

UNRAVELLING THE LAW

A GUIDE FOR WOMEN LIVING WITH HIV/AIDS

halc

HIV/AIDS Legal Centre Incorporated (NSW) ABN 39 045 530 926



LAW AND JUSTICE
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SOUTH WALES

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Women living with HIV face many challenges. Because of the nature of the HIV epidemic in Australia, the needs and concerns of positive women are often overlooked, misunderstood or ignored.

This booklet is specifically designed for positive women and the service providers who work with them. Presented in question and answer format, it provides basic information on some of the legal issues that concern many positive women. It doesn't try to cover every legal issue that is relevant to HIV positive people but it does aim to address the most common and most important ones for women.

The law on HIV is different in every state and territory. This booklet deals with NSW law only. If you are travelling or moving interstate, contact local organisations to find out what law applies there.

The contact details for HIV/AIDS Legal Centre (HALC) and other important organisations, including the main HIV/AIDS organisations in each state and territory, can be found at the end of this booklet.

A NOTE TO OUR READERS

This booklet contains the relevant law that applies in New South Wales at 1 January 2012. Every effort has been made to ensure the information contained here is up to date and accurate but it is no substitute for legal advice. Use this booklet as a guide only and contact HALC for legal advice on your particular problem.

Changes to the Public Health Act 1991 (NSW) were made by Parliament in 2010 but have not come into operation. The expected start date at this stage is the end of 2012. Check with HALC for progress on these developments.

CARE AND TREATMENT

1. When my HIV test results are positive, who is notified?

The lab that did the test must report the HIV positive result to the NSW Health Department, but your name and address are not given. The result is reported as a statistic. If the diagnosis is AIDS rather than HIV then your doctor must also do a report. Again, your name and address are not given.¹

2. What information should my doctor provide me with when I am first diagnosed?

The *Public Health Act 1991* (NSW) requires that your doctor provide you with the following information concerning your positive HIV status:

- the ways to minimise your risk of infecting others;
- the public health implications of your condition;
- that you need to inform sexual partners of your positive HIV status before having sex with them and obtain their voluntary consent to the risk of infection;
- a diagnosis and prognosis of your condition;
- the treatment options available to you.²

3. Will my doctor keep my HIV status confidential?

Yes, there are several laws that protect the privacy of your medical information. The *Public Health Act 1991* (NSW) specifically requires that health care workers (including doctors) take all reasonable steps to safeguard information about your HIV status.³ The exceptions are as follows:

- if you consent to the release of the information;⁴
- if a court orders it,⁵ for example, that your details be provided to the NSW Health Department if it is believed that you are putting the health of others at risk;⁶
- a health care worker can provide your HIV information to another health care worker but only if it is needed in connection with your treatment;⁷
- if you are hospitalised and the professional staff at the hospital become aware of your HIV status, they are required to notify the hospital and the Health Department;⁸
- if a health care worker has good reason to believe that you are putting the health of others at risk, they can notify the Health Department.⁹

Under this law, the penalty for unlawfully disclosing information about your HIV status is a fine of up to \$5,500.¹⁰ It applies not only to your doctor and other health care workers but also to any person who obtains information about your HIV status in the course of providing a service.¹¹

The *Health Records and Information Privacy Act 2002* (NSW) also helps to protect your medical information from being misused. If the information is unlawfully used or not kept safe¹² you can make a complaint to the NSW Privacy Commissioner.¹³ There is a six month time limit for lodging the complaint.¹⁴

Private GPs are also subject to the *Privacy Act 1988* (Cth)¹⁵ and must follow National Privacy Principles¹⁶ in protecting your personal information. If their handling of your information breaches one of these principles you can make a complaint to the Commonwealth Privacy Commissioner.¹⁷ There is a **twelve month time limit** for lodging the complaint.¹⁸

Unlawful disclosure of your HIV information may also amount to discrimination. So if you believe that information about your HIV status has not been kept private, do not delay in getting legal advice about your possible options. Contact HIV/AIDS Legal Centre (HALC).

4. Do I have to tell my dentist, gynaecologist or other doctors and health care providers that I am HIV positive?

No. All health care workers (including dentists) are required to use safe work practices that minimise the risk of infection for all their patients regardless of what information they have about the patients' medical conditions.¹⁹

These infection control practices are called Standard Precautions and are based on the principle that all patients may have a transmissible disease. If these procedures are followed, there is an extremely low chance of cross infection.

However, it may be wise to disclose your HIV status if there is a possibility that your HIV medications or related illnesses could affect the treatment you are given. If you are in doubt, consult your treating HIV specialist for advice.

