



Criminalising Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law.

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Criminalizing Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law

Summary of key findings and outputs

David Gurnham, Catherine Stanton and
Hannah Quirk

Introduction

This seminar series¹ addressed a series of questions: how should the law treat a person who transmits a serious infection such as HIV, or exposes others to the risk of infection? For example, should such a person be treated as a criminal, in the same way as someone who injures another? This project has brought together experts from a range of disciplines to answer these questions. Some of these commentators argued (in the seminars we organised, the related publications we edited, or both) that measures such as detention and criminal sanction are indeed appropriate and proportionate tools for preventing or punishing serious harms. Others argued to the contrary that severe public health measures or criminalization are not an appropriate response in this context, and for a number of complex reasons. In this seminar series, we have tried to highlight and explore some of the most pressing implications that the deprivation of a person's liberty in response to infectious disease transmission has for a number of professional and public organisations. Criminalization, for example, presupposes that people who infect others can be identified by the police, prosecuted by the Crown Prosecution Service (CPS) and effectively and fairly brought to justice in a criminal court applying the law. This process involves a potentially difficult relationship between the organs of criminal justice and public health bodies, whose agendas and priorities may not necessarily coincide.

The papers presented in the course of this seminar series have led us to at least two broad conclusions: 1) that there is a rich diversity of ways both for law to approach the problem of infection and its spread, and 2) that this is a topic that engages a number of different interested groups and generates discussion that is both rich and polarizing. While we did not identify any one view on criminalization, we heard and read strong criticism of the use of criminal sanctions in this context, as well as defences of criminal sanctions in some circumstances. The case-law and scholarship in this area originally grew out of debates about policy responses to HIV/AIDS, precipitated in England and Wales by the Court of Appeal's ruling in *R v Dica*² that HIV transmission without disclosure constitutes an infliction of grievous bodily harm under s.20 of the Offences Against the Person Act 1861. Over the course of the series this category of offence has been widened to include herpes. The worrying outbreak and spread of the Ebola virus further underlines its growing relevance, and the continuing need for meaningful critical scrutiny of the impacts and implications of legal measures taken.

¹ Funded by the ESRC (Economic and Social Research Council).

² [2004] EWCA Crim 1103.

This document summarizes the arguments of each of the papers presented over the course of this seminar series, gives details of outputs connected to it (whether by being the written and published versions of the papers presented, or papers published otherwise in response to the series), and also provides information on how and by whom we anticipate our findings being used.

Uses for and Users of these Findings

In the course of this seminar series, we have established links with four key organizations, all of which are involved in one or more of policy engagement, legal reform and clinical practice. These are Amnesty International, the British Association of Sexual Health and HIV (BASHH – an organization made up of professionals working in sexual health), the Crown Prosecution Service (CPS) and the Law Commission. With the exception of Amnesty, we have had representations from each of them, alongside participants across a range of other relevant organizations and institutions at the seminars. We are very grateful for all of these contributions to the series, and we hope that this summary report will be useful to them in turn.

For Amnesty, the Law and Policy programme '*Criminalization of Sexuality and Reproduction: exploring limits on state punitive regulation*', led by Jaime Todd-Gher,³ has convened an international informal expert group. This group, involving scholars and lawyers from the UK, Canada, Brazil and the United States is convening four times between Oct 1 2014 and Jan 14 2015 to discuss and to advise on the direction and framing of the Amnesty project. Our report will be a contribution to the work of this group, of which David Gurnham is a member, on the potential for human rights advocacy in responding to criminalization worldwide. The other three users are based within England and Wales. The Law Commission is currently conducting a scoping exercise in preparation for a more detailed look at relevant criminal provisions. It produced a scoping report in November 2014 with a call for responses, and our project (and seminar 4 in particular) represents a contribution to that exercise. We will also send the report to the CPS and to BASHH to contribute to their on-going reflections on their crucial work in (respectively) prosecuting cases of disease transmission and advising and treating patients who may be both defendants and complainants in those cases.

In addition to those four key organizations, we will also send this report to charities and other important groups with a particular interest in the topic. These include charities such as the Herpes Viruses Association

³ Human Rights Advocate/Adviser.

(HVA), the Terrence Higgins Trust (THT), the George House Trust and the HIV Justice Network. The latter has been highly important and influential in the dissemination of information and challenging of misperceptions regarding HIV.

