CRIMINAL PROSECUTION OF HIV TRANSMISSION

NAT POLICY UPDATE

AUGUST 2006

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The National AIDS Trust opposes the criminal prosecution of reckless transmission of HIV through consensual sex.

Reasons for this position include the need to affirm the individual's responsibility for his/her own sexual health; the human rights of those living with HIV and the difficulties of disclosure; the public health implications; and the potential for further discrimination against people living with HIV and vulnerable groups such as migrants.

NAT does not oppose prosecutions for intentional transmission of HIV.

The Government should restate, on grounds of equity and public health, its opposition to the criminal prosecution of reckless transmission of HIV.

The Crown Prosecution Service must engage in discussion with the HIV sector, including people living with HIV, on the criminal prosecution of HIV transmission. Prosecution for reckless transmission of HIV through consensual sex should end immediately. Prosecution guidelines should be produced for cases of intentional transmission.

Guidance is needed on the implications of criminal prosecution for people living with HIV; for clinicians and sexual health advisers; for voluntary sector advice and service providers; and for the CPS, police, lawyers and the courts.

Introduction

In the light of recent prosecutions for the transmission of HIV the National AIDS Trust has reviewed its position on criminal prosecution. Both national and international literature have been examined. Discussions have taken place with people living with HIV, with lawyers, clinicians and representatives of HIV-sector organisations and of community groups. A roundtable took place in the UK in July 2004 and a European conference was held in September 2004. A session also took place in Leicester at the Changing Tomorrow conference of people living with HIV and AIDS. The policy position contained in this document does not necessarily reflect the views of those participating in these discussions but these views have informed NAT's position which has been agreed by its Board of Trustees.

1. Recent Prosecutions

There has been transmission of HIV in this country for over twenty years but only since 2003 have there been prosecutions in England and Wales for HIV transmission. Nine prosecutions have so far taken place, eight resulting in conviction.

Mohammed Dica
Mohammed Dica was convicted on 14 October 2003 of "unlawfully and maliciously inflicting grievous bodily harm" on two women by infecting them with HIV. He was sentenced to a total of eight years imprisonment.

The Court of Appeal in May 2004 ordered a re-trial of the Dica case, deciding that the trial judge had been wrong to refuse to allow consideration of whether the women concerned had consented to the risk of infection. After two abandoned retrials, the retrial finally took place in March 2005, with by this stage only one of the original complainants pressing charges. Mr Dica was found guilty and sentenced to four and a half years in prison.

Kouassi Adaye
In January 2004 Kouassi Michel Adaye was sentenced to six years imprisonment for infecting someone with HIV as well as for other unrelated offences, to all of which he had pleaded guilty. The judge ordered that at the end of his sentence Mr Adaye should be deported. It should be noted that Mr Adaye had not been diagnosed with HIV but it was claimed he had been criminally reckless because he had been diagnosed with other sexually transmitted infections and had been advised that he was at high risk of being HIV positive. Mr Adaye had declined to take an HIV test.

Feston Konzani
In May 2004 Feston Konzani was sentenced to ten years for infecting three women with HIV. Mr Konzani will also be deported at the end of his sentence. This case was also taken to the Court of Appeal. Mr Konzani's counsel argued that agreement to have unprotected sex constituted consent to the risk of HIV transmission. The Court of Appeal rejected this argument and the verdict was upheld.

Paulo Matias
In May 2005 Paulo Matias pleaded guilty to the charge of reckless grievous bodily harm for infecting one woman with HIV and was sentenced to three and a half years in jail. Paulo Matias died in January 2006 from complications caused by HIV and hepatitis C cirrhosis of the liver.

Anonymous female
In July 2005 a twenty year old woman in Newport, Wales, pleaded guilty to a charge of grievous bodily harm for recklessly transmitting HIV to her male regular sexual partner. Her identity cannot be revealed by order of the court. She was sentenced to two years' youth custody.

Derek Hornett
In December 2005, Derek Hornett pleaded guilty to reckless transmission of HIV to an 82-year old woman. He was sentenced to three years and three months in jail. News reports also stated that he was given a Sexual Offences Prevention Order, which amongst other provisions prohibited him from having sex with anyone without telling them he was HIV positive.

Sarah Jane Porter
Sarah Jane Porter was sentenced to 32 months in jail in June 2006 for recklessly infecting her partner.

Mark James
The first gay man to be convicted of reckless transmission of HIV to his partner was sentenced in his absence in August 2006 to three years and four months in jail.

