



ONTARIO  
HIV & Substance Use  
Training Program

Disclosure and Legal Issues

Updated: August 2011

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## Disclosure and Legal Issues

**Goal:**

- To increase participants' understanding of the implications of the Legal and Public Health environment on people with HIV and their service providers.

**Objectives:**

- To encourage participants to think about issues relating to the disclosure of HIV status.
- To provide information regarding the criminal law and cases, while addressing the complexity and ambiguity of the application of the law.
- To engage participants in considering the impact of the use of the criminal law and the role of public health.

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## The Background

- Though there is no HIV specific criminal law, people living with HIV have a duty to disclose their HIV status to sex partners before having sex that carries a significant risk of HIV transmission.
- People living with HIV have been charged, convicted and sent to prison when they have not disclosed - even when no one became infected with HIV.

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## The Background

- The criminal law also applies to other sexually transmitted infections. But with the exception of three cases (involving herpes, Hepatitis B and Hepatitis C), only people living with HIV have been prosecuted.
- HIV is not easy to transmit. And HIV medications reduce the risk of transmission and have transformed HIV for many people into a chronic manageable illness.

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### When do people have a legal duty to disclose their HIV-positive status to sex partners?

- Parliament did not change the Criminal Code to include an HIV/AIDS-specific crime. Canadian courts have created the law about HIV non-disclosure.
- The Supreme Court of Canada decided in the *Cuerrier* case that the criminal law has a role to play in HIV prevention. It ruled that:
  - "People living with HIV have a legal duty to disclose their HIV status to sex partners before engaging in sex that carries a significant risk of HIV transmission."
- So a person who does not disclose his or her HIV status can be convicted of the Criminal Code offence of **aggravated sexual assault** even when a sex partner does not become infected with HIV.

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### When do people have a legal duty to disclose their HIV-positive status to sex partners?

- But the Supreme Court did not clearly define the most important part of the legal test: What counts legally as a *significant risk*? As a result, trial court decisions have been confusing and often contradictory...

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When do people have a legal duty to disclose their HIV-positive status to sex partners?

- Some courts have ruled that sexual intercourse using a condom does not present a legally significant risk of HIV transmission. Others have said it can be.
- Yet another court has said that to avoid conviction an HIV-positive person must not only wear a condom but also have an undetectable amount of HIV in their blood (also known as undetectable HIV viral load).
- One court convicted a person living with HIV for having oral sex without a condom. Another court found a person not guilty.
- Recently, one person has been convicted of murder, and police have laid attempted murder charges in other cases.

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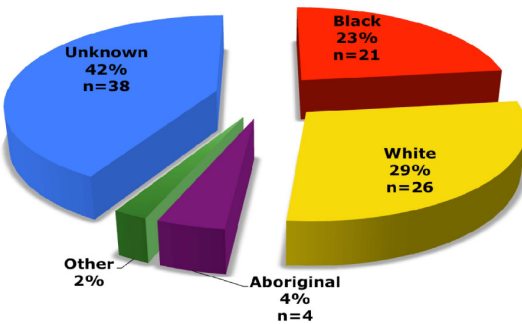
HIV non-disclosure charges and convictions in Canada and Ontario

**Canada:**

- At least 97 people have been charged; at least 59 people have been convicted.
- Since 2003 there has been an average of 10 cases per year.
- In 24 cases a person was convicted even though there was no HIV transmission alleged to have taken place.
- Almost 90% of the people convicted have gone to jail.
- White people make up about 30% of people charged. Black people make up almost 25%. Aboriginal and other people make up about 6%.
- We don't know the race or ethnicity of the other people charged.

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HIV non-disclosure, race/ethnicity of people charged, Canada, 1989-Oct 2009 (n= 91)



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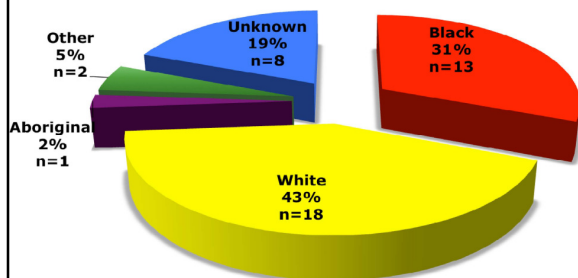
HIV non-disclosure charges and convictions in Canada and Ontario

**Ontario:**

- Leads Canada with at least 47 cases and 31 convictions.
- About 40% of the people charged have been white, 30% have been black, 7% have been aboriginal or another race or ethnicity.
- We don't know the race or ethnicity of the other people charged.
- Since 2005, 40% of men charged have been black.

