

# **POLICY FOR PROSECUTING CASES INVOLVING THE INTENTIONAL OR RECKLESS SEXUAL TRANSMISSION OF INFECTION**

## **EQUALITY AND DIVERSITY IMPACT ASSESSMENT REPORT**

### **Background**

- 1.1 To date, there have been 11 prosecutions and ten convictions in England and Wales under Section 20 of the Offences Against the Person Act 1861. All prosecutions were based on the reckless transmission of HIV.
- 1.2 In order to produce a policy statement and provide legal guidance to prosecutors a Working Group was convened in September 2005 with the task of developing such documents. The group involved representatives from the Terence Higgins Trust, the National AIDS Trust, UK Coalition of Persons Living with HIV and AIDS and the African HIV Policy Network. The Working Group also included representatives from the Home Office and the Department of Health.
- 1.3 The development of this policy statement and legal guidance is linked to the CPS' strategic theme of inspiring the confidence of the communities we serve and sits within the CPS PSA targets set in the 2004 Spending Review:
  - improve the delivery of justice by increasing the number of crimes for which an offender is brought to justice; and
  - reassure the public, by reducing the fear of crime and anti-social behaviour, and building confidence in the CJS without compromising fairness.
- 1.4 The scope of this Equality and Diversity Impact Assessment (EDIA) is confined to the work and consultations undertaken by the CPS.

### **Methodology**

- 2.1 The methodology applied in this impact assessment was based on:
  - Desk based research
  - Internal consultation, including the CPS Staff Networks: NBCPA, LGBT Network and Enable
  - Consultation via focus groups with community stakeholders and clinicians, academics and health care professionals
  - Wider public consultation
  - Analysis of qualitative responses
  - Analysis of available data in relation to cases prosecuted to date

### **Consultation & Involvement:**

- 3.1 As mentioned in paragraph 1.2 above, a Working Group was convened to oversee the development of the policy statement. The Working Group involved external and internal stakeholders and has met on four occasions to date. Terms of Reference for the Working Group are attached as Annex 1.

- 3.2 A focus group was held with academics and representatives from the voluntary and community sector on 21 December 2005 involving representatives from 15 stakeholder organisations. A second focus group was held on 13 January 2006 involving 12 clinicians, academics and health advisors. Views from these focus groups were taken into consideration in developing the policy proposals. Reports from the focus groups are available upon request.
- 3.3 The draft policy statement issued for public consultation from 1 September 2006 to 3 November 2006 was agreed by the Attorney General, the Director of Public Prosecutions and by members of the Working Group. Approximately 70 responses were received to this consultation.
- 3.4 A significant number of the responses were largely focused on the scientific evidence required to proceed with a prosecution. Therefore, a meeting was convened with members of the Expert Advisory Group on AIDS on 17 August 2007 to establish the extent to which the use of scientific evidence can demonstrate that the strain of infection in the complainant is consistent with the strain in the defendant and that the stages of infection in each are compatible with the assertion that the defendant infected the complainant.

### **Assessment & analysis**

- 4.1 The public consultation resulted in some 70 responses from voluntary and community organisations, charities, academics, medical institutions and universities, expert advisory groups, other government departments and CPS staff.

#### **Positive impacts**

- 4.2 The CPS recognises the importance of, and the need for, consistent decision-making whilst recognising the potential tension that exists between public health and criminal justice considerations. The criminal law exists in part to protect those who are the victims of unlawful conduct by others [including the unlawful sexual transmission of infection] and the role of the CPS is to apply the criminal law and prosecute individuals where the tests set out in the Code for Crown Prosecutors are satisfied.
- 4.3 The development of the policy has involved a range of community groups working together to dispel myths about sexually transmitted infections and to share advice about how to support people, both victims and defendants, who become involved in the prosecution process.
- 4.4 The policy statement makes clear that the perpetrator for these offences could come from any community and the CPS will firmly prosecute such cases regardless of the ethnicity, disability, gender, sexuality or age of the perpetrator.
- 4.5 The draft policy issued for consultation has been substantially revised following public consultation and the final policy can be genuinely described as a consultation informed policy.

