

INTENTIONAL OR RECKLESS SEXUAL TRANSMISSION OF, OR EXPOSURE TO, INFECTION

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Introduction

This guidance sets out how prosecutors should deal with cases involving an allegation of intentional or reckless sexual transmission of, or exposure to, infection which has serious, potentially life threatening consequences for the person infected. In developing this guidance, the Crown Office and Procurator Fiscal Service (COPFS) has consulted with the public health sector and has benefited substantially from their input and expertise. Their advice has been greatly appreciated, however, the content of this policy statement remains the responsibility of the COPFS.

There have been very few prosecutions in Scotland involving intentional or reckless transmission of, or exposure to, sexually transmitted infection. Although previous prosecutions have involved HIV infection, this policy is not restricted to HIV and applies to any sexual infection which could have serious, potentially life threatening consequences for the person infected.

Annex A provides details of previous prosecutions. The prosecution of Mark Deveraux in 2010, for the culpable and reckless transmission of, and exposure to, the Human Immunodeficiency Virus (HIV) attracted some concern from the public health and HIV sector due to the prosecution of charges where there was no transmission of the infection to the victim. One concern was that the threat of prosecution, particularly in circumstances where no resultant infection occurs, could prevent people at risk from sexually transmitted infection coming forward for testing.

COPFS recognises the strong public interest in encouraging persons who may be at risk from any sexually transmissible infection to seek early medical advice and to be tested. The majority of infections respond well to medical intervention and early diagnosis will ensure that an individual receives appropriate treatment. It is recognised that persons who seek medical testing and receive treatment, if necessary, are acting responsibly and this policy acknowledges and supports a preventative public health policy of early testing and treatment.

COPFS is publishing this guidance because it is recognised that it is important to provide clarity on the law of Scotland as it applies to the intentional or reckless sexual transmission of, or exposure to, infection. It is also recognised that there is a need for consistent decision making and transparency in understanding the reasons for those decisions. For that reason all cases of sexual transmission or exposure will be reported to specialists at the National Sexual Crimes Unit at Crown Office.

This prosecution policy will be reviewed regularly to ensure that any legal or medical developments are properly reflected in the policy.

While acknowledging that there can be tensions between public health and criminal justice considerations, the role of the prosecutor is to properly apply the criminal law of Scotland and prosecute individuals where it is in the public interest to do so; taking account of all the circumstances and available evidence in a case, the rights of victims to be protected by the law, public health concerns, the rights of the accused, and Convention rights.

While it would be desirable for prosecution policy to be the same in Scotland as in England and Wales, differences in the criminal law and evidential requirements in Scotland mean that it is not possible to adopt an identical policy. The legal differences are outlined in this document. However, where possible, COPFS has sought to reconcile our policy and practice with the policy in England and Wales. The Crown Prosecution Service (CPS) in England and Wales published a statement on its Policy for Prosecuting Cases Involving the Intentional or Reckless Transmission of Infection in August 2008, updated in July 2011.

The Legal Position in Scotland

The following is a statement of the current law of Scotland as it applies to reckless transmission or exposure.

The crimes relevant to the intentional or reckless transmission of, or exposure to, sexually transmitted infections, in Scotland are assault and the offence commonly known as 'culpable and reckless conduct'.

If there is evidence that an accused person **intentionally** infected the victim, the appropriate crime is assault.

If there is no evidence of intent to cause harm but rather evidence that indicates criminal recklessness, then the appropriate crime is culpable and reckless conduct. The leading case of *Harris v HMA 1993 SCCR 559* defines the crime of culpable and reckless conduct and considers two situations involving the crime of culpable and reckless conduct; culpable and reckless conduct to injury and culpable and reckless conduct to the danger of injury.

The case of *MacAngus and Kane v HMA 2009 SCCR 238* which is a full bench decision, further considers the offence of culpable and reckless conduct. Although this case concerns culpable homicide as a result of the supply of illegal drugs it examines the concept of recklessness and causation, specifically the knowledge and actions of both parties at the time and whether the actions of the accused were reckless in the circumstances.