A gay man
The second gay man charged with reckless transmission of HIV was acquitted in August 2006. Central to the acquittal was scientific evidence that virology reports could not prove route of transmission. NAT is preparing a guide on the use of virology reports in such HIV transmission cases.

Scotland - Stephen Kelly
Before the English cases there had been one conviction for HIV transmission in Scotland. In February 2001 Stephen Kelly, an ex-prisoner and former IV drug user, was convicted under Scottish law of having “recklessly injured” his former partner by infecting her with HIV.

Two further prosecutions have been brought in Scotland, but have been at least temporarily halted because one accused (Christopher Walker) was found to be mentally incapable of standing trial. A second prosecution has been delayed because the accused is currently in Italy, although the prosecution have indicated that they intend to seek his extradition.

At least one further prosecution is in process in Scotland at the time of writing.

2. What does the law now say on HIV transmission?

All those convicted in England have been found guilty under the Offences against the Person Act 1861 [OAPA] Section 20, recklessly inflicting grievous bodily harm. The two Court of Appeal decisions in the Dica and Konzani cases provide case law for the courts in applying the OAPA to HIV transmission. But it must also be noted that much still remains very unclear.

It appears that the courts now consider that if someone knows they are HIV positive, is aware of the risk of transmission and passes on HIV through sex, they are potentially guilty of recklessly inflicting grievous bodily harm

It also appears from the Court of Appeal judgment in the Dica case that it is a valid defence to claim that the person infected consented to the risk of transmission. The Court of Appeal in the Konzani case then clarified how that consent can be determined. According to the Court of Appeal, consent can, in almost all circumstances, only be given as a conscious response to the disclosure by the HIV positive person of his/her positive status. The Court was of the view that consent cannot be inferred simply from the fact that the person had agreed to unprotected sex.

A number of points require clarification and it is hoped that the current Crown Prosecution Service consultation on prosecutor guidelines will remove continuing uncertainties. Amongst the issues which need clarity are:

- Whether someone must be diagnosed with HIV if they are to be found guilty of reckless transmission (it appears so, but Mr Adaye was convicted without such a diagnosis)

- Whether prosecutions will be limited to transmission which has occurred through unprotected anal or vaginal intercourse

- Whether consistent use of a condom is ordinarily a valid defence against recklessness (again, it appears so, but this urgently needs to be made absolutely clear)

- How the OAPA 1861 will be applied to the transmission of other diseases, and in particular sexually transmitted infections.

These uncertainties need to be resolved, and in a way which protects the human and civil rights of those living with HIV and which accords with the best advice provided from bodies such as UNAIDS.

It is important to note that this application of the OAPA has been at the initiative of the police and the Crown Prosecution Service. The last public statement from the Government on this issue was in 1998 in the Home Office consultation paper 'Violence: reforming the Offences Against the Person Act 1861' where its position was that only intentional transmission of a serious disease should be a criminal offence.

Section 18 of the OAPA concerns intentional grievous bodily harm – causing grievous bodily harm with intent to do so. In two of the nine English and Welsh cases the prosecution had initially charged the defendants with deliberate intent, but

in the end both were convicted simply for reckless transmission. Such intent to harm would usually be difficult to prove when it comes to HIV transmission, and would be very rare. But there is a good argument for prosecution in such rare cases.

The situation in Scotland

Although the OAPA applies both in England and Wales and Northern Ireland, it does not apply in Scotland, which has a different system of criminal law.

In Scotland, the offence of which Stephen Kelly was convicted in 2001 is "reckless injury", which is a common law offence (that is, one which has no precise statutory definition). Stephen Kelly did not appeal against his conviction, and so there has been no written decision handed down by an appeal court detailing the scope of Scots law in this area, in contrast to the decisions handed down by the Court of Appeal in the Dica and Konzani cases.

Despite the differing terminology, the current position in Scotland is not, in its effect, thought to be significantly different from elsewhere in the United Kingdom. Possibly the only major difference is that it is theoretically possible that a prosecution might be brought for reckless exposure to the risk of HIV infection under Scots law (the offence of "reckless endangerment"). By contrast, a prosecution for HIV exposure would not be possible under English law unless the defendant had acted with the intention of transmitting HIV. There has not, however, been any attempt to bring such a prosecution to date.

