



PROSECUTIONS FOR HIV & STI TRANSMISSION OR EXPOSURE

A guide for people living with HIV in Scotland

You may have heard or read about prosecutions for HIV transmission in Scotland. There have been a small number of high-profile cases in the last decade that have resulted in individuals being found guilty of passing on HIV (transmission) or putting another person at risk of HIV (exposure) and given substantial prison sentences. For people who are diagnosed with HIV, this can raise a number of concerns and questions.

These cases are not the result of a Government decision to prosecute people for passing on HIV. They began in Scotland in 2001 because prosecutors tested existing laws to see if they could be applied to HIV. As a result there was on-going confusion about how the law should be interpreted and used in relation to transmission of and exposure to HIV.

The Crown Office and Procurator Fiscal Service (COPFS) has recognised the need for clarity and has now published a prosecution policy on what the law in Scotland actually means. The policy outlines the circumstances in which a prosecution is likely to take place and helps to explain what constitutes a crime in relation to HIV transmission or exposure under Scots law.

Terrence Higgins Trust, National AIDS Trust (NAT) and HIV Scotland oppose prosecutions for 'reckless' transmission or exposure. However, in this document we aim to give an objective account of the law and provide advice that is helpful and in the best interests of all readers.

This leaflet aims to explain the COPFS policy and Scots law in a straightforward way and to answer some of the most common questions and concerns people have. It is not a substitute for legal advice. We would recommend that people involved in these cases access good legal advice and representation as soon as possible. **If you need advice on securing legal representation, read the section entitled *'What do I do if someone accuses me?'* in this guide. Alternatively contact THT Direct on 0808 802 1221.**

The COPFS policy relates to all sexually transmitted infections (STIs) that can have 'serious, potentially life-threatening consequences' for those infected. Prosecutions are therefore possible for transmission of serious STIs and a charge has been brought in Scotland covering transmission of HIV and hepatitis C. In this leaflet we focus specifically on HIV, which is still the subject of nearly all investigations and prosecutions. However, much of the advice in this leaflet can be applied in cases of prosecution for the transmission of, or exposure to other serious STIs.



What are prosecutions for HIV transmission or exposure and how do they come about?



The prosecutions referred to in this leaflet are cases where a person living with HIV is investigated by police for either passing on HIV (transmission) or putting another person at risk of HIV (exposure). The police investigate relevant complaints and if they think there is enough evidence they report the matter to the Procurator Fiscal (COPFS). If the COPFS agrees there is enough evidence against the person accused to show that a crime has been committed, and it is in the public interest to prosecute, they will take the case to court. It will then fall to a jury to decide if the person is guilty of an offence.

Only a tiny number of cases have made it to court in Scotland. Investigations by police are also rare and most are dropped at an early stage because of a lack of evidence. Nevertheless, it is useful for people who are living with HIV, and healthcare professionals, to understand this area of the law in case issues ever arise.

Investigations and prosecutions happen for different reasons. They nearly always involve someone making a complaint to the police. Complaints can happen because a person feels they have been lied to or deceived about their sexual partner's HIV, or because they think they have been put at risk. If a complaint has been made against you, or you are thinking of making a complaint, it's important that you understand the seriousness of these cases and know your legal rights.

What law is used to prosecute people for HIV transmission or exposure in Scotland?



There are two laws that can be used to prosecute HIV transmission or exposure.

• Culpable and Reckless Conduct

This law is used when there is evidence that a person displayed 'criminal negligence and indifference' as to whether they could pass HIV on. In other words, they understood the risks but behaved 'recklessly' by not taking any action to protect or lessen the impact on the other person. 'Culpable and reckless conduct' is a common law offence and has been used in all of the cases that have taken place in Scotland so far.

• Assault Laws

If there is evidence that a person intentionally set out to transmit HIV to another person, assault laws could be used to prosecute them. There has never been a criminal case of intentional transmission of HIV in Scotland, or anywhere else in the UK, and no one has been found guilty of assault in this context.

This leaflet will concentrate on prosecutions for reckless transmission or exposure and use of the common law offence of 'culpable and reckless conduct', rather than intentional transmission.

What is the difference between prosecutions for transmission and for exposure?



Under Scots law a person can be prosecuted for recklessly passing on an infection (known in legal terms as 'reckless injury') – this is what we mean by transmission. A person can also be prosecuted for recklessly putting someone at risk of infection, even if the infection is not passed on (known in legal terms as 'reckless endangerment') – this is what we mean by exposure.

