



CRIMINALISATION IN ENGLAND & WALES: GUIDELINES FOR POLICE & PROSECUTORS

AAE MEMBER MEETING

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THE LAW



- Prosecutions are under the Offences Against the Person Act 1861 (OAPA 1861) – ‘Grievous Bodily Harm’
- **Section 20** – reckless transmission (maximum sentence: 5 years per complainant)
- **Section 18** – intentional transmission (maximum sentence: life imprisonment)
- It is also possible to be charged with *attempting* to transmit a serious sexual infection under the Criminal Attempts Act 1981

PROSECUTIONS



- **Prosecutions to date in England and Wales**
- Since 2003, 32 prosecutions, 29 for reckless HIV transmission:
 - 24 convictions
 - 4 acquittals
 - 1 died during proceedings
- 1 intentional transmission prosecution/conviction
- Other STIs can also be prosecuted: 1 conviction for transmission of hepatitis B and 1 for herpes

RECKLESS TRANSMISSION



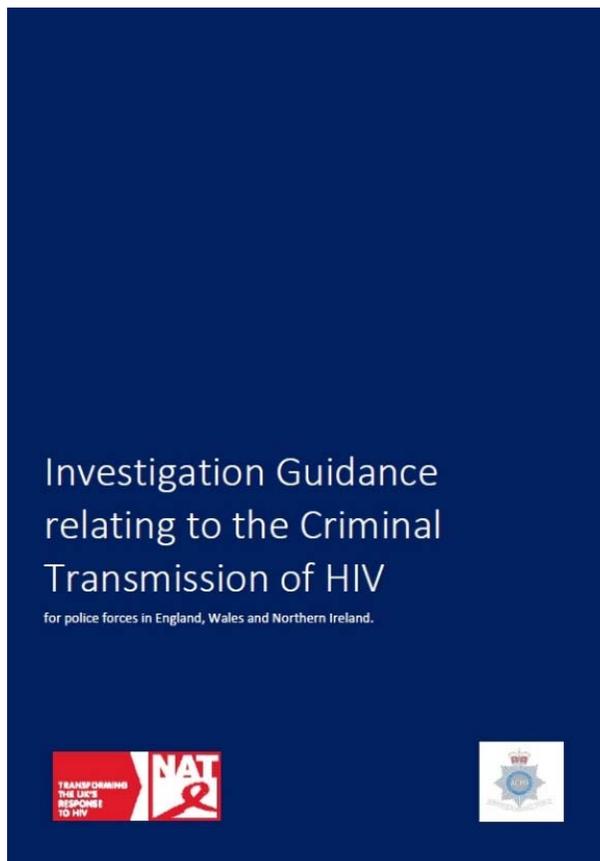
- You can be prosecuted for reckless HIV transmission if all of the points below applied in relation to the alleged offence:
- You knew you had HIV
- You understood how HIV is transmitted
- You had sex which risked HIV transmission
- You transmitted HIV to the sexual partner
- The sexual partner did not know you had HIV when the HIV was transmitted

INTENTIONAL TRANSMISSION



- One prosecution and conviction to date
- Have to be maliciously **intending** to harm
- Not the same as being deliberately reckless
- No defence of consent
- Possible charge of 'attempted intentional transmission' in absence of transmission itself - this was prosecuted alongside intentional transmission in the one existing case

RESOURCES



The image is a screenshot of a website page. At the top is a blue navigation bar with the CPS logo (scales of justice) and the text 'CPS'. To the right of the logo are links: 'About CPS', 'Crime info', 'Victims & witnesses', and 'Pro'. The main heading is 'Intentional or Reckless Sexual Transmission of Infection' in a large, bold, dark blue font. Below the heading is a sub-heading: 'Legal Guidance, Sexual offences, Violent crime'. A list of links follows, starting with 'Introduction' (marked with a downward arrow icon) and including: 'Internal Procedures', 'Relevant Offences', 'General Propositions', 'Reckless Transmission: Section 20 Offences Against the Person Act 1861', 'Evidential Issues' (with sub-links for 'Scientific and/or Medical Evidence', 'Non-cooperation by the Suspect', 'Sexual History', and 'Recklessness'), 'Safeguards against Transmitting Infection', 'Attempt to Commit Section 20 Grievous Bodily Harm', 'Intentional Transmission: Section 18 Offences Against the Person Act 1861', 'Rape', 'Sexual Transmission of an Infection as an Aggravating Feature of Another Sexual Offence', 'Public Interest Issues', 'Complainant and Witness Care Issues', 'Reporting Restrictions', 'Ancillary Orders', and 'ACPO Guidance'.

DEVELOPING LEGAL GUIDANCE



- 2003 - first prosecutions for reckless HIV transmission
- 2004 - NAT:
 - Organised a round table of HIV organisations, public health professionals, clinicians, academics and lawyers
 - Consulted people living with HIV via national conferences
 - Developed a policy paper outlining our position
 - Alongside THT, wrote to the CPS (Crown Prosecution Service) outlining issues with existing cases (e.g. public health concerns) and the need for clarity and legal guidance.

