

Women living with HIV and intimate partner violence

Questions and Answers

March 2016

HALCO
HIV & AIDS Legal Clinic Ontario




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Introduction

Who is this guide for?

This guide is for women, including trans women, who are living with HIV and who experience or are at risk of experiencing violence from their intimate partner. Intimate partner violence can be physical, emotional, psychological or sexual abuse from someone with whom you have or had an intimate relationship. Abuse by an intimate partner is not only wrong — it can be against the law. Yet, intimate partner violence is one of the most common forms of violence against women.

This guide gives you legal information, not legal advice

This guide provides information about different laws that may apply to women experiencing intimate partner violence, including information about how the criminal law affects intimate relationships for people living with HIV. This guide focuses on laws that apply in Ontario, but some sections (for example, the criminal law section) also apply in all provinces and territories in Canada. This guide does not provide legal advice about your particular situation. If you want or need legal advice, you should talk to a lawyer. If you are living with HIV, you can contact the HIV & AIDS Legal Clinic Ontario (HALCO). There is information at the end of this guide about where to get legal help.

Why is there a guide about intimate partner violence for women living with HIV?

While intimate partner violence can occur in relationships between people of all genders, we focus on issues that affect women living with HIV because the majority of people affected by intimate partner violence are women. It is often men (husbands, spouses, common-law partners or boyfriends) who commit this abuse, but these laws also apply to abusers of the same sex.

A woman may be afraid to tell her partner that she is HIV-positive because she is afraid her partner will be violent. She may be afraid to get treatment because she fears abuse. Violence can also begin or get worse during pregnancy and this can prevent a woman from seeking treatment to prevent HIV transmission to the baby during pregnancy and birth.

The law can be very complicated. Women living with HIV who experience intimate partner violence may face complex legal problems. The legal system is even more complicated for women if they are mothers, disabled, racialized, Indigenous, new to Canada or not Canadian citizens. Women living with HIV may have concerns about privacy and disclosing their HIV status. This guide helps inform women living with HIV about relevant criminal, privacy, family, immigration and public health laws, and how HIV can affect the way the laws might apply.

Our legal system has not yet addressed challenging issues related to HIV and intimate partner violence. Each woman's situation and needs are different and legal information does not cover every possibility. Some women may decide not to go to the police or to court. This guide is designed to provide you with some important information about your rights and our legal system to help you make the best decisions for yourself.

Nobody deserves to experience violence or abuse and if you are experiencing intimate partner violence, you are not to blame. There are steps you can take to better protect yourself and your children from abuse in an intimate relationship, and there are services that may help you. A lawyer can provide you with legal advice about your options. You may also decide to talk to a counsellor at a sexual assault centre, women's shelter or AIDS service organization (ASO). The counsellor may be able to provide you with support and assistance. There are links to some resources at the end of this guide.

Legal options for women living with HIV who experience intimate partner violence

Is intimate partner violence a crime in Canada?

Some abusive behaviours (such as actions and words) are considered crimes. These include:

- physical force or harm, even if there is no injury (assault);
- forced or unwanted sexual activity (sexual assault);
- threatening someone with harm or unwanted sex, or trying to assault or sexually assault someone;
- harassing or stalking someone (criminal harassment); and
- using force to take or keep someone in a place, without legal authority (forcible confinement).

Criminal charges can include assault, sexual assault, making threats, criminal harassment and forcible confinement. Sexual assault charges can also be laid if a person, including a woman with HIV, does not disclose their HIV status before sexual activity when there is a "realistic possibility" of HIV transmission (see section below titled "The criminal law and HIV").

How do you report a crime?

If it is an emergency because you or someone else is in immediate danger, you can call 911, which is the emergency number in Canada.

The emergency operator will talk to you and may send the police or other emergency help, such as an ambulance. If you need an interpreter, the 911 operator can get an interpreter on the phone. If you are injured, you should get medical care.

You should read this booklet to learn about things to consider before you decide to call or visit the police. It is a good idea to get legal advice from a criminal lawyer and from an immigration lawyer (if you are not a Canadian citizen) before going to the police or taking other action under criminal law. If you decide to report violence to the police, they will investigate your complaint and decide whether there is enough information that an offence probably occurred to lay criminal charges. The police will keep notes about the investigation.

It can be hard to remember details later so it is important that you write notes about what happened. Write the date, time, location and the names of anyone else who was there. Keep the notes in a safe place. It is also important to know that if you speak to other professionals about the abuse (for example, a doctor, social worker or counsellor), they will likely keep notes about what you reported. Be aware also that when you speak to anyone about the abuse, whether a professional or not (for example, a friend, acquaintance, neighbour or co-worker), this information can be used in a court proceeding. In some cases, this information could be used against you, even if you are the person complaining of the abuse. For example, it could be argued that the court should not believe you if you told different versions to people about what happened to you.

What if the police do not charge your abuser?

If the police do not charge your abuser, you may be able to lay a charge yourself. You would have to go to court and “lay a private information.” You would ask a Justice of the Peace at a court to lay a charge against the person, based on what you tell the Justice of the Peace about the situation. You will have to explain the facts in writing and promise that what you are saying is true. The Justice of the Peace decides whether there is enough information that an offence probably occurred to lay criminal charges. This process can be complicated, so you may want to get advice from a lawyer before you go to court.

What happens if your abuser is charged?

