

# HIV Disclosure and the Law: A Resource Kit for Service Providers



## Introduction

### About this Resource Kit

With regularity, people living with HIV (PHIVs) continue to be criminally prosecuted and convicted for not disclosing their HIV-positive status to sexual partners. As of December 2016, at least 184 people had been charged in Canada for not disclosing their HIV-positive status. Until the law is changed, criminalization is a reality that the community (PHIVs *and* the people who work with and support them) must live with and respond to. This Resource Kit is intended to provide both PHIVs and service providers with useful information and tools to make informed and empowered choices about how to respond to criminalization.

The criminalization of HIV non-disclosure raises complex legal and ethical issues for service providers, especially for AIDS service organizations (ASOs). It can challenge their counselling and record-keeping practices, as well as their capacity to support clients and protect client confidentiality.

It is up to each organization to choose how to respond to the current use of the criminal law against PHIVs. But whatever the response, **ASOs and other service providers should consider developing policies and guidelines about HIV disclosure, counselling and client confidentiality if they have not already done so.** An organization can develop its own policies and guidelines or adapt existing ones. Either way, **policies and guidelines should be based on a sound understanding of applicable legislation, relevant legal and ethical issues, and a realistic assessment of the practical and political situation in which the organization works.**

Although the criminal law may be used against PHIVs outside a sexual context (e.g., non-disclosure before sharing drug equipment, or biting or scratching without disclosure), this Resource Kit focuses on the application of the criminal law to HIV transmission or exposure in the context of **consensual sexual activity**, which accounts for the vast majority of cases in Canada and the area of greatest concern. Nevertheless, some information on the implications of criminalization in non-sexual contexts is available in the section on “Criminal law and HIV non-disclosure.”

This Resource Kit is for:

- **ASO staff and volunteers** who counsel PHIVs and/or their partners (whether or not the staff or volunteers are regulated professionals);
- **ASO Boards of Directors and Executive Directors (EDs)**;
- **Other agencies and organizations** in which staff and volunteers counsel PHIVs and/or their partners (e.g., HIV clinics, shelters, organizations for women that are victims of violence, youth community centres, etc.).

Use the Resource Kit to:

1. **Learn more about the disclosure of HIV status and**
  - criminal law, public health law and civil liability;
  - client confidentiality and record-keeping;
  - counselling standards and approaches; and
  - how to respond to the media.
2. **Counsel and give information to clients** about HIV disclosure and the criminal law.
3. **Develop or adapt for** your organization
  - client confidentiality and record-keeping policies;
  - guidelines for counselling PHIVs; and
  - client information materials about HIV disclosure.

## How to use this Resource Kit

This Resource Kit is divided into sections that will be updated periodically online to reflect the evolution of the law and the needs of the community, including PHIVs and ASOs.

The Resource Kit contains **information** on the law, ethics and counselling. It also contains **tools** — including checklists, decision-making trees, models of search warrants, samples of guidelines and policies, etc. — to help ASO staff members and service providers counsel their clients, protect the confidentiality of both client and organization, and develop guidelines and policies.

Each chapter can be used to meet a specific need for information or guidance. For example:

- Counsellors can use the section on “Criminal law and HIV non-disclosure” as a basis **to provide legally accurate information to clients about criminal law and HIV disclosure**, either through in-person counselling, by developing information sheets, or any other means of communicating information.

- ASOs can use the information in the section on “Client confidentiality and record-keeping” **to develop and adopt a policy on client confidentiality.**
- **If a police officer shows up at an organization with a search warrant for a client’s file**, the organization can use the step-by-step checklist in the section on “Client confidentiality and record-keeping” to take measures to protect the confidentiality of the client’s information.
- **If a client is charged, ASOs and other counsellors can use information in the section titled** “For more information and legal advice” to provide a client with necessary referrals.

Most of the materials including in this Resource Kit are based on the original 2004 publication, *Disclosure of HIV Status After Cuerrier: Resources for Community-Based AIDS Organizations*. Those materials have been updated and restructured to ensure both accuracy and practicability.

Additionally, the Resource Kit contains a new selection of relevant resources — selected by the partner organizations (Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario [HALCO], Coalition Communautaire des Organismes Québécois de Lutte contre le Sida [COCQ-SIDA], Canadian AIDS Society [CAS], Positive Living BC and the AIDS Coalition of Nova Scotia) but not necessarily developed by any of these organizations.

Most of the materials are available in both English and French, unless they come from an external source.

**This Resource Kit is not a substitute for legal advice about a particular situation.** It provides analysis and information about the legal and ethical issues related to HIV-disclosure that are commonly faced by ASOs and other service providers. It is a reference and a resource. Counsellors may still need to get legal advice about particular client situations. And a Board of Directors may want to have a lawyer review a policy before it is adopted.

### **Disclosure defined**

Disclosure is the act of informing others of a person’s HIV status. A PHIV may disclose his or her own HIV status. Or someone else may disclose a PHIV’s HIV status, with or without the PHIV’s consent, depending on the circumstances.