The standard of recklessness required for the crime of culpable and reckless conduct is high and mere negligence is not sufficient. "Recklessness" is defined in the case of *Paton v HMA 1936 JC 19* as conduct that is "*gross or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences*". There must be injury to another or danger of injury to another but there is no requirement to prove specific intent to cause injury in a charge of culpable and reckless conduct.

Proof of Culpable and Reckless Conduct

In the context of sexually transmitted infections, the crime of culpable and reckless conduct would be considered in circumstances where there is insufficient evidence to infer that the transmission to the victim was intentional but the facts and circumstances point to the accused having the necessary degree of recklessness as described above.

The essential facts which must be proved in such cases are that:

- (a) the victim has contracted the infection from the accused;
- (b) the accused has knowledge that he/she has the infection; and
- (c) the accused acted with the requisite degree of recklessness.

The fact that the accused has the infection need not be corroborated but the alleged reckless conduct, which would include knowledge of having the infection and the reckless transmission of the infection by the accused to the victim must be corroborated. Identification of the accused as the source of the infection in cases of transmission must be corroborated.

(a) The victim has contracted the infection from the accused

Evidence will be required to demonstrate that the accused has the infection and that the victim has contracted the infection from the accused. COPFS will need to be satisfied that the victim was not infected by another person or by any other means. This may involve the victim disclosing their relevant sexual history so that it can be shown that only the accused could have transmitted the infection

The medical and scientific considerations referred to below require to be taken into account when assessing whether there is sufficient evidence to establish that the accused has the infection and that the victim has contracted the infection from accused. Specifically, phylogenetic analysis is essential before taking proceedings. **There is insufficient evidence to proceed if the scientific evidence disproves a link between the infections.**

(b) Knowledge

Evidence of knowledge will usually take the form of a diagnosis being communicated to the accused prior to the alleged transmission and infection occurring.

Knowledge can, however, be inferred from other circumstances. It is possible that a person can have the requisite degree of knowledge that he or she is infected without undergoing the necessary medical tests. This will be a question of fact and it is not possible to provide an exhaustive list of the circumstances from which it will be possible to conclude that the person knew they were infected. In such cases, the prosecution will need to look for evidence of what might be described as "wilful blindness" on the part of the accused or a "deliberate closing of the mind" to the fact that they are infected and infectious. This will depend on the particular facts and circumstances of each case. For example, simply refusing an offer of a routine screening test for sexual infection is, in the absence of other evidence, unlikely to constitute evidence of "wilful blindness". However, evidence that the accused has had a preliminary diagnosis from a clinician who has recommended a formal confirmatory test for presence of the sexual infection but that the accused has failed to act on that recommendation or that the accused is exhibiting clear symptoms associated with the sexual infection from which it is reasonable to infer that they must have known that they were infectious or evidence that one of the previous sexual partners of the accused has since been diagnosed with a sexually transmitted infection and communicated that to the accused and the circumstances point to the accused being the source of that infection may constitute evidence of "wilful blindness".

The presence of one, or a combination, of these and other factual circumstances may be sufficient to allow the prosecution, and ultimately the court, to infer that the accused had the requisite degree of knowledge. These cases are likely to be rare. However, those who choose not to be tested will not necessarily escape prosecution for reckless sexual transmission of an infection if all the circumstances clearly point to the fact that they had the requisite degree of knowledge that they were infected.

(c) Recklessness

(i) Reckless Exposure of the Infection

Unlike England and Wales, the crime of culpable and reckless conduct is a distinct crime in Scotland. This offence covers situations where the conduct does not result in any actual injury but there is danger of injury to others and the accused exhibits criminal recklessness.

While recognising that culpable and reckless conduct to the danger of others is potentially criminal, in cases involving exposure to sexually transmitted infections, where there has been no resultant transmission of the infection, prosecution for the crime of culpable and reckless conduct would only be contemplated in exceptional circumstances.

For example, a prosecution may be raised in cases where an accused embarks on a flagrant course of conduct, having unprotected intercourse with several partners, failing to disclose his or her infection status, but through good fortune alone, fails to transmit the infection.

