

PROSECUTIONS FOR HIV TRANSMISSION

A guide for people living with HIV in England and Wales



You may have heard or read about prosecutions for HIV transmission in England and Wales.¹ Some people have been found guilty and been sent to prison for several years. For people diagnosed with HIV this can raise a number of worries and questions.

The Crown Prosecution Service (CPS) recently clarified when prosecutions for HIV transmission are likely to take place.² This leaflet aims to explain the law in a straightforward way and to answer some of the most common questions and concerns you may have. It is not a substitute for expert legal advice.

Prosecutions are also possible for the transmission of other sexually transmitted infections - for example hepatitis B and C. We focus in this leaflet on HIV, which is still the subject of nearly all investigations and prosecutions. However, much of the advice in this leaflet applies equally to other sexually transmitted infections.

NAT and THT are both opposed to prosecutions for reckless HIV transmission. The content of this leaflet aims nevertheless to provide an objective account of the law, and advice which we believe is helpful and genuinely in the best interests of all readers.

It is worth remembering that, in cases such as these, decisions as to guilt or innocence often come down to which of two individuals are believed by the court, given the fact that the sex took place in private. So it is very important to get good expert advice and legal representation as soon as possible (see the end of this leaflet for places to go for expert advice).

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1. You should also know that there have been similar prosecutions in Scotland but under a different legal provision. Therefore the information in this leaflet does not necessarily apply in the same way in Scotland
 2. The CPS Guidance applies not just to HIV but to other serious infections passed on through sex. Click here: www.cps.gov.uk to read the CPS document 'Policy for Prosecuting Cases Involving the Intentional or Reckless Sexual Transmission of Infection' for more detailed information.

What law is used to prosecute people for HIV transmission?

The law used in England and Wales to prosecute people for HIV transmission is the Offences Against the Person Act 1861 (OAPA 1861).

Of course this nineteenth-century law does not mention HIV – people are prosecuted under the sections of the OAPA 1861 on ‘grievous bodily harm’.

There are two possible offences – ‘reckless transmission’ (under section 20 of the OAPA 1861) and ‘intentional transmission’ (under section 18). There has never yet been a successful prosecution for intentional transmission (see end of leaflet) and so most of this leaflet will focus on ‘reckless transmission’ cases.

So when is someone possibly guilty of reckless HIV transmission?

You may be guilty of reckless HIV transmission if all five points below applied to you at the time of the alleged offence:

- **You knew you had HIV**
- **You understood how HIV is transmitted**
- **You had sex with someone who didn’t know you had HIV**
- **You had sex without a condom**
- **You transmitted HIV to that person.**

Am I guilty of 'reckless HIV transmission' if I didn't know myself that I had HIV?

No. If you didn't know you were HIV positive when you transmitted HIV to a sexual partner, there is no crime.

This means you can only be held responsible for reckless HIV transmission if at the time of the alleged act you already had an HIV positive diagnosis.

In very rare circumstances the police and courts might take the view that you really knew you had HIV even if you hadn't been tested, for example if you were told by a doctor that you probably had HIV but needed a test to make sure and you refused to be tested. But these would be exceptional circumstances.

Am I guilty of 'reckless HIV transmission' if I told my partner I was HIV positive before transmission took place?

No. If you can show that your sexual partner knew you were HIV positive and then had sex with you, that means they agreed to any risks of HIV transmission and you are not guilty of reckless transmission.

Am I guilty of 'reckless HIV transmission' even if a condom was used?

No. The law needs to find you 'reckless', and reasonable actions to reduce risk of HIV transmission – in particular use of a condom throughout penetrative sex – mean you haven't been reckless. It is, of course, possible on very rare occasions for someone to get HIV even when a condom is used (for example if it slips or breaks). But as long as the condom was being used with good faith in its effectiveness there is no crime.

The law is not clear as to what to do if you have HIV and you notice that the condom has slipped or broken during sex. But the best thing to do, both for the good of your partner and from a legal perspective, is to advise your partner to go to A&E or a sexual health clinic immediately and ask for PEP (post-exposure prophylaxis). PEP is a month-long course of treatment which can prevent someone from getting HIV if it is taken within 72 hours of the possible risk.

Am I guilty of 'reckless HIV transmission' for having unprotected sex with someone even if I didn't infect them?

No. There is no crime of 'exposing someone to the risk of infection'. If there is no transmission, there is definitely no case for prosecution. Some local police may not understand this and begin an investigation when there is no evidence of HIV transmission occurring. If this happens, you should get legal support immediately so that the investigation can be brought to an end.

How do you prove who gave someone HIV?

People often make assumptions about who infected them with HIV based on the idea that the person who tested HIV positive first was the person who was actually infected first. This is not necessarily the case, and it is sometimes possible that the person who complains to the police after recently testing HIV positive in fact infected the person they are accusing. It is also possible that the person making the complaint ('the complainant') was infected by someone else, or in another way (for example via sharing drug injecting equipment or a blood transfusion in a foreign country) months or years before they met the person they are accusing.