SEX AND RELATIONSHIPS

1. Do I have to tell my sexual partners that I am HIV positive?

Yes. Your HIV status does not prevent you from having a fulfilling and healthy sex life, but in NSW if you are HIV positive, you have a legal responsibility to try not to infect others. There are three main areas of law that deal with this responsibility: the *Public Health Act*, the *Crimes Act* and civil law.

Public Health Act

Under the *Public Health Act 1991* (NSW), if you are HIV positive, you are legally required to tell (disclose) your HIV status to a person **before** having sex with them.²⁰ You must not only tell your sexual partner but they must also voluntarily accept the risk. Sex includes any form of vaginal or anal intercourse or oral sex.

It is no defence that the other person should have asked about your HIV status, or that you used condoms or practised other safe sex methods. Nor is it a defence that the situation made it difficult for you to tell the other person, for example if you had casual sex. You are still required to disclose your HIV status. The penalty for not telling under the *Public Health Act* is a maximum fine of \$5,500.²¹

This also applies if you are a sex worker. Like all HIV positive people, the law requires that you tell your sexual partners of your HIV status.

If you are a sex worker and the owner or manager of the brothel where you work knows you are HIV positive and are not telling your clients, they can also be guilty of an offence under the *Public Health Act*.²² The penalty for this offence is a maximum fine of \$5,500.

Crimes Act

Under the *Crimes Act 1900* (NSW), transmitting HIV is included in the crime of causing grievous bodily harm.²³ If it is done intentionally, it carries a sentence of up to 25 years imprisonment.²⁴ If done recklessly, the sentence can be up to ten years imprisonment.²⁵ If done negligently (by an act or by failing to act) the sentence can be up to two years imprisonment.²⁶

The law in this area is complex but if you fail to tell your sexual partner that you are HIV positive and they do become HIV positive, there can be serious consequences for you. To find out more, contact HIV/AIDS Legal Centre (HALC).

Civil Law

In general, you have a legal responsibility to do all that is reasonable to protect your sexual partner from harm. Under civil law, if you infect them, they may sue you for damages for deliberately, negligently or recklessly infecting them. The law in this area is also complex. Get legal advice from HALC if you are concerned that you may be sued.

If your partner knows of your HIV status and understands the risk and voluntarily accepts it, it is unlikely that they could successfully sue you. Safe sex practices like using condoms may also be a defence if you are sued, or for offences under the *Crimes Act 1900* (NSW) (but not under the *Public Health Act 1991* (NSW)). However, it is difficult to predict the outcome of any particular set of circumstances as there is no conclusive case law in this area.

So, it is important that your sexual partner/s know of your HIV status, understand the risk and voluntarily agree to accept the risk. For more information about who and when you have to tell of your HIV status, read our booklet *Disclosing Your HIV Status: a Guide to Some of the Legal Issues*.

2. The person who infected me didn't tell me they were HIV positive. Can I take any legal action against them?

You have a number of options, such as having the person prosecuted or suing them for damages. However, you need to think very carefully first as it can often be very difficult for a court of law to determine what took place between sexual partners and it may become your word against theirs. Legal action can be a lengthy and stressful process and suing the other person can be expensive as well. If you win the case, they may not have the funds to pay. If you lose, you may have to pay their legal costs. So get legal advice from HALC before taking any action.

Prosecution

If you want the person to be prosecuted under the *Crimes Act 1900* (NSW) for deliberately transmitting or attempting to transmit HIV or for recklessly or negligently causing grievous bodily harm,²⁷ you will need to attend a police station and make a statement. Then it is the police who prosecute the person, that is, charge them with the crime. After you have made a statement, the police will decide whether to investigate and then whether there is enough evidence to prosecute.

The police may be reluctant to prosecute and a court may be reluctant to convict because of problems with proof. If the person is charged, in order for them to be

convicted of the offence, the court must be satisfied beyond reasonable doubt that the person acted in a deliberate or reckless way in harming you. If the person is found guilty they may be imprisoned, or required to pay a fine or undertake community service.

The police may be reluctant to prosecute and a court may be reluctant to convict because of problems with proof. If the person is charged, in order for them to be convicted of the offence, the court must be satisfied beyond reasonable doubt that the person acted in a deliberate or reckless way in harming you. If the person is found guilty they may be imprisoned, or required to pay a fine or undertake community service.

Suing under Civil Law

A sexual partner has a responsibility to act in a way that doesn't harm you. If you want to bring your own legal action against them under civil law, that is, to sue them for compensation, you will need to prove that the harm you have suffered is a direct result of their actions.

