



ASSAULT AND OTHER OFFENCES AGAINST THE PERSON

Response to the Consultation Guideline

Introduction

This response is submitted jointly from the National AIDS Trust, the Terrence Higgins Trust and from Dr Matthew Weait, Birkbeck College, London University, to the Consultation Guideline 'Assault and other offences against the person'.

Prosecutions for reckless disease transmission under section 20 of the Offences Against the Person Act 1861 only began in 2003 – indeed before then the Government doubted whether such prosecutions were possible in law. It is clear in particular in relation to the transmission of a disease in the context of a consensual relationship that there are very specific and sometimes different issues relevant to both harm and culpability.

Sentences to date for those convicted of reckless HIV transmission have been particularly severe, with 100% receiving custodial sentences (as opposed to 55% of all those convicted under s 20 in 2003), and 78% receiving sentences of more than 3 years (as opposed to 4% of all those convicted in 2003).

Concerns as to conclusions

We do not propose to discuss here the issue of whether prison is an appropriate setting for people living with HIV. We note that one of those sentenced to jail later died whilst in custody.

We have already cited the statistics for sentencing under s 20 of the OAPA 1861 for reckless transmission of HIV, which suggest the offence is being considered by the courts as one of the most serious possible instances of grievous bodily harm. Discussion in the Consultation Guideline is very brief, simply stating that even where sexual relations are consensual 'Such offences can be extremely serious and a significant custodial sentence is to be expected following conviction' [para.36]. In the advice from the Sentencing Advisory Panel it states, 'Where it is proved that an offender found guilty of a section 20 offence deliberately withheld information that he or she was carrying an infection that was likely to be transmitted, this is likely to fall at the most serious level of that offence category' [para.75].

Harm – we recommend that there be reconsideration of the seriousness of the harm resulting from HIV infection. We do of course believe HIV infection to be a serious matter. The extent of that seriousness will, however, differ between people and depend on how early the individual is diagnosed and how they respond to treatment. Recent modelling suggests that most HIV positive people on treatment will have normal life-spans. The pill burden of treatment has in recent years been significantly reduced, with every prospect of this trend continuing. Many people with HIV in the UK do not now see the need to see their clinician much more than once or twice a year for a check-up. Of course for a minority the management of the disease will be more difficult, and some people can endure unpleasant side-effects from treatment.

We do, however, doubt whether the harm is worse or even comparable to a permanent disfigurement or physical impairment caused by a malicious attack.

Likelihood of harm – the Sentencing Advisory Panel comment cited above refers to an infection that the defendant knew ‘was likely to be transmitted’. In fact it is always extremely unlikely from an act of unprotected sex that HIV will be transmitted, the usual percentage risk, for example, cited for HIV transmission during vaginal intercourse being between 0.06 and 0.08%.¹ Putting aside the appropriate-ness of prosecution in such circumstances, we believe this should at least be carefully taken into account in sentencing guidelines.

Culpability – it is hard to see how advice to date on seriousness and s 20 offences really takes account of the extension of prosecution to disease transmission and the very different circumstances which apply. For example, how does discussion of a ‘weapon’ apply? In what sense is unprotected sex a ‘pre-meditated assault’, given the millions who engage in unprotected sex, the low risk of HIV transmission from a single act of sex, and the fact that the majority of HIV transmissions are from the undiagnosed. Does it in fact make sense to frame the offence in terms of assault at all? A large proportion of the sexually active population engage in behaviours which can and are transmitting HIV and other serious infections, with a clear understanding of relevant public health messages. This is directly relevant to the degree of culpability of the defendants in these cases, but does not appear to have been considered.

Concerns as to process

We remain extremely concerned at the practice, and the proposed guidance, on the sentencing of those found guilty of reckless transmission of HIV under section 20 of the Offences Against the Person Act 1861. We do not believe this is appropriately informed by knowledge and understanding of the implications of HIV infection or of how HIV is transmitted.

It is worth noting that in the original Consultation Paper from the Sentencing Advisory Panel (1 September 2005) there was no mention or discussion of the use of the OAPA 1861 to prosecute reckless or intentional disease transmission, despite the fact that this was effectively a new area for prosecution and sentencing since 2003. By contrast ‘happy slapping’ and car rage made an appearance in the document. This significant and surprising omission suggests there had not been much initial consideration of the particular circumstances which might distinguish sentencing for disease transmission, and in particular HIV transmission, from other forms of assault.

Once the consultation had been brought to our attention, the National AIDS Trust, Terrence Higgins Trust and Dr Matthew Weait submitted responses. We were very aware, however, that in such a new area of law extensive information and consideration of HIV transmission were necessary for both the Panel and the Sentencing Guidelines Council, which should go beyond what could realistically be contained in our initial submissions.

NAT therefore proposed that the Panel hear from both HIV organisations and people living with HIV to gather more information on HIV transmission and on the realities of living with HIV (email from Dr Y Azad, NAT, to the Sentencing Advisory Panel 6 April 2006). This request was linked to the general duty obligations under the Disability

¹ ‘HIV and AIDS Reference Manual 2006’ NAM p.85

Discrimination Act 2005. This request was refused (email from Lesley Dix to Yusef Azad 13 July 2006).

The Crown Prosecution Service commenced a consultation in September 2006 on prosecutions of cases involving the reckless or intentional sexual transmission of infection. This consultation process has not yet been concluded, over one year later. The CPS received a large number of important and detailed responses, and consideration of the array of clinical and legal issues has understandably taken a lot of time.

We still believe as stated above that the severe sentences being handed down for reckless HIV transmission are inappropriate. We do not believe the Sentencing Advisory Panel or the Sentencing Guidelines Council have as yet fulfilled their public duty to pay due regard to relevant disability issues in relation to people living with HIV, which should involve hearing directly and in further detail from people living with HIV and from relevant organisations themselves.

We also believe, given the lack of prosecution guidance from the CPS, that it would be sensible for the moment simply to note this new area of sentencing in the current guidelines and propose, subject to the appropriate processes, to consider this matter separately once the CPS consultation is included and there has been more time to talk to affected communities.

Recommendations:

We believe that custodial sentences are inappropriate for most convictions for reckless HIV transmission since such sentences do not reflect appropriately the harm and culpability involved. We recommend, whilst prosecutions continue, that the current Guidelines be amended to provide for less severe sentences.

We also believe the process to date has not provided adequate opportunity to consider all the specific issues relating to sentencing people defined in law as disabled persons, and the implications also for gay/bisexual and BME communities. In advance of the conclusions of the Crown Prosecution Service, and without any discussion with affected groups, a definitive view that sentences should continue within the most severe range should not be taken by the Sentencing Guidelines Council.

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