The Four Seminars of the Series, and Related Outputs

1. Critical Perspectives on the criminalization of disease

Introduction to the theme and the papers presented

Seminar one (7th Jan 2013, University of Southampton) invited a panel of experts to respond to the most fundamental of questions that this ESRC series was set up to address, namely when (if ever) is the criminalization of disease an appropriate step (Matthew Weait⁴, Leslie Pickering Francis⁵ and John G Francis⁶), and what particular challenges are presented by the 'intimate' contexts in which disease may be spread (James Chalmers⁷, Alana Klein⁸, Catherine Stanton⁹). The seminar featured six presentations by legal international scholars and a practising criminal barrister who had worked on one of the leading cases (Steven Evans¹⁰).

a) Appropriateness and limits of criminalization

What ought to be the aims of a critical engagement with law on this topic? Matthew Weait's paper '*Unsafe Law: Health, Rights and the Legal Response to HIV*' warned that law – like sex or drug use – can (and often does) do harm. The point of critical engagement with law's responses to infection, Weait argued, is to advocate for measures that makes law 'safer', that is to say, to expose the harms that law (and criminal law in particular) inflicts both on people already infected and those vulnerable people who are not yet infected. Weait turns what he views as law's characterization of the sexually-active HIV positive individual who fails to disclose his or her infection or use condoms back onto law itself: as irresponsible, driven by questionable desires and disregarding the safety of others. Just as public health campaigns urge us to protect against the potentially dire consequences of sex, so law must be guided by credible scientific and social research that reveals the realities of infectivity and the (potential and actual) dire

⁴ Professor of Law, Birkbeck School of Law.

⁵ Alfred C. Emery Professor of Law, College of Law and Professor and Chair, Department of Philosophy, University of Utah.

⁶ Professor, Political Science Department, University of Utah.

⁷ Regius Professor of Law, University of Glasgow.

⁸ Assistant Professor, Faculty of Law, McGill University.

⁹ Lecturer in Law, School of Law, University of Manchester.

¹⁰ 36 Bedford Row.

consequences upon already marginalised individuals such as prostitutes and intravenous drug users of the criminalization of infection.

Leslie Pickering Francis and John G. Francis explored the boundary between public and private when disease is criminalized in their paper '*HIV Treatment as Prevention: Not an Argument for Continuing Criminalization of HIV Transmission*'. Citing the greater possibility of access to treatments that greatly reduce infectivity and prevent the onset of AIDS (in some countries at least), Pickering Francis and Francis suggested the emergence of conditions necessary for 'punctuated equilibrium'. This term describes conditions brought about by changes in technology that precipitate shifts of opinion that may allow for sudden and dramatic reversals in public policy. A policy towards decriminalization with regard to HIV is one that Pickering and Francis cautiously anticipate and advocate, since the technological developments of the last decade have had such impact on the possibility of the fatal consequences of AIDS that the punitive measure of criminal law are called into serious question.

b) Intimate relationships 1: sexual partners

One particularly controversial issue that has arisen in the course of this series is the extension for the first time of criminal sanctions in England and Wales to the sexual transmission of herpes. David Golding pleaded guilty in August 2011 to the s.20 offence of maliciously inflicting grievous bodily harm and was sentenced to 14 months imprisonment after he infected his girlfriend with this disease without informing her of his own infection and the consequent risk to her. This seminar took place between Golding's conviction and appeal (see seminar 4). The criminal barrister Steven Evans spoke to the seminar about his experience prosecuting this case at trial, and provided an invaluable insight into the protracted process of determining what sort of offence Golding had committed. This successful prosecution makes clear that for the CPS, the transmission without disclosure of herpes simplex type II (HSV2) is sufficiently serious to warrant the use of the same offence as has now become accepted in the case of HIV transmission.

While Weait's references to 'protection' use the analogy of the latex condom to consider 'lawtex' protections from law's own harms, James Chalmers brought a focus more directly on the role of criminal law in encouraging condom use with his paper *Catching up with the science, leaving culpability behind: recent developments in the criminalisation of HIV transmission and exposure*. Chalmers took up the important issue of how, if disease is to be criminalized, the defendant's actions and intentions should be framed in terms of a specific criminal offence. In England and Wales, disease transmission is regarded as a species of grievous bodily harm under the Offences Against the Person Act 1861.

This requires the accused to have actually transmitted a serious infection by sexual intercourse and to have been at least 'reckless' in this regard (that is to say, that he knew he was infected but went on to infect a sexual partner without disclosing his infection). In contrast, Canada constructs the wrong of this behaviour as vitiating consent to sex, and thus as an instance of unlawful sexual intercourse which may be committed irrespective of the actuality of transmission. Chalmers's paper analyzed the recent Supreme Court of Canada case of *R v Mabior*¹¹, in which the defendant's conviction for aggravated sexual assault was upheld despite not actually transmitting the infection to any of the complainants, and despite using condoms. Chalmers raised concerns about the implications of this case, and in particular the implication that even if the accused takes steps to reduce the likelihood of doing harm to a sexual partner by using condoms and taking antiretroviral drugs, he will still be held to have committed the offence. Such critical approaches thus argue that law needs to be able to recognize individuals' efforts to reduce risk as a reason *not* to find criminal culpability. While using condoms does not *eliminate* the risk of harm, Chalmers argued that in doing so, an infected person ought nevertheless to escape criminal legal censure.