#### **Potential adverse impacts**

- 4.6 Available epidemiological data indicates that HIV in particular impacts upon Black African communities and therefore any policy to prosecute such cases may in implementation disproportionately impact those of Black African origin. However, such disproportionality does not equate with discrimination or unjustified adverse impact: it reflects current prevalence rates which have an uneven social distribution. There are estimated to be more than 8,000 African people living with diagnosed infection in the UK. In addition several thousand more African people living in the UK have undiagnosed HIV infection since studies have shown that around two thirds of African people in the UK have never tested for HIV<sup>1</sup>. There have been 11 cases to date (with ten convictions); in the first three cases the defendants were Black African men with either refugee or asylum seeker status. All three defendants were recommended for deportation upon completion of their sentences. Although the number of cases has been few and any evidence of disproportionality would not be statistically significant, the profile of the first few defendants could be a cause for concern.
- 4.7 Defendants who have refugee or asylum seeker status may face deportation on completed of their sentences (if convicted) and may not have access to their required medication in their countries of origin.
- 4.8 Consideration must be given to disabled defendants, particularly those with living with learning difficulties or mental health problems. People living with learning difficulties may not understand the risks of transmission following a diagnosis of a sexually transmitted infection.
- 4.9 Submitted qualitative data indicates that some women may be reluctant to disclose that they have acquired a sexually transmitted infection due to the fear of domestic violence, or fear of social ostracism, cultural isolation, the loss of support of family and friends, and even access to their children.
- 4.10 Submitted qualitative data indicates that certain communities would fear disclosure of a sexually transmitted infection due to their religion or belief and fear of social ostracism.
- 4.11 Available epidemiological data indicates that HIV in particular impacts upon gay men and other men who have sex with men, and therefore any policy to prosecute such cases many in implementation disproportionately impact upon gay men and other men who have sex with men. However, such disproportionality does not equate with discrimination or unjustified adverse impact: it reflects current prevalence rates which have an uneven social distribution. Recent prevalence data indicates that an estimated 63,500 adults were living with HIV in the UK at the end of 2005, of whom 20,100 (32%) were unaware of their infection. In 2006, there were at least 7,093 new diagnoses of HIV, contributing to a cumulative total of 88,627 reported by the end of June 2007<sup>2</sup>. Men who have sex with men remain the group at greatest risk of becoming infected. By the end of June 2007, 39,593 men who have sex with men have been diagnosed with HIV in the UK, including those who have died. It has been estimated that, at the end of 2005, about 44% of all people living with HIV in the UK were men who had sex with men<sup>3</sup>. Submitted qualitative data indicates indicated that social stigma and discrimination,

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<sup>1</sup> African HIV Policy Network [www.ahpn.org](http://www.ahpn.org)

<sup>2</sup> AVERT [www.avert.org](http://www.avert.org)

<sup>3</sup> *ibid*

including the perception that certain sexually transmitted infections, e.g. HIV, are linked to gay men or other men who have sex with men.

- 4.12 Qualitative data received indicated that young people experience a disproportionate level of non-HIV sexually transmitted infections. In many young people it appears alcohol is a significant factor that inhibits condom use, and is also a factor in the decision to have sex. In addition, younger or vulnerable individuals may find it difficult to negotiate safer sex.
- 4.13 The first three cases involved Black African men with refugee or asylum seeker status as defendants. Two cases involved men who have sex with men and two cases involved female defendants who were both convicted. The majority of the cases have been male to female transmission and all these cases have resulted in convictions. There was some concern that this policy had the potential to result in disproportionality in charging decisions and prosecutions with respect to gender, race and sexual orientation. However, as more cases have been prosecuted, there appears to be less evidence of disproportionality in terms of race, gender and sexual orientation. However, the number of cases remains low (currently 11 prosecutions with ten convictions) and therefore any conclusions must remain tentative.