In particular cases, the prosecution may require to libel charges of culpable and reckless conduct involving exposure alone, along with a charge of reckless transmission, to allow the prosecution to lead relevant evidence of past or subsequent reckless behaviour capable of supporting the assertion that the accused had the necessary intention or recklessness for the charge involving transmission. In Scotland, prosecutors are precluded from leading such evidence unless fair notice is provided to the accused by libelling the crime or crimes covering such conduct on the indictment. This requirement of fair notice in Scots Law does not apply in England and Wales.

(ii) Requisite Degree of Recklessness

In determining whether a person has the necessary recklessness, the totality of all the facts and circumstances must be taken into consideration. Evidence of the following factors will mean that it is unlikely that the requisite degree of recklessness will be established.

- The person infected is receiving treatment and been given medical advice that there is a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts
- The person infected took appropriate precautions such as using a condom or other safeguards throughout the sexual activity.

With regard to HIV, there is a body of medical opinion that there is minimal or negligible risk of transmission when plasma viral load is below 50. **Annex B** provides further details regarding the medical and scientific opinion.

In cases of exposure alone, and in view of the negligible risk of transmission, there is a very strong presumption against prosecution in these circumstances.

In all cases, there must be careful assessment of the exact nature of the medical advice given and whether the advice regarding treatment, medication and precautions to be used, was followed. Expert medical opinion (either from a virologist or a bacteriologist) must be sought on the risk of transmission in these circumstances.

Each case will be considered on its merits but prosecutors should take a reasonable and practical view as to the extent to which recklessness remains where the suspect took appropriate safeguards which in the event became inoperative during sexual activity.

Medical and Scientific Considerations

Transmission can occur between a man and a woman, between two men, and between two women. An infection may pass from either person engaging in sexual activity including in either direction during penetrative sex.

Sexually transmitted infections may be bacterial or viral and the means by which infections are transmitted vary. Some sexually transmitted infections may be passed through semen or blood or a combination of both. There may be different rates of likely infection depending on the characteristics of the particular infection and the medium by which it is transmitted.

Because of the different nature of each sexually transmitted infection, the scientific and medical evidence required for a prosecution will depend on the facts of each case. Detailed scientific and medical evidence will always be required in cases where transmission has occurred in order to demonstrate that the accused sexually transmitted the specific infection to the victim. The nature of this scientific and medical evidence will depend on the type of sexually transmitted infection concerned. Prosecutors require to have a clear understanding of the mediums by which, and of the ways in which, any particular infection can be passed when considering the evidence required to prove how the infection was in fact transmitted - and therefore whether it was passed by the accused.

Although the scientific and medical evidence will only ever form part of a case against an accused person, a strong factual case surrounding the scientific and medical evidence is essential. In the case of some infections, the scientific and medical evidence can demonstrate with certainty that the accused did not infect the victim because the two people concerned have different strains of the infection. However, scientific and medical evidence cannot prove unequivocally that the accused did infect the victim.

In such circumstances, at best, the scientific and medical evidence may demonstrate that the strain of the infection in the victim is consistent with the strain in the accused and are compatible with the allegation that the accused infected the victim.

Use of Experts

Given the medical and scientific complexities associated with the sexual transmission of infections, in particular HIV, it will be necessary to use expert medical opinion to establish the necessary standard of proof. In cases where transmission has occurred, an expert (bacteriologist or virologist) will be required to give evidence that phylogenetic analysis of samples of the victim and accused produced a result consistent with transmission between the two individuals concerned.

An evidential difficulty would arise if the virus was a totally different strain. This is because the HIV virus exists in different strains, and if the strain is different from transmitter to receiver, it is most unlikely to have been transmitted by the person accused of culpably and recklessly transmitting the virus.

In summary, an expert bacteriologist or virologist can be used to eliminate potential suspects with certainty and can confirm that results are consistent with the accused having transmitted the infection to another but they cannot provide definitive proof of transmission between two specific individuals, nor indicate the direction of transmission.

Determining Whether Prosecution is in the Public Interest

Once satisfied that there is a sufficiency of evidence to prove knowledge and transmission (or in exceptional circumstances risk of transmission) by the accused, prosecutors must decide whether prosecution is in the public interest. This requires careful consideration of all the facts and circumstances of the case.