Scotland is the only place in the UK where people can be prosecuted for *recklessly* exposing another person to infection, without transmission occurring. Such a charge is only possible under English and Welsh law if there is evidence that the person *intentionally* set out to transmit HIV.

There has been one case involving charges for exposure in Scotland so far. That case involved another charge of transmission. The COPFS policy states that exposure charges should only be made in exceptional circumstances.

And intentional transmission?



For intentional transmission to be proven, it would need to be shown that the accused deliberately set out to give the other person HIV. There has never been a successful prosecution for intentional HIV transmission in the UK, and the circumstances would be rare and difficult to prove.

When is someone guilty of reckless HIV transmission?



You could be found guilty of reckless transmission of HIV if evidence is provided that proves all of the 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 did not follow the advice given by your doctor on preventing risk to others.
- You transmitted HIV to that person.

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



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

In some rare circumstances police and courts may take the view that a person knew they had HIV, and should be held criminally responsible, even if they didn't have an official HIV diagnosis. For example, if a doctor had told that person that they had HIV symptoms and needed to take a test, but they refused and then continued to recklessly put sexual partners at risk. These cases would only be brought in exceptional circumstances.

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



If you can provide evidence that proves that you disclosed your HIV status to your partner in some way and they also understood the risks around HIV transmission, then you should not be charged with an offence. The only exception would be if there is evidence that the victim is vulnerable or has been coerced, exploited or had any form of control exerted over him or her.

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



Prosecutors should not bring a case against you for being reckless if you have taken reasonable actions to reduce the risk of transmission or exposure to others, in particular by using a condom during sex. Though it is very rare, it is possible for HIV to be passed on even if a condom is used, for example if it slips off or breaks. However, as long as the condom was being used with good faith in its effectiveness there is no crime.

The law is not clear on what to do if you have HIV and you notice that the condom has slipped off or broken during sex. The best thing to do, both for the good of your partner, your peace of mind and from a legal perspective, is to advise your partner to go to a hospital Accident and Emergency

department (A&E) or a sexual health clinic immediately and ask for post-exposure prophylaxis (PEP). This 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 – however it is best to take it within 24 hours. More information on PEP is available from THT Direct or at: www.tht.org.uk/PEP

When could I be prosecuted for having unprotected sex with someone even if I didn't infect them?



Under Scots law it is possible for you to be found guilty of exposing another person to HIV, even if the virus has not been passed on. The circumstances in which charges may be brought are much the same as transmission cases, with the obvious exception of transmission not having taken place. To be found guilty of a reckless exposure charge, prosecutors would need to prove that all of the 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 did not follow the advice given by your doctor on preventing risk to others.

Exposure cases are extremely rare and should only apply in exceptional circumstances. These circumstances should be limited to where a person can be shown to have undertaken what is known in law as a 'flagrant course of conduct', for example having sex without a condom and without disclosing their HIV status on many occasions and/or with a number of sexual partners. They may also apply where a person deliberately misleads their partner or conceals information from them about the risks. Exposure charges could also be made alongside a transmission charge to demonstrate a pattern of criminally reckless behaviour.

If you are accused of reckless exposure it is essential that you seek legal support as soon as possible. It is also worth contacting THT Direct to get advice and support about your next steps.

Can I be found guilty of transmission or exposure if my viral load was undetectable at the time of the relevant sexual acts?



The COPFS in Scotland has recognised that if a person is taking antiretroviral medication and their viral load is undetectable, the likelihood of HIV being passed on is very low. However, whether a court or a jury would find you guilty of behaving in a criminally reckless way depends on whether you followed the advice of your doctor on how to prevent transmission and reduce the risk to others.

It is essential that you follow your doctor's advice relating to your viral load and risk of transmission if condoms are not used. You may need to be able to produce evidence of this advice in your defence.

How do you prove who passed HIV on to the person making a complaint?



People often make assumptions about who infected them based on the idea that the person who tested HIV positive first is the person who was infected first. This is not always the case. Many people live for years with HIV without realising that they have it. Sometimes the person who complains to the police about a person transmitting HIV to them, turns out to be the person who passed on HIV without knowing to the accused in the first place.

If a person hasn't tested for HIV before, or for many years, it can be difficult to rule out the fact that

they could have been infected another way. For example they could have been infected by another sexual partner, through sharing drug injecting equipment or a through a blood transfusion in another country in the past.

In transmission cases, complex scientific tests known as 'phylogenetic analysis' must always be carried out to compare the viruses of the person accused and the person making the complaint. If the two viruses appear to be different, this proves that one did not transmit HIV to the other. If the viruses are similar it can suggest that transmission may have taken place between the two people, but it is not enough to prove that it definitely did.