Prosecution policy in Scotland is not a matter for the Crown Prosecution Service. Instead, it is a matter for the Crown Office and Procurator Fiscal Service, which is a department of the Scottish Executive. Similarly, most issues of health policy are devolved to the Scottish Parliament under the Scotland Act 1998. Although the remainder of this paper, for the sake of brevity, refers in the main only to the UK government and the CPS, NAT believes that the Scottish Executive and Crown Office should take similar action to that which we recommend here.

3. Problems with the criminal prosecution of reckless HIV transmission

The application of the criminal law to HIV transmission is a completely new development in the United Kingdom. Sexual health services, best practice guidance, government strategies, professional standards and community norms – none of these were framed with prosecutions in mind. The implications of criminal prosecutions could well therefore be drastic. It should be noted that the OAPA 1861 was not drafted with either disease transmission or HIV in mind. We list below some of the most significant problems arising from these convictions.

Public health concerns

Any use of the criminal law in response to HIV transmission must be assessed in the context of public health policy and the wider impact on the spread of HIV in the UK.

Other jurisdictions around the world have had criminal sanctions in place against either disease transmission generally, or HIV/STI transmission in particular for many years. There is no evidence to date that such penalties have any impact in reducing rates of onward transmission of HIV, be it through incapacitation of those convicted,

rehabilitation or deterrence. In many countries with criminal penalties both HIV prevalence and incidence rates are higher than in those without.

Could criminal prosecutions actually harm public health by increasing rates of onward transmission of HIV?

There is a difficulty in answering this question since there is a lack of empirical data (and research to answer this question would be long-term and challenging). But policy-makers cannot absolve themselves from coming to reasoned conclusions as to likely public health impacts. There is an urgent and immediate need to respond to HIV and protect effective interventions. It is necessary to look at the foundations on which current sexual health interventions, which are proven to work, are based. If criminal prosecutions undermine such proven principles of health promotion, without any countervailing benefit, there should be an assumption of harm to public health.

At the heart of effective responses to HIV is trust in the confidentiality of sexual health services. Such trust is necessary if people are going to be honest with healthcare staff about their sexual behaviour. And such honesty is crucial for sexual health services to support people in safer sex, and in contact tracing and partner notification of others who might have been infected.

It is also clear that HIV-related stigma and discrimination in society are amongst the most serious obstacles to an effective response to the epidemic.

Criminal prosecutions may well involve courts ordering the submission of GUM clinic, or support organisation, records and notes. Once those living with HIV believe their GUM records could be used against them, there will be an impact on willingness to seek support to reduce risk-taking behaviour and on willingness to provide sexual health services with names of past sexual contacts.

It is already clear that prosecutions in the UK are having an impact on social research into HIV-related behaviours, both the willingness of people to participate and the willingness of researchers to ask all the questions they would like to have answers to.

If reckless transmission is a criminal offence those who might be infected may be deterred from testing. With knowledge of positive status there would come a new and intimidating liability, and this could deter some from finding out their status. More generally, the increased stigma arising from the reporting of prosecutions would put many off testing.

In cases where those living with HIV have engaged in risk-taking behaviour which was unplanned, inadvertent or ‘in the heat of the moment’, they should advise their sexual partner of the need to access Post-Exposure Prophylaxis (PEP). To do so has now become equivalent to the admission of a criminal offence. There will be those too scared to do so, particularly in casual encounters, relying instead on the probability that transmission has not taken place.

The emphasis in sexual health work has quite properly been on individuals taking responsibility for their own sexual health. The recent court cases could well result in an unhelpful move away from personal and shared responsibility to assumptions as to the responsible behaviour of others. This can only lead to more risk taking and more infections.

The Court of Appeal has rejected the argument that as long as the sex was genuinely consensual this should be treated as consent to the risk of HIV infection. NAT believes, however, that if two persons have consensual sex, there is consent both to the sex and to any risks inherent in that sex.

Sex would not be consensual if coercion was involved (e.g rape). NAT believes it could be argued, at least ethically, that were someone to lie about their HIV status in response to a clear question genuine consent is undermined.

NAT remain concerned that the criminalising of reckless transmission is going to run counter to the public health objectives of the National Strategy for Sexual Health and HIV which emphasise personal responsibility for sexual health, increased testing amongst vulnerable groups, and an end to HIV-related stigma and discrimination.

Human rights concerns

HIV in the United Kingdom affects overwhelmingly groups who are already marginalised and discriminated against – gay and bisexual men, African men and women, and injecting drug users. HIV brings with it a further array of stigmatising attitudes, including social ostracism, and concepts of blame and guilt. To the burden of a serious, and possibly life-threatening disease, society had now added criminal prosecutions which reinforce the stigmatising link between HIV and blame and which have given a new lease of life to highly prejudicial and misinformed media coverage.