Under civil law, you do not have to prove your case beyond reasonable doubt but rather that it is more probable than not. However, it may still be difficult to prove on the basis of probabilities that sex with that particular person caused your infection. The fact that HIV infection does not show up immediately in tests is also a complicating factor.

If you wish to sue, you must start your legal action within **three years** of the date of infection.²⁸ The courts strictly enforce this rule, and exceptions are made only in rare circumstances. So do not delay in getting legal advice about a possible claim.

Victim's Compensation Scheme

If you are the victim of a deliberate infection with HIV, for example where your sexual partner knew they were HIV positive and didn't tell you; or if you were infected as a result of a violent crime, like sexual assault, you may be able to claim Victim's Compensation.²⁹ Counselling and support services may also be available through this scheme. If you wish to make a claim, you need to lodge your application within **two years** of the date of infection.³⁰ Although exceptions are sometimes made to this time limit (for example in child sexual assault cases), **do not delay** getting legal advice about your claim.

3. I am concerned that the person who infected me may be infecting others. what can I do?

If you are concerned that the person who infected you is behaving in a way that will infect others, you may want to report them to NSW Health, through your nearest Sexual Health Service. NSW Health has powers to require the person to undergo counselling and education to change their behaviour.³¹ In extreme cases, the person may be supervised or detained under a Public Health Order. Your doctor or social worker can help you make the report to NSW Health.

4. I am having unprotected sex and my partner doesn't know that I'm HIV positive. If I tell this to my health worker, are they required to take it further?

Yes. If you continue to have unprotected sex with your partner you risk infecting them and health workers have a duty under Public Health Regulations and NSW Health Policy Directives to take reasonable steps to protect any person at risk of infection.³²

Health care workers (including doctors, nurses, counsellors, social workers) are required to keep your medical information confidential and not disclose it to your partner without your consent.³³

The Regulations and Policy Directives try to balance confidentiality and individual freedoms against the health risk to others. Ultimately, where there is risk of infection to another person, NSW Health will take careful action to prevent this. Where they believe you risk infecting others they will provide you with appropriate counselling, education and support to encourage you to inform your partner.

If necessary, where you continue to have sex with your partner without telling them that you are HIV positive, your health care worker can inform NSW Health and further action may be taken.³⁴ This can include a letter of warning, a case conference, a public health order that imposes conditions on your behaviour and, in an extreme case, detention.³⁵

If you wish to tell your partner of your HIV status but are concerned about how they will react, talk it over with a counsellor first. They can help you with how to go about it.

5. I am a sex worker having unprotected sex with my clients without telling them that I am HIV positive. If I tell my health worker about this, are they required to take it further?

Yes. As in the previous question, health care workers must keep your medical information confidential but must also take reasonable steps to protect the public. Health care workers can disclose your information to NSW Health if they have reasonable grounds to believe that failing to provide the information could place the health of the public at risk.³⁶ This step is usually only taken as a last resort. NSW Health then has a range of options. They may offer you counselling and support in changing your risky behaviour. If the behaviour continues, they can apply for a court order that compels you to attend counselling; imposes certain conditions on your behaviour; gives you an official warning; or in extreme circumstances they can detain you.³⁷ While court orders are not common, there are cases where they have been issued.

PREGNANCY AND CHILDBIRTH

If you are considering having a baby or are already pregnant, read the booklet called **Positive Pregnancy**. It is produced by the Paediatric HIV Service at the Sydney Children's Hospital and tells you about HIV and pregnancy, the birth, treatment options and what support is available. You can get a copy of the booklet online or from your HIV specialist, obstetrician, antenatal clinic, ACON or directly from the Paediatric HIV Service.

1. Does my HIV status prevent me from having fertility treatments?

No. The law in NSW does not prevent HIV positive women from accessing reproductive technology.³⁸ Although individual doctors and clinics can make their own policies concerning access to and eligibility for treatments,³⁹ they are still subject to anti-discrimination laws.⁴⁰ This means they cannot refuse you treatment because you are HIV positive.⁴¹

If you are refused on the basis of your HIV status, get legal advice as soon as possible as to whether there are grounds to make a discrimination complaint. A **twelve month time limit** applies for lodging a complaint so **do not delay** getting legal advice.⁴² Contact HALC.

2. If I undergo fertility treatment will my HIV status be kept confidential by the assisted reproductive technology (art) clinic that I attend?

Yes. The clinic must comply with the *Health Records and Information Privacy Act 2002* (NSW)⁴³ and the *Public Health Act 1991* (NSW)⁴⁴ and cannot disclose your health information without your consent.