DEVELOPING LEGAL GUIDANCE



- 2005 - CPS agreed to consult and set up an advisory group
- 2006 - 60 responses were made to the consultation. NAT & THT supported this by producing guidance for NGOs on how to respond
- 2008 - [CPS legal guidance published](#) following lengthy review process led by NAT, coordinating input from wider sector
- 2008 to present - guidance periodically reviewed and updated to reflect legal and clinical developments; current review ongoing
- THT produced a [report](#) on the management and outcomes of prosecutions 2008-2012 – identified issues and recommendations

WHERE ARE WE NOW?



Latest guidelines (not yet published):

- Introduction [complexity and sensitivity, internal processes, need for speed, no early pleas]
- Evidential considerations [including how and when evidence should be gathered]
 - The complainant has a sexually transmitted infection which is capable of amounting to grievous bodily harm
 - The suspect had a diagnosed sexually transmitted infection **at the time of** sexual relations with the complainant
 - The suspect **knew** at the material time that they had the STI
 - The suspect foresaw the risk of transmitting the STI but went on **unreasonably** to take that risk [i.e. they did not use appropriate safeguards: condoms or U=U]
 - The suspect infected the complainant [all other possible sources of infection must be ruled out]
- Public interest considerations
- Complainant & Witness Care Issues [e.g. reporting restrictions]
- Sexual Risk Orders
- STI investigation checklist

CHALLENGES



- Limited understanding of HIV (and wider public health issues) within the CPS – this has improved, but staff turnover means this is an ongoing process
- The CPS cannot change the law; only provide guidance on when and how it should be applied – by working with the CPS we have ensured that the guidance reflects case law and does not extend the reach of the criminal law beyond it
- The law in question (GBH) is not specific to HIV/STI transmission – applying it to consensual sexual behavior is problematic
- The CPS is under-resourced and this area of the law is complex and niche – as such it is not deemed a priority and progress can be slow
- The fact that guidance is available does not mean that it is always used or followed – this results in poor practice and undue distress for parties involved

LEARNINGS



- **Collaboration** – from the outset we worked with and leveraged authority and expertise from a wide cross-section of civil society
- **Speaking their language** – making legal arguments as well as policy / public health arguments, and couching arguments in legal terms
- **Relationship-building** – we have come to be a respected partner as a result of our ongoing work in this area and our willingness to engage with the issues
- **Proactive monitoring and engagement** – we have closely followed both legal and clinical developments, and frequently chase the CPS to make progress
- **Awareness** – often prosecutions only reach the press after sentencing. We rely on charities, clinicians, and people living with HIV to inform us of relevant cases

POLICE GUIDANCE



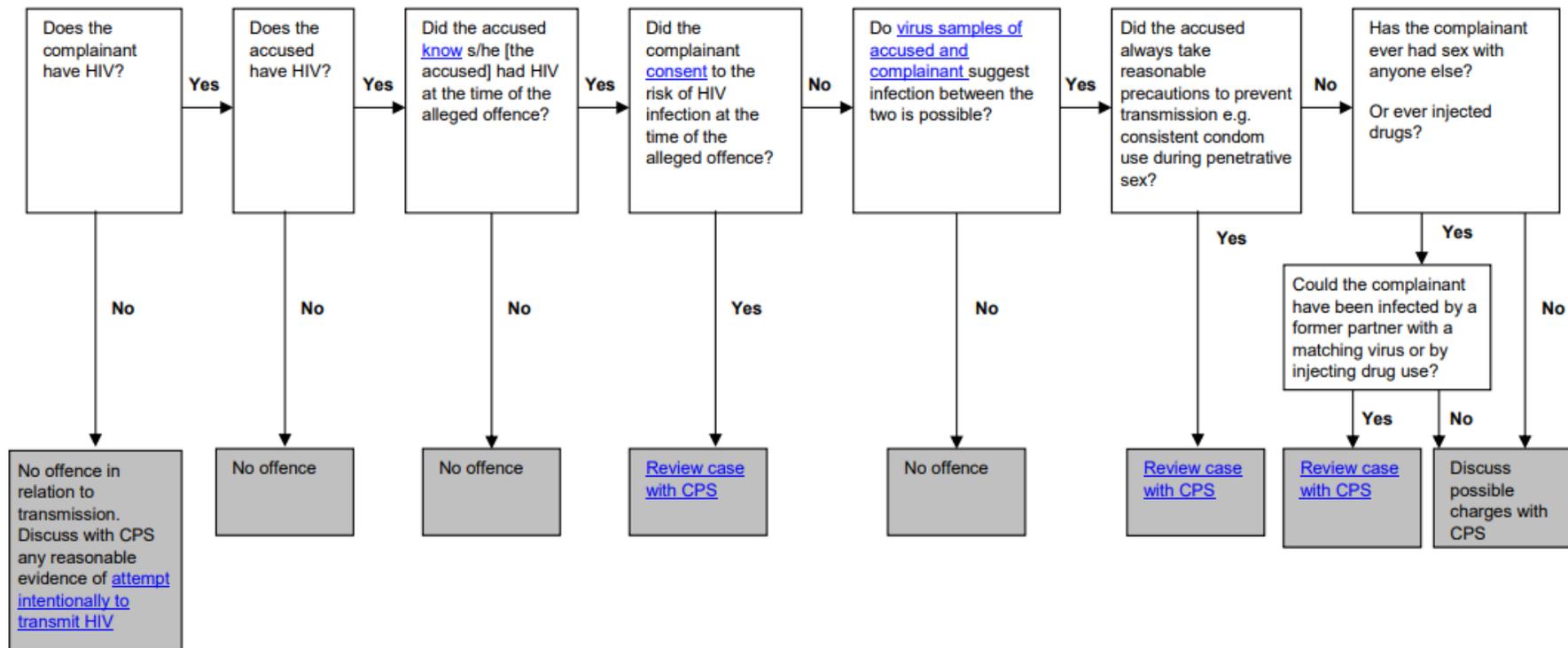
- 2006 – NAT & THT wrote to the Association of Chief Police Officers and the Metropolitan Police about the need for consistent investigation guidance
- 2008 – CPS legal guidance published → ACPO form a working group to draft best practice guidance for investigating police; NAT is the community representative
- 2009 – THT publish a [review](#) of police investigations into HIV/STI transmission from 2005-2008 – good practice, bad practice, recommendations
- 2010 – [investigation guidance](#) jointly drafted and published by NAT & ACPO, and approved by CPS
- 2011 to present – guidance periodically reviewed, with most recent update published in 2018. Consistent advocacy required.

