

BRIEFING NOTE FOR CBAOS

HIV Disclosure & the Criminal Law in Canada: Responding to the Media and the Public

Purpose

The purpose of this Briefing Note is to give community-based AIDS organizations (CBAOs) information to help them respond to media questions and other inquiries. The information in this Briefing Note is intended to provide responses that are positive and constructive, and respect people living with HIV.

The information contained in this Briefing Note is “brief”. It is intended to provide you with short “sound bites” so you can **effectively communicate your important message**.

What information does the Briefing Note contain?

This Briefing Note is organized into three parts:

1. Why a response is needed
2. Suggestions on how to respond
3. Essential facts about criminal law & HIV disclosure

The Briefing Note does not provide concrete and definitive answers to all of the questions or issues you may be asked to answer or respond to. This is because the criminal law about HIV disclosure is very complex and not clear.

For more information ...

For people who want more information and to develop a deeper understanding of all of the issues involved, you can read:

- **8 info sheets on Criminal Law & HIV** [Canadian AIDS Society & Canadian HIV AIDS Legal Network]. The law in these info sheets was updated in 1999. Since that time, the Supreme Court has released its judgment in *R v Williams* and

there have been a number of other court decisions. The important court decisions are mentioned in this Briefing Note. The info sheets are available at:

www.aidslaw.ca/Maincontent/infosheets.htm

- ***After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status*** [Canadian HIV/AIDS Legal Network, 1999], available at:

www.aidslaw.ca/Maincontent/issues/criminallaw/finalreports/cuerrier/tofc.htm

- ***Note on R v Williams (criminal liability for HIV exposure)***, 18 September 2003 [Canadian HIV/AIDS Legal Network], available at:

www.aidslaw.ca/Maincontent/issues/criminallaw/williams-comment.htm

- ***HIV Transmission: Guidelines for Assessing Risk (3rd edition, 1999)*** [Canadian AIDS Society]. A 4th edition of the *Transmission Guidelines* is going to be published in the spring of 2004. The *Transmission Guidelines* are available from the Canadian AIDS Information Centre:

www.aidssida.cpha.ca

This Briefing Note was prepared and distributed by the Canadian HIV/AIDS Legal Network, in partnership with the Canadian AIDS Society. If you have questions about the Briefing Note or want to give us your feedback, please contact:

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Why a response is needed

Some members of the Canadian AIDS Society and the Canadian HIV/AIDS Legal Network asked for tools to help them respond to media questions and public perceptions about HIV disclosure and criminal law.

Media often sensationalize stories about people living with HIV/AIDS who are charged or found guilty of Criminal Code offences related to HIV transmission. They often do not present the issue of people who are unwilling or unable to disclose their HIV status in context or take into account the realities of people living with HIV/AIDS. This affects how the public views people living with HIV. It contributes to a climate of fear and stigmatization of people living with HIV, and discrimination against people living with HIV.

Community-based AIDS organizations are approached by the media to comment on cases where Criminal Code charges have been laid. Community-based AIDS organizations should be prepared to counter the negative messages in the media by providing accurate information about the law and the context of HIV disclosure for people living with HIV. Community based AIDS organizations may also want to use this Briefing Note as a basis to engage people in their local communities, or as a **starting point** for counselling clients.

Suggestions on how to respond

Key messages

Here are a few key messages about HIV disclosure and criminal law that the Canadian AIDS Society and the Canadian HIV/AIDS Legal Network believe are important:

1. **Studies show that most people living with HIV tell their sexual partners about their HIV status and take steps to prevent HIV transmission (like using condoms during sexual intercourse).** Criminal law cases, like all court cases, are brought when things have gone wrong. We need to remember this fact. Cases like *Cuerrier / Williams* / the case you are speaking about are rare and certainly do not indicate the way most people living with HIV behave in their sexual relationships.
2. **It is unfair to stigmatize all people living with HIV because of the conduct of a few individuals.** People living with HIV already face fear, stigma and discrimination. People living with HIV do not deserve to be treated as criminals simply because they are HIV-positive.
3. **Everyone, not only people who know they are HIV-positive, has a responsibility to stop HIV transmission.** HIV is a reality in Canada. There are approximately 50,000 people living with HIV in Canada – but 30% do not know that they are infected and so they can't tell their partners. So whenever and wherever possible, people should take personal responsibility by using condoms when engaging in sexual intercourse.
4. **Some people living with HIV may not be able to disclose their HIV status to their sexual partners because they fear for their safety.** HIV-positive people in abusive relationships may not be able to use a condom or insist that their partner use a condom. They may also fear the consequences of disclosing their HIV status to their partner.
5. **Relying too heavily on the criminal law to prevent HIV transmission may be counterproductive.** It is unlikely that the threat of criminal penalties will stop people from having risky sex or sharing injection equipment (needles and syringes).
 - Instead, criminal penalties will deter those most at risk from getting tested for HIV. And if someone does not get tested, they will not receive counselling about changing behaviours that risk HIV transmission. Nor will they find out if they are HIV-positive, or access medical treatment and support services.
 - Criminalizing high risk sexual and drug injecting behaviours further stigmatizes people living with HIV and makes it even more difficult to provide effective education about preventing HIV infection (especially for socially marginalized communities most at risk).

