KNOW YOUR RIGHTS

A Guide for Child and Family Service Providers Serving People Living with HIV

March 2017

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Who is this guide for?

This guide was written for child and family service providers who provide support and assistance to people living with or affected by HIV.

This guide gives you legal information, not legal advice.

This guide provides legal information. Remember that many different people and organizations can provide you with information and support, but *only* a lawyer can give you legal advice. If you require legal advice about your specific situation, you should contact a lawyer.

INFORMATION THAT MY CLIENT MAY REQUIRE

What is disclosure?

Disclosure, in this context, is the simple act of a person living with HIV informing another individual of their HIV status.

What does the law in Canada say about disclosure of HIV status?

In most cases, people living with HIV (PLHIV) are not under a legal obligation to disclose their HIV status to others. However, Canadian law requires disclosure of an individual's HIV-positive status before certain sex acts and in some other limited circumstances.

Do PLHIV have a legal obligation to disclose their status to their health care provider?

PLHIV do not have a *legal* requirement to tell their doctor, nurse, dentist, surgeon, paramedic or any other health care provider that they are HIV-positive. This means that they decide whether or not to disclose their HIV status to their health care provider. Their personal health information, including their HIV status, is private, personal information. Health care providers — whether or not they know their clients' HIV status — should use universal precautions to prevent exposure to blood-borne infections at all times.

However, not having a *legal* obligation to disclose does not mean PLHIV should withhold their status from their health care provider. Telling their doctor about their HIV-positive status is often necessary to get the best care possible.

Can PLHIV be sued for lying on a medical form about their HIV-positive status?

Health care providers can ask PLHIV questions that are relevant to providing care. This allowance is why PLHIV may be asked to complete a form and provide information about their health at an initial appointment with a new doctor, dentist or other health care provider. However, there is no obligation for PLHIV to provide such information if they do not want to. If a PLHIV does not feel comfortable disclosing their HIV status, they have the right to refuse to respond to a health care provider's questions. If clients do not disclose their HIV-positive status to a health care provider, their decision not to disclose cannot be used against them.

When must PLHIV disclose their status to their sexual partners?

Generally speaking, PLHIV have a legal obligation to disclose their HIV status to their partners before engaging in sexual activity that would pose a "realistic possibility" of transmission of HIV. This legal obligation requires PLHIV to disclose their HIV status to their partners under particular circumstances.

There are three specific contexts in which PLHIV are legally required to disclose their HIV status:

Vaginal Sex

PLHIV have a legal duty to disclose their status prior to vaginal sex

a) without a condom (regardless of the HIV-positive partner's viral load*) and
b) with a condom when the HIV-positive partner's viral load is higher than "low."

PLHIV do not have a legal duty to disclose their status if they have a low or undetectable viral load *and* use condoms during vaginal sex.

Anal Sex

Anal sex poses a higher risk of HIV transmission than vaginal sex. Therefore, the legal duty to disclose is at least as strict as in the case of vaginal sex.

Oral Sex

Oral sex is considered a low-risk activity with respect to HIV transmission. However, the law *may* require that PLHIV disclose their status to their partners when engaging in oral sex without a condom and/or if their viral load is not low or undetectable. There is no duty to disclose before oral sex if the HIV-positive partner uses a condom *and* has a low viral load.

**The term "viral load" refers to the amount of HIV in a sample of blood. A viral load test measures the number of HIV particles in a person's blood. While having an undetectable or low viral load greatly lowers the chance of transmitting HIV to a partner, HIV can still exist in semen, vaginal or rectal fluids, breast milk, and other parts of the body. Regardless of whether or not their viral load is detectable or low, PLHIV are only legally obligated to disclose their status to their partners in the circumstances detailed above.*

How can PLHIV reduce the risk of criminal prosecution or conviction for non-disclosure to sexual partners?

While there is no fail-safe way to avoid being accused of HIV non-disclosure, there are some steps that your HIV-positive clients *may consider* taking to reduce the risk of being charged for non-disclosure under the criminal law (but they are not legally required to do so).

These steps include the following:

- Clearly disclosing their status when required and discussing the risk of HIV transmission and prevention.
- Conducting this disclosure in front of a witness (e.g., a health care provider or counsellor).
- Having sexual partners sign a document or agree to a video recording indicating that the PLHIV made them aware of their HIV-positive status.
- Keeping copies of any documents or correspondence that can be used to show that disclosure took place (e.g., letters, notes, emails, messages, texts, chat-room dialogues).
- Avoiding activities that may pose a higher risk for HIV transmission (specifically, vaginal and anal intercourse without a condom).
- Working with a doctor to maintain a low or undetectable viral load.