If charges are laid by the police or the Justice of the Peace, the government lawyer (“Crown counsel”) takes over the criminal court case against the abuser. The Crown counsel is not your lawyer and can continue with the case even if you decide that you do not want to continue with the case. You do not have the right to stop the criminal case. You will likely become a witness in the court case and you may have to go to court.

Would you have to tell the police that you are HIV-positive?

You are generally not required by law to provide information about your HIV status to the police. However, the police could find out your status during their investigation.

Could your HIV status be disclosed if you report a crime?

If police charge your abuser, lawyers might learn about your HIV status from your statement to the police, by asking the court to get access to your medical records, or because of what you say in court. If you lay a private information with a

Justice of the Peace, your HIV status may also come up in telling your story to the court. Your HIV status may also end up in the court's decision, which is normally available to the public and could end up in the media. If your HIV status is included in the court's decision, the police, immigration authorities and any member of the public can find out about your HIV status, which could be used against you in ways that you do not expect. You can ask a court to decide whether it will hide your name and other information that would reveal your identity by, for example, using your initials or banning anyone from sharing your name publicly. If you are HIV-positive, you should get advice from a criminal lawyer about protecting your privacy before reporting abuse.

What if I am reporting a crime related to HIV?

In certain circumstances, a person can be charged with a crime if they know they are HIV-positive and they have sex without telling their sexual partner about their HIV status (explained more fully below in the section titled “The criminal law and

HIV”). If you report your abuser for not disclosing their HIV status to you before sex, the police will likely ask if you have tested positive for HIV. If you refuse to answer, the police, the Crown counsel or the lawyers for the defence could ask the court to order access to your medical records or other records containing information about your HIV status. Please contact HALCO or another lawyer before you go to the police if you are considering reporting your abuser for not disclosing their HIV status.

What happens after you report your partner for abuse?

When you report intimate partner violence to the police, they will ask you for detailed information about the abuse. The police will also get information by talking to the abuser and possibly to family members, neighbours or other people

who may know something about your situation or your relationship.

If police find that an assault by your intimate partner probably occurred, they must lay a charge. This is called a “mandatory charging policy.” If police find that both partners were involved in aggressive acts, they have to try to determine who started the dispute, or who was the main person involved in the violent acts. Sometimes both partners are charged.

In these situations, an abuser may try to accuse you of committing a crime. For example, they may say you assaulted them, and if you are HIV-positive, they may claim that you did not tell them that you had HIV before you first had sex (see section

below titled, “The criminal law and HIV”). If you are in immediate danger, your safety is the most important thing, and you may want to go to the police. If you are worried that your partner will accuse you of being HIV-positive and not telling them before having sex, you should talk to a criminal lawyer before going to the police. If you are charged, it is important that you talk to a criminal lawyer as soon as possible.

If you report intimate partner violence and charges are laid against your abuser, the Crown counsel will likely ask you questions. You may also be asked to go to Court to tell what happened to you (called “testifying”). When dealing with sexual assault charges, the court will not generally permit questions about your sexual history, but you may be asked some questions. If you accused your abuser of not disclosing their HIV status, the court could allow more questions about your sexual history.

The Ministry of the Attorney General has a program that supports complainants of intimate partner violence and sexual assault, called the Victim Witness Assistance Program (VWAP). VWAP offers emotional support and referrals to counselling services for victims of crime, as well as information about the criminal court system. VWAP workers help you prepare for court and help you communicate with Crown counsel. Sexual assault centres can also provide information and support. If you are afraid of your partner, you can contact VWAP or a sexual assault centre. You should call HALCO for legal advice if you have concerns about your HIV status being disclosed or if you are concerned about being charged for not disclosing your HIV status. See the resources section at the end of this guide to find contact information for VWAP, sexual assault centres and HALCO.

What can you do to keep yourself safe?

If your abuser has been charged: They may be arrested and released, or they may be kept in jail for a while, or until the trial is finished. If you have concerns that if they are released they

will harass, threaten or harm you, tell the police. Your partner may be kept in jail until a court hearing, or they may be released with conditions that could say they are not allowed to contact you in any way and that they cannot come anywhere near you. When the case starts through the court process, VWAP will contact you to explain what will happen next. If you are still afraid your partner may contact or harm you, tell the VWAP worker or the Crown counsel.

If your abuser is using your HIV status to hurt you (for example, they are telling people your HIV status, or they are preventing you from accessing your medications or treatment), you should tell the VWAP worker or Crown counsel, and consider talking to a lawyer about other things you can do to protect yourself.

You can contact the Legal Aid Ontario Family Violence Authorization Program to see if you qualify for two hours of free legal advice related to intimate partner violence. Information is available in more than 200 languages. See the resources section at the end of this guide for contact information.

Whether or not your abuser has been charged: If you are afraid that your abuser may hurt you, you can apply for a court order to help protect you. If you

lived with your partner, and you are afraid that they may hurt you or your children, you can go to Family Court and ask for a “restraining order” (explained in more detail below in the section titled “Family law and HIV”). The court can order your partner to stay away from you and your children, or order your partner not to contact you in any way.

Another possibility is to go to criminal court to ask a Justice of the Peace for a “peace bond,” which is a court order that tells a person to “keep the peace” and be of good behaviour. Like a restraining order, a peace bond can order a person to stay away from you, your family, your home and places you go, as well as order that the person not have any contact with you. A court can also suggest that both parties sign a “mutual” peace bond, which means that you and the other person both promise to “keep the peace.” Signing a peace bond does not result in a criminal record, but breaking a requirement of a peace bond is a criminal offence that can result in jail time. It is important to get legal advice from a criminal lawyer before you sign a peace bond.

