

Questions & Answers

This brochure will help you make informed decisions about disclosing to sexual partners. It provides important information about the criminal law in Canada, public health, and specific implications for newcomers, including permanent residents, students, temporary workers, visitors, refugees, and people without immigration status.



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

HIV Disclosure to Sexual Partners: Questions and answers for newcomers

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Learning about your HIV-positive status is an important step for your health. Thanks to medical advances, people who know their HIV-positive status and have access to care and HIV treatment (antiretrovirals or ARVs) can live long and healthy lives. Access to treatment can also help reduce the risks of transmitting HIV to sexual partners. But knowing that you are HIV-positive also has other implications in your life — for example, deciding whom to tell about your HIV status.

This brochure will help you make informed decisions about disclosing to sexual partners. It provides important information about the criminal law in Canada, public health, and specific implications for newcomers, including permanent residents, students, temporary workers, visitors, refugees, and people without immigration status.

1. What does disclosing my HIV-positive status mean?

Disclosing your HIV-positive status means telling someone else (e.g., a friend, your parents, your spouse, etc.) that you are HIV-positive.

Most of the time, disclosure is up to you. You have no obligation to tell your family or friends that you are HIV-positive, but you might decide to do so if you think their support could help. Similarly, in most circumstances, you don't have to tell your landlord, employer, co-workers, classmates or school officials. You also do not have to tell your dentist or other health-care workers that you are HIV-positive. But, again, you might decide to

do so to ensure that you receive proper, well-informed care.

The situation is different when it comes to sexual partners.

2. What is disclosure to a sexual partner?

Disclosing to a sexual partner means telling someone you are having sex with that you are HIV-positive.

This person could be anyone with whom you have a sexual relationship, including your spouse, a regular sexual partner, or someone you might have sex with only once.

3. What does Canadian criminal law say about disclosure to sexual partners?

In Canada, people living with HIV have an **obligation** under the criminal law to tell their sexual partners they are HIV-positive before having sex that poses what the courts call “a **realistic possibility of transmission**.” (See below for a breakdown of sexual acts and disclosure requirements.) In other words, if you engage in a sexual activity that, according to the law, carries a realistic possibility for transmitting HIV, and you do not disclose your status beforehand, you could be charged with a serious crime. If you are found guilty, you could go to jail.

It does not matter whether HIV is transmitted or not. You can be charged simply for not telling your sexual partners that you are HIV-positive, even if HIV is not transmitted.

This legal obligation to disclose your HIV status applies equally to all sexual partners — whether it's a spouse, a long- or short-term relationship, sex in exchange for money, or a one-time sexual encounter.

As far as we are aware, all criminal cases for HIV non-disclosure have been brought against people who knew their HIV-positive status because they had received an HIV test (either in Canada or abroad). However, not taking an HIV test does not necessarily mean you will be protected against prosecution. Theoretically, you could be charged if you think you may be HIV-positive and you do not disclose that possibility. But, as of today, we are not aware of any cases against people who have not received positive HIV test results.

4. When do I have an obligation to disclose my HIV-positive status to a sexual partner under the criminal law?

You do not always have to disclose your HIV-positive status to your sexual partner. Whether or not you are required to disclose your HIV status under the criminal law depends on the level of risk of transmitting HIV. The courts decide what “realistic possibility of transmission” means.

The law might evolve or be applied differently depending on available medical evidence in a particular case. But based on the current state of the law, it is safest to assume that you have an obligation to disclose before:

- Vaginal or anal sex without a condom; **and**
- Vaginal or anal sex with a condom **unless** you have a low viral load (less than 1500 copies/ml).

A viral load test tells you how much HIV is in your blood. With effective HIV treatment, your viral load can become “undetectable.” When you have an undetectable viral load, it does not mean that you are cured of HIV, but it does mean that the virus is under control. Having a low or undetectable viral load can greatly reduce the risks of HIV transmission. This is why the law takes into account your viral load to determine whether you have an obligation to disclose.

Remember that the criminal law is about **disclosure**. This means you should not be prosecuted for having sex (even if you do not use a condom and/or your viral load is high) if you have disclosed your status before sex and sex is consensual.

5. When do I *not* have an obligation to disclose my HIV-positive status to a sexual partner under the criminal law?

Because using a condom **and** having a low or undetectable viral load means it is almost impossible to transmit HIV, courts have said that you **do not** have an obligation under the criminal law to disclose before vaginal sex if you use a condom **and** you have a low or undetectable viral load. (This principle **likely** applies in a similar way to anal sex but we cannot be certain until it is confirmed by the courts.)

There is also **no obligation** to disclose before other intimate activities that pose **no risk** of HIV transmission, such as kissing.

Oral sex is usually considered a very low risk for HIV transmission. However, at the time of this writing, we cannot say for certain that oral sex without a condom and/or without a low viral load does not require disclosure.

If you have been contacted by the police or if you are worried you might be at risk of criminal charges, **you need to talk to a lawyer**. The Canadian HIV/AIDS Legal Network (or “Legal

Network”) may be able to refer you to a lawyer familiar with HIV.

6. Does the criminal law around HIV disclosure have specific implications if I am not a Canadian citizen?

Yes. There are specific implications if you are **not a Canadian citizen** because there is a significant risk you could be deported from Canada if convicted.

If you have been contacted by the police or if you are worried that you may be at risk of criminal charges 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 details about your immigration status**. The Legal Network may be able to provide appropriate referrals.

7. Is there any obligation *outside* the criminal law to disclose my HIV-positive status to a sexual partner?

Yes. Public health authorities might require you to tell your sexual partner that you are HIV-positive.