c) Intimate relationships 2: women, gender and families

Alana Klein's paper '*A feminist analysis of the criminalization of disease*' offered a critical appraisal of feminist arguments about the criminalization of disease, focusing on Canada. She described and assessed an important distinction in feminist approaches to this subject, between a 'second wave' tendency to favour criminalization and a 'third wave' that favours decriminalization. Klein's review of the critical literature compared and contrasted the 'second wave' tendency to use the same sorts of political positioning on disease transmission as those which had already become orthodox with respect to sexual assault and rape: that women are the victims of male sexual violence and objectification. The 'Third wave' feminist critique problematizes the implicit disempowering of women and their choices within this framework, and Klein suggested that a move towards a less punitive view of disease transmission may be possible by considering in a more sophisticated way the contexts in which men fail to disclose and in which women consent to 'risky' sexual interactions. While in the context of rape and sexual assault, to advocate for decriminalization is all but impossible given the implications that victims are blamed and their status as victims undermined, situations of disease transmission do not necessarily admit of the same construction of one-way victimization.

¹¹ (2012) SCC 47.

In the final paper, Catherine Stanton considered the likelihood that English law will move to criminalizing the vertical transmission of HIV by HIV positive women to their babies in utero, during birth or breastfeeding. Stanton's paper *Criminalisation of HIV in pregnancy: a crime against my child?* presented a detailed examination of how s.20 currently applies to sexually transmitted infection and how these same principles might be translated into this non-sexual context. In theoretical terms it is conceivable that notions of fault, harm and causation might apply in this arena too but, as Stanton argued, there are also matters of public policy to consider. The CPS has hitherto refrained from extending the reach of law to punish women who infect their babies, and it has been stated in a civil healthcare case that "the law cannot come between the baby and the breast"¹². If, however, this view about public interest were to change and scientific evidence was available to establish causation, then the legal apparatus exists to support such an extension in the case of transmission via breastfeeding.

Publications arising from the seminar, and uses for the research

Publications and impacts arising from this seminar may be split into three categories: firstly academic papers presented at the seminar that have already been or will soon be published; secondly, articles by practicing medical experts responding to a call for papers we issued in three British Medical Journal Group journals inviting submissions on the themes of this seminar; thirdly, publications by we, the project investigators, that respond to the themes and papers presented at the seminar.

On the first category: three of these presented papers – Weait, Francis & Francis and Stanton – have been published in the leading journals *International Journal of Law in Context* and the *Journal of Medical Ethics*, and Klein's paper will be published as a chapter in a book of edited essays *Criminalising Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law* (Stanton & Quirk (eds.))¹³. These publications will be useful for scholarly readers, practitioners and for those involved in policy.

Representing the second category, an editorial by David Gurnham in the practitioner journal *Sexually Transmitted Infections*¹⁴ and a full article in the 'Criminalizing Contagion' special section of that issue by Phillips and Sukthankar¹⁵, address the key theme of seminar 1 on the appropriateness of responding punitively to the spread of disease. An

¹² Re C, p.303.

¹³ Cambridge: Cambridge University Press, forthcoming.

¹⁴ vol.89 (4):274-5.

¹⁵ Centre for Sexual Health, Manchester Royal Infirmary.

article by Dr Killian Dunphy¹⁶ reflects further on the second of seminar one's themes in a special feature in the *Journal of Medical Ethics* and guest-edited by Catherine Stanton¹⁷, specifically on the conviction of David Golding for the transmission of herpes and some of the philosophical perspectives that arise from it.

In the third category, David Gurnham's 'Choice, risk and death in the criminalization of HIV', published as the third chapter in his monograph *Crime, Desire and Law's Unconscious: Law, Literature and Culture*¹⁸, reflects on the discussions of seminar one in the light of psychoanalytic theory. He argues that criminalization may be understood, not as a pragmatic or practical response to disease (since criminalization can be shown to do more harm than good), but rather as an unconscious fantasy of wish-fulfillment: as the expression in culture of a desire to overcome humankind's vulnerability to disease and mortality.

2. Public information, moral panic and the media

a) Introduction to the seminar and themes

Seminar two (10th Sept 2013, University of Southampton) focused on disease transmission as a source of public concern, and as a matter of responsibility for government and other agencies in managing and responding to these worries. The seminar brought together academics in public health (John Coggon¹⁹ and Lucy Stackpool-Moore²⁰) and criminology (Maggie O'Neill²¹) as well as a practitioner in sexual health advice and communications (Peter Greenhouse²²) and the media (David Fenton²³). The seminar split into two sessions, the first addressing the issue of 'Perceptions and Misperceptions of Disease and its Carriers' and the second 'Evaluating Law's Responses'.

b) The Papers presented and a summary of their findings

For the first session, Coggon's presentation 'Epistemic and Communicative Duties in Public Health Ethics' provided a useful framework for discussions for the day as whole. His paper considered the role and positioning of 'public health ethics', and the extent to

¹⁶ Watford Sexual Health Centre, Watford General Hospital

¹⁷ 2014,40:793-797

¹⁸ Abingdon: Routledge 2014.

