

HIV LAW

Legal Responses to HIV and AIDS by JAMES CHALMERS, Oxford, Hart

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In the comparatively short period of time since the HIV virus was first “discovered”, jurisdictions across the world have responded in a variety of means. A number of these have been sympathetic to People living with HIV and AIDS (“PLHA”), for example attempting to guarantee confidentiality or prevent discrimination. Others have been more controversial and have sought to use law as a tool to limit the spread of HIV, by for example imposing liability for transmission of the virus. In addition as knowledge of the virus has improved and treatments developed, responses and interventions have evolved and matured with time as attitudes towards those affected have altered.

It is against this background that Chalmers’s work attempts to examine legal responses to HIV and AIDS within the UK in a variety of contexts. The book does draw on legal responses to other sexually transmitted infections (and contagious diseases) but primarily concentrates on HIV and AIDS. However, as acknowledged by the author, it is not a textbook on HIV and AIDS law offering a comprehensive review of all legal issues which arise in this context. Instead it examines a number of specific legal issues that have arisen in the context of HIV and AIDS. After an introductory chapter which introduces the reader to a number of recurring themes throughout the book, specific legal issues are dealt with in a number of self contained chapters.

Chapter two for example investigates the legal and ethical issues surrounding testing for HIV infection. Referring to both legal and non-legal sources Chalmers explores the issue of consent to HIV testing, asking and investigating does mere consent to testing suffice or must an individual specifically consent to an HIV test? The historical development of legal and professional opinion is clearly documented, as is the possible alteration to the law by the Human Tissue Act 2004. As well as examining consensual testing, the book also investigates unlinked anonymous testing, antenatal testing, premarital testing and the possibility of compulsory testing following alleged criminal activity. Whilst examining compulsory testing following criminal activity, Chalmers draws upon the experience in Scotland and in particular the consultation paper published by the Scottish Executive in 2005 concerning this issue. He skilfully examines the weaknesses of the proposed Scottish position by reference to both medical evidence and also the potential conflict with the European Convention on Human Rights.

Chapter three examines the issue of confidentiality and discusses the circumstances in which a duty to breach confidentiality might arise, whilst chapter four examines measures which have been either taken or proposed in order to reduce the spread of HIV. Here Chalmers concentrates on harm minimisation in relation to injecting drug users and examines the legal issues surrounding two topics – community needle exchange schemes and harm reduction measures in prisons. He acknowledges that harm reduction measures in prisons, most notably the provision of condoms and needle exchange, have faced opposition from some prison authorities. These authorities are opposed to the provision of condoms, believing that sexual activity in

prison should be discouraged rather than condoned; whilst needle exchanges have faced opposition for similar reasons and for the fact that needles have the potential to be used as weapons within the prison environment. It is against this backdrop that Chalmers conducts an interesting examination as to whether harm reduction measures in prison might be compelled by the exercise of Tort law.

The next chapter outlines the circumstances in which an individual's HIV-positive status may form the basis for a claim that they should not be deported from the UK when they have no other basis for remaining in the country. Chalmers recognises that as treatments for HIV have developed, to the extent that for many HIV is a chronic disease rather than an inevitably fatal condition, the legal system has been presented with new challenges. Due to the fact that these treatments are expensive and not widely available in those parts of the globe where HIV infection is most widespread, there has been significant tension over issues such as asylum, immigration and deportation. He does an exemplary job of analysing the law in this area, making reference to the wider social constraints which inevitably shape the thought processes of the judiciary within this area. There is discussion and analysis of the decisions in both *D v United Kingdom*¹ and *N v Secretary of State for the Home Department*² and also an interesting examination of whether, as an alternative approach, PLHA might seek to resist deportation by asserting a claim to refugee status under the 1951 Refugee Convention. There is however no discussion of the European Court of Human Rights' stage of proceedings in *N v Secretary of State for the Home*

¹ (1997) 24 EHRR 423

² [2005] 2 AC 296

*Department*³, although one suspects this is due to editorial timelines rather than conscious omission.

Chalmers next tackles the thorny issue of the criminalisation of HIV transmission and traces the development of the law in this area from the decision in *R v Clarence*⁴. He examines the uncertainties that persist in this area including whether the *mens rea* requirement for a prosecution under section 20 of the Offences Against the Person Act 1861 necessitates a positive HIV test and what is required for consent to operate as a defence. The case against criminalisation is examined and a number of key arguments of those who argue against criminalisation are tackled and rebutted. This chapter ends with a brief examination of the Crown Prosecution Service's guidelines covering prosecutions in this area which are, in Chalmers's opinion, a "missed opportunity" as they neither provide guidance as to when the power to prosecute will be used or offer any contribution to consistent decision-making within this area. The book then ends with a brief note on patent law in the area of access to treatment.

In sum, Chalmers is to be commended on an admirable work. His book presents the reader with an excellent introduction to a number of topics of key importance within this area. However it then attempts, and succeeds, in analysing those topics in greater depth and from a number different perspectives. It is apparent that Chalmers appreciates that the law in this area is shaped by a variety of conflicting external sources and he does a commendable job of conveying this message. Those seeking an introduction to this area would be hard pressed to find a better work.

³ *N v United Kingdom* [2008] ECHR 26565/05

⁴ (1889) LR 22 QBD 23

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