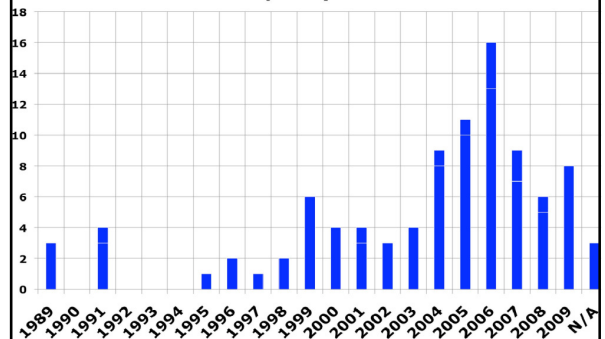
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HIV non-disclosure, race/ethnicity of people charged, Ontario, 1989-Oct 2009 (n=42)



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HIV non-disclosure cases, Canada, 1989-Oct 2009 (n=96)



Is the criminal law being used against people with other infectious diseases, like other sexually transmitted infections, hepatitis, TB, SARS or H1N1?

- There are many other infectious diseases that pose a significant risk of serious bodily harm. The Supreme Court decided that the criminal law could be used to address not only the risk of HIV infection but also of other sexually transmitted infections.
- However, with the exception of three cases (involving herpes, Hepatitis B and Hepatitis C), only people living with HIV have been prosecuted.

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Concerns that the current criminal law and media sensationalism may make people:

- **Less likely** to talk openly and honestly about sex, HIV and other sexually transmitted infections.
- **Reluctant** to get health care for sexually transmitted infections, including HIV, which may result in poor health and a greater risk of HIV transmission during sex.
- **Feel stigmatized** because they have HIV (or people may think they have HIV), and more likely to face discrimination.
- **Avoid** HIV testing out of a fear that they may be criminally charged
- **Fear** public health staff and mistakenly presume that public health staff and police are working together.
- **Think** that the criminal law will protect them from being exposed to HIV.

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Why is the current criminal law a problem for people living with HIV?

- People living with HIV in Canada face stigma and discrimination. HIV disclosure can lead to a loss of privacy, employment, housing, friends and family, and sometimes violence. The criminal law does not recognize this reality.
- Courts have not clearly set out the circumstances under which people living with HIV have a legal duty to disclose their HIV-positive status. The law has not defined with certainty what sex acts, under what circumstances, involve a legally significant risk of HIV transmission.

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Why is the current criminal law a problem for people living with HIV?

- Vindictive and abusive spouses, lovers and exes have used the criminal law as a way to control people living with HIV. Spouses, lovers and exs have threatened to falsely accuse their HIV-positive partners of not disclosing their HIV status.
- Many court cases involving alleged HIV non-disclosure have been decided based on credibility. Yet it is difficult if not impossible for people to prove that they disclosed their HIV-positive status, or practiced safer sex.

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Why is the current criminal law a problem for people living with HIV?

- Black people of African and Caribbean descent have historically faced systemic discrimination in Ontario society and the criminal justice system. Given this context, and the number of Black men who have been prosecuted for alleged HIV non-disclosure, Black men may be significantly affected by these prosecutions.
- Even when a court finds a person not guilty, his or her life may have already been ruined. A photo and private medical information may have been reported in the media. Before a trial takes place he or she has been judged "guilty" in the court of public opinion. And he or she may have spent many months in jail awaiting trial.

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What concerns do people working in the field have with using the criminal law to prevent HIV?

