutions serve to reinforce that sense of 'otherness' which HIV-related stigma carries, contributing to a social environment that makes it even harder to achieve the aims of HIV prevention.

#### 5.3.2 *Dissuades people from testing*

Some men focused very directly on the possibility that prosecutions could reduce people's motivation to have an HIV test. It was suggested that some people may decide to avoid knowing their own HIV status in order to avoid future legal liability for transmission.

**We need a solution that is for the greater good. The greater good will only be achieved by more people being encouraged to know their status. If knowing your status has the potential to land you in jail, fewer people will bother testing because it will be better not to know.**  
[aged 45, diagnosed with HIV, London]

Men who took this approach were in favour of promoting the principles of health promotion and HIV prevention that encourage knowledge and free choice over strategies that seek to control and limit behaviours.

### **5.3.4 Increases incidence of HIV in prisons**

Finally, there were those who raised the possibility that putting people with HIV in prisons will result in more transmissions within those settings.

**Cos they're hardly going to have safe sex in prison, which will only eventually make things worse.**  
[aged 36, last test negative, South East Coast England]

Rather than making a presumption that sexual activity stops once a person is incarcerated, those who took this view regarded the prison environment, with its inconsistent access to condoms, likely lack of needle exchange, and the increased likelihood of forced sex, as a place where inmates with HIV were not always going to have control over their participation in HIV exposure and transmission. To this extent, these men agree with others who have argued that 'prison health issues cannot be regarded as being separate from the protection and promotion of community health' (Elliott 2002: 20).

## **5.4 SUMMARY**

Most men who were not in favour of imprisonment gave a reason that related to responsibility. This is the one major thematic category that pervades the open responses, regardless of men's position on prosecutions, and we will come to it again in the next chapter. Unlike those who agreed with imprisonment (discussed in chapter 4), men who disagreed with prosecutions did not hold a unified view of responsibility. Instead, there was a divide – between those who regarded sexual contact as a shared undertaking with shared responsibility and those who felt that the person who acquires HIV is responsible for his own infection. Some of these latter responses blamed the (previously) uninfected partner, which is similar to those men that agreed with imprisonment and blamed the man transmitting HIV. The implications of this blaming culture are further discussed in chapter 7.

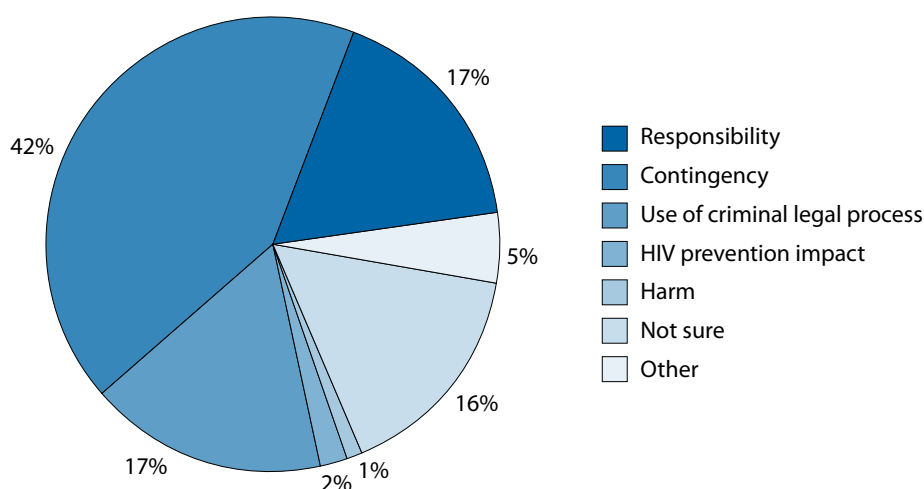
Others felt that even where people's actions were morally dubious, they did not feel that being in prison would do anything to improve future outcomes for that individual or the population as a whole. A final group took a broader view, by setting the population goals of HIV prevention as the primary measure against which all interventions are assessed. By their reckoning, criminal prosecutions caused more harm than good.