POLICE GUIDANCE

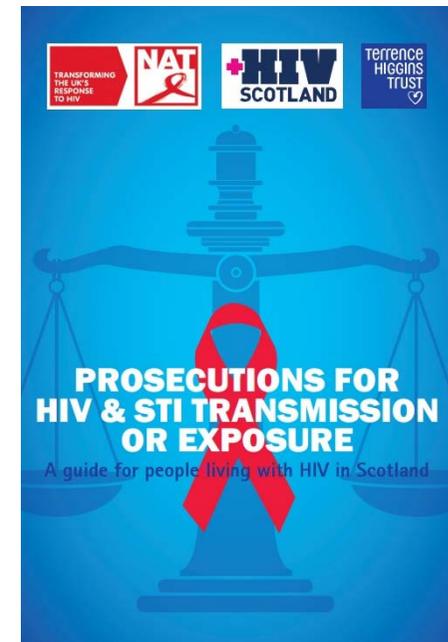
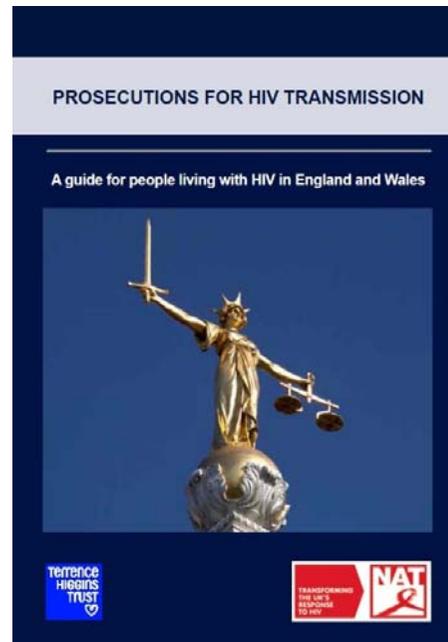
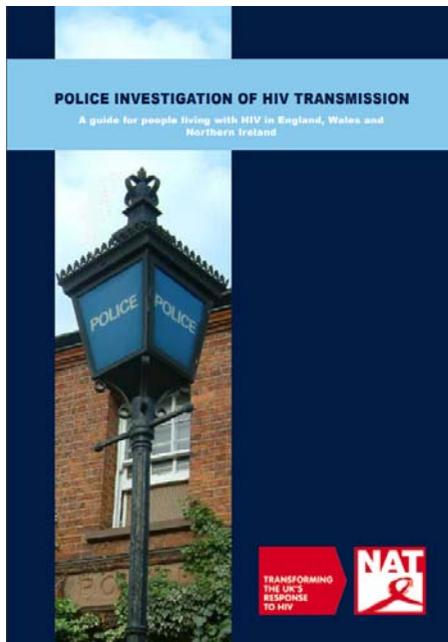


- **HIV: key facts for Police** – information on key biological and clinical facts, PEP & PrEP, testing and treatment, and discrimination issues.
- **Police investigation flowchart** – sets out the overall investigative process for police once an allegation is made.
- **Evidential Flowchart** – sets out the evidential steps in any investigation to limit unnecessary intrusion and ensure appropriate collection of evidence.
- **Accused under 18** – special considerations where the accused is under 18.
- **Communication Strategy** – guidance to police officers on communication around investigations and issues of confidentiality and media relations.
- **Initial contact via sexual health clinics** – recommends that initial contact with third parties should be made by sexual health professionals rather than police

EVIDENTIAL FLOWCHART



GUIDANCE FOR PLWH



THANK YOU



If you have further questions please contact me at calum.douglas@nat.org.uk or +44 20 7814 6746