Are PLHIV required to disclose their status to their employers?

In most cases, PLHIV do not have to tell their employers that they have HIV as their HIV status is private and personal information. Whether or not they disclose their HIV status at work, and to whom, is entirely up to them.

Most jobs pose no real risk of transmitting HIV to anyone else. So PLHIV have no legal obligation to tell anyone about their status. For their employer to request this information as a condition of hiring them would be unlawful discrimination. Note, however, there may be some exceptions to this general rule, especially for PLHIV who work in health care settings. If your HIV-positive client is considering a career in health care services, you should advise your client to contact the relevant regulatory bodies to find out the specific rules that would apply to them.

Can employers require job applicants to take an HIV test?

Employers cannot require job applicants to take an HIV test as a condition of employment (including on a job application or during an interview). They can, however, ask questions to assess an individual's ability to perform the duties of the job. This assessment can involve a medical exam that should not include an HIV test, since a positive test result would not indicate whether or not the applicant is able to perform specific job duties. Additionally, although it is against the law to do so, employers may ask personal questions regarding a job applicant's sexual orientation, marital status, and the like. There is no obligation to answer these questions. However, job applicants would do well to plan their answers to such questions in advance to avoid negatively affecting their chances of getting the job and to avoid future repercussions if the employer discovers that the applicant did not provide an accurate response.

MY DUTIES AS A SERVICE PROVIDER

What are my duties to my client with respect to their privacy?

Service providers, including staff and volunteers, have a legal duty to maintain the confidentiality of their clients' personal information, including their HIV status or any information provided during counseling. Specifically, clients' personal health information (including their HIV status) can only be disclosed with their consent.

What are the consequences for breaching this duty?

When a service provider breaches their clients' confidentiality, clients have several options at their disposal.

They may file a complaint with a privacy commissioner (or ombudsperson). Commissioners usually have the power to investigate and make rulings about complaints. The privacy commissioner's office may attempt to resolve a complaint through negotiation or mediation. The commissioner may also investigate a complaint and issue a report with recommendations.

Depending on where they live, clients may be able to sue the service provider and their organization in a civil court for breach of privacy.

Are there any limitations on my duty to maintain my client's confidentiality?

The general rule is that your clients' personal health information can only be disclosed if the client consents to it. However, your clients' personal health information, including their HIV status, can be disclosed without their consent if disclosure is *required* by law (e.g., via search warrant) or ethical duty, or is *permitted* by law or ethical duty (e.g., to prevent harm to others).

The three scenarios in which your duty to maintain your client's confidentiality is limited are as follows:

1. Your reporting obligations and potential interventions under public health laws
2. The need to prevent harm to another person
3. Your duty to abide by search warrants or subpoenas

What are my reporting obligations in accordance with public health laws?

The Public Health Agency of Canada publishes a list of diseases under national surveillance, which includes HIV and AIDS. Each province and territory, however, decides whether a given illness is considered reportable. In addition, the legislation in your province or territory may set out specific reporting obligations applicable to the type of service your organization or institution provides. Health care providers (such as doctors and nurses) as well as laboratory administrators, and in some provinces and territories, teachers and daycare providers, are some classes of service providers who may have reporting obligations under these provincial and territorial laws.

In what circumstances *may* client confidentiality be set aside to protect others from harm?

If your HIV-positive client is engaging in behaviours where the possibility of HIV transmission is high, third parties may be harmed. In such circumstances, you may have a legal duty to third parties such as your client's sexual or drug-injecting partner, and this duty can compete with your legal obligation to maintain your client's confidentiality.

In the *Smith v. Jones* case, the Supreme Court of Canada set out a number of conditions that, when satisfied, indicate that there is discretion to disclose confidential information about a client in order to prevent harm to another person. These conditions are as follows:

- There is a clear risk of harm to an identifiable person or group of persons.
- There is a risk of serious bodily harm or death.
- The danger is imminent.

The principles set out in *Smith v. Jones* apply to every service provider who works with and counsels PLHIV, whether they are regulated professionals or not.

According to the Supreme Court of Canada, confidentiality may be set aside when the facts of the case (i.e., the particular circumstances at issue) raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm. HIV, however, is difficult to transmit even during unprotected sex. As a result, it may be particularly challenging to establish *imminent danger* of serious bodily harm.