If your partner is using your HIV status to abuse you, you should tell the court. Protection against this kind of abuse may be added to either a restraining order or a peace bond. You can also consider getting legal advice immediately to find out whether there is something that you can do to protect your privacy.

If your partner does not follow any part of a restraining order or peace bond, you can call the police, and the police can charge them with a crime.

If you are afraid your abuser will hurt you, none of these options is a guarantee that you will be safe. It is important to have a full safety plan in place, even if the court has ordered your abuser to stay away from you. You can contact your local women’s shelter or support organization for help with a safety plan.

Can you get financial compensation for abuse?

In Ontario, you can apply for compensation (money) from the Criminal Injuries Compensation Board (CICB) if you are a survivor (victim) of a crime. The CICB is a government program that can give money to people who have suffered an

injury or have expenses resulting from a crime. Injuries can be physical or psychological. The CICB may pay in a lump sum or in monthly payments. The money is from the CICB and paid by the Ontario government, not the person that committed the injury. Contact HALCO for legal advice before making an application to the CICB. You should not delay in getting legal advice because there are deadlines to apply to the CICB.

Civil courts (different from criminal courts) can also award compensation for injury. These courts can make an order that the person who caused the injury pay money to you. The injury could be from unwanted physical contact, including sexual assault, and it can include psychological injury. The amount of compensation is related to the seriousness of the injury and the impact on your life. You should contact a personal injury lawyer before you start either a CICB application or a lawsuit. You should not delay in getting legal advice because there are deadlines to apply to court. For more information about finding a lawyer, see the resources at the end of this guide.

Family law and HIV

Family law covers a wide range of issues, including:

- separation and divorce;
- child custody, access and support;
- spousal support; and
- division of family property and the family home.

Family law is governed by both federal and provincial laws. Courts can make orders about family law issues. Family law can be complicated, so you should get legal advice from a family law lawyer about your rights and options.

There are rules that influence if and how provincial family court orders are enforced on First Nations communities (on reserve). If you live on reserve, contact a family law lawyer for legal advice. In all family law issues, your HIV-positive status alone should not determine whether you:

- are awarded custody of or access to your child;
- qualify for child and spousal support; or
- are granted a fair share of family property.

Your HIV-positive status should not be relevant in family law unless it affects how you care for your child or yourself.

If you have experienced intimate partner violence, there is a family court worker program that may help you through the family court process. For more information about the program, see the resources section at the end of this guide.

What options does family law provide to protect people who have experienced abuse?

Family law courts can order your partner to do or not do certain things. You may be able to get a restraining order against your partner if you are or were living together, and you are afraid they will hurt you or your child. Restraining orders can order them:

- not to contact you and/or the child(ren) in any way — for example, by phone, text, email, Facebook or through another person;
- to stay away from your home, work, child’s school or other places you regularly go; and
- to stay a certain distance from you and/or your child.

Custody and access orders set out who has the legal right to make all of the important decisions about a child (custody) and who may have the legal right to visit the child (access). In cases of intimate partner violence, the court can order very specific times and places where the access parent can visit the child, including “supervised access,” which means there must always be another person with the child and visiting parent. In rare cases where the court thinks the child can never be safe with a parent, the court can order no access.

If you are/were married to your partner, you can apply for an exclusive possession order that can:

- allow you to live in the family home without your spouse (with or without any child);
- allow you to maintain possession of household property; and
- order your spouse not to come to the home.

An order for exclusive possession of the family home does not affect who owns the home or change the right that both spouses have to share the value of the family home. It is usually temporary until there is a final decision about ownership and how to divide family property between the spouses.

You can make court applications for restraining, custody/access, or exclusive possession orders on an urgent or emergency basis. The applications can be dealt with quickly, but sometimes not immediately.

Court orders do not always prevent harassment or violence. Your abuser may not obey a court order.

However, it is important to follow a court order, and if a court order is not obeyed, there can be serious consequences.

If you fear for your physical or mental health or safety or that of your child, you should consider going to a safe place like a women's shelter. You should speak with a family law lawyer for legal advice about applying for a family court restraining order, custody/access order or exclusive possession order. There are resources listed at the end of this guide.

If your former partner is charged with a crime, do you still qualify for child support or spousal support?

Parents have obligations to support their children. It does not matter if you are or were married to the other parent of your child, or if you ever lived together. If you separate from the other parent and you end up raising the child most of the time, you can apply to a family court to ask for an order for child support, or for an order requiring another

parent to provide ongoing information about their income or job search efforts if they are currently unable to work. Your child's parent will be required to pay child support if they have more than a minimal income, and even if they have been charged with a crime. While being in prison does not automatically mean that someone can stop paying child support, a parent can try to change the child support order if there has been a change in circumstances, such as a change in their income.

To determine the amount of child support, a court will apply the Child Support Guidelines. These Guidelines set out a fixed amount of support per child based on the income of the person paying support and the number of children in the family. This amount is called the "table amount." Generally, the parent that the child lives with most of the time receives child support from the other parent. You can find a link to the table amount for child support in the resources section at the end of this guide.

