Guidance notes from the National AIDS Trust (NAT) and Terrence Higgins Trust (THT) on the CPS Consultation on prosecuting sexual transmission of HIV and other STIs

The Crown Prosecution Service (CPS) has launched a public consultation on its 'Policy for Prosecuting Cases involving Sexual Transmission of Infections which causes Grievous Bodily Harm'. The document is available for download at http://www.cps.gov.uk/news/consultations/sti_process.html. All cases prosecuted so far have been for 'reckless transmission' of HIV.

Please respond to this CPS consultation. The deadline for submission of responses is 3 November 2006 at the latest.

Details of where to send responses are available at the beginning of the consultation document.

Criminal prosecution for reckless transmission of HIV involves a fundamental change in the way our society responds to the challenge of HIV. The first prosecution in England and Wales took place in 2003 and since then there has been much debate within the HIV sector and amongst people living with HIV.

Now you have a chance to have your say. This issue is too important to ignore. Anyone can put in their views to the current CPS consultation and we would encourage you to do so. The larger and more diverse the response, the greater will be the authority of the key messages to emerge.

We particularly encourage submissions to the CPS from people living with HIV, HIV organisations, people from the communities most affected by HIV (in particular gay and bisexual men, and African men and women), clinicians, nurses, sexual health advisors and other healthcare workers, health promoters, counsellors, researchers in relevant fields, etc.

Please also note that other STIs in addition to HIV can be prosecuted, so responses will also be important from those who work with or are affected by other conditions which can

be transmitted sexually such as hepatitis C, chlamydia, herpes (Annex A of the consultation paper contains a list of the main types of sexually transmitted infection).

You might find it useful, before drafting your response, to get some background on the law and the arguments around this issue. Both the National AIDS Trust and Terrence Higgins Trust/Sigma Research have produced helpful resources [see www.nat.org.uk/prosecutions and www.tht.org.uk/prosecutions].

General guidance on responding to the consultation

1. Please note that the CPS consultation covers prosecuting policy and practice in England and Wales only, not Scotland or Northern Ireland.
2. The CPS cannot change the law, only decide how and when people should be prosecuted. The CPS (and this consultation) is primarily concerned with when they should, or should not, pursue a prosecution within the current law. Therefore, the main content of your response should comment on the CPS document rather than discuss in general the pros and cons of criminalising reckless or intentional HIV transmission. You can always make more general comments on using the criminal law to prosecute HIV transmission in a 'Part 2' of your response, but be aware that this is unlikely to affect the CPS's decisions.
3. Equally, the CPS are not responsible for police practice in investigating cases, although they may have some influence over this by their decisions about when they are likely to prosecute.
4. Please note that the CPS will assume you are happy for your response to be published unless you tell them you want it to remain confidential. We hope as many responses as possible will be made public.
5. The consultation document ends with a 'consultation questions response sheet'. Please note that whilst these questions are important ones which need to be addressed, you do not have to limit your response to answering these questions but are perfectly free to comment on any other aspect or section of the document. Indeed, we would, as the notes below suggest, encourage you to also take account of other issues. You can simply include answers to the questions in the response sheet within your own overall response, or fill in the form but add to it on additional pages any other comments you might have on the consultation document.
6. It is likely that the CPS will get quite a large number of responses to this consultation. The easier a response is to read, the more likely they are to take good notice of what it says. It is worth taking time to ensure that what you say is clear and addresses the specific points in their document. One possible layout is to address the relevant points in their document in order and by number, and then go on to discuss other

matters you feel they have left out, or could usefully add.

7. If you have had experience of supporting someone through one or more of these cases, it may be helpful to give practical examples to support your points. Any specific information on impacts of these prosecutions on your life or the lives of others, or on your professional field of expertise, would be particularly important to include.

Specific issues to consider in the CPS document

Please note: this is not intended as a template for other people's responses. It is important that you make your own response to the document. However, we hope this will provide some useful pointers to areas where you can influence the CPS and where THT and NAT have concerns. Our full responses will be available at a later date.

1. **Introduction (and throughout) – Section 1** - the document talks a great deal about the "victim". It is important to remember that every person with HIV was infected by someone else, and also that there is a much wider community of interest in these cases, particularly other people living with HIV. Is the repeated emphasis on the 'victim' to the exclusion of any consideration for the vulnerability of the defendant appropriate? It is after all for the court to come to a final view as to whether the complainant is from the point of view of the law actually a 'victim' or not. What do you think of the tone of the document?
2. **Introduction (and throughout) – Section 1** - the CPS are targeting sexual transmission. What is the difference between sexual transmission and other forms of disease transmission? The same harm ensues whatever the route, so is it appropriate that sexual transmission is singled out for prosecution?
3. **The Role of the CPS – Section 2** – There is a reference to the fact that all decisions to prosecute in these cases will be made by the Principal Legal Advisor of the CPS and all decisions not to prosecute approved by the relevant CPS Unit Head [2.4]. It is vitally important that the CPS is properly sensitive to the realities and complexities of HIV. Is this commitment sufficient? What about a commitment to non-stigmatising language by CPS staff and prosecutors both in court and in media relations; and a commitment to the training of relevant staff in understanding of STI transmission, virology, disability equality obligations as they relate to HIV, and other appropriate issues?
4. **The Code for Crown Prosecutors – Section 3** – this section repeats standard CPS information on its rules and processes. There will probably be little point in your challenging the content of this section, though of course it is up to you.

