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11 February 2015

David Ormerod
Commissioner for Criminal Law
Law Commission
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Tower
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London SW1H 9AG
By email to oapa@lawcommission.gsi.gov.uk

Dear David,

Reform of Offences against the Person: A Scoping Consultation Paper

Thank you for your letter of the 12 November 2014 and the opportunity to contribute to this consultation exercise. I have confined my answers to the questions asked in chapter 6, but am in broad agreement with the approach which the Commission has taken throughout the paper. In particular, I strongly agree that there would be "benefit in pursuing reform of the law of offences against the person in the form of a modern statute replacing all or most of the Offences Against the Person Act 1861" (question 12).

I would comment on the questions asked in chapter 6 as follows:

On questions 33 and 34, I can do no more than record agreement.

On question 35, I think that the preferable rule is (1) ("D should be bound to disclose facts indicating a risk of infection only if the risk is significant"). Two points may be noted. First, if D can only be sure of avoiding liability by disclosure (as rule (2) would suggest), D's incentive to use a condom seems to be diminished (that said, if no offence of exposure exists, condom use does of course reduce the possibility of criminal liability in tandem with reducing the possibility of transmission). There is a danger that this could undermine public health policy by making the work of those counselling persons newly diagnosed with HIV unnecessarily complex. It might be felt necessary to (a) advise D that a condom should be used to avoid transmission but (b) to explain that criminal liability could attach to transmission and that criminal liability would not depend on condom use. Such advice would be potentially confusing and unhelpful.

Secondly, a rule other than (1) might produce anomalous results if a restrictive approach is taken to the question whether D can be liable without actual knowledge of D's infection (paras 6.36-6.39), that is, a view that liability requires knowledge (or something close thereto).

For example: assume that D1 engages in unprotected intercourse with V1, and D2 does so with V2. D1 knows he is HIV positive (and that V1 does not know this) but is responding to treatment. D2 knows that his sexual history (of which V2 is unaware) puts him at a high risk of being HIV positive, but no more than that. On these facts, it is likely that D2 is exposing V1 to a higher risk than D1 is V2. A rule which suggested that D1 was potentially criminally liable but that D2 was not would be anomalous.

On question 36, I agree.

On question 37, I do not consider that future reform should pursue this possibility, for the reasons which are identified in the paper.

On question 38, I think the observation at para 6.109 that concerns here are "a criticism of the way the orders are used rather than of the existence of the power" is accurate, but the concerns remain valid ones. The use of preventive orders to criminalise conduct which is not itself an offence is a matter of concern, but it does not seem to be one which could be addressed within the scope of the current project. In reference to the suggestion made in the second sentence of para 6.109, I do not think it could ever be appropriate for an ASBO or SOPO to require that D undergo treatment. Such orders should not be used as a form of coercive medical intervention. An order might conceivably require that D not engage in sexual intercourse (or unprotected sexual intercourse) if D is not adhering to a treatment regime, but meaningfully specifying what would satisfy a requirement of adherence would be difficult. I do not think such orders could meaningfully focus on issues other than condom use or disclosure, and even there their use should be discouraged.

Yours sincerely,

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