Sometimes when partners separate, the person with the higher income pays spousal support to the other person. If you were married, the rules are in the Divorce Act, which applies across Canada. In Ontario, if you didn't get married, you may be able to get spousal support if you lived with your partner in a relationship for at least three years (called common-law spouses), or if you lived together in a steady relationship for any length of time and you have a child together. The amount of spousal support can be affected if the person is also paying child support. Child support will take priority to ensure that the child's needs will be looked after.

Judges must consider a number of factors when deciding if a partner should get support after separation. Spousal support is not meant to compensate people for any misconduct of the partners during the relationship, such as cruelty or other forms of abuse, but it can address ongoing financial impacts of that cruelty or abuse.

The Family Responsibility Office makes sure that child and spousal support payments are made so you do not have to contact your former partner or disclose your contact information to them.

Complicated rules apply to child support and to spousal support. You should consult a family law lawyer to help you understand these rules and other factors that may apply to your situation. You can go to a Family Law Information Centre or call Legal Aid Ontario to get basic information about child and spousal support and how to apply for it in court. You can get more information about these services online and links to these services are listed at the end of this guide.

Are you required to disclose your or your child's HIV-positive status if a child protection agency is involved with your child?

Disclosing your or your child's HIV-positive status is a personal decision. If a child protection agency has concerns that are HIV-related, they may be able to request more information about your health situation if they can show it matters. There may be ways to argue that it does not matter.

If a child protection agency knows your HIV-positive status, the agency is required to keep it confidential and only use it for legal purposes. Child protection workers are trained to work with women who experience abuse in their relationships. You may have had a negative experience with a child protection agency before. You may have felt that the agency discriminated against you because of your HIV status or for other reasons. If the agency worker is not helpful, ask to speak to a supervisor. If that does not resolve the problem, speak to a family law lawyer or HALCO for legal advice. There is information at the end of this guide about where to get legal help.

Can your child be taken away from you because you are HIV-positive?

Your partner may threaten to disclose your HIV-positive status if you report their abusive behaviour or if you leave with your child. But your child cannot be taken away from you just because you are HIV-positive. There is nothing about being

HIV-positive, on its own, that justifies taking your child away from you, because almost all household interactions and parenting roles pose no real risk of transmitting HIV to anyone else.

Will your HIV-positive status affect decisions regarding custody, residence of, or access to your child?

Your HIV status on its own should not affect decisions regarding child custody, residence or access. Your rights and responsibilities as a parent do not change because you are HIV-positive.

If you separate from the other parent of your child, you will have to decide who has custody of the child. Custody means you have the legal right

to make significant choices about raising your child. Both parents can have custody, even if they are separated. If you cannot agree about how your child is cared for and raised after you separate, or you don't feel safe talking to your partner about it, then you can ask the court to decide who gets custody. The court can order that one or both parents have custody, and they can also make orders about where the child lives. The court can also order what access each parent is allowed. Access means that a parent has the right to spend time with the child and know about the child's life, but does not have the right to make significant decisions about the child's life. The court will decide custody and access based on the "best interests of the child," which is a legal test.

To decide about custody, the court must consider whether a parent has ever been abusive to their partner, to a parent of the child, to anyone living in their household, or to any child. This will be part of the court's decision about whether the abusive person has the ability to act as a parent.

Other factors the court can consider to determine the best interests of the child are:

- the parenting skills that each parent has;
- the plan each parent has to care for and raise the child;
- the ability of each person to provide for the child;
- how long the child has been in the same home, school and community; and
- the child's wishes and feelings.

While your HIV-positive status alone should not affect the court's decision about child custody, residence or access, issues related to your HIV-positive status or your child's HIV-positive status may be taken into consideration. For example, if you have any illnesses or disabilities that affect your ability to care for your child, the court should consider whether your ability to meet the child's needs is affected. If your ability is affected, then the court should consider whether you can get supports in place to meet your child's needs, and what is in the best interests of your child.

HIV still carries a lot of stigma and, in bitter disputes, your ex-partner may try to use it against you. Speak with your lawyer and your support workers for advice if you fear that your ex-partner may try to use your HIV status against you to undermine your rights as a parent.

Immigration law and HIV

If you test positive for HIV during an immigration medical exam, who will find out?

Positive HIV tests from an immigration medical examination are shared with:

- Citizenship and Immigration Canada (CIC);
- Your spouse/partner if they sponsored you. If you are sponsored by your spouse/partner, CIC will disclose your HIV-positive test result to the

spouse/partner 60 days after telling you it plans to do so, unless you withdraw your application; and

- Public health authorities in Canada. If an application to immigrate to Canada is approved, CIC informs the public health agency of the province/territory where you will be living (or are living, if you are already in Canada) of your HIV-positive status.

Will my immigration status be affected if I leave my partner or report their abuse to the police?

If you are a permanent resident, you cannot lose that status or be removed from Canada only because you have left an abusive relationship or report abuse. Sometimes an abusive partner can threaten to have a sponsored spouse or partner removed from Canada, which is called being deported, as part of their abusive control. If you

are concerned that your spouse or partner will try to have you deported, you should talk to an immigration lawyer about your situation and options.

You may have “conditional” permanent resident status if you submitted an application to come to Canada as a spouse or partner on or after October 25, 2012, and were in a relationship of two years or less with your sponsor, or had no children in common with your sponsor at the time of the sponsorship application. If you have conditional permanent residence status, you are expected to live with your sponsor for the first two years after your arrival as a sponsored spouse, or after you get your conditional permanent residence status if you are already in Canada. If you separate from your sponsor before then, you could lose your permanent resident status and might not be allowed to stay in Canada. An exception can be made for separations that are the result of abuse or neglect by a sponsor (or a member of their family) aimed at the sponsored spouse/partner, her child, or a family member who usually lives in their household. If you are in this situation, it is important to talk to an immigration lawyer right away.