Complex scientific tests – known as 'phylogenetic analysis' – must always be done in these cases to compare the viruses of the complainant and the accused. If the two viruses appear to be different then this proves that there was no HIV transmission between the two people, and so no crime.

If the viruses appear to be similar this shows that HIV transmission from the accused to the complainant could possibly have taken place, but it does not prove it. It is still possible the complainant in fact transmitted HIV to the accused, or that both were infected by another person or other people sharing the same type of virus.

Before any court case begins there needs to be an investigation of the past sexual contacts of both people, to decide whether it can be proved 'beyond reasonable doubt' that it was the accused, and not someone else, who infected the complainant. This is usually difficult to prove which is why it has been rare for someone who pleads not guilty to be found guilty of this offence.

What do I do if someone accuses me of HIV transmission?

There are support organisations out there to help you. The best place to ring is THT Direct on 0845 12 21 200 as they have a lot of experience of these cases, but you can also get in touch with your local HIV organisation who may be able to put you in contact with experts. Don't forget, the vast majority of accusations never reach court, so don't panic.

In particular, don't be rushed into hasty action. Ensure you get expert legal advice before giving a statement, giving permission to access your medical records, or pleading guilty. All these actions have serious implications. You may have regrets about past actions but that is not the same as actually being the one responsible for someone else's HIV infection.

Ask any solicitor who may represent you if they have worked on this sort of case before. If they have not, make sure they are in contact with experts in this area of law who can provide them with resources and advice. Again, THT Direct will be a good place for a solicitor to go if they have no previous experience of such cases. They can then be put in contact with more detailed expert advice.

What do I do if I've just been diagnosed with HIV?

An HIV diagnosis can be a shock and a difficult thing for some people to come to terms with. There are many support organisations around the country that can help you come to terms with a diagnosis, and there will also be professional advice available in your HIV clinic. Take advantage of such support and advice.

Remember tens of thousands of people live normal and productive lives with HIV in the UK. Of course it is serious to have a long-term condition such as HIV – but the reality is probably very different from what you fear.

Don't act hastily – remember initial feelings of anger, blame and shock may well develop into a set of different attitudes over time.

It is very easy to make assumptions as to who gave you HIV. But the assumption may not be right. Nearly one in three people with HIV in the UK don't know they have it. And the majority of HIV infections are from people who themselves are not yet diagnosed.

It is easy to assume the person who had an HIV diagnosis when they had sex with you must have been the one who infected you. But if you have had other sexual partners before or since, it could possibly be someone else who did so. In any court case your sexual history will be thoroughly investigated to find out whether the accused was definitely the person who gave you HIV.

What should I do if I want to make a complaint about someone infecting me?

If you are considering making a complaint against someone for HIV transmission, be sure it is your decision to do this and it is not just a result of others urging you to involve the law. Once a charge is made it can be difficult to go back, even if you want to.

Even if you feel absolutely certain that this person was responsible for your HIV infection, you may be mistaken. You will have to prove that you couldn't have become infected any other way. Not only will your sexual history be 'on trial' but, in addition, anyone with whom you had sex before testing HIV positive will have to be contacted, and blood samples taken, to rule out the possibility that they infected you.

The process can be intrusive and distressing for both you and the person you are accusing, and since it is difficult to prove that one person infected another, it may not result in a conviction. If you do decide to make a complaint, make sure you keep in touch with THT or your local HIV organisation for ongoing confidential advice and support.

How do I make sure I don't transmit HIV to my sexual partners?

If you know you have HIV you should use a condom when having sex to avoid passing HIV on to your sexual partners. If you find it difficult to use a condom, or difficult to insist that your sexual partner uses a condom, help and advice are available on a confidential basis from your HIV clinic, THT or another local HIV support organisation.

It is not always easy to tell someone about your HIV status. Again, there are people who have experience of this and can provide really practical and sensitive advice on how to talk about HIV with others. If you need advice and help speak to the health advisor or health trainer at your HIV clinic, or go to your local HIV support organisation.

And intentional transmission?

For intentional transmission to be proved it would need to be shown that the accused actually and maliciously wanted to give the other person HIV. There has never yet been a successful prosecution for intentional HIV transmission, and the circumstances would be rare and difficult to prove. There is also a possible charge of 'attempted intentional transmission' where even in the absence of infection someone can be convicted of trying to infect someone with HIV. Again, there has never yet been a case of attempted intentional transmission which has got to court.

There have been some police investigations where there have been initial and misguided attempts to charge people with intentional transmission. If you find yourself being accused of intentional transmission, get expert advice from THT Direct immediately.

Where can I get further information?

This information was correct as of May 2009. For the latest advice and further information call THT Direct on 0845 12 21 200, or visit:

www.nat.org.uk/criminal-prosecutions

www.tht.org.uk/prosecutions

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Terrence Higgins Trust is the UK's largest HIV and sexual health charity with centres across England, Scotland and Wales. THT provides information and advice, campaigns for better sexual health and the rights of people with HIV and offers a wide range of services including sexual health checks, counselling and support groups.

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