When considering all the facts and circumstances of a particular case, some factors will have more significance and weight in determining whether criminal proceedings would be in the public interest. For example, a prosecutor is likely to attach significant weight to the fact that the accused took precautions such as condoms or that the accused was acting in accordance with medical advice.

Factors Tending Against Prosecution

Consent by the Victim

Consent on the part of the victim to the conduct, even if instigated by the victim, is not a defence to a charge of assault or culpable and reckless conduct in Scots law¹.

¹ *HM Advocate v Rutherford* 1947JC 1, 1947 SL3 (murder); *Smart v HM Advocate* 1975JC 30; 1975 SLT 65 (assault); and *Finlayson v HM Advocate* 1979JC 33, 1978 SLT (notes) 60 (culpable homicide by

However, in the context of sexually transmitted infections, there is a strong presumption against prosecution where the prosecutor is satisfied that all of the following factors apply:

- There is evidence that the victim had knowledge and understanding of the accused's infection status and the risk of transmission in the type of sexual activity undertaken.
- The victim freely consented to undertake that risk
- There is no evidence to suggest that the victim is vulnerable or has been coerced, exploited or had any form of control exerted over him or her. This would include consideration of the comparative age of the parties involved; any power imbalance between the parties, overt aggression, manipulation, coercion or bribery, or misuse of substances as a disinhibitor.
- There are no other circumstances to suggest that the consent was either not fully informed or freely given.

Although there is no defence of consent to a charge of culpable and reckless conduct, a strong presumption against prosecution is also appropriate on the basis that it is highly unlikely that the requisite standard of criminal recklessness would be achieved in circumstances where the victim gave their informed consent and free agreement to sexual activity in the knowledge of the risk of transmission of infection. This would also apply where the victim freely chose not to use any precautions such as condoms.

Particular Vulnerabilities of the Accused

When dealing with these types of cases it should be recognised that there may be particular vulnerabilities on the part of the accused which have materially contributed to their actions. For example, any power imbalance between the parties, overt aggression, manipulation which has led the accused to agree not to use safeguards or not to disclose that they had a particular infection.

Use of Precautions

Where a person has used appropriate safeguards to prevent transmission.

Medical Advice

The person infected is receiving anti-retroviral therapy treatment and has been given medical advice that there is a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts.

Factors tending in favour of prosecution

Deliberately Misleading or Concealing Information from a Partner

injection of a controlled drug causing death) and *Khaliq v HM Advocate* 1983 S.C.C.R. 483 (selling glue sniffing kits to children).

If the victim had asked the accused specific questions about the risk of infection and had been deliberately misled this would be a factor weighing in favour of prosecution, particularly if it was clear the accused had knowledge and was attempting to conceal the risk from the victim.

Particular Vulnerabilities on the Part of the Victim

If there is evidence to suggest that the victim is vulnerable or has been coerced, exploited or had any form of control exerted over him or her. This would include consideration of the comparative age of the parties involved; any power imbalance between the parties, overt aggression, manipulation, coercion or bribery and the misuse of substances as a disinhibitor.

Evidence of a Course of Flagrant Conduct

Repeated instances of unprotected intercourse, with either the same or multiple partners, where there is a history of failure to disclose the risk of infection, would be a factor in favour of prosecution, even where no transmission resulted.

The above list of factors which may be taken into account is not exhaustive and in determining whether a prosecution should be raised in the public interest, consideration must be given to all the mitigating and aggravating circumstances of the case, including the impact upon the victim, the accused and the wider public health concerns. For example, there may be issues surrounding confidentiality and the victim's desire not to have sexual orientation, practices or relationships exposed in public. Therefore, the impact upon the victim must be considered sensitively.