3. When I have a baby, will I be reported to community services because I am HIV positive?

No. Being HIV positive is not enough reason on its own for you to be reported to Community Services (formerly known as DOCS). Community Services will only intervene if they are notified that a baby or child is at risk of being harmed or that an unborn child is at risk of harm after the birth. For example, if you were exposing the child to an unreasonable risk of HIV infection.

4. During pregnancy, what are my rights about making decisions for my own and my baby's health?

Until the child is born it has no legal rights of its own and, generally, you have the right to make decisions about your own body. However if you behave in a way that will threaten the health of the baby after he or she is born, for example, by increasing the risk that he or she will be born HIV positive, then the law has the power to prevent it.

There are several methods and treatments that reduce the risk of transmitting HIV from mother to child. Taking certain medications during the pregnancy can lower the risk and birth by Caesarean section may also be recommended if, for example, your viral load is high. After the birth, avoiding breastfeeding and giving the baby a 4-6 week course of antiviral treatment greatly reduces the risk of HIV transmission.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), if a health care worker has reasonable grounds to suspect that your unborn child has an increased risk of harm because you are refusing treatments that are recommended to reduce the baby's risk of HIV infection, then the worker may report the matter to Community Services.⁴⁵

5. What happens if a report is made to community services that I am exposing my unborn child to unreasonable risk of infection?

Any interested person can make a report to Community Services if they believe a child (including an unborn child)⁴⁶ is at risk of significant harm.⁴⁷

If you unreasonably refuse treatments during pregnancy or act in other ways that may increase the risk of transmitting HIV to the child once it is born, then an interested person might believe that you are risking the health of the child and contact Community Services.

Once a notification is made, an assessment is made of the risk.⁴⁸ Usually, a Community Services caseworker will speak with you, your family and the health workers involved in your care.

After the assessment is made, Community Services will decide how best to proceed. This may include providing you with extra support during the pregnancy, making a care plan or supervising you and your child after the birth.⁴⁹

Community Services can also apply to the court for orders but this should only be done as a last resort.⁵⁰ Cases like this are extremely rare but they do show that the court can and will intervene to protect the child. Where the court has intervened, the mother has never been ordered to take anti-viral treatments against her will.

In the 1999 case of *Re: Baby A*, the NSW Supreme Court made an order preventing the mother from breastfeeding her child because of the increased risk of the child becoming HIV positive if breastfed.⁵¹

In the 2006 case of *Re: Elm*, the mother stopped taking anti-viral medication during her pregnancy, refused to have a Caesarean birth and would not agree to the baby having anti-viral medication.⁵² In that case, the NSW Supreme Court ordered the Department of Community Services (or DOCS, as it was then known), to have 'care responsibility' for the baby,⁵³ and authorised doctors to give the child anti-viral treatment after birth.⁵⁴ The court also ordered that the mother be prevented from breastfeeding and prevented from removing the child from the hospital until she received written consent from Community Services.

If Community Services becomes involved in your pregnancy, it is very important that your own needs be heard and that your rights be protected. Contact HALC for legal support in your dealings with Community Services or get legal advice from a lawyer or legal centre experienced in family and child protection law, such as Women's Legal Services NSW. If you identify as an Aboriginal or Torres Strait Islander you can also contact Wirringa Baiya Women's Legal Centre or the Indigenous Women's Legal Contact Line at Women's Legal Services NSW.

6. Can my child sue me if he or she is born HIV positive?

Although it is legally possible that your child could sue you, it is unlikely that this will happen. There are no cases in NSW of HIV positive children suing their mothers because they were born HIV positive.

As a parent, you have a general legal responsibility to care for your child and not harm them. If you do all that is reasonable to prevent the transmission of HIV to your child, then you have not breached this legal duty and it is unlikely that your child could successfully sue you.

RAISING CHILDREN

1. Do I have to tell my child's school, pre-school or childcare centre about my own or my child's HIV status?

No. There is no law requiring you to tell school staff, management or other students about your or your child's HIV status. In some instances, however, it may be beneficial for your child that their school or childcare facility knows of any health issues that may affect their attendance or performance.

We advise that you think very carefully before telling the school or childcare centre about your own or your child's HIV status. Discuss it first with a counsellor or social worker. If you do decide to inform the school or childcare facility, a social worker can help you ensure that the appropriate members of staff are involved; that only the necessary information is given; and that any concerns of the school are directly addressed.