# 6 Men who were not sure about criminal prosecutions

This chapter focuses on the open-ended responses given by men who were not sure if imprisonment for the sexual transmission of HIV was a good idea. In total, there were 2120 men in this group, making up one quarter (26%) of the sample who gave a response to the question. Unlike those with a definitive position on this issue, there was relatively little association between men's responses to other questions in the survey, and their tendency to say they were not sure about criminal prosecutions. Among those who were unsure of the value of criminal prosecutions, most (79%) went on to explain why they felt that way.

The largest proportion of responses (42%) were part of the major thematic category of contingency. In these cases, men felt that their ultimate agreement or disagreement with prosecutions was dependant on the particular behaviours and motivations resulting in a specific instance of transmission.

Main themes among men who were not sure



Significantly smaller proportions raised aspects of responsibility in their answers (17%), or questioned the appropriateness of using the criminal legal process to address HIV transmission (17%).

A final group (16%) reiterated their initial 'not sure' response, by simply restating that they did not know whether or not prosecutions were a good idea. As there is little detailed content among this latter group, there is no analysis or discussion about them. Taken together, these four major thematic categories comprise the vast majority of responses from men who were unsure about prosecutions, and the first three form the structure of this chapter.

## 6.1 CONTINGENCY

There were two primary, and substantively different, issues raised by men whose responses centered on the contingent factors that would influence their view of prosecutions. One related to the circumstances of the sexual activity resulting in HIV transmission, and the other relating to the presence or absence of intent in the mind of the person who transmits HIV. Among those sampled in this group, almost half referred to the circumstances within which sex occurred, and more than one third discussed intention.

### **6.1.1 It depends on the circumstances**

In the main, responses allocated to this category were not highly specific about what kinds of circumstances might influence the respondent's view about whether or not a particular transmission should be prosecuted. Instead, most tended to reiterate the need for each case to be judged on its particular facts and context. Others felt it was not appropriate to make blanket judgements about scenarios that were likely to be highly complex.

**The matter is more complicated than the question [asked in the survey]. Whether it is a good idea or not depends on many factors.**  
[aged 22, last test negative, South Central England]

Some felt that it was best left for the courts to decide which cases merited prosecution. Thus, they did not feel comfortable in saying that all such transmissions should result in imprisonment, but neither would they rule imprisonment out.

**Because whether (and what) punishment is appropriate depends on the circumstances.**  
[aged 39, last test negative, Yorkshire and The Humber]

There were a small number of men who did specify particular aspects that might rule out prosecutions. Some considered that there could be evidence of unsuccessful attempts to prevent transmission such as an overruled desire to use a condom, or condom failure. In such instances, they argued, prosecution was inappropriate.

**It depends on the situation. It may have been accidental, or the previously negative person may have forced the unsafe sex. Every case needs looking at individually.**  
[aged 35, last test negative, London]

Others argued that the contextual factors that may have resulted in a presumption of HIV infection would have to be taken into account.

**It depends on different factors and circumstances. I know people who just like bareback intercourse and that involves risks. Seemingly HIV+ [people] might assume that [those] who engage in risky behaviours might be positive too. In other words it's not a clear-cut situation.**  
[aged 34, last test negative, London]

Taken together, these comments emphasise the need to consider detailed social and sexual factors before determining culpability. They do not altogether rule out prosecution, but there is not a high degree of specificity about the circumstances in which imprisonment would be justified.

### **6.1.2 Intentional acts should be prosecuted**

Where men's deliberation about their support of the prosecution hinged on a question of intent, their responses were largely similar. If it was intentional then it should be prosecuted, if it was not then no prosecution was merited.

**They would have to be doing it on purpose.**  
[aged 66, never HIV tested, East Midlands England]

The idea of intention is variously elicited through notions of malice, deliberation and wilfulness.

**Maybe.. if they consciously infect [them], as it can kill you!**  
[aged 29, diagnosed with HIV, East of England]

**Depends whether the HIV+ person passed HIV to the HIV- person maliciously.**  
[aged 22, last test negative, East Midlands England]

**It would depend on the circumstance. If someone is intentionally infecting people that is different from someone who had a casual encounter.**  
[aged 36, last test negative, South West England]



However, other responses about intention were less straightforward. Some described circumstances that would construct a reckless transmission charge (lack of positive disclosure and lack of measures to prevent transmission) as an intentional act. It is unsurprising that some men are not clear about the significant legal distinction between intention and recklessness, not least because press coverage continues to conflate the two by using words like 'deliberate' to describe the actions of people prosecuted for reckless transmission. As a result, there are those who (wrongly) believe that those who have already been imprisoned were convicted of intentionally transmitting HIV, typified by the following response.