COPFS process to be followed where proceedings are raised

If, having given full consideration to the evidential requirements, the public interest and public health considerations set out above, the Procurator Fiscal is satisfied that there is sufficient evidence and that criminal proceedings are in the public interest, a report should be submitted to the National Sexual Crimes Unit (NSCU) in Crown Office with a recommendation that criminal proceedings should be commenced. Any scientific or medical issues in relation to proving that the virus was recklessly transmitted by the accused or that there was exposure which created a risk, should be highlighted along with any factors which may be relevant to prosecution.

Legal Position in England and Wales

There are two crimes available to the Crown Prosecution Service in England and Wales for the prosecution of intentional or reckless sexual transmission of infections. These are sections 18 and 20 of the Offences against the Person Act 1861. Section 18 is the intentional infliction of grievous bodily harm by one person on another and section 20 is where a person inflicts grievous bodily harm upon another without intending to do so (that is, where they are 'reckless'). Both crimes require the infliction of

bodily harm. It is this requirement of proving infliction of bodily harm for both of these crimes that precludes the CPS from prosecuting a person for reckless exposure, where there has been no transmission of infection.

For the purpose of proving the crime of reckless transmission of infection, the CPS guidance confirms that "Recklessness" in this context is defined as meaning "that a defendant foresaw that the complainant may contract the infection through sexual activity and still went on to take that risk". Once the prosecutor is satisfied that the suspect has foreseen the risk of infection, the 'reasonableness' of taking such a risk must be considered. 'Reasonableness' is dependant upon the circumstances known to that person at the time he or she decided to take the risk.

If the prosecution can prove that the defendant intended sexually to transmit an infection to a person but failed to do so, a charge of attempting to commit section 18 may be brought.

Overview of the Guidance

Prosecution will be unlikely where the following circumstances apply:

- The accused did not know that he/she was HIV positive
- The accused did not understand how HIV is transmitted
- The accused disclosed his or her HIV positive status to the victim
- The accused took reasonable steps to reduce the risk of transmission, for example, by using recommended precautions or avoiding higher risk acts
- The accused was receiving treatment and had been given medical advice that there was a low risk of transmission or that there was only a negligible risk of transmission in some situations or for certain sexual acts

Prosecution will be likely where the following circumstances apply:

- The accused deliberately misled or concealed information from the victim
- The accused did not attempt to reduce the risk of transmission, for example by failing to take prescribed medication or by failing to follow particular medical advice
- The victim was particularly vulnerable in some way
- There is evidence that the accused had intentionally embarked on a course of flagrant conduct

Conclusion

As the independent prosecution service for Scotland acting in the public interest, COPFS must have regard to the existing case law, the current relevant medical or scientific evidence and any mitigating or aggravating factors that exist, in determining whether there is sufficient evidence that a crime of culpable and reckless transmission or exposure has been committed and whether criminal proceedings are in the public interest.

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Crown Office and Procurator Fiscal Service
1 May 2012

ANNEX A

SUMMARY OF CASES PROSECUTED IN SCOTLAND

In Scotland there have been 3 prosecutions and convictions involving the transfer of, or exposure to, the HIV virus. The first two cases were **HMA – v- Stephen Kelly** in 2001 (HIV only) and **HMA –v- Giovanni Mola** 2007 (HIV and Hep C) In both of these cases the complainer had not chosen to lead a lifestyle that would raise the risk of contraction of the HIV virus, and it was proved in evidence beyond doubt that the accused was responsible for passing on the infection to the complainer. In the case of **Kelly** the accused had admitted he had infected the complainer prior to his being prosecuted. In the case of **Mola**, the complainer had been a virgin prior to meeting the accused, and the Crown had the benefit of leading scientific evidence that proved the accused and the complainer shared the same strain of the HIV virus; putting the proof of one of the essential facts in a prosecution of this nature, that the accused had transmitted the infection to the complainer or exposed them to risk, beyond reasonable doubt. The third case, **HMA v Mark Deveraux, in** 2010 involved 4 complainers, 3 of whom were not infected but were exposed to the risk of transmission. However there was evidence to support the assertion that the accused had been criminally reckless in relation to risk of transmission to all complainers and he accepted this and pled guilty by s76 indictment. The prosecution against Mark Deveraux for culpable and reckless transmission of the HIV virus attracted media attention and considerable concern from the medical and HIV sector. Concern focussed mainly upon the fact that the prosecution involved charges where there had not been actual transmission of the infection to the victim. However, in the particular circumstances of that case, the criminal standard of recklessness was sufficiently capable of being proved and was accepted as being so proved by Mr Deveraux and his legal adviser, when a plea of guilty was tendered by section 76 procedure. Therefore cases of exposure may be rare but are capable of meeting the legal tests laid down in *Harris v HMA 1993 SCCR 559* and *Paton v HMA 1936 JC 19*