2. If I tell them, will it be kept confidential?

The *Public Health Act 1991* (NSW) requires that all service providers, including schools, kindergartens, pre-schools and childcare facilities, keep information about a person's HIV status confidential.⁵⁵ Under this law, the penalty for failing to take all reasonable steps to prevent disclosure of the information to another person is a fine of up to \$5,500.⁵⁶ For a list of the exceptions to this law, see answer to Question 3 in the section *Care and Treatment* in this booklet.

The *Health Records and Information Privacy Act 2002* (NSW) also requires that public and private organisations that collect, hold or use health information must abide by specified health privacy principles.⁵⁷ If the school or childcare service breaches one of these principles, you may make a complaint to the NSW Privacy Commissioner.⁵⁸

Unlawful disclosure of information about your HIV status may also amount to discrimination. So if you are concerned that your HIV information is not being kept private, contact HALC for advice and assistance. A complaint to the NSW Privacy Commissioner must be made within **six months**, so **do not delay** getting legal advice.⁵⁹

3. Can my child be excluded from the school or from any activities because of my or my child's HIV status?

No. Children who are HIV positive or who have positive parents can participate fully at school, pre-school or in childcare. It is against the law for the school or childcare service to discriminate against your child because of your or your child's HIV status. Both the *Anti-Discrimination Act 1977* (NSW) and the *Disability Discrimination Act 1992* (Cth) make it unlawful to discriminate, at the time of enrolment or afterwards, on the grounds of a disability.⁶⁰

If your child is denied access to a childcare service or an educational activity because of their or your HIV status, you may wish to consider making a complaint under the Anti-Discrimination or Disability Discrimination laws.⁶¹ You may also wish to lodge a complaint with the NSW Ombudsman, and if the service is operated by your local council, you may make a complaint to the council.

The law on discrimination is complex. If you feel that there has been discrimination against you or your child because of your or their HIV status, contact HALC for advice about a possible complaint. There is a **twelve month** time limit for lodging a discrimination complaint so **do not delay** getting legal advice.

4. My partner and I are raising our child together. If we separate, will my HIV status be relevant in any family law proceedings regarding arrangements for our child?

Under the *Family Law Act 1975* (Cth), the key issue that the court considers when making decisions about parenting arrangements is 'what is in the best interests of the child'.⁶² To determine this, the court will look at a number of factors.⁶³

The main factors are the need for the child to have a meaningful relationship with both parents and the need for the child to be protected from harm from abuse, neglect or family violence.⁶⁴ Additional factors include each parent's capacity to provide for the child's needs.⁶⁵

Any medical issues that affect your ability to parent may be considered a factor in deciding care arrangements. However, there is no general requirement that you disclose your HIV status in family law proceedings. If your HIV status does become an issue in the proceedings, make sure the court has the details of any support arrangements you have in place that help you with the care of the child.⁶⁶

For information about family law, read the booklet *Women and Family Law* from Women's Legal Services NSW. Their contact details are at the end of this booklet.

5. What could happen if I refuse to give my HIV positive child the recommended medications or treatment?

If a health worker believes that your HIV positive child is at risk of significant harm because you are refusing them the recommended HIV treatments or medications, the health worker has a duty to report the matter to Community Services (formerly known as DOCS).⁶⁷

When a report is made, Community Services will investigate and assess⁶⁸ whether your child is at risk because he or she is not receiving the necessary medical care.⁶⁹ A Community Services officer will speak with you and may also talk to your child's doctor.⁷⁰

Once an assessment is made that a child is at risk, there are a range of actions that Community Services can take.⁷¹ These include:

- arranging for support services to help you with the medical care of your child;
- developing a care plan;
- developing a parent responsibility contract that contains certain conditions that you will need to fulfil;
- exercising emergency care powers that may include removal of the child;
- seeking care orders from the Children's Court.

Although the more serious actions should only be taken in exceptional circumstances and as a last resort, Community Services has wide powers where children are considered to be at risk.

If Community Services becomes involved, get legal advice as soon as possible.

Contact HALC or a lawyer or legal centre with experience in family and child protection law, such as Women’s Legal Services NSW. If you identify as an Aboriginal or Torres Strait Islander, you can also contact Wurringa Baiya Aboriginal Women’s Legal Centre or the Indigenous Women’s Legal Contact Line at Women’s Legal Services NSW.