In light of *Smith v. Jones*, service providers considering breaching client confidentiality in a case related to HIV non-disclosure should consider the following:

- whether they are reasonably certain that the client is engaging, or intends to engage, in unprotected vaginal or anal sex, rather than simply assuming that this is the case; and
- all factors that may increase or decrease the risk posed to the HIV-positive client's partner(s), including, for instance, the client's viral load or antiretroviral treatment (when this information is known) and the frequency of unprotected sex.

What should I do if I am considering breaching my client's confidentiality to meet a legal or ethical obligation?

If you, as a service provider, are considering breaching your client's confidentiality, it is important to understand that you must respond carefully and with proper consideration of your obligations. The guidelines below should be followed unless there is valid reason not to do so.

First, you should seek guidance from a supervisor or executive director.

Second, you should answer the following questions:

- Has the HIV-positive client been informed of the HIV disclosure requirement in the context of sexual partners, including the legal implications of HIV non-disclosure?
- Has the HIV-positive client been thoroughly counseled on the means of protecting a sexual partner from HIV transmission?
- Is an identifiable person or group of persons at risk?
- Is the risk a risk of serious bodily harm or death?
- Is the serious bodily harm or death imminent? In other words, the nature of the threat must be such that it creates a sense of urgency.

When answering these questions, service providers should take into consideration all factors that may increase or decrease the risk posed to a client's partner(s), such as type of sexual activity; client's viral load or HIV treatment, when known; and frequency of unprotected sex.

If the answers to all of the above questions are "yes," then you should consider the following questions:

- What option would be the least intrusive? Could you, for instance, have a general discussion about HIV, its transmission, prevention and testing with the person at risk?
- What will be the potential harm if you breach client confidentiality? This includes harm to the client, to the relationship between the client and service provider, and to the ability of the organization to carry out its mandate.
- What will be the potential harm if you don't breach client confidentiality? This includes harm to the client's partners and to the organization's ability to carry out its mandate.
- Does the harm of breaching confidentially outweigh the harm that may occur if confidentiality is preserved?

In weighing the above factors, if you choose to **preserve** client confidentiality, you should continue to counsel your client about HIV prevention and inform the client about the legal implications of HIV non-disclosure. If you choose to **breach** client confidentiality, then you should consider the steps you will take while continuing to protect your client's rights and well-being to the greatest possible extent. Such considerations include the following:

- Deciding who you are going to contact, and when and what client information you are going to disclose (disclosure should only be limited to what is absolutely necessary).
- Giving the client reasonable advance notice, and discussing the procedure you are going to follow and the information you are going to disclose (note that this may not be a practical consideration in certain circumstances).
- Helping the client develop a plan to deal with the possible negative consequences associated with disclosing confidential information.

Once you have addressed these considerations, you are in a position to proceed with disclosure. It is important to disclose as little information as possible; in other words, disclose only the relevant information to accomplish the goal of preventing harm. Additionally, **you must not reveal the name or other identifying information of your client**, unless absolutely required to protect the person at risk. If you do reveal your client's identity, you must satisfy yourself that anyone you are providing information to also knows the importance of not revealing your client's identity.

Your organization should record the reasons for the decisions it took and inform the client of any action to be taken if it breaches their privacy.

Are there any specific reporting obligations regarding protecting minors?

In general, there is no obligation under Canadian criminal law to report a crime to the police or provide the police with information about a client, unless such a requirement is set out in a search warrant. However, if a service provider has reason to believe that a child is (or might be) in need of protection, provincial and territorial laws usually have explicit obligations to report these concerns to child protection authorities (or any other authority designated by the legislation), even if doing so means breaching client confidentiality. Provincial and territorial laws usually protect the informant against lawsuits if such a report was made in good faith and in compliance with the legislation. These laws also usually consider failure to report a child in need of protection an offence.

The obligation to report usually applies to anyone who believes a child is in need of protection. Provincial and territorial legislation, however, may also create specific obligations for certain professionals, such as child care workers, teachers and health care providers. Regulated professionals should also be aware of any legal or ethical duty to report that may exist in acts and regulations that govern their profession. Depending on the province or territory, reporting obligations may apply to children and youth under a certain age, and to older children with disabilities.

