

# HIV PREVENTION TOOLKIT FOR YOUNG WOMEN

## DISCLOSURE

Disclosure involves a complex mix of psychological, emotional, social, sexual and legal issues, and can be overwhelming for many people. Disclosure may feel risky or threatening on many different levels.

Unlike disclosure to other people, disclosure to sexual partners may be required by law, under Canada's Criminal Code. There are other factors to consider, too, when disclosing to sexual partners, which have nothing to do with the law.

### Disclosure and the law under Canada's Criminal Code

An HIV-positive person is legally required to tell sexual partners about their HIV-positive status **before** having any sex that poses "a realistic possibility"<sup>2</sup> of HIV transmission. According to the Supreme Court of Canada, this means:

- ➔ A person with HIV **has a legal duty** to disclose their HIV status before having:
  - vaginal, frontal<sup>3</sup> or anal sex **without** a condom, or
  - vaginal, frontal or anal sex when their viral load<sup>4</sup> is **higher than "low,"** even when a condom is used.
- ➔ An HIV-positive person **does not** have to disclose their HIV status before having vaginal sex if a condom is used **AND** they have a "low" viral load at the time of sex.

HIV<sup>1</sup> disclosure is when someone tells someone else that they are HIV-positive. Disclosure can take different forms and happen in a number of contexts. This fact sheet focuses on HIV disclosure to sexual partners.

<sup>1</sup> HIV stands for human immunodeficiency virus, a virus that attacks the immune system and results in a chronic, progressive illness which makes people vulnerable to other potentially serious infections and cancers. (AIDS, which stands for Acquired Immunodeficiency Syndrome, is the advanced stage of HIV infection. )

<sup>2</sup> Sexual acts that are considered to have a "realistic possibility" of HIV transmission from a legal perspective may actually have a low risk of transmission from another perspective.

<sup>3</sup> Frontal sex is an alternate term for vaginal sex, and is used by some trans\* men who feel more comfortable with this language. They might also say "front hole" instead of vagina, or they might use another word altogether. If you have a trans\* partner, you can ask them what terms they prefer.

<sup>4</sup> Viral load is the level of HIV in an HIV-positive person's blood. A "low" or undetectable viral load is achieved by taking HIV medication, which keeps the person healthier and also makes them less infectious to sexual partner(s). They are still HIV-positive, though. Viral load can change, and is measured with regular blood tests.

## Why do people living with HIV have an obligation to disclose their status to sexual partners under Canada's Criminal Code?

The criminal law considers that not telling a sexual partner your HIV-positive status can invalidate their consent to have sex when:

- ➔ Sex poses a “realistic possibility of transmission”; and,
- ➔ A sexual partner would not have consented to having sex if they had known that the other person was HIV-positive.

When these two conditions are met, HIV non-disclosure is considered fraud vitiating consent (there is no legally recognized consent because ‘deception’ created a misunderstanding about what was being consented to). HIV-nondisclosure transforms otherwise consensual sex into sexual assault.

## What charge and penalty result from non-disclosure?

People in Canada have been charged and convicted of various crimes for not disclosing their HIV-positive status to a sexual partner before having sex. People are usually charged with aggravated sexual assault, meaning that if they are convicted they will serve time in jail and be registered as a sexual offender. Sentences vary depending on the circumstances of a case.

## Why is disclosure sometimes difficult?

Disclosure is complex and can cause people significant anxiety. It may be especially difficult if the diagnosis is recent and the person is still processing their own thoughts and feelings about it.

Depending on individual circumstances, a person might feel they are risking their relationship, whether new or already established. They might fear questions about their history and how they got HIV. They might fear anger, violence, rejection, discrimination, legal repercussions, or the loss of their children, home, financial security, privacy or immigration status. These can be profoundly difficult fears for anyone to face.

## Timing of disclosure

### To current partners:

If someone is already in a sexual relationship when they find out they're HIV-positive, they will have a legal obligation to disclose to their current partner(s) before they have sex again (unless their viral load is low and they use a condom).

### To new partners:

Some people choose to disclose immediately - on or even before the first date – so as not to waste time or become emotionally invested in somebody who considers HIV a deal-breaker. Other people prefer to wait until the relationship begins to take root emotionally, so they can get to know each other first, and so they disclose to fewer people. Either approach is fine – it's a matter of personal preference. As far as the law is concerned, however, everyone has a duty to disclose before having sex that poses a realistic possibility of transmission.

From a **LEGAL** perspective, it does not matter if the other person gets infected with HIV or not. People have been charged and convicted even when HIV was not transmitted.

People living with HIV may face criminal charges for not disclosing their HIV-positive status even if the sexual partner(s) did not ask about HIV before having sex.

Some people are completely open about their HIV-positive status, while others prefer to keep it private or semi-private.

### To former partners:


There is no requirement under Canada's Criminal Code to disclose one's HIV-positive status to past partners. Public health law, however, is a little different and varies by province. Generally speaking, when a person is diagnosed, public health expects that the person will inform their past partners and/or that they will provide the names of their past partners so that public health can inform those partners (referred to as contact tracing or partner notification). While this notification is not a legal obligation under Canada's Criminal Code, some public health agencies can be persistent about it.