6. I am raising my children alone. What happens if I’m not well enough to care for them for a short period?

Friends and family may be able to help in the short term when you aren’t well. For a longer period of care by a non-relative, you may wish to make a more formal, legally recognised arrangement, such as a parenting order from the Family Court or a care plan made with Community Services. These arrangements are discussed more fully in the next question but be sure to get legal advice about the best way to proceed. If family and friends are unable to help you in the short term, you can voluntarily place your child with Community Services in temporary care. This gives Community Services the care responsibility for your child for a period of three months.⁷²

A temporary care arrangement can only be made with your consent⁷³ (where you are well enough to consent) and it must give consideration to plans for restoring the child to you.⁷⁴ During this time you can request the arrangement be terminated at any time.⁷⁵

At the end of three months, Community Services may renew the arrangement for a further three months.⁷⁶ If a temporary care arrangement has been in place for at least six of the previous twelve months another temporary care arrangement cannot be made and Community Services may pursue a longer-term option.⁷⁷

Before entering any temporary care arrangement, get legal advice about your options. Contact HALC or a lawyer or legal centre with experience in child protection law, such as Women’s Legal Services NSW. If you identify as an Aboriginal or Torres Strait Islander, then you can also contact Wurringa Baiya Aboriginal Women’s Legal Centre or the Indigenous Women’s Legal Contact Line at Women’s Legal Services NSW.

7. What happens if I’m not well enough to care for my child long-term?

For greater peace of mind, you may need to formalise any long-term arrangements regarding the care of your child. This may be done in the following ways.

Parenting Order under the Family Law Act 1975

You or any person who has an interest in your child's welfare can apply to the Family Court for a parenting order that sets out matters such as who the child lives with, who the child spends time with, and who can make decisions about the child's future.⁷⁸ Under parenting orders the responsibilities can be shared. For example, you may wish to keep some responsibility for long term decisions concerning the child, even though the child lives with someone else.

In deciding whether to grant the parenting order, the court must regard the child's best interests as the most important consideration.⁷⁹ Factors that are relevant to the best interests of the child include protecting them from harm, ensuring they receive proper parenting, and protecting their right to enjoy and maintain a connection with their culture. The court will also consider the child's wishes, their relationship with others and the capacity of relevant others to care for the child.⁸⁰

Care Arrangements with Community Services

If you are unable to care for your child, Community Services may become involved. If Community Services decide that your child is in need of care and protection, there are a range of actions that may be taken.⁸¹ Community Services may:

- provide and arrange for support services for you and your child;
- develop a care plan with you to meet your and your child's needs;
- develop a parent responsibility contract;
- exercise emergency protection powers to ensure the protection of the child; this may include removal of the child, for example where there are fears for the child's safety;
- seek appropriate orders from the Children's Court, including a care order.

If Community Services become involved, it is very important that you have support and assistance regarding any decisions that are made concerning the care of your child. Contact HALC or a lawyer or legal centre with experience in parenting law such as Women's Legal Services NSW. If you identify as Aboriginal or Torres Strait Islander you can also contact Wirringa Baiya Aboriginal Women's Legal Centre or the Indigenous Women's Legal Contact Line at Women's Legal Services NSW. Contact details are at the end of this booklet.

Adoption

Adoption permanently transfers all legal parental rights and responsibilities from

the child's birth parents to the adoptive parents. It is given effect by an adoption order made by the NSW Supreme Court.

Recent changes to the *Adoption Act 2000* (NSW) make it easier for a step-parent or relative to adopt.⁸² Aboriginal and Torres Strait Islander communities and agencies also have a greater role in the adoption process of Aboriginal and Torres Strait Islander children.

For an adoption order to be granted:

- there must be a written report from either Community Services, an approved adoption assessor or an accredited adoption service;⁸³
- in most cases, the birth parents must consent to the adoption;⁸⁴
- if the child is an Aboriginal or Torres Strait Islander, specific placement principles must be applied which give placement preference to the child's Aboriginal or Torres Strait Islander community;⁸⁵
- if the child is not an Aboriginal or Torres Strait Islander, their culture, any disability, language and religion must be taken into account; and as far as possible, the child's given name, identity, language and cultural and religious ties should be preserved.⁸⁶

The court must also be satisfied, among other things, that:

- the adoption order is in the best interests of the child;
- in light of the child's age and understanding, their wishes and feelings about the adoption have been sought and taken into account;
- the adoption is preferable to other action that could be taken, for example a parenting order made under the *Family Law Act 1975* (Cth) or a care order made under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).⁸⁷

8. What care arrangements can I make for my children, in case I die while they are still young?

All people should make a Will. Whilst the main purpose of a Will is usually to distribute your property, you can also include in it your wishes for the future care of your children. Although a court is not bound by your Will when determining care arrangements for your children, the court will definitely take into consideration the wishes you express in it.

For more information and advice about Wills, guardianship and Powers of Attorney, contact HALC.