¹⁹ Reader in Law, University of Southampton.

²⁰ Ph.D. candidate, Birkbeck School of Law.

²¹ Professor of Criminology in the School of Applied Social Sciences and Fellow of the Wolfson Research Institute for Health and Wellbeing, Durham University.

²² Media Committee Chairman at BASHH - British Association for Sexual Health & HIV, Consultant in Sexual Health at WISH Centre, Weston General Hospital and Consultant in Sexual Health at Bristol Sexual Health Centre.

²³ BBC South Health Correspondent.

which public health agendas can and should be set by deference to 'experts' in moral philosophy, ethics and health. Coggon's paper presented two contrasting approaches to public health ethics – the 'neutral' expert who presents the facts and allows the public to make their own mind up, and the 'advocate' who sees their role in terms of countering harmful public messages and harm denialism coming from (for example) the tobacco and alcohol industries. For Coggon the political activism of public health experts and their claims to represent the only responsible means for government agenda-setting poses problems relating to legitimacy and democracy. These reflections of course have important ramifications for public perceptions of disease and the 'right' or 'informed' way to respond to disease and people with diseases.

Public perceptions of disease are intertwined with social stereotypes. O'Neill's paper presentation '*Transgressive Imaginations: sex work, abjection and contagion*' focused on her ongoing research that seeks to challenge stereotypes about marginalized people and communities by bringing these voices to the fore. By a combination of ethnographic, visual and participatory methodologies to access the authentic stories and life-histories of urban sex workers, O'Neill argues that the ills and humiliations of marginalization might be countered through research. By using these exploratory approaches, O'Neill's aim is to construct a network of biographies that challenges traditional ways of framing of sex workers as carriers of infection. She showed three short clips of her conversations with research subjects and produced a film that gives further insight into these methodologies.

Fenton, representing the BBC in the south of England on health, spoke about the practical challenges for and responsibilities of the media in responding to stories about disease and health. His remarks were highly valuable as they helped to set the academic papers within a practical context, and underlined how volatile healthcare stories can become. Fenton spoke of his experience covering the Measles, Mumps and Rubella (MMR) controversy and displayed footage of his interview with a mother whose concerns about the possible consequences of the vaccine on her child had been encouraged by worrying and conflicting reports of a risk of autism. The problems and controversies highlighted in Fenton's presentation connected significantly with all of the other papers of the seminar: choices about who to speak to and how much airtime to apportion to 'expert' as opposed to 'lay' voices provided a neat example of the kinds of issues raised earlier by Coggon. Furthermore, Fenton's comments about how the *reporting* of public concerns as 'facts' can exacerbate myths and stereotypes that more 'informed' opinion would seek to challenge spoke to the concerns explored by O'Neill.

For the second session, Lucy Stackpool-Moore presented her paper *'The intention may not be cruel... but the impact may be: understanding legislators' motives and wider public attitudes to a draft HIV Bill in Malawi'*. Her work explores a tension between the aims and impacts of criminalization that leads to ambivalence as regards notions of stigma and agency. As Stackpool-Moore argued, although proposed legislation in Malawi is backed by political rhetoric about the need to combat the stigma of HIV, it nevertheless contains criminalizing provisions that are deeply stigmatizing. To this end it stipulates severe jail terms for HIV transmission, failure to disclose one's infection to partners, and failure to use a condom. As regards agency, Stackpool-Moore is critical of moves to criminalize the sexual transmission of infections on the basis that it simultaneously exaggerates, misleads and denies the agency of the people who may find themselves affected.

Finally, Greenhouse spoke on the role of expert opinion and expert comment in law's involvement in disease. His particular focus was the David Golding conviction for passing on herpes, on which the barrister Steven Evans had presented at seminar 1. Two important aspects of that case were referred to by Greenhouse. Firstly, that Golding had pleaded guilty to the s.20 offence of inflicting grievous bodily harm, meaning that his guilt was decided without the evidence going in front of a jury. Secondly, that his guilty plea was accepted by the court on the basis of the Crown's expert evidence alone – Golding's defence had not sought to bring their own evidence that might challenge the prosecution's case.

Greenhouse spoke of the difficulties for sexual health experts in providing the kind of certainty in herpes cases necessary for a safe conviction 'beyond reasonable doubt', casting doubt on the usefulness of criminal justice in this context. Greenhouse's organisation, like the Herpes Viruses Association, had been critical of the Golding prosecution and was hopeful that the Court of Appeal would, in due course, overturn the conviction.

c) Publications and uses of the findings

Similarly to seminar one, outputs relating to seminar two may be divided into those that are published versions of papers presented at the seminar, and those outputs produced through a related call for papers on the issues under discussion at the seminar, published across the three BMJ Group journals referred to above.