**Because it might not have been intentional – the people who have been imprisoned for passing on HIV have (allegedly) had unprotected sex with the intent of passing on the virus, and with the intent to harm. But proving actual intent is very difficult. Sometimes people with HIV (I imagine) get scared and don't want to acknowledge their condition. If it can be proved, with absolute certainty, that the intent is there then my answer would be yes. But you can't.**

**[aged 37, never tested, West Midlands England]**

There are a complex series of thoughts conveyed in the response above. The respondent is sure, on the one hand, that people who have not acted with intent should not be imprisoned. Yet he is also sure that those who have already been imprisoned had 'intent to harm' presumably because they had 'unprotected sex'. Establishing that an activity has occurred does not necessarily provide proof of the state of mind of a defendant (ie. intent), although this respondent appears to assume that it must. This response highlights that people believe the criminal legal system operates in the way that they believe it should operate (rather than the way it actually does). Thus, where a person presumes that only intentional actions are criminal, they will believe that those already imprisoned must have acted with intention.

A further complicating feature involved contrasts drawn between 'intentional' and 'accidental' transmission. Some describe situations where measures taken to prevent transmission (such as the use of a condom) unexpectedly fail as not warranting prosecution, and they construct a binary which consists of accidents and intentional behaviours. Whereas the law only makes a distinction between recklessness and intention, here the contrast offered by some respondents is somewhat different.

**If it was intentional then yes they should be imprisoned because it is damaging to a person's life! However if it was an accident, ie. condom breaking, then no they shouldn't be imprisoned.**

**[aged 20, never tested, South West England]**

It is unclear how this particular respondent (and others who pointed out the possibility of similar 'accidents') would feel about prosecution of a person who did not disclose their HIV infection, did not take precautions against sexual transmission, and at the same time, sincerely hoped not to pass their HIV infection onto a sexual partner.

The absence of a clear understanding (or articulation) of recklessness means we need to be slightly more circumspect about what men mean when they talk about intention. Without further detail, it is difficult to know what someone means when they say that their decision about prosecutions depends on whether there was 'intent'. This is not to say, however, that all respondents raising this issue did not understand the specific legal differentiation between recklessness and intent, though most did not.

**It depends on intent. If it can be proved the act was intended to cause harm or detriment then yes, if the act was one of ignorance or passion overtaking logic, then I don't see it should be regarded as criminal. However, intent would be near impossible to establish in a court.**

**[aged 34, last test negative, London]**

Analysis of the responses offered by men who raised questions of intention gives an insight into the complexities of the use of legal terminology in everyday life. The ways that intent is employed and understood by these men, and the ways that it can be differently counterposed with recklessness and accidental infection offers a strong indication that there remains a great deal of confusion about what actions and states of mind are required in order to bring a successful conviction for reckless transmission (a less serious crime) or intentional transmission (a more serious one).

## 6.2 RESPONSIBILITY

Among men who were not sure about prosecutions fewer than a fifth raised the matter of responsibility to help explain their response. Among those who did, more than one third of those sampled considered the potential responsibilities of the partner who had become infected, and a further third felt that responsibility should be equally shared between sexual partners. About a fifth of this already small group felt that the partner with diagnosed HIV had a primary responsibility in such situations.

### 6.2.1 *Person acquiring HIV has primary responsibility*

Similar to some of the men who disagreed with prosecutions altogether, some of those who were unsure considered that those who become infected with HIV should accept that they have responsibility for their own well-being.

**It is your own responsibility to protect yourself.**  
[aged 28, last test negative, Wales]

In many cases, men made wide-ranging comments about the duties and responsibilities that each of us has to maintain our own sexual health. However, it was common for men to say that the infected person should consider themselves to blame, rather than looking for fault elsewhere. These comments were infused with a strong sense of the moral duty of the individual to maintain their own bodily integrity, and that infection somehow signifies failure, and therefore, fault.

