



EXPLAINING THE CRIMINAL LAW ON HIV TRANSMISSION TO YOUNG PEOPLE LIVING WITH HIV IN THE UK

A briefing note for Children's Nurse Specialists and other relevant professionals

1. Introduction

People living with HIV in the UK can be prosecuted if they either recklessly or intentionally pass HIV on to a sexual partner.

The age of criminal responsibility in England, Wales and Northern Ireland is 10 years old. Therefore in these three nations it is possible for young people living with HIV from the age of 10 upwards to be considered criminally liable for reckless or intentional HIV transmission.

The latest statistics show that in the UK a third of young men and a quarter of young women have their first sexual experience before the age of 16. Some research also indicates that young people living with a chronic health condition are more likely to engage in risky sexual behaviour.

It is important to note that there has not been a prosecution of someone with HIV who was under 18 when the relevant events took place. There have however been some police investigations.

The purpose of this briefing note is to explain the law around the criminalisation of HIV transmission and what it means for young people. It is important that nurses and other clinicians discuss this difficult topic with young people living with HIV since it is vital those young people understand the law and how best to protect themselves from possible prosecution. It is very unlikely that young people living with HIV will get this information from **anywhere** else.

Advice on prosecutions should be in the context of the clinic providing sex and relationships education and support for young people living with HIV.

2. The law in England and Wales on criminal HIV transmission

Reckless or intentional HIV transmission are prosecuted under the Offences Against the Person Act 1861 – section 20 for reckless transmission, and section 18 for intentional transmission. All prosecutions to date have been for 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:

1. You knew you had HIV
2. You understood how HIV is transmitted
3. You had unsafe sex with someone
4. You transmitted HIV to that person
5. That person didn't know you had HIV

Points 1 and 2

Most of the young people concerned about prosecutions for HIV transmission will know they have HIV and have an understanding of how it is passed on (for those young people who have not yet been informed or fully informed as to the nature of their condition and how HIV is passed on, the defence would be that they did not have the knowledge of their HIV status to be criminally liable for any transmission which occurred).

Point 3

To be guilty of reckless transmission you need to be reckless and that means having vaginal or anal sex without a condom. Even without the use of a condom, it is extremely unlikely that someone on HIV treatment with an undetectable viral load will transmit HIV to a sexual partner. In the unlikely event this occurred, relying on one's undetectable viral load may well show that you had not acted recklessly, though this has yet to be tested in an actual court case. Adhering well to treatment is therefore a good way for a young person to protect themselves in the event of an allegation of transmission.

Point 4

It is not against the law simply to have sex without a condom. A crime is only possibly committed if you also transmit HIV through unsafe sex. Many allegations are made even when no HIV was passed on – in such a case get legal support as soon as possible to end the investigation (see below). Furthermore, people should not make assumptions as to who gave HIV to whom – it can be difficult to prove the source of an HIV transmission.

Point 5

If the person you had sex with, and who is claiming they got HIV from you, knew that you were HIV positive at the time of the sex in question, then they consented to the risk and you are not guilty of a crime. Usually they will know you have HIV because you disclosed to them, but it is possible they could have found out from someone else.

More on disclosure

Disclosure therefore is a way of ensuring that your sexual partner consents to any risk of HIV transmission. It is a defence against prosecution should you transmit HIV through unsafe sex. But it is important to stress that the law does not require you to disclose you have HIV before sex – **it is not a crime not to disclose your status**. Non-disclosure simply deprives you of a defence should you transmit HIV through unsafe sex.

And intentional transmission?

No case of intentional transmission has ever come to court – there would need to be evidence that the accused set out deliberately to infect their sexual partner with HIV. However, sometimes allegations of intentional transmission or an attempt to transmit HIV intentionally are made. Get legal advice immediately in such a case (see below).

3. The law in Scotland

The law in Scotland around HIV transmission is more or less the same as that in England and Wales but with one important difference. In Scotland it is possible to prosecute someone for 'reckless endangerment' – in other words, for exposing someone to the risk of HIV infection even if transmission did not occur. Scottish prosecution guidance states that prosecutions for exposure would only happen in exceptional circumstances, for example having unsafe sex without disclosing one's status with a number of sexual partners on a number of occasions. It is important to stress that the Scottish prosecution authority accepts that 'Prosecutors can take into account that treatment can be a precaution' – in other words that someone with a suppressed viral load is not endangering a sexual partner even if a condom is not used.

The age of criminal responsibility in Scotland is eight years old but the age from which a child can be prosecuted is 12.

4. And Northern Ireland?

There has not been a prosecution in Northern Ireland and there is no guidance on this issue available from the Northern Ireland prosecution authority. But it is assumed the law would be applied in a way very similar to that in England and Wales.

5. What if a complaint is made to the police about a young person with HIV?

As with adults with HIV, it is very important that young people against whom allegations or complaints are made do not panic or do anything hasty. The most important thing is to get the best support and advice as quickly as possible.

The Association of Chief Police Officers has published best practice advice on how to investigate these sensitive cases in England and Wales and one section addresses what to do –

“If the accused is under 18

If the accused is under 18, particular care must be taken in the handling of the allegation. Any criminal investigation or proceedings involving a person under the age of 18 must have regard to the welfare of the person concerned. Young people with HIV are especially vulnerable individuals. Great care must be taken to keep their HIV positive status confidential, shared only with those necessary to take forward the investigation of the complaint and ensure the welfare of the accused. An appropriate adult should be available to support all accused persons under the age of 17. It is highly likely that the accused young person may have special educational needs, mental health issues or poor understanding of his/her HIV status and infectiousness, so even in the case of 17 year-olds there should be consideration of the involvement of an appropriate adult. The paediatric HIV consultant responsible for the young person’s HIV care should be contacted as soon as possible. Early consultation is encouraged with the CPS.”

Key points to remember:

- It is important to ensure the investigating police officer(s) are aware of the ACPO best practice advice, and in particular the section cited above – available on many local force intranet sites or on [NAT’s website](#). Encourage the police also to contact the CPS for advice as soon as possible.
- It is important for an appropriate adult to be identified to accompany the young person as they are questioned etc.
- It is important the young person’s HIV consultant knows about the allegation and is in contact with the police.
- It is important that no guilty plea is entered in advance of the accused being carefully and well advised by a competent solicitor.
- It is important to get competent legal advice as soon as possible – contact NAT (020 2814 6767) or THT Direct (0808 202 1221) for advice on solicitors to contact.

Further reading:

1. [Prosecutions for HIV Transmission](#): A guide for people living with HIV in England and Wales NAT, THT June 2010
2. [Police Investigation of HIV Transmission](#): A guide for people living with HIV in England, Wales and Northern Ireland NAT May 2011
3. [Prosecutions for HIV & STI Transmission or Exposure](#): A guide for people living with HIV in Scotland NAT, HIV Scotland, THT February 2013

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