If you are in the middle of the application process to be sponsored as a “Spouse or Common-law Partner in Canada” and you leave the relationship, or are thinking about leaving, you should get legal advice right away. If a spouse or partner withdraws the sponsorship or you separate while the application is being processed, you will no longer be eligible for permanent resident status as a “Spouse or Common-

law Partner” and you may be forced to leave Canada. You may still be able to pursue an application to remain in Canada on humanitarian and compassionate grounds.

Many people are in Canada legally without permanent (only temporary) status. For example, they may have work or study permits, or they may have been allowed to enter Canada as visitors for a certain period of time. After the legal status has ended, these people are in Canada without legal immigration status. If you are in Canada without legal immigration status, immigration officials could find you and force you to leave Canada (this is called being deported). If you try to leave your abuser or report the abuse, the abuser may threaten to report you to immigration authorities. It is very important that you talk to an immigration lawyer right away if you think you may leave your partner or report their abuse. Contact HALCO for more information as soon as possible.

What are the consequences of a criminal conviction on my immigration status?

If you are not a Canadian citizen, there is a risk you could be told to leave (deported from) Canada if you are convicted of a crime. If you have been contacted by the police or if you are worried that you may be charged with committing a crime and you are not a Canadian citizen, you should immediately contact an

immigration lawyer, even if you are a permanent resident and/or you came to Canada as a refugee. You should also immediately contact a criminal lawyer and tell the criminal lawyer about your immigration status.

The criminal law and HIV

The focus of this section is criminal law, sex and HIV. It does not cover all the legal issues about HIV and disclosure. For example, there is likely a legal duty to disclose when sharing needles to inject drugs, and it is also possible that you could be sued in a civil court by your partner for not disclosing your HIV status before sex. You can contact HALCO for information about other legal issues, including other HIV disclosure issues.

Disclosing your HIV-positive status means telling someone else that you are HIV-positive. In most situations, it is up to you to decide to disclose. You have no obligation to tell your children, other family members or friends that you are HIV-positive.

But, disclosure with sexual partners is very different.

What does the criminal law say about sex and HIV?

There is no law that specifically addresses HIV disclosure in the *Criminal Code*. But in 2012, the Supreme Court of Canada ruled that if you have HIV, you have a legal duty to disclose your HIV status before sexual activity if there is a “realistic possibility” that you will infect your partner with HIV during the sexual activity. If you do not tell your sexual partner that you are HIV-positive before the sexual activity, you can be charged with a serious crime, *even if HIV was not transmitted*. Courts consider HIV non-disclosure a crime when:

- the sexual activity between you and another person creates a “realistic possibility of HIV transmission”;
- you did not disclose your HIV-positive status before having sex; and
- the person you had sex with would not have consented to sex had they known of your HIV status.

When do you have a legal duty to disclose your HIV-positive status before sex?

The legal duty to disclose your HIV-positive status to your sexual partner relates to the level of risk of transmitting HIV. The courts decide which sexual activities and circumstances create a “realistic possibility of transmission.” In some cases, you may not have a duty to disclose (see below).

Disclosing your HIV status is a very personal decision whether or not you have a legal duty. You can call HALCO to get legal advice before you decide about disclosing.

While the law might change or be applied differently in a particular case, under the current law there is a legal duty to disclose your HIV infection before:

- vaginal or anal sex without a condom; and
- vaginal or anal sex with a condom *unless* you have a low HIV viral load (see below for more information about HIV viral load).

The courts have not decided how the criminal law applies to oral sex, whether the oral sex is given or received.

The legal duty to disclose your HIV infection applies to *all* of your sexual partners, whether you are married, living together, dating, having sex in exchange for money, or having a casual sexual encounter.

Lying about your HIV is the same, or worse, than not disclosing your HIV status. You can be charged *even if*:

- you did not intend to harm your partner; or
- your partner was not infected with HIV by the sexual activity with you.

Do you have to disclose if your sexual partner is also living with HIV?

There is a risk that you might be charged and convicted for not telling your HIV-positive partner that you have HIV. However, these cases are rare and to our knowledge have not involved situations where the accused person's sexual partner disclosed their HIV status before the sex

happened. Please contact HALCO for more information about this issue.

“Viral load” is the amount of HIV in a person's body. Viral load is measured by a blood test.

“Undetectable” means that the amount of HIV in the blood is so low that it cannot be detected by the viral load blood test. Even if you have an undetectable viral load, you still have HIV. The goal of antiretroviral therapy (ARV) is to lower the viral load to undetectable.

“Low viral load” means that the amount of HIV in the blood can be detected in the test but is at the low end of the scale. In 2012, the Supreme Court of Canada did not specify how “low” a viral load must be when deciding if there is a duty to disclose your HIV infection. Based on the Court's decisions, at least any viral load below 1,500 copies per millilitre should be considered “low” but we do not yet know for sure what the cut-off point will be.

When do you not have a legal duty to disclose your HIV before sex?

Courts may rule differently depending on the evidence in each case, but at this time, there is *no* legal duty to disclose to a sexual partner:

- when a condom is used properly and does not break *and* the person living with HIV has a low or undetectable viral load;
- when sexual activities with no risk — or an extremely low risk — of HIV transmission are involved (for example, kissing, mutual masturbation, oral sex with a condom).

