

<b>Institution: Birkbeck, University of London</b>
<b>Unit of Assessment: LAW</b>
<b>Title of case study:</b> Punitive laws, public health and HIV/AIDS: How research on criminal liability for HIV transmission and exposure has informed policy-makers, medical practitioners and others.
<p><b>1. Summary of the impact</b></p> <p>This case describes Professor Weait's research into the impact of punitive laws relating to HIV transmission and exposure and against people living with HIV and AIDS (PLHIV). His work has informed the development of policy on criminal liability for HIV transmission and exposure by UNAIDS (the Joint United Nations Programme on HIV/AIDS), the United Nations Development Programme (UNDP), the International Planned Parenthood Federation (IPPF) and the National AIDS Trust (NAT). It has led directly to invitations to contribute at international policy fora as well as civil society and professional medical organisations. His research has been acknowledged judicially; has contributed to the UK Crown Prosecution Services' guidelines on this issue; and involved knowledge transfer to, and consequent capacity enhancement of the activities of various interest and community groups.</p>
<p><b>2. Underpinning research</b></p> <p>The research underpinning this case study was undertaken by Professor Weait during two periods at Birkbeck (1993-99 as lecturer) and 2007 to date (as reader then professor). Weait's research activity in the intervening period is mentioned where necessary to provide context. There are three threads (legal conceptual; scientific; and social) to Weait's theoretical and empirical research:</p> <ol style="list-style-type: none"> <li>i. <b>Legal Conceptual:</b> How the responsibility of PLHIV is framed within criminal law, problematising assumptions about core concepts such as fault, harm, consent and causation as applied to cases involving the transmission of HIV, and addressing HIV as an issue for the communities of PLHIV and for public health, rather than as a legal problem for which punitive legal responses can provide an effective solution. Weait's research in this area was informed by doctrinal and theoretical research that challenged conceptual frameworks, which is characteristic of Law School research at Birkbeck, and by the work that he undertook for HIV/AIDS organisations and for HIV clinicians at the local, regional, national and international level (3.1 &amp; 3.4).</li> <li>ii. <b>Scientific:</b> Interdisciplinary collaboration with leading European virologists into the problems associated with the use of phylogenetic analysis. Phylogenetic analysis is the study of the genetic relatedness between HIV strains, and is used in evidence at criminal prosecutions for transmission of HIV. Weait's research (3.5) explored the inter-relationship between complex scientific processes with the rules of criminal evidence; and describes the limitations of the inferences that could be made by expert witnesses (specifically that phylogenetic analysis alone cannot establish to the criminal standard the route, timing or source of HIV infection).</li> <li>iii. <b>Social:</b> The gathering and analysis of qualitative and quantitative data to explore (in collaboration with sociologists, psychologists and activists) the impact of criminalisation of HIV exposure and transmission on sexual behaviour and clinical practice, in order to understand the causes and adverse impact of criminalisation on health and relationships between patients and clinicians (3.2) and on late clinical presentation by those living with HIV (3.3).</li> </ol> <p>During the 1990s at Birkbeck, and informing his work as a volunteer member of the Terrence Higgins Trust legal services group, Weait developed his research methodology into problematising assumptions about core concepts relating to offences against the person. These findings informed his contribution to the Trust's submissions to the 1998 Home Office review of non-fatal offences against the person. This initial research was completed and published as <i>Taking the Blame</i> (3.1) between leaving Birkbeck (1999) and joining the Open University (2000).</p>

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A series of ESRC-funded seminars in 2004-5 (whilst employed at Keele University) explored and demonstrated the impact of criminal law's doctrinal approach to harm and consent on PLHIV.

The culmination of Weait's research, however, was published in 2007 after re-joining Birkbeck as the monograph *Intimacy and Responsibility: The Criminalization of HIV Transmission* (3.4) in which Weait demonstrates that criminalising HIV nondisclosure, exposure and transmission has unintended and negative consequences on prevention initiatives and creates barriers to testing and treatment of PLHIV. Weait continues to develop this area of research, collaborating and publishing with medical professionals and scientists concerned with the impact of criminalisation both on health outcomes and primary research into prevention; and participating in high-level international consultations and conferences.