Although other examples of disease transmission, and in particular transmission of other STIs, could now be prosecuted, in all likelihood the vast majority of prosecutions will be of HIV transmission. This can only undermine attempts to 'normalise' HIV within society and healthcare.

The Government in 1998 cited the resulting stigma and discrimination against those living with HIV and relevant communities as the main reason not to prosecute for reckless HIV transmission. That argument still stands – and its prediction is unfortunately being fulfilled.

Justice-related concerns

Will prosecutions for HIV transmission result in just outcomes for those affected? It is important to acknowledge that there are cases where individuals diagnosed feel they have been seriously wronged by their sexual partner. One difficulty at present is that the courts are the only route open for people to express that sense of anger and wrong. The public and intrusive nature of that process for all parties, and the severe custodial sentences handed down to date, are not necessarily the preferred option for such individuals. More consideration is needed of alternative dispute resolution processes. It is striking that amongst those living with HIV who have been surveyed on the issue, the vast majority are against prosecution for reckless HIV transmission. This suggests that once time has elapsed to understand better the implications of a positive diagnosis, and perhaps some of the difficulties people have in disclosing positive status to others, feelings of retribution subside.

There are cases where the argument for prosecution seems strong. We have already cited the extremely rare cases of intentional HIV transmission. Were such a case ever to be proved, it appears difficult to argue that the maliciousness of the act and the harm done should go unpunished.

More difficult is the question of cases where someone has deliberately lied or deceived their sexual partner as to their HIV positive status. The UNAIDS Policy options paper 'Criminal Law, Public Health and HIV Transmission' states, 'Criminal sanctions may be appropriate in the case where consent to engage in risky activity is obtained by deliberate deceit regarding HIV status. It is recommended that criminal sanctions not be applied for the mere non-disclosure of HIV-positive status'. The OAPA 1861 as interpreted by the courts does not make such a distinction. NAT can see an ethical argument for punishment where someone attempting to safeguard their own sexual health has been deceived in this way. But the OAPA 1861 is not the right legislative instrument to achieve this and any alternative would need to be examined very closely to ensure it did not do more harm than good.

Current prosecutions take no account of the difficulties many face in disclosure and/or condom negotiation. The result will be unjust outcomes where people who needed advice, protection or support are instead made to shoulder all the responsibility for HIV transmission.

The stigma and discrimination associated with HIV may make disclosure difficult. In communities or contexts where discrimination and even violence against HIV positive people are prevalent, disclosure may be extremely problematic and dangerous. The most acute problems may occur in marriages and settled relationships where disclosure of status can involve admission of sexual infidelity, rape or IV drug use. Women in particular may find it difficult to disclose without severe risks.

Pressure not to use condoms may come from the negative partner and be difficult to resist. There are many individuals who are faced with two equally difficult, and sometimes dangerous, courses of action - insistence on condom use or disclosure of HIV positive status.

Furthermore, there is no confidentiality agreement in the bedroom. There is no guarantee that disclosure of HIV positive status will remain only with the sexual partner. It could be the case that news soon spreads amongst friends, family, neighbours and acquaintances, that it becomes generally known in a community. Again, in a world where there is still considerable HIV-related stigma, the implications for that person's relationships, employment and security are serious.

In short, the law is making unreasonable demands on a vulnerable group of people where many, who have the best of intentions, may nevertheless need time and support in working out how to disclose to sexual partners. There is a wealth of research which demonstrates the complexity around issues of condom use and negotiation. To place all the responsibility for safer sex on the HIV positive sexual partner is an ineffective, unduly demanding and unjust requirement. NAT agrees with the UNAIDS conclusion that mere non-disclosure of HIV status should not be a prosecutable offence.

Other difficulties

There is a danger of vindictive prosecutions from people who have been in relationships which have soured (and there are already examples of vindictive complaints). There is also great difficulty in proving what took place between two people in the privacy of the sexual encounter. In such circumstances it is often the person from the more marginalised group who is disbelieved.

We are extremely concerned that four of the six convictions in England have been of migrants, three from Africa and one from Portugal. There is evidence that criminal prosecution tends to penalise and further stigmatise marginalised and vulnerable people.

The courts have displayed errors in understanding of transmission risk, ignorance of the social difficulties surrounding disclosure, and a mistaken assumption that a positive diagnosis means an imminent death sentence, with no awareness of the treatments now available.

