

Counselling in the context of the criminalization of HIV non-disclosure



Legal information vs. legal advice

Legal information can help a client understand the law and his or her rights, but it is general.

Legal advice is about a client's specific situation. It is meant to help a client decide what to do.

Only lawyers can provide legal advice. Service providers can only provide legal information.

- Service providers counselling people living with HIV should be able to provide their clients with some information about the criminal law and the duty to disclose. Community-based organizations in particular are often the best or only source of information and support for people living with HIV (PHAs).
- The criminal law as it relates to HIV non-disclosure is complex and evolving. When providing information, service providers should provide their clients with **written materials** on the criminal law and HIV from reliable sources (e.g., materials developed by the Canadian HIV/AIDS Legal Network or HALCO, the HIV & AIDS Legal Clinic Ontario)
- It is very important to remember that **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.**
 - For instance:
 - A service provider can describe, with the support of written materials, what type of behaviour may lead to criminal prosecutions. *But a service provider cannot discuss with a client the chances that he or she might be prosecuted or convicted based on an analysis of his or her particular situation.*
N.B.: The law is complex and service providers should always refer their clients to a lawyer for additional information or for legal advice regarding their particular situation.
 - If a client says s/he is thinking of going to the police because s/he has been exposed to HIV by a sexual partner who allegedly failed to disclose his or her HIV-positive status, a service provider can explain to the client what the criminal law says about HIV non-disclosure and what could be the

general consequences associated with a complaint to the police (e.g., the police may ask very intimate questions; criminal proceedings can take a long time; once the police decide to lay charges, a complainant cannot stop the proceedings, even if s/he changes their mind, etc.). *But a service provider cannot advise his client whether to go to the police or not, or what would happen in their particular circumstances, nor can a service provider discuss with a client what would be the chances of success of his or her complaint to the police.*

- A service provider can describe to a client different things PHAs can do that may reduce the risks of prosecution or conviction. *But a service provider cannot tell a client what strategy would be the most efficient in terms of legal protection given the client's particular situation.*
- When service providers provide legal information, they should:
 - *Provide written materials* from reliable sources.
 - *Use general terms*: for instance, if a client who has not disclosed his status to a partner asks you whether he could be convicted for non-disclosure even if he used a condom, respond that you cannot advise him on his particular situation but that you know that a number of court decisions have been in favour of not criminalizing people who used a condom, and that few people have been charged, prosecuted and convicted in circumstances where a condom was worn and there was no disclosure.
N.B.: This is an example that may not reflect the latest legal developments in the criminal law. To know what the law is in Canada, see the section on “Criminal law and HIV non-disclosure,” also in this resource kit.
 - *Prefer the terms “may” or “might” to affirmative responses* (e.g., “disclosing in front of a counsellor *might* help prove HIV disclosure”).
 - *Avoid analysing a client's particular situation.*
- If a client needs legal advice, s/he should contact a lawyer. Service providers should refer their clients to lawyers they may know in their province and who are familiar with this particular issue. For other referrals, see the section “For more information and legal advice,” also in this resource kit.

This document is part of the on-line resource, *HIV Disclosure and the Law: A Resource Kit for Service Providers*, available at www.aidslaw.ca/community-kit. It contains general information and does not constitute legal advice. Reproduction is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of the information. For further information, contact the Legal Network at info@aidslaw.ca. *Ce document est également disponible en français.*

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