## **Recommendations**

- 5.1 The CPS recognises that those affected by the sexual transmission of infection often face many difficulties in reporting the incident to the police and then supporting any prosecution at court that may follow that report and that barriers exist which mean that some people are less likely to report offences. In order to help the complainant through the difficult experience of giving evidence in court the prosecutor will ensure that the complainant is aware of the special measures that can be applied for at court to provide a more secure environment in which the complainant may give their evidence. The CPS recognises that in cases involving the sexual transmission of infection, the complainant may be particularly vulnerable and will not wish to be identified by the media and therefore the prosecutor will carefully consider the option of applying for an order preventing the reporting of certain details of the complainant in the media that may lead to their identification.
- 5.2 Due consideration must be given to the kind of advice and the recipient's comprehension of the clinical or medical advice received. This is particularly relevant given the cultural diversity of Black and minority ethnic communities who may face linguistic/cultural barriers to behaviour change messages and understanding of perceived risk; this will be equally relevant to defendants living with learning difficulties and some young people who may not have received adequate sexual health education.
- 5.3 We will not accept a plea unless there is scientific and factual evidence which proves the contention that the defendant deliberately or recklessly and actually transmitted the infection to the complainant. The policy will be applied with strict adherence to the Code for Crown Prosecutors. The fact that the defendant says that they did and that they intended so to do is not sufficient to meet the Code's evidential test. There has to be other factual evidence to support our case.

- 5.4 Defendants and victims will be monitored by race, gender, disability and religion or belief (as with all cases). HIV in Britain today has an uneven social distribution with highest prevalence rates amongst specific communities and groups, in particular, Black African communities, gay men and other men who have sex with men. In this wider context we are acutely alert to the potential for unjustified differential impact in prosecutions. The CPS needs to monitor the implementation of the policy to ensure that unjustified disproportionality does not flow from the application of the prosecution policy per se. If the monitoring data were to indicate that Black or minority ethnic people were prosecuted disproportionately to their representation in the prevalence population, then the CPS would need to analyse that data carefully and address any unjustified adverse impact that is found. If the monitoring data were to indicate that gay men, and other men who have sex with men, were prosecuted disproportionately to their representation in the prevalence population, then the CPS would need to analyse that data carefully and address any unjustified adverse impact that is found. Although currently, the CPS does not record the sexuality of victims or defendants, it is proposed that these cases will be recorded manually and therefore details of the profiles of the victim and defendant should be obtained from the case files.
- 5.5 As these offences are highly sensitive and to ensure consistency of approach, all cases in which a charge of sexual transmission of infection might be preferred should be notified to the Director's Principal Legal Advisor through the Area's Head of the Complex Casework Unit (CCU), where there is one, or through the Chief Crown Prosecutor (CCP) where there is not. This includes cases where the local prosecutor does not consider there to be sufficient evidence. The reviewing lawyer must provide a synopsis of the evidence and a recommendation regarding the appropriate course of action to take which must be considered and endorsed by the CCU Head or CCP.

**Date of EDIA Report**

31 August 2007

**Date of Publication of Results**

## **ANNEX 1**

### **Transmission of Serious Disease Project Board**

#### **Terms of Reference<sup>4</sup>**

##### **Purpose of the Project Board**

The Project Board will be responsible for overall project guidance and assistance and to ensure that the project achieves the expected benefits within the agreed costs, quality and timescale. The Project Board will be chaired by Ed Beltrami, (CCP North Wales)

##### **Role of external members**

- Bring knowledge and expertise from their respective field to the group
- Contribute fully at meetings
- Attend meetings or send a deputy
- Constructively challenge CPS methods and thinking regarding the development of the policy statement and guidance.
- Guide and support the work of the Board to achieve best practice
- Act as a conduit for information between the Board and their respective stakeholders
- Bring issues to the group for consideration, potentially through producing issues papers

##### **Role of CPS**

- The CPS will be ultimately responsible for producing the CPS policy statement and guidance on the transmission of serious diseases whilst seeking to do this in consultation with external members of the group
- Brief members on the purpose of the group and the wider role of CPS to enable them to fully participate and confidently contribute
- Ensure meetings provide for an open and honest debate
- Give appropriate timescales for consultation on written documents and circulate these in an accessible format
- Ensure that CPS undertake the actions arising from meetings and keep to deadlines
- Keep members fully informed of progress, related issues/developments and changes

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<sup>4</sup> These Terms of Reference were agreed at the Working Group meeting on 19 September 2005.