It is unclear what will happen if a condom breaks during sex that takes place where a person with HIV has a low viral load. You might have a duty to disclose in this situation as soon as the condom breaks. If your partner knows that you are HIV-positive, they can decide whether to

seek “post-exposure prophylaxis” (PEP) with anti-HIV drugs. PEP needs to be started as soon as possible after the exposure, within a maximum of 72 hours.

But be aware that disclosure after a broken condom may increase the risk that your sex partner will contact the police, which may lead to you being charged with a criminal offence. Or your sex partner may react badly, which could lead to conflict or violence.

Remember that the criminal law is about non-disclosure: not telling your sexual partner that you are HIV-positive. It is not a criminal offence if you disclosed your HIV status before sex and your partner agrees to have sex with you, even if you do not use a condom and/or your viral load is high. Public health authorities, however, may become involved even if disclosure took place. For more information about public health law, please see the section titled “Public health law and HIV.”

What if disclosing your HIV-positive status could result in violence?

Unfortunately, the law does not properly acknowledge the reality of abuse, the difficulties around disclosing one’s HIV-positive status, or the fact that some people feel they cannot disclose because they are afraid that they will be harmed in some way. If a woman is not safe, she may not

have the power to make choices about sex, including when to have sex, whom she has sex with, or whether condoms are used.

The court might accept that someone living with HIV is not required to disclose if they fear harm as a result of disclosing, or if they are forced to have sex through violence or threat. However, there have been no cases reported in Canada where a court addressed these issues, so there is no clear answer yet.

What happens if you are charged with not disclosing your HIV-positive status to a sexual partner?

If a person living with HIV exposes someone else to a “realistic possibility” of HIV infection during sex but did not disclose their HIV infection before sex, the police can investigate and charge the woman living with HIV with a serious crime, usually aggravated sexual assault.

If the police want to question her or they arrest her, she does not have to answer their questions. But, she should tell the police basic information such as her name and date of birth. Anything she says to the police at any time may be used against her. She has the right to speak to a lawyer in private. (For more information about legal aid and finding a lawyer, see the resources section at the end of this guide.)

After arresting and questioning a woman living with HIV, the police can either release her from the police station or put her in jail. She can apply for bail so that she can be released from jail until her case has been decided. If the court refuses to release her, she will have to stay in jail while her case is ongoing.

Her picture, her HIV status, other personal information and the crime she is accused of committing may appear in a police press release, in the media and on the internet. Usually, criminal court trials are open to the public and the media.

She can hire a lawyer to defend her in court. Depending on her income, legal aid may help to pay for the lawyer.

If she pleads guilty, or if the court decides she is guilty, she will almost certainly be sentenced to time in prison. She will have a criminal record. Her name will almost certainly be put on a federal and provincial list of sex offenders. A DNA sample will almost certainly be taken from her and placed in a data bank of convicted criminals.

If the charges are dropped or she is found “not guilty,” she will be set free.

A person with a criminal record may not be able to travel to some countries. And she may not be able to get some types of jobs.

If she is not a Canadian citizen, immigration authorities may be able to deport her.

If police contact you or charges are laid against you, you should immediately contact a criminal lawyer for help. If you have not already, you should also call HALCO. If the police have released, or intend to release information about you, contact HALCO right away. If you are not a Canadian citizen, it is very important that you also speak with an immigration lawyer. Criminal charges or convictions could affect your ability to stay in Canada (see the section above titled “Immigration law and HIV”).

Although the criminal law about HIV non-disclosure is strict and the consequences can be severe, it is important to put the risk of a criminal charge and possible conviction into context. At the end of 2014, approximately 75,500 people in Canada were living with HIV. When this guide was written in February 2016, about 175 people in Canada had been charged for not disclosing their HIV infection to their partners before sex. Of these, approximately 17 cases involved women who were charged with not disclosing their HIV-positive status to men before sex.

How can you reduce your risk of criminal charges and convictions?

In a criminal case, the Crown counsel (government lawyer) must prove beyond a reasonable doubt that the accused person committed a crime. This means that the Crown counsel must present the court with evidence. The Crown counsel can use almost anything you tell some-

one else about your sexual history as evidence against you in a criminal case, so

think carefully before you talk to anyone about HIV disclosure and the sex you have had. The only exception is a lawyer because other than in extremely rare circumstances, everything you say to a lawyer who has agreed to listen to your case and maybe work for you is confidential and cannot be used against you in court.

There is no guaranteed way to avoid being accused of HIV non-disclosure. If you are accused, police will investigate and may or may not decide to lay charges. Here are some things that you can do *before* you have sex to protect yourself against charges:

- Tell your sexual partners that you are living with HIV.
 - Keep evidence that you have disclosed to your partners, such as copies of letters, emails, text messages or evidence that shows they know.
 - Disclose in front of a reliable witness, such as a friend, and have the witness write down the date and what was said and send it to you for safe keeping.
 - Have a couples counselling appointment together with your doctor, nurse or social worker at your clinic or hospital, or with a counsellor at an AIDS service organization (ASO), and clearly disclose your HIV to your partner, *before* you have any sex, at the appointment, which can be documented in your file.
- If you decide not to disclose:
 - always use latex condoms; and
 - see your doctor regularly to try to keep your viral load as low as possible. Ask your doctor to test your HIV viral load on a regular basis so you have evidence that your viral load is low or undetectable.

