



CPS POLICY STATEMENT AND GUIDANCE ON PROSECUTING CASES INVOLVING THE INTENTIONAL OR RECKLESS SEXUAL TRANSMISSION OF INFECTION

AN INITIAL EXPLANATION FOR HIV SUPPORT ORGANISATIONS AND PEOPLE LIVING WITH HIV

Introduction

On Friday 14 March 2008 the Crown Prosecution Service published a Policy Statement and Guidance for Prosecutors on cases involving the intentional or reckless sexual transmission of infection www.cps.gov.uk. The documents are relevant to England and Wales. All prosecutions to date in England and Wales have been for reckless HIV transmission.

The CPS documents were the product of a long consultation process with which HIV organisations were closely involved. The content of the documents remains the sole responsibility of the CPS. The National AIDS Trust continues to be opposed in principle to the prosecution of reckless HIV transmission (we do not oppose prosecution for intentional transmission). We do, however, believe in a number of areas the CPS documents now provide welcome clarification.

As soon as possible, the National AIDS Trust, with partners such as Terrence Higgins Trust, will provide detailed explanation and guidance on the implications of the CPS prosecution policy for people living with HIV, for organisations who support them and for relevant professionals. But we thought it would be useful to highlight immediately some of the key points to be found in the CPS documents.

We must make clear that this NAT paper does not replace or substitute for appropriate legal advice for anyone who is being investigated or charged in such cases, or who is thinking of making a complaint. Anyone personally concerned about the possibility of prosecution should contact **THT Direct on 0845 1221 200** to be put in contact with expert advice as soon as possible.

The CPS documents deliberately avoid specifying at any point a particular sexually transmitted infection, keeping their advice generic. This NAT paper attempts to identify the implications for HIV of this generic advice. This paper is not an exhaustive account of all the issues but does attempt to explain the circumstances in which someone with HIV could possibly be prosecuted for HIV transmission and relevant defences.

Key points from the CPS Policy Statement and Guidance for Prosecutors

In what circumstances could someone be prosecuted for reckless HIV transmission?

There has to be scientific evidence to support the claim that the defendant infected the complainant.

The CPS make clear that even where the defendant is thinking of pleading guilty scientific evidence is crucial to determine the likelihood of the defendant having infected the complainant. No prosecutions can proceed without such scientific evidence having been produced. The document 'HIV Forensics' (NAT/NAM Feb 2007 <http://www.nat.org.uk/document/230>) provides further information on this important point. The relevant scientific evidence in relation to HIV will ordinarily be 'phylogenetic analysis' of HIV virus samples from defendant and complainant.

Phylogenetic analysis can demonstrate that the defendant was **not** responsible for the complainant's infection [see Guidance para.6.2 and 'HIV Forensics' Summary etc].

Even where a close match between the two samples is demonstrated there may be other possibilities to the defendant having infected the complainant – for example, the complainant having infected the defendant, or they both having been infected by a third party. It means that even where samples are closely linked, 'other evidence needs to be obtained', for example detailed sexual histories of the complainant as well as the defendant, to prove the likelihood that the defendant was responsible for the complainant's infection [Guidance para.6.6].

In summary, the scientific evidence alone cannot conclusively prove the responsibility of the defendant for the complainant's infection but it has to be part of any prosecution case. Defendants should always get expert advice before thinking of pleading guilty to a charge of reckless transmission, particularly in relation to the interpretation of scientific evidence.

The defendant has to have 'known' that he or she was infected when the relevant transmission took place to be convicted of reckless transmission.

In the vast majority of circumstances someone will only 'know' they are infected if they have been diagnosed. The CPS does state that there might be limited circumstances where even without a formal diagnosis someone effectively 'knows' they are infected – for example, where a clinician has given someone a provisional HIV diagnosis and recommended a confirmatory test which the defendant has refused [see Guidance para.6.11 and for other possible examples]. But these additional circumstances would be very rare. In most circumstances if the accused had not been diagnosed, that fact should stop in its tracks any investigation.

The defendant has to have understood that he or she was infectious to other people and how the infection is transmitted.

The CPS make clear that it is not enough simply to prove a diagnosis took place. People are often shocked when diagnosed and do not necessarily take in what they are told [see Guidance paras.6.10, 6.12-14]. The CPS also has to prove (and states it can be difficult) that the defendant had really understood the nature of their infectiousness and relevant risk behaviours.

The complainant must not have known of the defendant's HIV positive status. The informed consent of the complainant to the risk of HIV infection is a defence against a charge of reckless HIV transmission.

The 'informed consent' of the complainant to the risk of HIV infection is a defence and is a matter for the jury to decide [see Guidance paras.5.2 to 5.4]. This will in most cases be proved if it can be shown that the defendant had told the complainant of his/her HIV positive status before HIV transmission occurred. But the CPS do allow other possible ways in which the complainant might have been 'informed' of the defendant's HIV status – whether from a third party, or a hospital visit, or from evident symptoms of infection – and this is not an exhaustive list.

The defendant will not have taken steps to protect their partner from infection. Consistent condom use is a defence against a charge of reckless HIV transmission

The section from para.6.16 to 6.21 refers repeatedly to 'safeguards'. In the context of HIV transmission this refers mainly to condoms, which if consistently used would mean 'it will be highly unlikely that the prosecution will be able to demonstrate that the defendant was reckless', even when infection has nevertheless occurred. Even inappropriate condom usage (for example, an out-of-date condom) can be a defence if it can be shown that the defendant believed in good faith (albeit incorrectly) that the 'safeguard' was appropriate.

The CPS documents are less clear and helpful in relation to condom breakage during sex [see Guidance para.6.20 and 6.21]. The Guidance seems to say that if the condom breaks ('the safeguards cease to be operative') and if then sex continues without the condom and transmission occurs, the defendant could be convicted of reckless transmission unless he or she had, before resuming sex, disclosed their status to their partner (which would then mean the partner had consented to the risk).

It would have been helpful to have had a clear statement from the CPS encouraging people with HIV who have not disclosed their HIV status to their sexual partner, when they notice condom breakage, to advise their partner immediately to access PEP without fear of police investigation and prosecution, and NAT will continue to press for this.

HIV transmission must have taken place. There is no crime of 'attempted reckless HIV transmission'.

In other words, someone with HIV who exposes a sexual partner to the risk of HIV infection without disclosing their status has not committed any crime – an offence only occurs when HIV infection of the sexual partner actually takes place [see Guidance para.7.1].

What is intentional HIV transmission?

Intentional HIV transmission is where someone had purposefully gone out to infect someone with HIV and succeeded in doing so. There has not to date been a

successful prosecution for intentional HIV transmission and such circumstances will be extremely rare, and furthermore immensely difficult to prove. It is worth stating that there is no defence of 'consent' in relation to such a charge. It is also possible to be convicted of a charge of **attempted** intentional transmission. Even in an intentional transmission case, the need for scientific corroboration as set out above applies.

Conclusion

The CPS concludes that 'obtaining sufficient evidence to prove the intentional or reckless sexual transmission of infection will be difficult and that accordingly it is unlikely that there will be many prosecutions' [Policy Statement Conclusion]. This simply underlines the need, in any possible accusation or investigation, for people living with HIV and their support organisations to access expert advice as soon as possible.

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National AIDS Trust