**It's a difficult one because I feel responsibility lies with the individual, and if one is prepared to put themselves in a compromising situation in the first place, then they should be prepared to face the consequences, I believe.**  
[aged 36, last test negative, London]

There were others who moved beyond general commentary on the need to protect the self, by describing the specific activities that people who aim to avoid HIV infection should undertake. In the main, this related to ensuring that sex was protected.

**Because it is the responsibility of the negative partner to have sex which is safer.**  
[aged 29, never tested, South Central England]

This sentiment was similar to those who suggested that all potential sexual partners should be treated as though they have HIV, as this helps to ensure risk reduction.

**I assume everyone has HIV, that way I always have safe sex, it is your choice to have unsafe sex.**  
[aged 38, last test negative, South West England]

A smaller group of men were also of the opinion that it is up to men without HIV to ask their partners about their HIV status.

**It is the person's responsibility to ask. If they don't ask, they don't want to know.**  
[aged 43, diagnosed with HIV, London]

The idea of men without HIV initiating discussion about HIV was not a common suggestion however, and other research demonstrates that this is not a common behaviour.

Many responses within this sub-theme revealed an expectation that all sexually active gay men would be fully aware of the risks of HIV transmission, and that they therefore took risks in full knowledge of the likelihood that they could become infected.

**Casual risky behaviour in backrooms or home after a club with a stranger... gay men know the risks... shit happens!**

[aged 40, diagnosed with HIV, London]

**Everyone should act as if the partners they are with are positive anyway, the knowledge of the virus is out there.**

[aged 38, diagnosed with HIV, London]

These comments reveal an assumption that detailed knowledge about HIV, its transmission, and its prevalence has successfully permeated the entire population of gay men. Previous research (Keogh *et al.* 2006) demonstrates that such views are most prevalent among men with diagnosed HIV, and men in their social and sexual networks. Where men take the view that everyone is aware of the risks of HIV transmission during the sex that they have, this is naturally followed by the position that they should act accordingly. This contrasts sharply with the views of many men described in section 4.2, whose position about the exclusive responsibilities of men with diagnosed HIV to disclose their status and protect their partner is premised on an expectation that this is what usually happens (at least they would like to think that is the case during their own sexual encounters, and have rarely considered the alternative possibilities).

### **6.2.2 Both partners share responsibility**

As with men that did not agree with prosecutions, some who were unsure about prosecutions focused on the shared responsibilities between sexual partners. Men expressing such views were uncomfortable with the notion of punishing the person with diagnosed HIV, without also considering the responsibility of the person acquiring HIV.

**This puts the onus onto the +ve partner, and I'm not entirely sure this is just.**

[aged 28, last test negative, North East, England]

Some respondents considered the sharing of sexual responsibility as a means of ensuring that blame for 'irresponsible' activity was shared.

**To pass it on is irresponsible, but then, any who don't have it that have potentially unsafe sex should know better.**

[aged 34, last test negative, East Midlands, England]

Here, the notion that uninfected people should 'know better' (as described above) is extended and balanced by a belief that the person who transmits HIV must also take some responsibility. As the following respondent says, where expectations are made only of one's sexual partner and not of one's own, then the individual has let himself down.

**Because responsibility lies with both sexual partners. If you choose to have sex with someone and you do not know their HIV status, the onus is as much on you to ascertain what it is, as it your sexual partner's to ascertain your HIV status. Simply not asking and expecting to be told is an abdication of personal responsibility.**

[aged 45, last test negative, East of England]

The way in which this group of respondents describe shared responsibility differs markedly from those who used a similar notion to defend their view that criminal prosecutions were not a good idea (see section 5.1.1). Perhaps this is because those who are unsure about prosecutions are more likely to want to see the wrongs of one party effectively being balanced out by the wrongs of another. Rather than approaching the issue from a position of certainty, they consider first one point of view, and then contrast it with the other. In contrast, respondents who were quite certain that they disagreed with prosecutions tended to base their response on a pre-conceived philosophical

view that both partners are equally involved, meaning that it was not possible (or desirable) to apportion blame for any unintended consequences.