FAMILY VIOLENCE

1. Sometimes my partner gets angry and abuses me for being HIV positive. What can I do?

If you feel threatened by your partner's behaviour and are concerned for your safety you can apply for an Apprehended Domestic Violence Order (ADVO) to protect you from the violence and abuse.⁸⁸ An ADVO is an order made by the court that forbids a person from assaulting, harassing and intimidating you.⁸⁹ The order can also forbid specific conduct such as the person touching you, shouting at you or making threats.

An ADVO can be taken out against any person who is or has been in a domestic relationship with you. This includes your partner, ex-partner, a relative, a carer or anyone in your household.⁹⁰ An ADVO can be for a specified period of time but usually lasts for twelve months.⁹¹ It does not result in a criminal record for the person unless they breach the order.⁹²

If you feel safe enough to discuss the issue of the abuse with your partner, you may wish to consider contacting a Family Relationship Centre (FRC) or other counselling service to obtain relationship advice and support. FRCs offer information and confidential advice for families. Be sure to tell the staff at the FRC or the counsellor that you are experiencing abuse from your partner.

2. How do I apply for an ADVO?

Contact your local police station or the Chamber Registrar of your nearest Local Court. The police have Domestic Violence Liaison Officers who are specially trained to assist with domestic violence cases.

If you don't wish to contact the police at first instance, you can contact:

- your local Women's Domestic Violence Court Advocacy Service;
- Community Services Domestic Violence Line (24 hour service);
- Victims Access Line (24 hour service);
- Women's Legal Centre Domestic Violence Legal Advice Line.

These services may also be able to provide you with assistance in obtaining an ADVO, or assistance with going to court.

If you identify as an Aboriginal or Torres Strait Islander you can also contact:

- Indigenous Women's Legal Contact Line;
- Wirringa Baiya Aboriginal Women's Legal Centre.

If you are an immigrant or refugee woman, you can contact Immigrant Women's Speakout Association of NSW (IWSA).

The phone numbers are at the back of this booklet.

If you are in immediate danger call Triple Zero (000) and ask for the police. An ADVO can be obtained urgently at any time, day or night.⁹³ If you have been harmed or an attempt has been made to harm you, the person may also be charged with a domestic violence offence.⁹⁴

If you are injured you may be entitled to Victim's Compensation.⁹⁵ For more information talk to the services listed above.

3. How can I protect the privacy of my HIV status with the police and at court?

You do not have to tell the police of your HIV status. They cannot force you to disclose this private information. If your HIV status is not directly relevant to the matter before the court, you do not have to tell the court that you are HIV positive.

When you attend court for the apprehended domestic violence order hearing, the court will be open to the public and the hearing may involve discussion of personal matters.⁹⁶

Sometimes the court can be closed to the public, for example, where it would jeopardise the safety, welfare and well-being of children.⁹⁷ This does not happen often as the legal system believes strongly in open-court justice.

If you would like the court to be closed because of the sensitive nature of your medical issues, then you will need to apply to the Magistrate. Your application should include a medical report from your doctor outlining your medical conditions. It should also include the reasons that you believe provide justification for the unusual step of closing the court to protect your safety and well-being.

As an alternative, so that your HIV status is not mentioned in court, you could hand up the medical report to the Magistrate and ask that your HIV be referred to in court as your 'medical condition'.

If, in any court proceedings, you are concerned that your HIV status may be disclosed, contact HALC.

END NOTES

CARE AND TREATMENT

- ¹ *Public Health Act 1991* (NSW) ss 14, 16, 17 and Schedule 1
- ² *Public Health Act 1991* (NSW) s 12 and *Public Health (General) Regulation 2002* r 5
- ³ *Public Health Act 1991* (NSW) s 17(2)
- ⁴ *Public Health Act 1991* (NSW) s 17(3)(a)
- ⁵ *Public Health Act 1991* (NSW) s 17(3)(c)
- ⁶ *Public Health Act 1991* (NSW) ss 17(3)(c), 18, 19
- ⁷ *Public Health Act 1991* (NSW) s 17(3)(d)
- ⁸ *Public Health Act 1991* (NSW) s 69 and *Public Health (General) Regulation 2002* r 10(1)
- ⁹ *Public Health Act 1991* (NSW) s 17(3)(e) and *Public Health (General) Regulation 2002* r 10(2)
- ¹⁰ *Public Health Act 1991* (NSW) s 17(4)
- ¹¹ *Public Health Act 1991* (NSW) s 17(2) and (4)
- ¹² *Health Records and Information Privacy Act 2002* (NSW) and Schedule 1 Health Privacy Principles, Principle 5 Retention and Security
- ¹³ *Health Records and Information Privacy Act 2002* (NSW) s 11, Part 4 and Schedule 1
- ¹⁴ *Health Records and Information Privacy Act 2002* (NSW) s 42
- ¹⁵ *Privacy Act 1988* (Cth) s 6C
- ¹⁶ *Privacy Act 1988* (Cth) ss 13A, 16A-F and Schedule 3
- ¹⁷ *Privacy Act 1988* (Cth) s 36
- ¹⁸ *Privacy Act 1988* (Cth) s 41(1)(c)
- ¹⁹ *Public Health (General) Regulation 2002* Schedule 3 Code of Conduct and NSW Health Department Infection Control Policy 23 May 2007 Document No. PD2007_036