For the first category, Lucy Stackpool-Moore published her paper as an article in the 'Criminalizing Contagion' special section of *Sexually Transmitted Infections*²⁴.

For the second category, Stackpool-Moore's published contribution is joined by further publications submitted in response to the call for papers that we issued to accompany the seminar series. In that same *STI* issue (guest-edited by David Gurnham), Parvez *et al.*²⁵ – responding to the first of the seminar's two themes (Perceptions and Misperceptions of Disease and its Carriers) – draw attention to the particular vulnerabilities of female sex workers in New York City, which includes but is not limited to exposure to sexually transmitted infections. Although, as the authors admit, more detailed research and analysis is necessary before confident conclusions can be drawn, their research raises difficult questions about the wisdom of incarcerating female sex workers who are often already marginalized and disempowered. Meanwhile Lonzoou Kpanake *et al.*²⁶ – on the second of the seminar's themes (Evaluating Law's Responses) – emphasizes that governments of African nations are increasing resorting to criminalization – and in the example of the West and Central African 'model law' in particularly draconian style – despite marked opposition from civil society groups that for some time now has included UNAIDS.

In the 'Criminalizing Contagion' special section of *Medical Humanities* guest-edited by Hannah Quirk²⁷, Patrick O'Byrne and colleagues²⁸, respond to the first of the seminar's themes: they review and analyze available data on knowledge and perceptions of the criminal law on disease transmission and their impact on relevant behaviours (e.g. disclosure practices). The authors find a highly conflicting picture on both perception and knowledge.

3: The Practicalities of Enforcement and Prosecution

Seminar three (University of Manchester 8 January 2014) was more practitioner focused. John Dilworth²⁹ presented 'A Prosecutor's Perspective'. To ensure consistency in charging these rare cases, CPS policy is that such decisions should be made by the Director of Public Prosecution's Principal Legal Advisor. Dilworth noted that the use of the criminal law in the most intimate of physical exchanges is always going to attract publicity and will invite strongly held and differing views. The role of the prosecutor is clear: to apply the criminal law and prosecute

²⁴ 2013, June, vol.89(4): 285-9.

²⁵ 89(4):280-4.

²⁶ 89(4):290-4.

²⁷ 2013, Dec, vol.39(2):77-90.

²⁸ 39(2):85-90.

²⁹ Acting Deputy Chief Crown Prosecutor, CPS North West.

individuals where the two stage test set out in the Code for Crown Prosecutors is satisfied.

These cases require expert advice in relation to any medical or scientific evidence being considered in order to establish a causal link between the defendant and the infection of the complainant and the degree of recklessness involved. Prosecutors need to establish the suspect's knowledge of their infectiousness and any steps taken to prevent transmission. Prosecutors must ensure that the standards of witness and complainant care as set out in the Victim's Code and Prosecutors' Pledge are adhered to. They will need to be satisfied that the complainant did not receive the infection from a third party or that the complainant did not infect the suspect or defendant.

Imogen Jones³⁰ gave a thought-provoking response to Dilworth's paper. She challenged the approach adopted by the CPS, noting that the standard of 'reckless' was lower than the government's proposed standard of 'intentional'. She raised the overlapping of victimisation and questioned the application of the public interest test. We emphasised in our proposal that we wanted to include scholars at all levels and Imogen is an early-career researcher.

Ceri Evans³¹ presented a paper entitled '*Criminal Prosecution of Transmission of STIs: A Practitioners View*'. She explained that the British HIV Association (BHIVA) and the British Association of Sexual Health and HIV (BASHH) believe that this use of the law is unhelpful and potentially harmful to public health. They support UNAIDS' recommendations to limit the use of criminal law and the Oslo declaration that a "non-punitive, non-criminal HIV prevention approach" is preferable. The 'Swiss Statement' from a group of senior HIV doctors in 2008 recommended that HIV-positive heterosexuals could stop using condoms with their regular HIV-negative partner in specific circumstances including if their partner agreed and their blood viral load had been undetectable for at least six months. BHIVA and BASHH support the use of antiretroviral treatment as a defence against recklessness where the estimated transmission risk for the type of sexual intercourse is low and when there is evidence of appropriate use and regular STI screening. Healthcare workers have a duty of confidentiality to their clients (and third parties identified in their records). They have no duty to answer questions that the police ask about their patients, unless the request is sanctioned by a court order. They have a legal duty to advise patients on ways of protecting their sexual partners from infection; failure to do this may give rise to civil liability if the patient's sexual partner becomes infected as a result. The General Medical

³⁰ Lecturer in Law, University of Birmingham.

³¹ Society of Sexual Health Advisers and Senior Sexual Health Adviser at the West London Centre for Sexual Health.

Council has issued guidance on this but it is difficult to know when to raise the issue with newly diagnosed patients. Clinicians tend to raise the topic earlier on whereas community based groups tend to wait for the client to ask.