4. Information for HIV Positive People

HIV positive people who wish to seek advice on the implications of these court cases for their own relationships and sexual behaviour should take appropriate professional advice or, for example, contact a relevant helpline such as THT Direct (0845 1221200). This Paper, including NAT's understanding of the issues and conclusions, is for information purposes only and is not a substitute for that personal and expert assistance. Every effort will be made to update this paper promptly in response to events but it should be noted that the law remains unclear in some areas and could well change further as case law develops. The NAT website will always have the most recent version of this paper (www.nat.org.uk).

NAT's understanding of the current state of the law is:

You are only likely to be prosecuted for HIV transmission if:

your sexual partner does not know you have HIV
and you don't tell them
and you don't always use a condom for penetrative sex
and they become infected as a direct result
and they decide to make a complaint to the police.

If you use a condom and the condom slips or breaks, and you have not previously disclosed your status, you should tell your partner your HIV status at once and advise them to get PEP (post-exposure prophylaxis) immediately in order to prevent possible transmission.

Some are arguing from certain court judgements that HIV positive people are effectively required by the law to disclose their status to all sexual partners, whether or not they have safer sex. We do not think there is a realistic likelihood of the CPS taking forward a case where the defendant has clearly tried to avoid risk by using condoms consistently.

5. Conclusions

The NAT position on criminal prosecution of HIV transmission

The National AIDS Trust opposes the criminal prosecution of reckless transmission of HIV through consensual sex. **Section 20 of the OAPA should never be used to prosecute people for transmitting HIV**.

Consensual sex involves both persons taking responsibility for their own sexual health. If someone who is HIV negative decides to have sex they take responsibility for possible consequences of that action. We believe this position properly affirms individual responsibility, the rights of HIV positive people to privacy, and the needs of public health.

NAT does not oppose prosecutions for intentional transmission of HIV.

Further discussion of these issues can be found in the UNAIDS Policy Options Paper 'Criminal Law, Public Health and HIV Transmission', available at the UNAIDS website www.unaids.org.

What should happen now?

It is unclear what the Government's current position is on the prosecutions which have taken place, which go against their stated position against the criminalising of reckless transmission.

The Government should restate, on grounds of equity and public health, its opposition to the criminal prosecution of reckless transmission of HIV.

It seems unlikely that in the near future the Government is going to amend the Offences Against the Person Act 1861. Whilst the OAPA remains on the statute book and is the basis for any prosecution, the Crown Prosecution Service needs to clarify the circumstances in which it considers prosecution for HIV transmission to be in the public interest.

The Crown Prosecution Service must engage in discussion with the HIV sector, including people living with HIV, on the criminal prosecution of HIV transmission. Clear published prosecution guidelines should be produced as soon as possible to remove confusion and uncertainty. Prosecution for reckless transmission of HIV through consensual sex should end immediately. Prosecution guidelines should be produced for the rare cases of intentional transmission.

Comparable initiatives are needed in Scotland from the Scottish Executive and the Crown Office and Procurator Fiscal Service (responsible respectively for public health and prosecution policy).

As the law and prosecution policy are clarified, **guidance is needed on the implications of criminal prosecution for people living with HIV; for clinicians and sexual health advisers; for voluntary sector advice and service providers; and for the CPS, police, lawyers and the courts**.

Criminal prosecution of HIV transmission will not assist those living with HIV as they tackle such difficult issues as disclosure, negotiating safer sex or dealing with stigma and discrimination. There is good reason to believe it will make things worse. **There is a need for further research into the needs of HIV positive and HIV negative people around safer sex, negotiation and disclosure, how a supportive policy context can be established and effective services and advice provided**.

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For **more information** contact yusef.azad@nat.org.uk

Further reading:

UNAIDS Policy Options Paper 'Criminal Law, Public Health and HIV Transmission', available at www.unaids.org

Court of Appeal Judgement R v Dica www.hmcourts-service.gov.uk/judgmentsfiles/j2493/regina-v-dica.htm

Court of Appeal Judgement R v Konzani www.hmcourts-service.gov.uk/judgmentsfiles/j3177/r-v-feston_konzani.htm

The National AIDS Trust (NAT) is the UK's leading independent policy and campaigning voice on HIV and AIDS.

We develop policies and campaign to halt the spread of HIV and AIDS, and improve the quality of life of people affected by HIV, both in the UK and internationally.

We aim to prevent the spread of HIV and AIDS, ensure people living with HIV have access to treatment and care, and eradicate HIV-related stigma and discrimination.