### 3. References to the research

- 3.1 Weait, M. (2001) 'Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV', *Journal of Social Welfare and Family Law*, 23(4), pp. 441-457. <http://www.tandfonline.com/doi/abs/10.1080/09649060110079837>. Peer-reviewed. One of the first published articles on decriminalisation of reckless transmission.
- 3.2 Dodds C, Weait M, Bourne A, Egede S, Jessup K, Weatherburn P (2013) [\*Keeping Confidence: HIV and the criminal law from service provider perspectives\*](#). London, Sigma Research.
- 3.3 Lazarus, J.V., R. Jurgens, M. Weait et al. (2010) 'Overcoming obstacles to late presentation for HIV infection in Europe', *HIV Medicine* 104. <http://dx.doi.org/10.1111/j.1468-1293.2010.00872.x> Peer-reviewed.
- 3.4 Weait, M. (2007) [\*Intimacy and Responsibility: The Criminalization of HIV Transmission\*](#), Abingdon: Routledge-Cavendish. Peer-reviewed.
- 3.5 Bernard, E., A-M. Geretti, A. van Damme, Y. Azad, and M. Weait. (2007) 'HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission', *HIV Medicine* 8, 382-387. Peer-reviewed. <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-1293.2007.00486.x/abstract>.

Other indicators of quality:

**Recognition that research was relevant to stakeholders:** Weait was invited to present findings from 3.3 and 3.4 to *HIV in Europe* conferences in Brussels (2007) and Stockholm (2009), to policy makers, health professionals and civil society representatives from various countries.

**Inclusion in a significant work of reference by the leading global network representing PLHIV:** 3.5 is cited in GNP+'s *Global Criminalisation Scan Report (2010)* (5.9) an overview of the extent to which laws have been used to prosecute PLHIV for HIV transmission and exposure.

**Inclusion (by others) in the body of knowledge of policy-makers:** 3.1 was cited in the 2002 UNAIDS policy options paper on *Criminal Law, Public Health and HIV Transmission*.

### 4. Details of the impact

Weait's research argues for a harm-reduction approach to the use of law, demonstrating to international policy-makers and others that an overly broad criminalisation of HIV nondisclosure, exposure and transmission has a negative impact on prevention efforts and on the lives of PLHIV. Weait's international policy work includes invitations to work as a consultant for **UNAIDS** and **UNDP**, and dates back to 2002 when the first UNAIDS policy options paper on criminalisation of HIV transmission and exposure cited in its bibliography Weait's *Taking the Blame* (3.1), one of the

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first published articles arguing for decriminalisation of reckless transmission. Weait is one of the very few UK legal academics continuously involved in these policy-making fora over such a lengthy period.

Throughout the eligible period Weait has been invited to provide expert assistance to key international consultations organised by UNAIDS and UNDP, e.g. the 2011 *Expert meeting on the scientific, medical, legal and human rights aspects of criminalisation of HIV non-disclosure, exposure and transmission* (report of the meeting is at 5.4 below), which united for the first time leading scientists and legal scholars/practitioners to discuss the latest medical and scientific developments regarding HIV and how these should impact on criminalisation of HIV nondisclosure, exposure and transmission. Pg. 2 of 5.4 advises that it benefited from “information, evidence and analyses” from the two background papers prepared by Weait *Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape* and *Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Scientific, Medical, Legal and Human Rights Issues*. The papers were also used in the February 2012 High Level Policy Consultation on Criminalisation of HIV Non-Disclosure, Exposure and Transmission. 5.1 can confirm the background papers and agenda prepared for the 2011 expert meeting ‘benefit[ted] from the scholarship and research of Professor Weait’ and that such input was ‘critical for the development of such policy and advocacy approaches’. As a member of the Technical Advisory Group for the Global Commission on HIV (UNDP/UNAIDS) Weait contributed the UNAIDS/UNDP Policy Brief on *Criminalisation of HIV Transmission* (5.7 referring to 3.1) in 2008, by acting as an ‘expert reviewer of several drafts and provid(ing) valuable input’ (5.1).

From 2011 to 2013, UNAIDS entered a more intense period of deliberation of research, evidence-building and policy dialogue, during which time Weait wrote the background paper on criminalisation (5.5) for the Commission, which reported in July 2012 (as 5.6, which acknowledges Weait’s role in the Technical Advisory Group and cites publications by Weait). The culmination of this period was the publication on May 28<sup>th</sup> 2013 of updated UNAIDS guidance that both

- restated the policy position of UNAIDS and the Global Commission on HIV and the Law (that general laws – not HIV specific laws – should only be applied to the extremely rare instances of intentional transmission of HIV); and
- provided recommendations to governments, policy-makers, law enforcement officials, and civil society (including PLHIV) to “*achieve the goal of limiting and hopefully ending the overly broad application of criminal law to HIV*” (pg 2 of the guidance).