### **6.2.3 Person with diagnosed HIV has primary responsibility**

A smaller, but significant group of men focusing on responsibility also highlighted the primary and exclusive responsibilities of people with diagnosed HIV. Similar to men who agreed with prosecutions (described in section 4.2) most were referring to a responsibility to disclose their infection to a sexual partner.

**I believe they should declare their status.  
[aged 40, last test negative, North West England]**

Although there was also some expectation that people with diagnosed HIV should ensure that condoms were used during intercourse, in the main, the matter of responsibility hinged on disclosing having HIV to allow a sexual partner to make an informed choice whether or not to have sex, and what sex to have.

**Because someone who knows they are positive should inform their sexual partner before they have sex with them. If they then proceed to have unprotected sex then both parties have consented to the risk. If the knowledge of serious risk is known by one party then the positive person is putting the negative person in certain serious danger of serious infection. However, I'm not sure that criminalisation is the right answer.  
[aged 23, last test negative, South West England]**

The above response is illustrative of a small number of men in this group who are somewhat troubled by how their position on the exclusive responsibility for disclosure sits with their uncertainty about criminal prosecutions. Ultimately, it is the punishment that they are unsure about, not the nature of the wrongdoing.

## **6.3 CRIMINAL LEGAL PROCESS**

Men who were unsure whether criminal prosecutions were a good idea sometimes expanded upon their view by wondering whether the criminal justice system was the best means of dealing with such situations. Among those sampled in this group, about half considered prison to be an improper response, and a further fifth suggested more appropriate means of addressing such cases. There is a high degree of consistency when comparing these responses to those employed by men who were against prosecutions (see section 5.2).

### **6.3.1 Prison is an improper response**

There were those who simply said that they did not feel that prison was the correct punishment or deterrent for those who transmit HIV during sex. Most felt that prison was too severe a penalty for such behaviour.

**Because although it is wrong not to tell your partner, imprisonment is too harsh.  
[aged 17, never HIV tested, South West England]**

Some others were concerned about the health impact of placing a person with HIV in prison.

**Not at all sure that prison is a sensible place for such a person, partly for health reasons.  
[aged 63, never tested, London]**

While some respondents' views were embedded in their broader concerns about prison's ineffectiveness as a means of responding to any crime, more common was a concern about its utility in these specific circumstances. There is a strong concern voiced that the use of imprisonment requires strong justification and proof of efficacy, and that its use for the sexual transmission of HIV

appears unjustified. As we reported earlier there is sometimes a separation between a belief that a wrong has been committed, and a belief that imprisonment is the correct means of addressing that wrong.

### 6.3.2 Alternatives to prison

In the main, those who recommended alternatives to prison felt that such circumstances required a preventive, therapeutic and ultimately an empathetic response. Many suggested that educational or counselling-based interventions would better help such individuals to alter their behaviour in order to avoid further future transmissions.

**I'm not an educated man of words, but here goes. Though I do believe in imprisonment, not as a punishment, but to protect society, is this not a psychiatric / social / emotional problem, to be addressed with empathy, to identify with an understanding of another's situation and feelings and life? No way do I say what they did was right in any way, but imprisoning someone for this doesn't truly address [or] remedy the crime / motive.**

[aged 44, last test negative, London]

With only a few exceptions, men offered alternatives to retributive or punishment-focused outcomes. Instead, they made suggestions that might help to improve the future well-being of the individual with diagnosed HIV, and those around them. Once again these approaches directly echoed those made by men who rejected imprisonment altogether (see section 5.2.2).

## 6.4 SUMMARY

Where men who were not sure about prosecutions gave reasons for their response, answers tended to be longer and more equivocal than those given by men who clearly agreed or disagreed with prosecutions. In the main, they felt that forming an opinion would depend on particular aspects of a case, including risk reduction, shared understandings and intent (despite the highly contested meanings that this notion is shown to have). Given all of these possible contingencies, many felt it was not feasible to offer a single definite answer.

Where responsibility was raised by men who were unsure about prosecutions, the perspectives were more diverse than among men who were sure of their position. Among men who agreed with imprisonment (chapter 4), the vast majority were concerned with the responsibility of the diagnosed partner, and among men who disagreed with imprisonment (chapter 5), there was a divide between responsibility shared by both partners, or just the person acquiring HIV. Among men who were unsure about prosecutions, *all three* responsibility sub-themes were rehearsed by different respondents in different ways while simultaneously expressing grave doubt about prosecutions. Others considered imprisonment to be an inappropriate response to such cases, which directly mirrored the arguments explored in section 5.2.