The notion of a child in need of protection may vary from one province or territory to another. The definition of a child in need of protection in provincial or territorial legislation may not easily apply to situations that service providers may encounter in the context of HIV criminalization (e.g., a service provider has good reason to believe that a client is not disclosing their HIV-positive status to their sexual partner). In the absence of explicit legislation, it will be up to the organization to choose the best approach depending on the circumstances.

Can I be held criminally responsible or sued in civil court for either disclosing or not disclosing my client's HIV status?

Courts have ruled that some institutions and professionals with specific mandates (such as hospitals, psychiatrists, social workers and police) have a duty (i.e., a legal obligation), in some specific circumstances, to take reasonable steps to protect someone they can identify as being at risk of harm, by either better controlling or supervising a client or by warning specific people known to be at risk. In these civil lawsuits, the issue has been whether the institution or professional was negligent — and therefore liable to pay monetary compensation ("damages") to a person who was injured because the institution or professional failed to fulfill a "duty of care" to the person who was harmed.

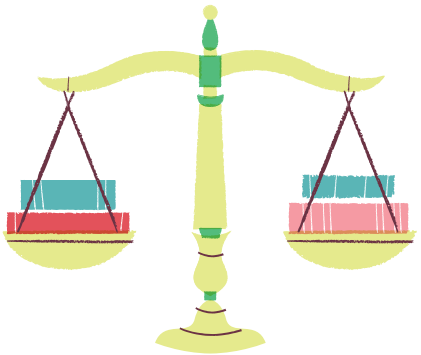
In some cases, this duty of care may extend as far as revealing information that you otherwise would be required to keep confidential. This obligation is often referred to as a "duty to warn"; that is, a duty to take reasonable steps to prevent "reasonably foreseeable" harm to another person or persons by warning them. In some cases, this duty to warn may **not** require going as far as directly warning the person the service provider thinks or knows is at risk of harm.

Therefore, do not assume that directly warning a person believed to be at risk is always necessary. Rather, it is important to think through, and get legal advice on, what an organization or service provider could do under the particular circumstance. The organization or service provider has to balance a duty of confidentiality to the client against the possibility of being liable in a lawsuit if confidentiality is not breached in some way and a third party is harmed.

There is currently no reported court decision establishing a "duty to warn" in the specific context of HIV non-disclosure, nor is there currently any civil suit against a community service provider for failing to warn a partner at risk of HIV transmission.

To what extent can I counsel my clients?

As a service provider, you can only provide legal information to your client, which includes information about the criminal law and the duty to disclose. Only lawyers can provide legal advice.



What is the difference between legal information and legal advice?

Legal information consists of generalized details that can assist clients in understanding their rights and obligations under the law. In contrast, legal advice consists of guidance on a client's specific situation, which is meant to aid the client in deciding what to do.

How should I provide legal information to my clients?

Legal information is best provided via written materials from reliable sources (such as this or other publications written by the Canadian HIV/AIDS Legal Network or one of its partners). By referring to written sources, you, for example, can describe to your client what kinds of behaviour may lead to criminal prosecution.
It is also recommended that you use general terminology when describing the law, for example, to your client, in order to avoid advising your client on the specifics of their case. Additionally, avoid analyzing a client's particular situation and use verbs such as "might" or "may" (e.g., disclosing in front of a counsellor *might* help to prove HIV disclosure).

What kind of legal advice could my clients require and what should I do if my clients require this guidance?

In cases where HIV non-disclosure is at issue, your HIV-positive clients may request that you analyze their situation and discuss their chances of being prosecuted. Additionally, your clients may ask for your advice regarding whether they should speak with the police and the potential chances of success of their complaint to the police. Your clients may also ask for your opinion on the most effective legal strategy with respect to their particular situation. These are examples of scenarios which would necessitate the provision of legal advice. You should not engage in such discussions with your clients, nor should you analyze their case or provide your opinion on options to pursue or chances of success. If your clients approach you with any such questions, you should always refer them to a lawyer in their province or territory for additional information or legal advice, if need be.

How do I respond to a search warrant?

If you are presented with a valid search warrant by a police officer to search the relevant premises or seize items that may be evidence for a criminal case, you are legally required to turn over the records or portions of the records requested by the police under the warrant. However, there is no obligation to turn over any more information or materials than that covered by the warrant. As such, you must fulfill your duty of client confidentiality insofar as possible when complying with the search warrant. In order to maintain this balance, the following steps are recommended when responding to a search warrant:

Consult your organization's policy and guidelines on client confidentiality and record-keeping, if such policies exist. Some organizations may feel strongly against breaching client confidentiality for the sake of protecting their relationships with their clients and their reputation for approachability in the community, so they may choose to fight a search warrant in court.