Weait’s research has led to invitations to address policy-makers and professional medical organisations e.g. his presentations at **HIV in Europe** conferences, identifying how criminal law disincentivises the timely uptake of testing by those with heightened infection risk and on expert evidence in criminal trials involving allegations of HIV transmission and exposure (3.3 & 3.4).

**National AIDS Trust (NAT)** described Weait as the ‘leading UK academic’ with whom it collaborated over eight years, contributing specific research-led legal expertise to NAT and to the entire UK HIV sector (5.2). NAT highlighted Weait’s expertise on the use of behavioural orders, for those convicted of reckless HIV transmission. NAT used this expertise in submissions to the **Sentencing Council** and **CPS**, achieving a policy change in 2011 whereby CPS will no longer use behavioural orders against those convicted of reckless transmission, or only in very limited circumstances. Further, Weait’s contribution to a joint paper on HIV forensics and use of phylogenetic analysis (3.5) identified how certain scientific evidence can and had been previously misinterpreted. This led to CPS acknowledgment of the inconclusiveness of phylogenetic analysis and forensic difficulties in proving HIV transmission; leading to an acquittal for HIV transmission in England; and the development of CPS nationwide policy guidance on future handling of such evidence. The evidential threshold was raised for cases to reach court, with a consequent reduction in the number of cases prosecuted. NAT commented that the response of the UK HIV sector to criminalisation of HIV transmission is regarded as a model by UNAIDS and others due to its evidenced-based focus, training and education of HIV-sector professionals.

**IPPF** used Weait’s research extensively in their work on challenging criminalisation across the

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world (5.3). Weait was a key contributor to IPPF's 2010 campaign (5.10); to *Verdict on a Virus: Public Health, Human Rights and the Criminal Law* (translated into three additional languages); he participated in the video advocacy resource *Behind Bars*; contributed to the school-based anti-stigma campaign *Positive? Awareness of and attitudes to HIV 2011* distributed through the Department of Education; and participated in international advocacy work in Sweden, and a Berlin Consultation in 2012, facilitating an advocacy session for civil society participants.

Weait's research acts as an important reference point for non-academic stakeholders in two other spheres.

His inclusion in GNP+'s *Global Criminalisation Scan Report (2010)* (see 5.9) makes a significant contribution to its overview of the extent to which laws have been used to prosecute PLHIV for HIV transmission and exposure. GNP conclude the evidence shows there is no correlation between the HIV prevalence in a country and their willingness to use criminal laws and other punitive measures to regulate transmission; and cites 3.5 and Weait et al's 2009 article *Sexually charged: the views of gay and bisexual men on criminal prosecutions for sexual transmission*. London: Sigma Research.

And the quality of Weait's analysis with respect to criminal Liability for HIV transmission was acknowledged by the judiciary in an important 2011 Commonwealth case *Neal v The Queen* (5.8).

**5. Sources to corroborate the impact**

- 5.1 Joint United Nations Programme on HIV/AIDS (UNAIDS), Chief, Human Rights and Law Division [factual statement already provided].
- 5.2 National Aids Trust, Director of Policy & Campaigns [factual statement already provided, citing evidential threshold and quality of analysis of evidence by CPS at <http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Police-investigations.aspx>]
- 5.3 International Planned Parenthood Federation, Senior HIV Advisor [factual statement already provided].
- 5.4 [UNAIDS Meeting Report of Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of Criminalisation of HIV Non-Disclosure, Exposure and Transmission, Geneva, Switzerland, 31 August – 2 September 2011](#)
- 5.5 Weait, M. 2011 [The Criminalisation of HIV Exposure and Transmission: A Global Review](#).
- 5.6 UNDP, HIV/AIDS Group. Global Commission on HIV and the Law, [Risks, Rights and Health](#), July 2012.
- 5.7 [Criminalization of HIV Transmission: Policy Brief](#), Geneva, UNAIDS/UNDP (2008).
- 5.8 [Neal v The Queen \[2011\]](#) VSCA 172 (15 June 2011) (Supreme Court of Victoria).
- 5.9 [Global Criminalisation Scan Report 2010: Documenting trends, presenting evidence \(GNP+ 2010\)](#)
- 5.10 [Verdict on a Virus: Public Health, Human Rights and Criminal Law](#), International Planned Parenthood Federation, 2008 (citing *Taking the Blame* [6]) and IPPF's video advocacy resource *Behind Bars* (<http://www.hivandthelaw.com/campaign/our-campaign-video-channel>).