Where can you get support around HIV-disclosure?

Telling others that you are HIV-positive can be difficult and stressful. You do not know how someone may react. You may fear rejection, violence or abandonment by your partner or other people. You may worry that they will use your HIV status against you or that they will tell others about your status. You may be especially worried about your privacy if you live in a small community of people who share your culture or language, or people who know a lot about each other. You may be afraid that family or other community members will reject or abandon you or even become violent if they know your HIV status or your sexual practices. These worries can be even greater when you have little money or resources to move, or if you do not have legal immigration status in Canada.

Contacting your local ASO or women's health organization can be a good first step but you should know that information you share with others can be used in a court case. The health care records of people accused of not disclosing their HIV status are used in most if not all court cases. Records from other support agencies have also been used in court cases. Organizations that can provide support are listed at the end of this guide.

Public health law and HIV

In Canada, every province and territory has laws to protect public health. Public health authorities are legally responsible for protecting public health. In Ontario, public health is organized into 36 separate regions, each with their own public health unit. Public health units are legally responsible for protecting public health by trying to prevent the transmission of various infections, including HIV. A public health unit in one region may use its powers differently than a public health unit in another region. To prevent transmission of HIV, public health authorities will generally require you to disclose that you have HIV to every sex partner and *also* use a condom.

Will public health authorities find out that I am living with HIV?

Public health authorities learn the name, date of birth, gender and contact information of most, but not all, people who test positive for HIV and a number of other sexually transmitted infections (STIs). For more information on HIV testing and whether public health authorities will be

informed of your positive test result, please contact HALCO.

Will public health authorities contact me?

When a public health unit first learns that you are living with HIV, they will counsel you about sexual health, safer sex, and HIV and STI prevention.

Will public health authorities contact my spouse or my sex partners?

If you test positive for HIV or another STI, public health requires that your sex partners be contacted, even if you are not currently having sex. This is known as contact tracing, partner counselling or partner notification. Public health authorities can ask you for information about

your sex partners, including their names. Public health requires that your known sex partners be contacted so that they can be told that they may have been exposed to an STI and be advised to get medical care. Public health authorities may notify a partner directly or require proof that your partners were notified. Public health authorities should not disclose your name to your partners, but your partners may figure out that it is about you. Depending on the circumstances, public health authorities may let you or your doctor notify your partners. (Contact tracing also applies to needle-sharing.)

What can public health authorities do if they think I am having sex that risks passing HIV or another STI?

If you are HIV-positive and you test positive for another STI, public health authorities may assume that you put another person at risk of getting infected with HIV. Public health authorities may counsel you, or issue a “Section 22 Order” against you, or both. Because public health law focuses on preventing new cases of HIV infection, authori-

ties can use their legal powers to require HIV disclosure and safer sex. Public health authorities have the power to make a Section 22 Order against you if they have reason to believe that you are having sex that risks passing HIV or another STI, and if they believe the order is necessary to decrease or eliminate that risk.

The order will usually tell you that you must

- attend counselling sessions given by public health authorities;
- give public health authorities the names of people with whom you have had sex;
- disclose your HIV infection to every sex partner; and
- use a condom every time you have sex.

If you get a Section 22 Order and you want to fight it, you only have 15 days to file an appeal. You can contact HALCO for legal advice.

What if I am a victim of abuse?

Public health orders should only address behaviours over which you have control. If public health authorities contact you because they believe that you are having sex that risks passing

HIV or another STI, but this is in relation to abuse, talk to a lawyer as soon as possible to discuss your situation and what you can do to avoid an order. If an order is issued, you should contact a lawyer immediately as there are only 15 days to appeal. If you are living with HIV, you can contact HALCO.

Resources

Organizations that offer counselling, support and assistance in Ontario

Assaulted Women's Helpline:

<http://www.awhl.org/>

Free, anonymous and confidential 24-hour telephone/TTY crisis telephone line for women in Ontario who have experienced any form of abuse (service is offered in 150 languages).

- 1 866 863-0511
- 1 866 863-7868 (TTY)

Fem'aide: <http://www.femaide.ca/>

Free 24-hour telephone/TTY line for Francophone women in Ontario.

- 1 877 336-2433
- 1 866 860-7082 (ATS)

Ontario Government Victim Services Directory:

<http://services.findhelp.ca/ovss/>

- Support Line: 1 888 579-2888

Victim Witness Assistance Program (VWAP): www.ontario.ca/victimservices Program (run by the Ministry of the Attorney General) that supports complainants of intimate partner violence and sexual assault, through referrals to counselling services, as well as information about the criminal court system.

- 1 888 579-2888

For a list of sexual assault centres in Ontario:

<http://www.draw-the-line.ca/gethelp.html>

For a list of sexual assault/domestic violence treatment centres in Ontario hospitals: <http://sadvtreatmentcentres.ca/en/view.php?key=42&menu=37&lang=en>

Ontario AIDS and Sexual Health Info Line

- 1 800 668-2437

The Teresa Group:

www.teresagroup.ca

Supportive programming for mothers living with HIV.

- Family Support Coordinator: 416 596-7703 ext. 315

Ontario Aboriginal HIV/AIDS Strategy (OAHAS): www.oahas.org/

HIV 411: <https://aso411.ca/>

Resource for finding HIV-related services across Canada.