In Canada, when you test for HIV, the test result is reported to the provincial or territorial public health authorities. The type of information that gets reported to public health, and perhaps stored in a database, depends on the law and practice in the relevant province or territory. (If you choose to take an anonymous HIV test, the test result and non-identifying information will be reported to the public health agency, but not your name. However, when you begin accessing medical care for HIV, your name will likely be reported to public health regardless of the type of test involved.)

If you test positive for HIV or certain other sexually transmitted infections (STIs), public health authorities — depending on where you live — will

“A realistic possibility of transmission” — disclosure obligations according to sexual activity

The following table summarizes what we can say about your disclosure obligations, based on the current state of the law in Canada.

N.B.: The courts decide what “a realistic possibility of transmission” is. The law may evolve or be applied differently depending on medical evidence available in a particular case.

	Obligation to disclose	No obligation to disclose	Possibly no obligation to disclose but it is uncertain
Sex (vaginal, anal) without a condom, regardless of viral load	X		
Sex (vaginal, anal) with a condom but without a low or undetectable viral load	X		
Sex with a condom AND a low or undetectable viral load		X (at least for vaginal sex)	X (anal sex)
Oral sex			X
Kissing		X	

probably require that your sexual partners be contacted. This is called partner notification.

Public health authorities are responsible for protecting public health and preventing the transmission of infections, including HIV. While these authorities will generally work with you, they may sometimes take action if you do not or cannot disclose your status to your sexual partners. The powers and procedures of public health authorities vary from one province/territory to another.

Note that even if you think public health may have contacted your sexual partners, you might still have an obligation under the criminal law to disclose your HIV-positive status before having sex. It is always safer **not to assume** that your partners know you are HIV-positive if you have not directly told them yourself.

8. What if I am sponsored by my spouse or partner to come to Canada?

If you are sponsored by your spouse or partner and you test positive for HIV, Citizenship and Immigration Canada (CIC) will give you 60 days to tell your spouse or partner that you are HIV-positive, or to withdraw your application.

If you don't withdraw your application, CIC will notify your spouse or partner of your HIV-positive status after the 60-day deadline. Your spouse or partner will be given an additional 60 days to decide to withdraw or maintain sponsorship. If your spouse or partner doesn't choose to withdraw sponsorship, your application will proceed normally. This is important information because, if you have not told your spouse or partner (with whom you have sex) about your HIV-positive status, you could be at risk of criminal charges if your spouse or partner decides to go to the police.

And again, as with public health, even if you think CIC may have contacted your spouse or partner, it is always safer **not to assume** your partners know you are HIV-positive if you have not directly told them yourself.

9. Where can I get support around disclosure?

Telling others that you are HIV-positive can be difficult and stressful. In some cases you may fear rejection, violence or discrimination, or you may be worried that your HIV-positive status will not be kept confidential. Such concerns are particularly real for those living in tight-knit communities and in communities where sexuality and HIV are taboo. Racism, gender norms, economic conditions, and cultural and language barriers are all factors that can also affect a person's ability to disclose their status, take precautions to reduce risks of HIV transmission, and access support.

Contacting your local AIDS organization can be a good first step

to finding help and support. You may also want to seek legal advice before deciding whether to disclose your HIV status.

Additional resources

For more information on:

HIV disclosure and the criminal law

— See our info sheet, *Criminal Law & HIV Non-Disclosure in Canada*, at < www.aidslaw.ca/site/criminal-law-and-hiv/ >, and watch our series of videos about the HIV and the criminal law at < www.youtube.com/aidslaw > (available in English and French only). You can also contact the Legal Network and other organizations working at the intersection of HIV and the law in Canada (see contact information below). If you need legal advice, you should contact a lawyer; the Legal Network may be able to provide appropriate referrals.

HIV disclosure at work, school or in health care settings — See our series of info sheets, *Know Your Rights*, available at < www.aidslaw.ca/site/kyr/ > (available in English, French, Arabic, Chinese, Spanish and Tagalog).

Public health and HIV testing options

— In your province, contact your local AIDS service organization. If you live in Ontario, the HIV & AIDS Legal Clinic Ontario (HALCO) can provide legal advice if you have concerns related to public health.

Criminal convictions and their impact on non-Canadian citizens

— See Community Legal Education Ontario, *Mental illness, criminal offenses & deportation: tips for front-line workers* (June 2013), at < www.cleo.on.ca/sites/default/files/book_pdfs/mentill.pdf > (English only)

Contact information:

- **Canadian HIV/AIDS Legal Network** (Canada):
< www.aidslaw.ca >
Tel.: +1 416 595-1666
Fax: +1 416 595-0094
E-mail: info@aidslaw.ca
- **HIV & AIDS Legal Clinic Ontario (HALCO)** (Ontario):
< www.halco.org >
Tel.: +1 416 340-7790
or +1 888 705-8889
Fax: +1 416 340-7248
E-mail: talklaw@halco.org

- **Coalition communautaire des organismes québécois de lutte contre le sida (COCQ-SIDA) — Clinique d'information juridique VIH info droits** (Quebec):
< www.cocqsida.com >
Tel: +1 514 844-2477 (ext. 34)
Toll-free (when calling from outside Montréal): +1 866 535-0481 (ext. 34)
E-mail: vih-infodroits@cocqsida.com

To find a local AIDS organization, go to < hiv411.ca >.

To find a lawyer, contact legal aid and lawyer-referral services in your province. Legal aid offers services for individuals with low income.

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