Before any court case begins there should be an investigation of the past sexual contacts or risk activities of both people. This is essential to decide if it can be proven that it was the accused that passed on HIV to the person making the complaint, or whether they may have become infected any other way. In order for prosecutors to take a case to court, they need to be able to prove beyond reasonable doubt that the person making the complaint could only have acquired HIV from the person they have accused and not from any other source.

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



There are support organisations available to help you or you can ring THT Direct. THT Direct has 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 local experts. HIV Scotland has an online service finder that can help you find your local support agency: www.hivscotland.com/service-finder/

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 of these actions have serious implications. You may have regrets about your past actions but that is not the same as actually being the person responsible for someone else's HIV infection.

Ask any solicitor who may represent you if they have worked on this type 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 is a good place for a solicitor to start if they have no previous experience of these cases and want some guidance.

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.

An HIV diagnosis can cause shock and can be a difficult thing for people to come to terms with. There are many support organisations around the country that can help you cope 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 of living with HIV 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 feelings over time.

It is very easy to make assumptions about who gave you HIV. But this conclusion may not be correct. Nearly one in four people with HIV in the UK don't know they are infected and the majority of HIV

infections occur because people pass the virus on without knowing. In any court case your sexual history is likely to be investigated to find out whether the accused was definitely the person who gave you HIV.

If you do decide to make a complaint, make sure you keep in touch with your local HIV organisation for confidential advice and support.

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



Reducing HIV transmission is everyone's responsibility. A quarter of people living with HIV in the UK don't know they are infected. If you think you could have been at risk, it is important you take a test so you can protect your own and your partner's health. It is also important that you use condoms when having sex to protect yourself and others.

If you already know you have HIV it's important that you follow your doctor's advice about reducing the risk to your sexual partners. Effective condom use can prevent risk to others. 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 Direct or your local HIV support organisation.

Where can I get advice and support on disclosing my HIV status to sexual partners?



It is not always easy to tell someone about your HIV status. Again, there are people who have experience of this and can provide practical and sensitive advice on how to talk about HIV with others. If you need advice and help, speak to the health advisor at your HIV clinic, contact your local HIV support organisation or call THT Direct. The website www.myhiv.co.uk hosts private online forums where people living with HIV can discuss problems and share advice and support entirely confidentially.

Where can I get further information?



This information was correct as of February 2013. For the latest advice and further information call THT Direct on 0808 802 1221, or visit:

- www.nat.org.uk/criminalprosecutions/
- www.tht.org.uk/prosecutions
- www.hivscotland.com

The COPFS policy is available here:

- www.crownoffice.gov.uk/Publications/2012/05/Sexual-Transmission-or-Exposure-Infection-Prosecution-Policy

If you feel that you need further support on this or related issues, visit HIV Scotland's online service finder to identify local organisations that can provide help and advice:

- www.hivscotland.com/service-finder/

The HIV & sexual health charity for life

Terrence Higgins Trust is the UK's largest HIV and sexual health charity with centres across England, Scotland and Wales. Terrence Higgins Trust 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.

Website: www.tht.org.uk | THT DIRECT > 0808 802 1221

Terrence Higgins Trust Scotland, Top Floor, Rothesay House,
134 Douglas Street, Glasgow, G2 4HF

Tel: 0141 332 3838 | Email: info.scotland@tht.org.uk

Terrence Higgins Trust is a registered charity in Scotland (SC039986)
and in England and Wales (reg no. 288527).

Shaping attitudes. Challenging injustice. Changing lives.

NAT (the National AIDS Trust) is the UK's leading charity dedicated to transforming society's response to HIV. We provide fresh thinking, expertise and practical resources. We champion the rights of people living with HIV and campaign for change.

Website: www.nat.org.uk

NAT: New City Cloisters, 196 Old Street, London EC1V 9FR

Tel: 020 7814 6767 | Fax: 020 7216 0111

Email: info@nat.org.uk

National AIDS Trust is a registered charity No. 297977 and a company limited by guarantee (registered in England and Wales) No. 2175938.
Registered office: NAT, New City Cloisters, 196 Old Street, London EC1V 9FR.

Promoting positive change

HIV Scotland exists to ensure that Scotland has responsive policies, quality services and a supportive environment that enables people living with HIV in Scotland to live full and active lives.

Website: www.hivscotland.com

Registered office: Suite 2, 27 Beaverhall Road, Edinburgh EH7 4JE

Tel: 0131 558 3713 | Fax: 0131 558 9887

Email: info@hivscotland.com

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