- Finally, threatening people who expose someone else to HIV with criminal prosecution may create a false sense of security among HIV-negative people.
6. **People living with HIV are entitled to a healthy sex life, just like everyone else.** People living with HIV do not have to tell every sexual partner that they are infected with HIV. According to the Supreme Court’s *Cuerrier* decision, HIV-positive people have a legal duty to disclose their status before they have sex that places the other person at a significant risk of serious bodily harm – in other words, at significant risk of HIV infection. Not all sexual activities carry a significant risk of HIV infection [for example, kissing and oral sex]. And in the *Cuerrier* decision, the Supreme Court suggested that HIV-positive people might not have a duty to tell partners they are HIV-positive if they use condoms for sexual intercourse. But the courts have not confirmed this suggestion, so it is not the law.
 7. **The *Williams* case goes too far by suggesting that people who think there is a risk they may be HIV-positive have a legal duty to tell others.** It is not a good idea to “extend” the criminal law (and its serious penalties) beyond cases where someone knows for certain that he or she is HIV-positive, based on a medical test or diagnosis. Many sexually active people in Canada have had unprotected sexual intercourse – an activity that carries a high risk of HIV infection. Remember, 30% of HIV-positive people in Canada do not know they are infected. And you can’t tell just by looking at someone whether or not he or she is HIV-positive. So do all of these people who have had sexual intercourse without a condom have a legal duty to tell their sexual partners that they may be HIV-positive? The criminal law and criminal investigations should not police the most intimate details of people’s sexual lives and sexual histories based only on a risk that someone may be HIV-positive.

Tips on how to answer questions

Journalists’ and reporters’ questions may not be based on a good understanding of the legal and medical issues involved in HIV disclosure and HIV transmission. They may not be aware of the reality of people living with HIV. You probably have a better understanding of the issues, and almost certainly a better understanding of the perspective of people living with HIV. This is part of the reason that journalists and reporters are asking you for information, answers and comments.

So, while it is important to try to answer journalists’ and reporters’ questions, it is more important to get your point across. **Think of each question as an opportunity to make your point and to be an advocate for your clients and other people living with HIV.**

When the journalist or reporter first contacts you, it is a good idea to ask what types of questions she will be asking you. **It is also perfectly OK (not to mention a good idea) to ask the journalist or reporter to call back later to do the actual interview.** This will give you time to look over the Briefing Note and any other information you need to. You will have a chance to think about and formulate your answers and remind yourself of the key messages or points you want to make in the interview.

Essential facts about criminal law & HIV disclosure

People living with HIV have a legal duty to disclose ...

As a result of the *Cuerrier* decision of the Supreme Court of Canada, people living with HIV have a legal duty to disclose their HIV status before engaging in behaviours that put another person at **significant risk of serious bodily harm**. The Court clearly stated that risk of HIV infection is risk of a serious bodily harm.

An HIV-positive person does not have to infect the other person with HIV to be criminally charged. It is enough that they put the other person at a significant risk of HIV infection.

The two most common situations where there is a significant risk of HIV transmission are: (1) **unprotected sexual intercourse** (anal or vaginal); or (2) **sharing injecting equipment** (needles and syringes) that contains HIV-infected blood.

Practically speaking, this means that people living with HIV must disclose their HIV status before having unprotected intercourse (vaginal or anal) and before sharing injecting equipment (needles and syringes) that contains HIV-infected blood.