When we combine the complex findings from these last two major thematic categories, it would appear that as many as one third of respondents who had originally said they were not sure about the idea of imprisonment, gave reason to suggest that they were in grave doubt about its use. Whereas it is often difficult to find a useful means of interpreting what survey respondents mean when they say they are 'not sure' about a particular question – in this particular instance, it is the men who answered 'not sure' who are perhaps the most interesting. They are men who want to know more about an event before they are prepared to judge it, and they are men who can be seen to be actively weighing up the balance of what they may regard as an immoral act, on the one hand, with a potentially problematic response, on the other.

# 7 Discussion

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This report describes the views of gay men and bisexual men on criminal prosecutions for the sexual transmission of HIV. As well as revealing their views on particular legal principles, we think what they told us also says something about their approaches to HIV risk management. In this final chapter, we explore the insights that these findings offer and consider their potential impact on HIV prevention planning at the level of the population.

## 7.1 WHERE HAVE THE GOALS OF HIV PREVENTION GONE?

The strategic goal of HIV prevention activities with men who have sex with men in England and Wales is to reduce the number of new HIV infections occurring during sex between men (Hickson *et al.* 2003). Community, cultural and policy developments that have the potential to impact on HIV incidence can be assessed in direct relation to that goal. However, this report demonstrates that reducing HIV incidence is not the priority when gay and bisexual men describe their views on prosecutions for HIV transmission.

The idea that prosecutions will halt or slow down HIV transmission was not widespread among those who supported prosecutions. Instead, those who support imprisonment regard the goals of prosecutions as determining the appropriate location of blame, and delivering punishment. We might have expected, for example, that men who support prosecutions would see them as a means of deterrence, or that imprisonment might have other beneficial impacts on the epidemic as a whole. However very few men used this reasoning. Only 4% of those who thought imprisonment was a good idea supported their view by saying that prosecutions could reduce the number of people getting HIV (either through incapacitation or deterrence). The goal of reducing HIV incidence was not a significant issue among those who supported criminalisation.

Even among those who disagreed with prosecutions, only a few mentioned the aims of HIV prevention. These men viewed criminal prosecutions as having an adverse effect on the environment within which all HIV prevention interventions occur. They argued that prosecutions deter people from testing for HIV, that it increases HIV-related stigma and discrimination and that these outcomes outweigh any benefit associated with prosecutions. Some argued that increasing the numbers of prison inmates with HIV would increase overall incidence, given that UK prisoners lack consistent access to the basic tools of risk reduction.

These findings demonstrate that, in the collective imagination, prosecutions for sexual HIV transmission have little to do with addressing the epidemic on a population level. They are instead much more about the punishing those who pass on HIV. Responses to the transmission of HIV are usually met with fear and outrage. Where these impulses are allowed to take centre stage, the key goals of HIV prevention are forgotten.

## 7.2 REGARDING HIV AS FATAL DISEASE

Most of the men who supported prosecutions considered HIV to be invariably fatal. Although many of those same men would have been aware of effective treatments for HIV, such awareness was absent from their immediate response when asked about prosecutions. The perception that HIV equals certain death helps to maintain the stigma related to HIV, which in turn, negatively impacts on the environment in which prevention interventions occur.

There is little question that HIV is currently perceived by gay men as a very serious medical condition (Weatherburn *et al.* 2008) and it is not an aim of HIV prevention to convince men otherwise.

However, knowing that potential sexual partners may have HIV while appearing healthy, seeking sex and not disclosing their HIV infection are HIV prevention needs. Those who fail to understand the benefits of treatment will consider an HIV diagnosis to be quickly followed by illness and death. They may also believe that they can visually identify (and avoid) those potential partners who have HIV (because they will look ill or different in some other way). Where men believe they can 'spot' men with HIV, they are less likely to consider that some of their own sexual partners may be infected. Rather than recognising and proactively reducing risk in circumstances where a sexual partner's HIV status is unknown, the default assumption tends to be that he has the same (negative) HIV status and that risk reduction measures are not needed. Ultimately, men's knowledge of the successes and challenges of anti-HIV treatment requires better integration with the way they manage HIV risk in their own lives. Where men's reaction to prosecutions reveals that they equate HIV with certain death, this need is crucial.