Karl Laird's³² paper '*Criminalising contagion – questioning the paradigm*' examined the development of the common law so that the reckless transmission of 'HIV or some other serious sexual disease' (*Dica*) could be considered an assault under the Offences Against the Persons Act 1861. He set out the Law Commission's proposed Draft Criminal Law Bill that recommended criminalizing the reckless or intentional transmission of any disease and the reasons for the government rejecting the idea. He addressed some of the evidential difficulties in establishing causation and considered issues relating to the risk involved. Laird considered whether the relatively low risk of infection meant that it could be regarded as 'unreasonable' for the purposes of criminal law; he also discussed aggravating factors such as the breach of trust involved in failing to disclose one's infection. He argued that as the law currently stands, there is no reason for carving out an exception for non-STDs; parity is required across all types of disease.

Karl Laird and Ceri Evans' papers will be developed and published in the forthcoming collection edited by Catherine Stanton and Hannah Quirk. The role of the CPS is obviously critical in prosecuting these cases and it is developing its policy in response to the case law and new scenarios such as different diseases. John Dilworth asked to be sent a copy of our report.

4: The use of the law and scope for legal reform

a) Introduction to the seminar and themes

The fourth and final seminar in the series took place in Manchester on Friday 26th September 2014. Seminar four included consideration of how various jurisdictions have approached the issue of whether the transmission of disease should be subject to criminal sanction as well as possible future developments. In the context of England and Wales, the seminar addressed some issues raised by the use of the criminal law. As well as considering existing law, the seminar also addressed other potential models the law could adopt.

As part of the project, we wanted to engage with as many groups as possible. Therefore delegates at this seminar included charity representatives, healthcare professionals, academics and a

³² Lecturer in Law, St Edmund Hall, University of Oxford.

representative from the Law Commission. We also, as part of the project, wanted to enable the participation of students interested in this field and so some undergraduate and postgraduate students also attended the seminar.

b) The Papers presented and a summary of their findings

In his paper, '*Disease Transmission and the Criminal Law – A Nordic perspective*', Professor Aslak Syse³³ spoke of his work chairing the recent Law Commission in Norway and set out the Commission's conclusions which are contained in its October 2012 report, *Om kjærlighet og kjøletårn*³⁴. Unlike Denmark, which decided to decriminalize the transmission of the HIV virus, the Norwegian Law Commission has recommended that Norway maintain the use of the criminal law in this context. It recommended that there should be specific legal provisions governing the transmission of infection, rather than the use of general provisions relating to bodily harm. Moreover, a majority the Commission held that improperly exposing another to the risk of infection should be subject to punishment, even if transmission did not occur. The Commission has recommended however, that prosecution should only occur where an individual has exposed two or more people to risk, or another person to a risk on repeated occasions or through reckless behaviour. The draft penal provisions are limited to diseases that cause 'significant harm to body or health', which would currently include HIV. The Commission recommended that either gross negligence or intent would need to be proven in order for the transmission offence to be made out. The Commission's recommendations suggest that the prior consent of a partner to being exposed to risk can negate criminal liability. However, this consent should be recorded in the presence of a healthcare practitioner. Furthermore the proper use of condoms provides protection from prosecution. The Commission's recommendations are currently subject to consideration by Norway's Minister of Justice.

Dr Sharon Cowan³⁵ spoke of comparative approaches to criminalization, focusing on the law in England and Wales and in Canada (this followed on from James Chalmers' consideration of Canadian law in his paper presented at seminar one). These two jurisdictions have taken very different approaches. In general, the law in England and Wales only permits prosecution in transmission cases (though a defendant who intended to transmit the infection but failed, may be prosecuted). In contrast, Canada prosecutes cases of both

³³ Professor of Law, University of Oslo.

³⁴ In translation this reads: 'On love and cooling towers' – a reference to the fact that the Commission were also considering how to protect individuals from airborne contagious disease, such as legionella from cooling towers.

³⁵ Senior Lecturer in Criminal Law and Medical Jurisprudence, University of Edinburgh.

exposure and transmission, categorizing these as either an assault or a sexual assault. The case of *Cuerrier*³⁶ established that failure to disclose HIV positive status prior to sexual activity would vitiate consent to that activity where there was a 'significant risk of bodily harm'. However, no prosecutorial guidelines were issued as to how this test should be applied. The Supreme Court of Canada subsequently determined that non-disclosure would be criminal except where the accused person had both a low viral load *and* had used appropriate contraception.³⁷ Cowan argued that if the criminal law is to be used in this context, it should only apply to transmission cases. Furthermore, she argued that it is preferable to treat these as assault cases, rather than sexual assault ones, since this distinguishes between cases where the complainant did not consent to sex with the risk of HIV transmission from those where there was no consent to sex *per se*.