ANNEX B

HIV viral load contained in the plasma of blood and in genital secretions is the most important factor in the transmission of HIV.

Successful highly active HIV therapy (ART) reduces plasma viral load to below the level of detectability of most currently used laboratory assays (<50cpml) and at these levels, HIV transmission is extremely rare.

Analysis of 11 cohorts including 5021 heterosexual couples, where one partner was HIV positive and taking ART treatment, showed no case of transmission where one partner had an undetectable viral load below 400 copies/ml and who was receiving ART. Occasional transmission occurred in those couples where the HIV positive partner was below this level but not receiving ART.

A multinational randomised controlled trial showed a 96% reduction in the risk of HIV transmission in heterosexual couples in which the infected partner was given immediate ART, compared to a group where ART treatment was deferred and the single linked transmission in the treated group is thought to have occurred before the plasma viral load became undetectable.

The issue of HIV transmission at low plasma viral loads has been extensively discussed in the recent literature. Most recent international commentary accepts that the likelihood of HIV sexual transmission is extremely low if the plasma viral load is suppressed. The overall risk of transmission through vaginal sex on effective ART has been estimated at lower than 1:100,000 sexual acts and is comparable to, or lower than the transmission risk with reliable condom use in untreated individuals. However, a negative plasma viral load cannot always be considered as a marker of an undetectable seminal viral load. Reports of semen/plasma viral load discordancy are consistent with very occasional case reports of HIV transmission with undetectable plasma viral load. One model suggests that there is a low but definite number of transmissions over a period of time. The risk is thought to be higher for homosexual couples compared to heterosexual couples engaging in vaginal intercourse.

The risk of HIV transmission through peno-anal sex is likely to be higher than for peno-vaginal sex in the absence of ART and it is biologically plausible that this difference in the rate of transmission might also apply in the presence of ART. Studies comparing per contact to per-partner transmission rates suggest considerable variability in infectiousness during peno-anal sex between and within partnerships over time. The limited available evidence suggests that the residual transmission risk for anal sex in heterosexuals and MSM with undetectable plasma viral load is higher, more variable and possibly more sensitive to the effects of co-existing STIs than the risk for vaginal sex.

There is persisting concern about the validity and the public health implications of statements to the effect that individuals are 'non infectious', but there is a worldwide expert consensus that the risk of sexual transmission of HIV from a person who has been stabilised on and who has a plasma viral load of <50 or <40 copies/ml for at least six months, is very low. The remaining uncertainty is whether the risk of HIV transmission through peno-oral, peno-anal or peno-vaginal sex is zero or non-zero in each case. Although HIV-1 RNA may be

detectable intermittently in the semen of infected men, it is present in low concentration, perhaps at a level that is unlikely to be transmitted efficiently.

There does appear to be consensus that the risk is minimal and could even be described as negligible. Whilst, the Scottish Government Office of the Chief Medical Officer agree that the risk of transmission is minimal, they have confirmed that this can be dependant on a number of factors, for example, the type of sexual act being engaged. **Therefore, the advice given at present by the Chief Medical Officer to persons who have been stabilised on ART and who have a plasma viral load of <50 or <40 copies/ml, is that safeguards should continue to be used.**

Accordingly the medical and legal position is that there may still be a negligible risk of transmission and therefore, technically, the crime of culpable and reckless conduct is capable of being committed if someone has exposed another to risk. The whole circumstances of such exposure would require to be carefully considered, evidence of viral loads and ART in such cases and expert medical opinion on the risk of transmission, would be essential to determine whether there is a sufficiency of evidence of to support a charge culpable and reckless conduct.