### 7.3 LAYING BLAME

Responsibility emerged as the most significant theme for all men, regardless of their views on prosecution. For a significant proportion, their beliefs about the exclusive and primary responsibility held by those with diagnosed HIV centered on the obligation to disclose their HIV infection. This is not surprising given that most gay and bisexual men think men with HIV should disclose their status before having sex and that men who do not disclose are by default not infected (Keogh *et al.* 2006, Weatherburn *et al.* 2008). Patterns of support for prosecutions follow patterns of disclosure expectations (Dodds *et al.* 2008).

In HIV prevention terms, men's strong beliefs about how people *should* behave toward one another informs their understanding of how people *do* behave. Where respondents have expectations that all men with diagnosed HIV should tell their sexual partners in advance, they will also apply this expectation when having sex themselves. The expectation that people with HIV will disclose their infection to all sexual partners prior to intercourse carries the implication that HIV diagnosis itself confers a contingent element of culpability. From this perspective, knowledge is accompanied by an automatic obligation to warn others of the possibility of infection, and where disclosure does not occur that default culpability is affirmed. Furthermore, the twin assumptions that all men with HIV will both know about their infection, and that they possess the desire and skills to disclose to all their potential sexual partners presumes that men without HIV have no part to play in protecting themselves from infection.

The responses of many men who support imprisonment demonstrate little appreciation of the possibility of living well with HIV, and a clear indication that they blame men with diagnosed infection for any subsequent transmission they are involved in. Such views support HIV-related stigma, and provide evidence of pervasive HIV prevention need. For instance, those who do not appreciate that most people with HIV on treatment live full and active lives will be less likely to consider whether some of their own sexual partners have HIV. If we expect people with HIV to look thin and sickly we are unlikely to appreciate that a healthy and attractive sexual partner might have HIV. Among men who have not tested HIV positive ignorance of this kind is associated with viewing HIV transmission risk as theoretical unless directly confronted with a positive disclosure (Keogh *et al.* 2006). Those who lack the knowledge, the will or the power to reduce the risk of acquiring HIV, or the capacity to implement risk reduction during a sexual encounter, are ill-equipped to deal with a positive disclosure when it occurs. In addition, where men with diagnosed HIV have experienced rejection and recrimination as a consequence of prior disclosures to potential sexual partners, their likelihood of maintaining a strategy of universal disclosure is substantially diminished (Bourne *et al.* 2009, Sullivan 2005, Keogh *et al.* 1999).

These needs were not *caused* by the emergence of criminal prosecutions for sexual HIV transmission. However, legal developments maintain and possibly exacerbate them by fostering unrealistic

expectations and encouraging blame. Those with unrealistic assumptions of sero-concordancy and positive disclosure may welcome what they regard as a further layer of protection from the criminal legal system. Instead, the opposite is the case. They will continue to take risks, naive to the possibility that current and future sexual partners could have diagnosed HIV and not tell them.

In the main, UK HIV health promotion targeting gay men and bisexual men aims to increase knowledge and capacity to avoid participating in HIV exposure and transmission, regardless of HIV status (Hickson *et al.* 2003). The approach has encouraged men to avoid blame, and instead to consider risk reduction as a communal and shared aspiration. Yet health discourses are increasingly attributing blame. The stigma that accompanies blame (or outward signs of blameworthiness, such as having HIV infection) serves a critical social function in maintaining social divisions and power imbalances. As long as having HIV is associated with blame, those who acquire the virus will continue to be regarded as wrong-doers, both for behaving in ways that got them infected in the first place and also as holders of a terrible 'knowledge' which they can withhold from sexual partners. Such responses to HIV reinforce the underlying and long-standing association between infection and deviance, meaning that the person with HIV is feared and maligned.

