

11 February 2015

Professor David Ormerod QC
Commissioner for Criminal Law
Law Commission
1st Floor
Tower
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Dear Professor Ormerod

Reform of Offences Against the Person: A Scoping Consultation Paper

Thank you for your letter inviting BHIVA to comment on this consultation. Please see below for the remarks from the Association.

The British HIV Association (BHIVA) is the leading UK association representing professionals in HIV care, serving as a national advisory body on all aspects of HIV care and related issues. It is committed to the development and promotion of good practice in the treatment and prevention of HIV and HIV-related illnesses.

BHIVA believes that the application of the law related to Offences Against the Person to the reckless transmission of HIV and other sexually transmitted infections is unhelpful and potentially harmful to public health. Along with a number of other stakeholders we have contributed to the working groups on CPS Legal Guidance, which provides a helpful framework for prosecuting such cases appropriately insofar as current case law will allow. However this still falls short of the UNAIDS (preferred) recommendation to limit the use of criminal law to cases of intentional transmission of HIV.

This is a complex issue which the Law Commission have clearly engaged with in devoting a separate chapter to transmission of disease. We will limit our comments at this stage to the consultation questions within this chapter but would wish to provide further detailed comments in any future full review of Offences Against the Person.

Question 33

We consider that future reform of offences against the person should take account of the ramifications of disease transmission. Do consultees agree?

BHIVA agree that any future reform should take account of disease transmission. Current case law has been built upon the law governing Offences Against the Person so it is important to consider how, if at all any such reform should apply to disease transmission. This must take account of individual rights and the wider public health agenda.

Question 34

We also consider that in such reform consideration should be given to:

- (1) whether disease should in principle fall within the definition of injury in any reforming statute that may be based on the draft Bill;***
- (2) whether, if the transmission of sexual infections through consensual intercourse is to be excluded, this should be done by means of a specific***

exemption limited to that situation. This could be considered in a wider review; alternatively

(3) whether the transmission of disease should remain within the offences as in existing law.

Do consultees agree?

BHIVA believe that any reform should strongly consider full alignment with the UNAIDS recommendation regarding HIV that only intentional transmission be prosecuted. To include disease within the definition of injury regardless of whether transmission was intentional or reckless would leave considerable scope for prosecutions related to reckless transmission of a wide range of diseases e.g. TB. Such an approach would be unpractical and could cause considerable harm to public health. Excluding transmission of sexual infections through consensual intercourse is similarly problematic as non-sexual transmission of disease including HIV e.g. by sharing injecting equipment or breast feeding could still be prosecuted. This would also require a more detailed consideration of consent issues which is not currently within the remit of this work.

Question 35

If the transmission of disease is to be included in any future reform including offences causing injury, it will be necessary to choose between the following possible rules about the disclosure of the risk of infection, namely:

- (1) that D should be bound to disclose facts indicating a risk of infection only if the risk is significant; or***
- (2) that D should be bound to disclose facts indicating a risk of infection in all circumstances; or***
- (3) that whether D was justified in exposing V to that risk without disclosing it should be a question for the jury in each particular case.***

Do consultees have any preference as to these possible rules?

Although the phrasing of this question links to the current CPS prosecution guidance, it is somewhat confusing to include the issues of disclosure and level of risk in the same question. Disclosure of the risk to infection is currently not a legal requirement in itself and BHIVA would not support any legal requirement to disclose HIV status. Disclosure of HIV status is complex and fraught with difficulty and many individuals need significant support to do so. Non-disclosure per se does not indicate a disregard for others when reasonable protective measures are taken to prevent transmission. Additionally, there are instances where non-disclosure may be justified even in the absence of such protective measures as alluded to at 6.94 in the consultation paper. HIV stigma and discrimination continues in the UK and remains a significant factor in late diagnoses of HIV and non-engagement in HIV services. A legal requirement for disclosure to take place risks further stigmatization of already vulnerable and marginalized groups and any legal changes must be considered in the light of public health and the overall goal of reducing HIV infections. It is highly unlikely that a requirement to disclose HIV status will reduce onward transmissions. For example, disclosure does not necessarily mean sexual activity will cease and HIV negative individuals may take less protective measures and simply rely upon active disclosure of infection. This is problematic given that most new infections are transmitted in the early stages of HIV when the HIV load in blood is extremely high and most individuals are unaware of their infection.

Although BHIVA would advocate prosecuting only cases of intentional HIV transmission if reckless transmission remains within the law then the level of risk is clearly important and needs to be clarified. The CPS have gone some way to doing this in their prosecution guidance and any future reforms must ensure that there is clear guidance not to prosecute when the risk of transmission is considered very small. It should not be left to individual juries to decide whether the level of risk in a specific case was acceptable or not as this will lead to considerable inconsistency and injustice.

Question 36

We consider the reform of offences against the person should consider the extent to which transmission of minor infections would be excluded from the scope of injury offences. Do consultees agree?

Yes BHIVA agree that consideration should be given to excluding minor infections from the scope of injury offences.

Question 37

Do consultees consider that future reform should pursue the possibility of including offences of transmission of infection, endangerment or non-disclosure?

BHIVA does not support the pursuance of such specialised offences which would be counter to UNAIDS recommendations. Provision for intentional transmission of disease can be included in these reforms. We have outlined our position relating to disclosure of HIV status in the response to question 35. Furthermore we would not support an offence of endangerment; HIV positive individuals do not pose a risk to the general public and we believe that the low risk of transmission per sex act does not justify such a punitive response. This is also likely to increase stigmatisation of individuals infected with HIV.

Question 38

Do consultees have observations on the use of ASBOs, SOPOs or other means of penalizing non-disclosure?

BHIVA does not support the use of such orders in cases of HIV transmission and strongly oppose these as penalties for non-disclosure. Transmission of HIV per se is not a sexual offence so the use of SOPOs is wholly inappropriate. We also consider the use of ASBOs to be inappropriate being disproportionate to both the offence (in current law) and the low risk of transmission per sex act. It is also extremely difficult to see how such an order would be enforced without a complete disregard for the rights of the individual issued with such an order.

With kind regards

Yours sincerely

Dr David Asboe
Chair, British HIV Association (BHIVA)