- Public health staff, community health and social service workers, HIV outreach and prevention workers, mental health professionals and human rights and civil liberties advocates are troubled by the current expansive use of the criminal law. Many people living with or at risk of getting HIV are already socially marginalized. As front-line workers, including people living with HIV, we know that the criminal law is making it more difficult to support people living with HIV. It might also be making it more difficult to prevent new HIV infections.

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### What role does public health play in preventing HIV?

- The Ontario Health Protection and Promotion Act imposes on public health authorities a legal duty to control the spread of certain infectious diseases, including sexually transmitted infections like HIV. It also gives public health authorities the legal powers they need to protect the public's health.

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### What role does public health play in preventing HIV?

#### Public health:

- Provides information, counselling, testing, surveillance and partner follow-up for HIV and other sexually transmitted infections.
- Can order a person living with HIV to take action so that he or she does not put another person's health at risk (known as a section 22 order).
- Can apply to a court to enforce the section 22 order where there is evidence that the person is not following the order.

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### Does it make sense to use public health powers, rather than the criminal law, to prevent the spread of HIV?

- If preventing HIV is our ultimate goal, in the vast majority of cases it makes sense to use public health powers rather than the criminal law. If public health authorities are adequately funded and effectively exercise the full range of their legal powers, we believe that the vast majority of situations involving HIV non-disclosure can be addressed without recourse to the criminal law.

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### Does it ever make sense to use the criminal law against people living with HIV who fail to disclose their HIV status to sex partners?

- Public health authorities in Ontario may require more resources to effectively address difficult situations where people engage in behaviours that pose a risk of HIV transmission to others. Even with adequate resources, there may be rare cases when public health powers may not be effective to prevent someone from knowingly putting a sex partner at risk of HIV infection.
- After extensive consultation and study, the Joint United Nations Programme on HIV/AIDS (UNAIDS) recognized a limited role for the criminal law, in cases of intentional transmission - where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and successfully transmits HIV. UNAIDS also takes the position that the criminal law should not be applied where an HIV-positive person took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts.

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### How can we change the situation?

There are two ways to change the criminal law:

- Parliament can amend the Criminal Code by passing a new law. It can take years of advocacy to convince Members of Parliament that a new law is needed. And if an issue is politically contentious or unpopular, the law might never be changed, or a new law might be worse than the old one.
- Courts, through their decisions, can interpret or re-interpret existing Criminal Code offences. In concert with lawyers, we are working on this. But it can take many years to bring about change through the courts.
- But there is a way to change not the law itself, but how Ontario police and Crown Counsel use the law. The Attorney General of Ontario can issue *prosecutorial guidelines*.

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### What are prosecutorial guidelines?

- The Attorney General issues prosecutorial guidelines to assist Crown Counsel in making decisions and to promote high standards and consistency in how criminal cases are handled. Crown Counsel, sometimes called Crown Prosecutors, are lawyers responsible for the prosecution of criminal cases.
- Prosecutorial guidelines are rarely absolute and do not take decision-making responsibility away from Crown Counsel. They provide the overall philosophy, direction and priorities of the Attorney General and set out detailed practice guidance for Crown Counsel.
- Examples of criminal offences covered by Ontario prosecutorial guidelines include:
  - hate crimes and discrimination
  - sexual offences
  - spouse/partner offences
- <http://www.ontarioaidsnetwork.on.ca/c/he/why.html>

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## How might Ontario prosecutorial guidelines help people living with HIV?

### Guidelines might:

- Clarify the circumstances under which prosecution is appropriate and help ensure that people living with HIV will not be prosecuted where there was no real risk of HIV transmission.
- Help ensure that criminal investigations and prosecutions are informed by a complete and accurate understanding of current medical and scientific research about HIV and the risk of HIV transmission, and take into account the social contexts of living with HIV.
- Help ensure that police and Crown Counsel handle HIV-related criminal complaints in a fair and non-discriminatory manner.
- Make clear that the law applies to all sexually transmitted infections, so that HIV is not singled out and stigmatized.

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## This presentation is NOT LEGAL ADVICE.