### What if sexual activity took place before disclosure?

Disclosure after-the-fact can be difficult if someone knew of their HIV-positive status when they had sex and a condom wasn't used and their viral load was not low. If one thinks they may be at risk of prosecution, they should contact a criminal lawyer. The Canadian HIV/AIDS Legal Network or a local AIDS service organization might be able to make an appropriate referral to a lawyer. It is better to obtain advice from a criminal lawyer before discussing these situations with anyone else, because what one says in this circumstance might be used against them.

### Tips for disclosing one's HIV status:

When disclosing their HIV-positive status to a partner, one should:

- ➔ Know that disclosing, while difficult, can be a huge relief – especially if one has been putting it off or it has been a significant source of worry and anxiety.
- ➔ Understand that – in the best case – disclosure can open the doors to greater intimacy, honesty, trust and communication in a relationship.
- ➔ Do research to obtain a solid understanding of HIV and how it is – and is not – transmitted.
- ➔ Seek advice and guidance and disclosure tips from HIV support groups and/or local AIDS service organizations if possible. (See ASO411.ca  find one.) Many people say disclosure gets easier with experience.
- ➔ Let a friend or counsellor know ahead of time so they can check in and provide post-disclosure support.
- ➔ Try to choose a time when nobody involved is feeling tired, hungry, rushed, cranky or angry.
- ➔ Avoid waiting until engaged in sexual foreplay before disclosing. Sexual arousal releases chemicals that can affect perceptions, cognition, and decision-making abilities.
- ➔ Consider disclosing in the same way it is hoped the other person will respond. For example, if a matter-of-fact and calm response is desired, disclosure should be made in a matter-of-fact and calm way. Sobbing during disclosure may convey the message that it's a disaster. It's not. HIV is a chronic but manageable health condition.

**The Supreme Court's decisions have left some questions unanswered, for example:**

- Is disclosure required for oral sex?
- Is disclosure required for anal sex when a condom is used and viral load is low?
- Is disclosure required when a condom breaks?

**These questions may be answered as new cases go to trial.**

**For more information about disclosure and the law, please see the information sheet on HIV and the Criminal Law,<sup>5</sup> by the Canadian HIV Legal Network.**

<sup>5</sup> [http://www.aidslaw.ca/site/wp-content/uploads/2014/09/CriminalInfo2014\\_ENG.pdf](http://www.aidslaw.ca/site/wp-content/uploads/2014/09/CriminalInfo2014_ENG.pdf)

- ➔ Be clear about expectations regarding confidentiality. If one wants their HIV status to be treated as confidential information, they should say so. (Understand, though, that there is never a guarantee of confidentiality.)
- ➔ Know that a current or former sexual partner won't necessarily be HIV-positive. They will need to get tested to find out, and should be provided with contact information for a local AIDS service organization where they can get more information, testing and support.
- ➔ Understand that partners may have a lot of questions and they may be upset, fearful or angry during or following disclosure. If someone is afraid that a partner might become violent, they should consider disclosing in a semi-public place like a restaurant or a park, and/or with an HIV advocate present.
- ➔ Depending on the circumstances, consider disclosing to a new partner by email or text, so there's a record of having disclosed **before** having sex. Some people ask their sexual partners to sign a form, acknowledging that they've disclosed their HIV status **before** having sex. There are potential advantages and disadvantages to these ways of disclosing, so one should consider the circumstances first. (Anything written in an e-mail, on a website or through social media may later be shared with others — so care and caution should be exercised when posting personal information online.)
- ➔ Have printed materials to share that will help facilitate understanding of HIV. Give the other person time to absorb and process this information. Nobody should be expected to make decisions (to have sex, for example) right away.
- ➔ Try to be philosophical if somebody chooses to end a relationship or not start a relationship because of one's HIV status. Maybe they're just not the right partner and HIV helped "weed them out."

## What to do when one is on the receiving end of disclosure

When on the receiving end of someone else's HIV-positive disclosure, one should:

- ➔ Understand that the disclosure probably wasn't easy.
- ➔ Recognize the importance of getting tested for HIV if there has been condomless sexual activity or sharing of drug injecting equipment.
- ➔ Respect confidentiality. Some people are open about their HIV-positive status with everyone, while others tell very few people. One should never disclose someone else's HIV-positive status without express permission to do so.
- ➔ Know that these days it's common for people to be in long-term romantic and sexual relationships with HIV-positive partners and never contract HIV. There is a very low risk of transmission if the person has a low or undetectable viral load (achieved through HIV medication), and virtually no risk if condoms are also used.
- ➔ Know that one can still have healthy children with an HIV-positive partner.
- ➔ Learn about pre-exposure prophylaxis (PrEP). Some HIV-negative people in relationships with HIV-positive partners choose to go on HIV-prevention medication called PrEP. Consult health care providers for more information.
- ➔ Take the time to absorb and process information and learn more about HIV before making decisions.