In his paper, '*Breach of trust and the criminalization of non-disclosure of HIV-positive status*', Dr James Slater³⁸ argued for the use of a different paradigm. He argued that the criminal law has a role to play in protecting public goods. Slater argued that one such public good is trust. In this context, he suggested that the criminal law therefore had a role to play in protecting stable relationships. Thus, an individual not taking responsibility for the health of their partner in a stable relationship is within the scope of the criminal law. Conversely, the criminal law should not involve itself in the context of those engaging in casual sexual relationships, since, Slater argued, such casual encounters are not a public good.

The other two papers addressed the application and impact of the existing law in England and Wales. Dr Matthew Phillips³⁹, in his paper '*HIV transmission and the law: what do people living with HIV understand?*', explained the findings of a study he carried out with Gabriel Schembri among patients at the unit where he works in Manchester. The study highlighted that there was a poor understanding of the law, with few feeling that they had been informed of this by the clinic. For example, one participant expressed the view that 'it is illegal to have unsafe sex if you know you are HIV positive'. Another thought that their status meant that it was possible to be charged with attempted manslaughter or indeed murder. The study highlighted strongly held views of morality whereby it was seen as immoral to pass on the virus, though with little mention of notions of shared responsibility. The study therefore highlighted the patchy understanding of the law and the need for clinics to see the provision

³⁶ [1998] 2 SCR 371

³⁷ *R v Mabior* 2012 SCC 27, *R v DC* 2012 SCC 48.

³⁸ Senior Lecturer in Law, University of Buckingham.

³⁹ Manchester Centre for Sexual Health.

of such information as a 'process' over time, rather than a one-off discussion.

In his paper, Dr David Gurnham⁴⁰ examined the recent Court of Appeal decision in *R v Golding*⁴¹. Gurnham addressed both specific concerns in relation to the court's decision-making process, together with broader issues this decision raises. Gurnham highlighted the emphasis the court placed on the perceived personal characters of the two parties involved, rather than looking at key principles of harm, fault and causation. Thus, whereas Golding was portrayed as dishonest, his girlfriend was perceived as possessing integrity. In sexual transmission cases, it may be difficult to tell the source and timing of transmission. Therefore, the court sought to resolve this by placing heavy reliance on the complainants' testimony. In addressing the question as to whether the defendant would have known he was infectious even if he was not showing symptoms (relevant to the issue of 'recklessness'), the court relied on expert evidence that he *should* have been so advised although the Court of Appeal found that his medical evidence could not demonstrate with certainty that he was given this advice. Gurnham also raised the issue as to whether the charge of causing 'grievous bodily harm' (GBH) is appropriate or whether there is a case for saying that transmission of herpes is in fact the lesser offence of 'actual bodily harm' (ABH). This issue was not addressed by the court, which saw its role as determining whether there was enough evidence for a *prima facie* case to answer a s.20 charge. However, as the law stands at present, in order to prosecute for ABH, there would have to be an assault, which is usually not present in transmission cases. Thus, the question arises as to whether the transmission of herpes should be classed as GBH as per the Court of Appeal's decision or whether the requirements for a prosecution for ABH should be altered.

c) Publications and uses of the findings

As in relation to the other seminars, outputs may be divided into those that are or will be published versions of papers presented at the seminar, and those outputs produced through a related call for papers on the issues under discussion at the seminar, published across the three BMJ Group journals referred to above.

In relation to the first category, Professor Aslak Syse's paper will be published as part of the edited collection (Stanton and Quirk eds.) mentioned above. David Gurnham's paper will be published as a co-

⁴⁰ Associate Professor (Reader) in Law, University of Southampton.

⁴¹ [2014] EWCA Crim 889; appeal hearing 18th August 2014.

authored essay with Andrew Ashworth in another forthcoming edited collection⁴².

Dr James Slater's paper builds on an earlier publication. We understand that following the seminar he plans to develop the paper further with a view to publication.

Dr Sharon Cowan's paper was published as part of the special issue of *New Criminal Law Review*⁴³ guest-edited by David Gurnham and Imogen Jones.

Dr Matthew Phillips and Dr Gabriel Schembri's study arose outwith this project. However, we understand that it is due to be published by the *Journal of the Faculty of Reproductive Healthcare*.

In the second category (i.e. papers published as a result of the call for papers), in the 'Criminalizing Contagion' special section of *Medical Humanities* guest-edited by Hannah Quirk⁴⁴, Daniel Grace⁴⁵ uses a mixture of methodologies to analyze what he calls the 'spread' of criminalization statutes throughout Central Africa from 2005-2010 following the drafting of the USAID model law in 2004. As a structure for producing legal responses to HIV/AIDS, Grace finds this exportation and repeated recycling of the model law problematic in a number of important ways. In addition, in a paper recently published in the *Journal of Medical Ethics* (guest-edited by Catherine Stanton), Jessica Flanigan 'Non-culpable ignorance and HIV transmission'⁴⁶ argues that legal frameworks should be sensitive to the fact that culpability may be affected by ignorance, whether moral or factual. Therefore there may be some cases where criminal prosecution is not appropriate.