Greater Toronto Area organizations (may also have information for women in other parts of Ontario)

Women's Health in Women's Hands:

<http://www.whiwh.com/>

- 416 593-7655

METRAC Action on Violence:

<http://www.metrac.org/>

- 1 877 558-5570

Barbara Schlifer Commemorative Clinic:

<http://schliferclinic.com/>

- 416 323-9149
- 416 323-1361 (TTY)

Family Services Toronto:

<http://www.familyserVICEToronto.org/>

- Trauma services (including relationship violence): 416 595-9618
- David Kelley LGBTQ Counselling Program: 416 595-9618

The 519 Church Street Community Centre: <http://www.the519.org/>

- The 519 Anti-Violence Program:
416 355-6782

AIDS Committee of Toronto:

<http://www.actoronto.ca/women>

- Women's Support Coordinator:
416 340 8484 ext. 239
- Women's Community
Development Coordinator:
416 340-2437 ext. 453 or 276

Africans in Partnership Against AIDS
(APAA): www.apaa.ca

- 416 924-5256 or 416 644-1650

Alliance for South Asian AIDS

Prevention (ASAAP): www.asaap.ca

- 416 599-2727

Asian Community AIDS Services

(ACAS): <http://www.acas.org>

- 1 877 630-2227 or
1 877 644-2227

Black CAP: <http://black-cap.com/>

- 416 977-9955
- Women's Support Coordinator:
416 977-9955 ext. 260

Prisoners with HIV/AIDS Support
Action Network (PASAN):

www.pasan.org

- 1 866 224-9978
- Women's Community Program
Coordinator: 416 920-9567 ext.
225

Toronto People With AIDS Foundation
(PWA): www.pwatoronto.org

- 416 506-1400

Family court worker program of the
Ministry of the Attorney General:

http://www.attorneygeneral.jus.gov.on.ca/english/ovss/family_court_support_worker_program/

Assistance through the family court
process for those who have experi-
enced intimate partner violence.

- Victim Support Line:
1 888 579-2888

Legal advice

HIV & AIDS Legal Clinic Ontario
(HALCO): <http://www.halco.org/our-services/legal-services>

- 416 340-7790
- Toll-free in Ontario:
1 888 705-8889

Legal Aid Ontario:

www.legalaid.on.ca/clinics

Community legal clinics provide
free legal services to people across
Ontario.

- 1 800 668-8258
- 1 866 641-8867 (TTY)

The Law Society Referral Service

(LSRS): www.lsuc.on.ca/lrsr

Online service that provides referrals
to lawyers or paralegals for up to 30
minutes of free consultation; the ser-
vice can be accessed by telephone if
you cannot access a computer because
you are in custody, in crisis, in a shelter
or in a remote community without
internet access.

- 1 855 947-5255

Other legal resources

Intimate partner violence

Community Legal Education Ontario
(CLEO) <http://www.cleo.on.ca/>

Print and online public legal educa-
tion materials on many legal topics in
English, French and other languages.

- Order print copies: 416 408-4420.

- *Do you know a woman who is being abused? A Legal Rights Handbook*, CLEO
<http://www.cleo.on.ca/en/publications/handbook>
- *Family violence when a woman is sponsored by a spouse or partner*, CLEO
<http://www.cleo.on.ca/en/publications/famvio>

Ontario Women's Justice Network (OWJN): www.owjn.org
Information to help survivors of violence and their supporters better understand legal rights in Ontario.

- 416 392-9138

Family law

Family Law Education for Women: www.onefamilylaw.ca
Website provides online resources on women's rights under Ontario family law and other areas of law that are important when families break down. Information is available in 14 languages and in multiple formats.

Legal Aid Ontario Family Law Service Centres:
http://www.legalaid.on.ca/en/getting/type_familylawservicecentres.asp

The Ministry of the Attorney General Family Law Information Centres:
<http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.php>

- 1 800 518-7901
- 1 877 425-0575 (TTY)

For more information about property rights on reserve, see Ontario Women's Justice Network, *Understanding Property Rights on Reserves*

http://owjn.org/owjn_2009/component/content/article/58-aboriginal-law/355-matrimonial-property-rights-reserves

For more information about the Child Support Guidelines and the table amount for child support, see Department of Justice, *Support Tables*:
<http://www.justice.gc.ca/eng/fl-df/child-enfant/ft-tf.html>.

Resources on family law, CLEO:
http://www.cleo.on.ca/en/resources-and-publications/pubs?language=en&field_legal_topic_tid_i18n=87

Children's aid: Information for parents, CLEO
<http://www.cleo.on.ca/en/publications/cas-en>

Immigration law and HIV

Criminal charges in Canada and your immigration status, CLEO
<http://www.cleo.on.ca/en/publications/stat-en>

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Privacy rights and HIV

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Acknowledgements

This guide was produced by the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario (HALCO) and METRAC. Funding was provided by the Law Foundation of Ontario, and Legal Aid Ontario provided French translation services. AIDS Committee of Toronto (ACT) provided funds for printing the English version of this resource.

We are tremendously grateful for input from the following reviewers: Fatimatou Barry, Angela Chaisson (who reviewed portions of the section titled “Legal options for women living with HIV who experience intimate partner violence”), Marisol Desbiens, Kim Dolan, Karin Galldin, Marlene Ham, Haoua Inoua, Tara Jewel, Julie S. Lalonde, N. Nicole Nussbaum (who reviewed the section titled “Family law and HIV”) and members of the International Community of Women Living with HIV (ICW) in Canada.