In the *Cuerrier* case, the Supreme Court **suggested that careful use of a condom may reduce the risk of HIV transmission** to the point where the risk of serious bodily harm is not significant. And as a result, an HIV-positive person who properly uses a condom **might not have a legal duty to disclose** his or her HIV status before engaging in sexual intercourse. But this was **only a suggestion** by the Supreme Court, and it **not the law**.

Whether or not a person living with HIV has a legal duty to disclose their HIV status before sex (or sharing injection drug equipment) **will depend upon the risk of HIV transmission** associated with the sexual (or drug injecting) activity.

People living with HIV **do not have to disclose their HIV status** to sexual partners before engaging in activities that pose **no risk or negligible risk of HIV transmission**. [kissing; cuddling; mutual masturbation; digital-anal intercourse, insertive or receptive fellatio/cunnilingus with a condom.]

It is **unclear** whether or not people living with HIV have a legal duty to disclose their HIV status to sexual partners before engaging in activities that pose **low risk of HIV transmission** [oral sex without a condom; intercourse with a condom]. In *R v Edwards*, a lower court judge indicated that there is no legal duty to disclose HIV status before unprotected oral sex because it is a low risk activity.

In the *Williams* case, the Supreme Court of Canada opened up the possibility that a person who is **aware of the risk that he or she has contracted HIV** may have a legal duty to tell his or her sex partner about this before engaging in unprotected sexual intercourse. So a person who thinks he or she may be HIV-positive, **even if he or she**

does not know for sure, may have a duty to tell sexual and injection drug use partners before engaging in high-risk behaviour.

The Supreme Court in the *Williams* decision also left the door open for people living with HIV to be held **criminally liable for engaging in activities that would put an HIV-positive person at risk of re-infection with HIV**. Depending on the medical and scientific evidence, it may be possible to prove that re-infection with a different or drug-resistant strain of HIV can result in a serious bodily harm that would endanger the life of someone who was already HIV-positive. So even if people living with HIV know that their sexual or drug injecting partner is HIV-positive, they may have a legal obligation to disclose their HIV status to that person when engaging in activities that have a significant risk of HIV transmission. But a court has not definitively decided this issue.

What Criminal Code charges do people living with HIV face if they breach the legal duty to disclose?

People who are charged under the Criminal Code for putting others at risk of HIV infection are likely to be charged with either **aggravated assault** or **common nuisance**, or **both**.

Under the Criminal Code, a person commits an **assault** when he or she applies force intentionally to another person without the other person's consent. Force means touching. The person's consent to the touching (or sex) is not valid if it is obtained by fraud. Fraud means either lying or not telling. The maximum term of imprisonment for assault is 5 years.

Under the Criminal Code an assault becomes an **aggravated assault** where a person commits an assault that endangers the life of another. The maximum term of imprisonment for aggravated assault is 14 years. In the *Cuerrier* case, the Supreme Court decided that an HIV-positive person who has unprotected sexual intercourse without disclosing his HIV status is guilty of aggravated assault because of the risk of infection with HIV, which endangers the other person's life.

In the *Williams* decision, the Supreme Court was faced with a situation where an HIV-positive person had unprotected sexual intercourse with someone who was likely HIV-positive. The Court decided that where there is a reasonable doubt whether or not the other person was HIV-positive before the unprotected sexual intercourse, the person's life may not have been endangered. So the HIV-positive person cannot be found guilty of the Criminal Code offence of aggravated assault. But he or she would be guilty of **attempted aggravated assault**. The maximum term of imprisonment for attempted aggravated assault is 7 years.

Under the Criminal Code, a person is guilty of **common nuisance** if he or she fails to discharge a **legal duty** and as a result **endangers the lives, safety or health** of the public. People living with HIV have a legal duty to disclose their HIV status before engaging in any activity that carries a significant risk of HIV transmission. People living with HIV have been convicted of common nuisance for having unprotected sexual intercourse

without first telling their sexual partner that they were HIV-positive. The maximum term of imprisonment for common nuisance is 2 years.

Legal duties of community-based AIDS organizations

CBAO 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**.

CBAO 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**).

- ⊕ CBAOs faced with a police search warrant to seize client information can “assert privilege” over the information. To do this, the CBAO 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 CBAO should get legal advice, and advise their client to do so, as soon as possible.

CBAO 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, CBAOs cannot be charged with or convicted of a criminal offence for failing to report a client to police.

CBAOs 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.

CBAOs, their 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.

CBAOs, their staff and their volunteers **who do not take steps to prevent harm 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.