As noted in relation to the other seminars, we have taken steps to ensure that there will be a continuing impact of these seminars and the project's outputs beyond the world of academia. The Law Commission is currently carrying out a scoping exercise examining the use of the Offences Against the Person Act 1861. As this project is pertinent to their work, we invited a representative from the Law Commission to attend the final seminar. We have also agreed to provide a copy of this final report to the Commission for their reference as they carry out their research. We consider this will be of value in highlighting publications which may be of interest to their project and also in

⁴² Stanton C, Devaney, S, Farrell, A-M and Mullock, A, *Pioneering Healthcare Law: Essays in Honour of the Work of Margaret Brazier* (Routledge, forthcoming, 2015)

⁴³ 'Offenses of sex or violence? Consent, fraud and HIV transmission' (2014) 17(1) 135-161

⁴⁴ 2013, Dec, vol.39(2):77-90

⁴⁵ 30(2):77-84

⁴⁶ 2014, 40:798-801.

identifying those individuals and bodies working and researching in this area, who they may wish to contact directly for input.

Following this seminar, Dr Matthew Phillips (of the Manchester Centre for Sexual Health) has also suggested establishing a collaboration with students studying at the law school at the University of Manchester. Although this idea is at a very early stage, we consider this also has scope for impact in the longer term. Such a collaboration could involve not just undergraduate law students, but also medical practitioners, intercalating medical students and practicing lawyers, who all study on our master's courses. Thus it could impact on current and future academics, practitioners and policy makers.

Full list of outputs

Books (edited):

Stanton, C. and Quirk, H. (eds.) *Criminalizing Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law*. Cambridge: Cambridge University Press, forthcoming.

Special collection across three BMJ Group journals

Sexually Transmitted Infections, edited by David Gurnham, 2013, 89(4): 274-294,

Gurnham, D., 'Criminalising contagion: ethical, legal and clinical challenges of prosecuting the spread of disease and sexually transmitted infections' (editorial), pp.274-5

Phillips M., Sukthankar A., 'Imprisonment for non-intentional transmission of HIV: can it be supported using established principles for justifying criminal sentencing?', pp.276-9.

Parvez F., Katyal M., Alper H., Leibowitz R., Venters H., 'Female sex workers incarcerated in New York City jails: prevalence of sexually transmitted infections and associated risk behaviors', pp.280-4.

Stackpool-Moore, L., 'The intention may not be cruel... But the impact may be': understanding legislators' motives and wider public attitudes to a draft HIV bill in Malawi', pp.285-9.

Kpanake L., Patassi A., Mullet E., 'Criminal prosecution of a male partner for sexual transmission of infectious diseases: the views of educated people living in Togo', pp.280-4.

Journal of Medical Ethics, edited by Catherine Stanton, 2014, 40: 792-801

Stanton, C. 'Criminalising Contagion' (editorial) p. 792.

Dunphy, K. 'Herpes genitalis and the philosopher's stance'. pp. 793-797.

Flanigan, J. 'Non-culpable ignorance and HIV transmission'. pp. 798-801.

Medical Humanities, edited by Hannah Quirk, 2013, 39(2): 75-84

Quirk, H., 'Criminalising contagion: the criminal law and disease transmission' (editorial), pp.75-6.

Grace, D., 'Legislative epidemics: the role of model law in the transnational trend to criminalise HIV transmission', pp.77-84.

O'Byrne P., Bryan A., Roy M., HIV criminal prosecutions and public health: an examination of the empirical research, pp.85-90.

Other articles and book chapters (written or edited by one or more authors of this report either presented at or responding to the seminar series):

Gurnham, D. 'What role should criminal justice play in the fight against STIs?' (2012) *Sexually Transmitted Infections*, 88(1):4-5.

Gurnham, D. 'Choice, risk and death in the criminalization of HIV', in Gurnham, D. *Crime, desire and law's unconscious: law, literature and culture*, Abingdon: Routledge 2014.

Gurnham, D. and Ashworth, A., 'Revisiting the law on the transmission of disease', in Stanton C, Devaney, S, Farrell, A-M and Mullock, A, *Pioneering Healthcare Law: Essays in Honour of the Work of Margaret Brazier* (Routledge, forthcoming, 2015).

Stanton, C. 'Maternal transmission of HIV infection: a crime against my child?', *Journal of Medical Ethics* (2014): Online First 4 June. doi:10.1136/medethics-2013-101368.

Weait, M. 'Unsafe law: health, rights and the legal response to HIV' (2013) *International Journal of Law in Context*, 9(4): 535-564. [edited by David Gurnham]

Francis, J. G. and Francis, L. P. 'HIV treatment as prevention: not an argument for continuing criminalisation of HIV transmission' (2013) *International Journal of Law in Context*, 9(4): 520-534 [edited by David Gurnham]

If you experience any difficulties getting access to any of these publications, please contact one of the authors of this report (listed below).

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