Blame also underscored many of the responses given by men who opposed prosecutions. They often claimed that men who acquired HIV had no one to blame but themselves. This can be regarded as a reflex reaction against the use of a criminal justice system, which by its very nature seeks to prove a defendant's responsibility for transmission. Nonetheless, in HIV prevention terms, this stance reveals a further desire to identify and isolate the blameworthy, weighting the blame on the other side of the transmission equation with the partner who acquired HIV. Men who lay the blame with those acquiring HIV take a very different approach to risk than those described above. They tend to assume that all partners *should* (and therefore *do*) attend to the risk of HIV transmission in all sexual encounters. However, as we have seen, risk management is often characterised by deferral, and defended by a hope that the presence of HIV will make itself known, and that it need not be attended to until it is absolutely necessary. What blame tends to do, therefore, is to further entrench these positions, between men who feel that those who acquire HIV 'should have known better', and those who feel that men who transmit HIV 'should have acted more honourably'. This need to locate blame for HIV transmission undermines HIV prevention needs of men on both sides, as it reinforces the pervasive assumption that all men think and act in the same way.

## 7.4 FUTURE CHALLENGES

Since the first UK conviction for sexual HIV transmission occurred in 2001, the public response of most HIV health promotion agencies has been severely limited. Few written interventions targeting gay men and bisexual men have directly addressed the topic of criminalisation, and few HIV agencies have done anything in the public domain. Hence, gay and bisexual men's understanding of the rise, and subsequent decline in the number of cases, or why cases were ever brought, has not been substantially affected by the agencies that specialise in HIV and sexual health. Although the recent Crown Prosecution Service (2008) policy will probably make successful prosecutions less common in the future, that too has been met with public silence. This is problematic as it means the vast majority of gay and bisexual men take their information only from the mass media sources whose portrayals have been of "despicable" people who "deliberately" infect others.

We have established that the majority of gay and bisexual men who do not have diagnosed HIV believe prosecutions for the transmission of HIV to be justified. While we should not assume that public education on criminalisation is a necessary response, where this position is based on, or compounds misunderstanding, public education may be appropriate. We believe it is crucial to address the common misconceptions that the criminal law exacerbates, particularly the perception that the law now provides negative and untested men with added protection from HIV in sexual interactions.



*Making it Count* (Hickson *et al.* 2003) describes a framework for planning activity intended to contribute to a reduction in the incidence of HIV infection during sex between men. One aim of *Making it Count* is that men are aware of the possible HIV-related consequences of their sexual actions. Expecting to be told that a person you are about to have sex with has HIV is a problem both because a third of people with HIV do not know they have it and because many people who do know they have HIV will not tell sexual partners before sex. Expecting people with diagnosed HIV to disclose their status before sex can result in a perception that if one is not told this, then the partner does not have HIV. This can clearly lead to misjudgements of sexual risk.










In the *Gay Men's Sex Survey 2006* three quarters (74%) of all men expected HIV positive disclosure from potential sex partners (Weatherburn *et al.* 2008). This expectation was notably more common among men under 20 (91%); men that had never tested for HIV (85%); men with lower levels of formal education (82%); and men with fewer male partners. Of all the needs of gay men and bisexual men described across all the GMSS surveys this is the most commonly unmet. Given that *Making it Count* suggests we prioritise interventions with aims that are poorly met for many of the population, addressing this need has long been an important challenge.






When we address this need in the future, we have to ensure that no man now assumes that the law will protect him from HIV exposure or transmission, whether or not we think it should. The naivety with which some men approach sex (Keogh *et al.* 2006) is not a result of the criminalisation of sexual HIV transmission but that naivety will have been consolidated and exacerbated by it. Enabling men with limited experience of HIV to recognise the possibility that their sex is HIV sero-discordant and equipping them with the knowledge and skills to maximise pleasure and minimise harm, remains the crucial role of HIV health promotion.

Another role for HIV health promotion is to address the stigma associated with HIV among gay men and bisexual men. While we have reported elsewhere the propensity of both gay and bisexual men, and African people, to stigmatise members of their own communities on the basis of known (or assumed) HIV infection, the degree to which the reality of living with HIV is misunderstood, and the fear and loathing with which men characterise those "other" gay men and bisexual men with HIV is clearly evident in the findings presented here. The othering of HIV continues to be the largest underlying challenge to our HIV response.

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