- For more information and legal advice, contact the HIV & AIDS Legal Clinic (Ontario), a Legal Aid Ontario-funded clinic.
- Tel 416-340-7790  
Toll-free 1-888-705-8889  
TTY 416-922-2352  
TTY toll-free 1-866-513-9883  
[www.halco.org](http://www.halco.org)
- © Ontario Working Group on Criminal Law and HIV Exposure, 2010.

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## Important Notes

- The crime is about **exposing** someone to a significant risk of HIV infection when you didn't tell that person, before sex, that you have HIV. So you can be charged and convicted for not disclosing even if the other person does not get infected.
- If there is a significant risk of passing on HIV, but you lie about your HIV infection ("I'm HIV negative."), or you don't tell you're the other person about your HIV infection ("He didn't ask. I didn't tell."), you can still be charged and convicted.
- You can be charged and convicted even if you didn't know or think that you had a legal duty to disclose.

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## Reducing your risk of criminal charges and convictions

Here are things you can do if you want to **reduce** the risk of passing on HIV to other people and **reduce** your risk of getting in trouble with the law:

- Don't assume your partner knows you are HIV positive.
- If you are going to disclose, make it count. Have a witness.
- Tell your sex partners you are HIV positive. And try to get proof that you told them.
- Use condoms and water-based lube when you have sex, to protect your sex partners from being exposed to HIV.
- Instead of intercourse, have other types of sex and safer sex that have lower risks of passing on HIV.
- See your doctor regularly and work with your doctor to get your viral load as low as possible.
- You might consider having sex only with people you know are also HIV positive.

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## Legal Duties of Community Based Organizations

- Staff and volunteers have a legal **duty to keep client information confidential**. This means that, **as a general rule, client information cannot be released or disclosed without client consent**.
- Staff and volunteers **may be forced to disclose client information** to police under a **search warrant**, or to a court where a judge orders someone to attend court and give evidence (known as a **subpoena**).
- Faced with a police search warrant to seize client information can "assert privilege" over the information. To do this, the organization must request that the police seal any information they take in an envelope and not open it until a court decides whether the police can legally use it. The organization should get legal advice, and advise their client to do so, as soon as possible.
- Staff and volunteers do **NOT have a duty under the criminal law to report to police clients** who engage in sex or injecting activities that risk HIV transmission. Therefore, organizations cannot be charged with or convicted of a criminal offence for failing to report a client to police.


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## Legal Duties of Community Based Organizations

- Employees who are members of a professional body (like registered nurses and social workers) **may have an ethical duty to disclose client information** to prevent harm where a client's behaviour places a known person at risk of HIV infection.
- Staff and their volunteers **may be sued in civil court by a client** and found civilly liable if they disclose client information without consent, or without being compelled to do so under a search warrant or court order.
- Staff and their volunteers **who do not take steps to prevent harm to a third party may be sued in civil court by anyone who suffers harm as a result of the failure to take those steps**. But since no Canadian court has decided this issue, **it is not clear** whether the third party would win or lose the case.

*Source: Canadian HIV/AIDS Legal Network: BRIEFING NOTE ON HIV DISCLOSURE & CRIMINAL LAW IN CANADA*

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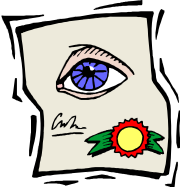


## Public Health Section 22 Orders & Some Disclosure Issues for Service Providers

Ryan Peck, Barrister & Solicitor  
Executive Director, HIV & AIDS Legal  
Clinic (Ontario)  
March 25, 2008

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## Section 22 Orders




- Public health is given considerable powers under the *Health Protection and Promotion Act ("HPPA")*, particularly under s. 22.
- Where the health unit reasonably believes that a person with HIV is putting others at risk, they can issue a "section 22 order".

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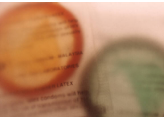
## Section 22 Orders

- In order to issue an order, the health unit must have reasonable grounds to believe that the order is necessary to decrease or eliminate the risk.
- Under a section 22 order, public health can order "a person to take or to refrain from taking any action".



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## Section 22 Orders




- Section 22 orders are not common.
- Usually they are only issued when someone who is HIV+ is diagnosed with another sexually transmitted disease, like syphilis or gonorrhoea; because that is considered proof of unsafe sexual activity.