Disclosure can occur in many contexts: disclosure within personal relationships (to lovers, partners, spouses, children, friends and other family); disclosure in the workplace (to an employer, other employees, clients); disclosure to health and other service providers (physicians, emergency services, dentists, social workers, insurers, etc.); disclosure in an institutional setting (prisons, schools, etc.); and disclosure to the general public via the media, including online media and social networks.

The focus of this Resource Kit is **disclosure by HIV-positive people to their sexual partners**, though some resources available in this kit also address the issue of disclosure in other contexts.

## **A focus on HIV over other sexually transmitted infections**

This Resource Kit is about issues related to HIV disclosure and the criminal law. However, ASO staff members and other service providers should know that people have been prosecuted for exposure to or transmission of other sexually transmitted infections, including hepatitis B, hepatitis C and herpes. However, at the time of this writing, the very vast majority of prosecutions have concerned HIV.

## **The role of ASOs and other service providers**

HIV disclosure is a difficult issue for people who work (or volunteer) in ASOs or for other service providers who counsel PHIVs and/or their partners. It is a difficult, complex and sensitive issue and ASOs are often the best or only source of information and support for PHIVs. According to preliminary findings of a recent study in Ontario, ASOs and media are the primary sources of information about the criminal law and HIV non-disclosure for PHIVs.<sup>1</sup>

But accurate and understandable information is hard to wrestle out of complex and sometimes inconsistent legal decisions. **It may not be possible to give a client clear answers to his or her questions.** Moreover, **only lawyers are authorized to provide legal advice.** Service providers are not entitled to counsel an individual on his or her particular situation as it relates to the criminal law. Service providers can only provide legal information. **Finally, people who work in ASOs may also be faced with competing moral and legal duties where they know a client who has not disclosed his or her HIV status is engaging in higher risk behaviours.** What should the worker (or volunteer) do in this situation? What legal obligations does the worker have to the client or to the client's sexual or drug injecting partner(s)? Can the worker be held criminally responsible or sued civilly for disclosing or not disclosing the client's HIV status?

HIV disclosure is also a difficult and challenging issue for EDs and ASO Boards of Directors. **EDs and Boards are ultimately responsible for the policies and procedures of their organizations, for ensuring that clients receive high quality services, and for supporting staff and volunteers in their work.** They need to take a leadership role in tackling the difficult legal and ethical issues related to disclosure of HIV status. EDs and Boards can accomplish this by:

- ensuring that staff, volunteers and clients have accurate information about their legal and ethical responsibilities;
- engaging in an open and honest discussion and policy development process that includes Board members, EDs, staff, volunteers and clients; and

- putting in place policies and guidelines about client counselling, client confidentiality and record-keeping.

### **The original project: *Disclosure of HIV Status After Cuerrier: Resources for Community-Based Organizations***

After the Supreme Court of Canada's landmark 1998 decision in *R. v. Cuerrier* criminalizing HIV non-disclosure, PHIVs and ASOs called for resources to help them address the difficult issues raised by disclosure of HIV status. The Canadian HIV/AIDS Legal Network's report, *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status* (1999) and the CAS / Legal Network criminal law info sheets provided accurate information about HIV disclosure and the legal issues involved. They also identified the difficulties and challenges facing community-based AIDS organizations in Canada after the *Cuerrier* decision. Yet existing resources did not provide, in clear and plain language, information in a form that met the diverse needs of ASOs. Nor did they provide the type of resources that ASOs needed to develop policies, practices and guidelines for their staff and volunteers. This was not what they were designed to do. Consequently, the community formally requested further information and resources through the CAS People living with HIV/AIDS Forum and annual general meeting resolutions process in the year 2000.

In response, CAS formed a partnership with the Canadian HIV/AIDS Legal Network and AIDS Coalition of Nova Scotia. Funding from Health Canada's Canadian Strategy on HIV/AIDS was obtained to develop or adapt relevant information, analysis, policies and guidelines regarding HIV disclosure, counselling and confidentiality issues arising as a result of the *Cuerrier* decision.

A community advisory committee was established to provide direction to the project. Five members represented each region of the country (Bob Leahy, René Légaré, Michael Sobota, Carl Bognar, Jane Underwood). The committee also included one representative from CAS (Anna Alexandrova, National Program Consultant), the Legal Network (Glenn Betteridge, Senior Policy Analyst) and the AIDS Coalition of Nova Scotia (Robert Allan, Executive Director).

### **The new Resource Kit: *HIV Disclosure and the Law: A Resource Kit for Service Providers***

Because the law had evolved since 2004 and new resources developed to help the community respond to the criminalization of HIV non-disclosure, it was time to update the Resource Kit and restructure it so it would centralize existing resources and be more accurate and practical.

Six organizations have updated this resource. The original partners — Canadian HIV/AIDS Legal Network, Canadian AIDS Society and AIDS Coalition of Nova Scotia — were joined by new partners HALCO, Positive Living BC and COCQ-SIDA who have all been actively engaged in the issue of the criminalization of HIV non-disclosure.

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<sup>1</sup> B. Adams, “Drawing the line: Views of HIV-positive people on the criminalization of HIV transmission in Canada,” presented at the Canadian HIV/AIDS Legal Network symposium, Toronto, June 2010.