

SEX

How the law works

The laws used to prosecute people for HIV transmission vary from country to country in the UK. England and Wales have different prosecution laws to Scotland.

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The law used in England and Wales to prosecute people for HIV transmission is the Offences Against the Person Act 1861 (OAPA 1861). People are prosecuted under the section on grievous bodily harm. There are two possible offences – reckless transmission (under section 20) and intentional transmission (under section 18). You must have actually transmitted HIV to be successfully prosecuted.

The common law offence of 'Culpable and Reckless Conduct' is used to prosecute cases in Scotland. This is a legal 'catch all' vehicle which criminalises acts that cause injury to others or create a risk of injury. This means that people can technically be prosecuted for both passing on the virus and for putting someone at risk through unprotected sex. The law in Scotland focusses on the behaviour of the defendant, rather than the harm caused, and whether their conduct can be considered 'reckless' or not.

So when is someone found guilty of reckless HIV transmission?

In England & Wales, you may be found guilty of reckless HIV transmission if all of the below apply:

- You had sex with someone who didn't know you had HIV

- You knew you had HIV at that time
- You understood how HIV is transmitted
- You had sex without a condom
- You transmitted HIV to that person.

The situation is much the same in Scotland. However, there is the added possibility of a case being brought even if transmission hasn't taken place, but where a person has been put at risk without their prior consent or knowledge.

In England and Wales the penalty in these cases is a maximum prison sentence of five years for each person someone is found guilty of infecting. There is no minimum sentence. Non-UK residents can be recommended for deportation on completion of their sentence.

In Scotland sentencing has been at the higher end of the scale for 'reckless conduct', ranging from five years in one case to 10 where a person had infected one individual and had 'exposed' three others.

And intentional transmission?

Someone can only be charged with intentional transmission if it can be proved they maliciously and intentionally tried to give the other person HIV. Although many cases start with this allegation, so far the charges have always been reduced to reckless transmission before reaching trial.

There is often a lot of confusion, with people assuming that anyone who knows they have HIV and then transmits it must have done so "intentionally", but this is not so – either legally or in everyday life. However, the maximum sentence for intentional transmission is life imprisonment so it is vital to get good legal advice fast if this is the

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charge.

How can I avoid being prosecuted?

The simplest way of avoiding prosecution is to make sure that your partner knows you have HIV and that whatever sex you have is consensual within this knowledge. If you don't feel able to tell them about your diagnosis, you should use a condom when having sex to avoid passing HIV on. It's also important to follow your doctor's advice on treatment and reduce your viral load to undetectable, to minimise the chance of any accident.

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 from your HIV clinic, Terrence Higgins Trust or another local HIV support organisation. Hoping for the best or keeping your fingers crossed are not effective precautionary methods.

Sometimes, despite this, accusations get made. If that happens, call THT Direct and get experienced advice.

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