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## Section 22 Orders

- In addition, if someone refuses to disclose the names of their past sexual partners, or refuses to tell their current partner they are HIV+, public health can issue an order forcing them to.



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## Section 22 Orders



- The typical order issued by public health to PHAs says:
  - Always use condoms for any penetrative sexual activity
  - Always disclose your HIV+ status to sex partners
  - Never share needles
  - Attend all medical appointments
  - Report changes of address to public health

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## Section 22 Orders

⌘ Under the *HPPA*, if an order is issued and breached, a PHA can be prosecuted under the *HPPA* and fined up to \$5000.

⌘ In addition, the MOH can file a section 22 order in the court and have it turned into a court order. When a court order is breached, the court has the power to jail the offender for contempt.



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## Section 22 Orders

⌘ So public health law is different from the criminal law. The criminal law is all about disclosing your HIV+ status to others.

⌘ For public health purposes, disclosing HIV+ status is not the issue - making sure a PHA does not transmit HIV to others is.



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## Section 22 Orders



Section 22 orders are appealable to the Health Services Appeal and Review Board, but an appeal must be filed within 15 days of the receipt of the order.

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## Section 22 Orders

⌘ There is an enormous variation from health unit to health unit about when a section 22 order will issue.

⌘ There is also variation across the province about what the order says.



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## Section 22 Orders

⌘ When a section 22 order is issued, it has to be given to the patient in person.

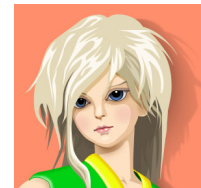
⌘ Most health units do this by going to the person's house, with a police officer. The nurse then gives the order to the person at their home.



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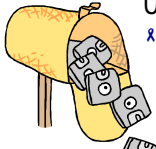
## Sally

Sally is a 19 year old who injects. She is currently in a relationship with an HIV positive man. You know he is HIV positive as he is a former client of your agency but Sally does not know he has HIV. Sally has also said she is pregnant.



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## Disclosure Resources



### Useful Resources:

✕ "Disclosure of HIV Status After *Cuerrier*: Resources for Community Based AIDS Organizations". (Available on-line at <http://www.aidslaw.ca/Maincontent/issues/criminal/allaw/disclosure.htm> or it can be ordered from the Canadian HIV/AIDS Information Centre at (613) 725-3434 or 1-877-999-7740.)

✕ The Information and Privacy Commissioner has published a number of good resources for providers and patients about the new PHIPA. Call 1-800-387-0073 to order them free of charge, or download them from [www.ipc.on.ca](http://www.ipc.on.ca).

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## Resources

- [HIV disclosure](#): a legal guide for gay men in Ontario (pdf)
- [Dévoilement du VIH](#): guide d'information sur le droit, pour les hommes gais en Ontario (pdf)
- Canadian HIV/AIDS Legal Network: [www.aidslaw.ca/criminalallaw](http://www.aidslaw.ca/criminalallaw)
- AIDS & Law Exchange (AIDSLEX): [www.aidslex.org](http://www.aidslex.org)

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## Contact HALCO

Ryan Peck  
HIV & AIDS Legal Clinic (Ontario)  
65 Wellesley Street East, Suite 400  
Toronto, ON M4Y 1G7

Tel: 416-340-7790  
Toll-free: 1-888-705-8889  
TTY: 416-922-2352  
TTY Toll-free: 1-866-513-9883  
Fax: 416-340-7248

Email: [peckr@lao.on.ca](mailto:peckr@lao.on.ca)

Website: [www.halco.org](http://www.halco.org)

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## Contact Us

Nick Boyce, Provincial Director  
[nboyce@ohsutp.ca](mailto:nboyce@ohsutp.ca)

CC Sapp, Provincial Trainer  
[ccsapp@ohsutp.ca](mailto:ccsapp@ohsutp.ca)

490 Sherbourne St., 2<sup>nd</sup> Floor  
Toronto, ON M4X 1K9  
1-866-591-0347 (toll free)  
416-703-7348 (t)  
416-703-3542 (f)  
[www.ohsutp.ca](http://www.ohsutp.ca)



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