5. **What is meant by intentional and reckless sexual transmission of infection which causes grievous bodily harm? – Section 4** – the explanation of intentional and reckless transmission appears to be in accord with the judgements made by the Court of Appeal in the cases of Dica and Konzani. Any views on the general principle of applying the Offences Against the Person Act 1861 to sexual transmission of disease are probably best made in a Part 2 to your submission rather than in your proposed changes to the CPS policy document.
6. **Establishing recklessness – Section 4 –** at 4.3 the paper states that a relevant factor in establishing recklessness is 'the extent of the defendant's awareness of his/her infection at the time when the sexual activity occurred'. The CPS should make absolutely clear that they will not prosecute anyone who had not received an HIV diagnosis before the time when the relevant sexual activity took place. (Of course, receiving an HIV diagnosis does not necessarily mean that the fact of being HIV positive and its implications are fully understood, as the consultation paper goes on to acknowledge).
7. **Use of a condom (proper usage) – Section 4** – there is a good explanation of how to use a condom properly but little acknowledgment that many people are not aware of all this information. Does using a condom poorly or imperfectly necessarily mean you have been reckless?
8. **Use of a condom (condom breakage and PEP) – Section 4** - the discussion at 4.10 about disclosure following a condom breakage, in its current wording, does not state clearly that no prosecution should take place where there is immediate disclosure with a view to the uninfected person being able to access post-exposure prophylaxis (PEP). Without such a CPS commitment, people might be deterred from advising their sexual partner to access PEP, feeling that the threat of prosecution outweighs the risk of transmission from a single act.
9. **Is There Enough Evidence to Prosecute? – Section 5** – Phrases such as "sexual behaviour" [5.1.iii] fail to distinguish between sexual acts which are acknowledged to have a significant risk of transmission of an STI and others which may not. The point made about use of condoms as a defence against a charge of recklessness in the previous section should be reiterated by the CPS here. The vagueness of the language used also

fails to distinguish between the differing modes of transmission of different STIs. If the CPS is going to prosecute for reckless sexual transmission of disease, shouldn't prosecutions be limited to behaviours where there is consensus of a 'significant' risk of transmission – e.g. in the case of HIV, limited to unprotected anal or vaginal intercourse?

10. **Is There Enough Evidence to Prosecute? (Domestic Violence) – Section 5** – From para.5.7 the CPS attempts to fit these prosecutions into its 'domestic violence' template. Is this appropriate? Apart from cases where there are additional claims of domestic violence in the relationship, we do not believe the comparison to be relevant or helpful. There needs to be much greater acknowledgment in the CPS paper of how distinctive the circumstances and challenges are of prosecuting these cases of sexual transmission of disease. THT and NAT are particularly concerned at the statement in 5.8 that prosecutions could take place against the wishes of the "victim". There are many reasons why someone may not want to pursue a prosecution against the person from whom they contracted HIV e.g. including acceptance of partial responsibility, a reasonable concern of stigma and discrimination following identification as someone with HIV and a belief that a prosecution will not help them get on with their lives. This provision for prosecution without a "victim complainant" is particularly concerning in the light of recent experience of police trawls for possible transmissions where no complaint has been made by an infected person.

11. **Is it in the public interest to prosecute? – Section 6** – the discussion of public interest factors is useful, and we would encourage all respondents to comment on the possible public interest factors outlined. But there are additional factors not mentioned in the document. These include the mental health of the defendant and their ability to understand and come to terms with their diagnosis and the potential contributory negligence of a complainant who may have refused to wear a condom.

12. **Helping victims and witnesses – Section 7** – The discussion at 7.16 of reporting restrictions is welcome; however, there is no recognition of either the equal vulnerability of e.g. the children of an accused where a stigmatised and vertically

transmissible condition such as HIV is involved, or the simple impossibility of hiding the identity of a complainant from their family, friends and local community in cases where a long term relationship is involved.

13. **Helping victims and witnesses – Section 7 – and Sentencing – Section 9** – There are references to the Victim Personal Statement. There are concerns on the use of such statements in these cases given the fact that the perspective someone living with HIV has on the fact of their infection can change significantly as they understand over time how, for example, to live with HIV and the effectiveness of treatments. If the case takes place relatively soon after the complainant has been diagnosed it may be that the statement is less an objective account of the real impact of HIV infection on his or her life than a repetition of widespread stigmatising misconceptions about HIV. There is also reference at 9.1 to the aggravating factor of abuse of trust in cases of assault in domestic settings – is that relevant to these cases?
14. **Conclusion – Section 10** – There is a welcome commitment to continuous improvement in the way such cases are dealt with but no commitment in detail to monitoring arrangements – would some further details of monitoring and review processes be useful?

These are only a few ideas. Once you have read through the document, you will certainly have others of your own.

National AIDS Trust and Terrence Higgins Trust
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