Ask to see the warrant and receive a copy for your records. When examining the warrant, make sure a justice of the peace has signed it and that it includes the records the police have requested. Additionally, check the deadline that limits the length of time the police can use the warrant.

Ask the police exactly what records they want. Locate those records, or portions of those records, for the police, place them in an envelope or box and seal it. Write on the envelope or box: "PRIVILEGE ASSERTED — DO NOT OPEN."

Tell the police that you are asserting that these records are confidential and privileged at law. You may want to state this in writing as well.

Give the details (name, address, telephone number) of the organization's lawyer, if known, and appropriate records to the police.

Call the concerned client(s) immediately to advise them of the seizure and suggest they seek legal advice by providing appropriate referrals.

Call a lawyer as soon as possible to get legal advice. If it's possible to obtain legal advice before handing over the documents, then contact the lawyer then.

Additionally, if you feel that the police are pressuring you to compromise on your duty to your client(s), or the police seek to obtain information or search premises not covered by the warrant, your organization should contact a criminal lawyer as quickly as possible for advice. It is also important to remember that the police cannot review the documents before seizing them or browse through files to determine what might be relevant.

How do I respond to a subpoena?

The *Criminal Code of Canada* empowers a court to issue a subpoena to require any person(s) likely to have material evidence about a criminal case to attend court to give evidence, and discuss and bring any relevant materials. Such material may include clients' counseling records. If you fail to appear before court when subpoenaed, you will be found guilty of contempt of court, and the court may issue an arrest warrant for you.

It is important to remember that when served with a subpoena, organizations and lawyers must consider whether or not they are going to claim that client records and other information should not be introduced as evidence by asserting "privilege" (which is a legal principle).

When served with a subpoena, it is recommended that you take the following steps:

Consult the organization's policy and guidelines on client confidentiality and record-keeping, if they exist. Again, some organizations may feel strongly against breaching client confidentiality for the sake of protecting their relationships with their clients and their reputation for approachability in the community.

Contact the client(s), advise them of the subpoena, suggest they seek legal advice and provide appropriate referrals.

Call a lawyer to obtain legal advice.

Identify what exact information and documents are required by the court (a lawyer may be able to assist your organization with this).

Locate the records, or portions of the records, and place them in an envelope or box and seal it. Write on the envelope or box: "PRIVILEGE ASSERTED — DO NOT OPEN."

Work with the organization's lawyer to prepare the defence of the assertion of privilege in court.

Finally, **under no circumstances should you destroy records after being served with a subpoena.** If you do so, you may be cited for contempt of court and, upon conviction, subjected to a fine or imprisonment.

ADDITIONAL RESOURCES

The criminal law and HIV

Canadian HIV/AIDS Legal Network, *HIV Disclosure and the Law: A Resource Kit for Service Providers* [undated].
Useful information and tools to make informed and empowered choices about how to respond to criminalization. www.aidslaw.ca/community-kit

Canadian HIV/AIDS Legal Network, *Criminal Law & HIV Non-Disclosure in Canada*, 2014.

Canadian HIV/ AIDS Legal Network, *HIV Disclosure to Sexual Partners: Questions and answers for newcomers*, 2015.

Canadian HIV/AIDS Legal Network, *Women and the Criminalization of HIV Non-Disclosure*, 2012 (updated 2017).

Privacy rights and HIV

Canadian HIV/AIDS Legal Network, *Know Your Rights*, 2014.
A series of 8 brochures available in seven languages on privacy rights and disclosure obligations of people living with HIV in a variety of day-to-day contexts. www.aidslaw.ca/site/kyr

Canadian HIV/AIDS Legal Network, *Privacy and Disclosure: Questions and answers on HIV-related privacy and disclosure issues for women's service providers*, 2012.

Canadian HIV/AIDS Legal Network, *Privacy and Disclosure for Youth Living with HIV or Hep C: Questions and Answers*, 2017.

ACKNOWLEDGEMENTS

This guide was produced by the Canadian HIV/AIDS Legal Network. Funding was provided by the Public Health Agency of Canada.

The Legal Network is grateful to Saara Green, Nadia Narain and Nicci Stein for their invaluable input to this resource.

Illustrations and design by Ryookyung Kim.

www.aidslaw.ca