SEX AND RELATIONSHIPS

- ²⁰ *Public Health Act 1991* (NSW) s 13(1) and (4)
- ²¹ *Public Health Act 1991* (NSW) s 13(1) and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17
- ²² *Public Health Act 1991* (NSW) s 13(2)
- ²³ *Crimes Act 1900* (NSW) s 4 definition. In 2007, the definition of GBH in s 4 was amended to include a grievous bodily disease.
- ²⁴ *Crimes Act 1900* (NSW) s 33
- ²⁵ *Crimes Act 1900* (NSW) s 35
- ²⁶ *Crimes Act 1900* (NSW) s 54
- ²⁷ *Crimes Act 1900* (NSW) s 33, 35, 54
- ²⁸ *Limitation Act 1969* (NSW) ss 50C and 50D, the date on which the cause of action is discoverable by the plaintiff
- ²⁹ *Victims Support and Rehabilitation Act 1996* (NSW) ss 5, 6, 7, 10, 11, 21 and Schedule 1
- ³⁰ *Victims Support and Rehabilitation Act 1996* (NSW) s 26

- ³¹ *Public Health Act 1991 (NSW)* ss 23-27; NSW Health Department Policy Directive (27 January 2005) ‘HIV Infection Management of People Who Risk Infecting Others’ (and new draft Policy Directive of May 2009)
- ³² NSW Health Policy Directive ‘HIV Infection Management of People Who Risk Infecting Others’ PD2005_258, 27 January 2005 (and new draft Policy Directive May 2009); NSW Health Policy Directive ‘HIV Confidentiality: A Guide to Legal Requirements’ PD2005_134, 25 January 2005. Although the Directives still currently operate, the *Public Health Regulations* referred to in them have been repealed. The relevant Regulation is now *Public Health (General) Regulation 2002*, clause 10(2).
- ³³ *Public Health Act 1991 (NSW)* s 17, *Health Administration Act 1982 (NSW)* s 22 and *Mental Health Act 2007 (NSW)* s 189. Also civil claim for breach of confidentiality.
- ³⁴ *Public Health Act 1991 (NSW)* s 17(3)(e) and *Public Health (General) Regulation 2002* clause 10
- ³⁵ *Public Health Act 1991 (NSW)* ss 23-30 and NSW Health Policy Directive ‘HIV Management of People Who Risk Infecting Others’ PD2005_258, 27 January 2005 (and new draft Policy Directive May 2009)
- ³⁶ *Public Health Act 1991 (NSW)* s 17(3)(e) and *Public Health (General) Regulation 2002* clause 10(2)
- ³⁷ *Public Health Act 1991 (NSW)* ss 23-30 and NSW Health Policy Directive ‘HIV Management of People Who Risk Infecting Others’ PD2005_258, 27 January 2005 (and new draft Policy Directive May 2009)

PREGNANCY AND CHILDBIRTH

- ³⁸ *Assisted Reproductive Technology Act 2007 (NSW)*
- ³⁹ ‘Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research’ (June 2007) Australian Government, National Health and Medical Research Council (Guideline 5.3.1)
- ⁴⁰ *Anti-Discrimination Act 1977 (NSW)* s 49M (disability discrimination in the provision of goods and services) and *Disability Discrimination Act 1992 (Cth)* s 24 (discrimination in the provision of goods and services)
- ⁴¹ Although they can refuse to accept gamete donation from someone who has an increased risk of transmissible infection (Guideline 6.4)
- ⁴² *Anti-Discrimination Act 1977 (NSW)* s 89B(2)(b) and Australian Human Rights Commission Act 1986 (Cth) s 46PH
- ⁴³ *Health Records and Information Privacy Act 2002 (NSW)* s 11 and Principle 11 of Schedule 1 Health Privacy Principles, and also ‘Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research’ (June 2007) Australian Government, National Health and Medical Research Council (Guidelines 5.6 and 10.1)
- ⁴⁴ *Public Health Act 1991 (NSW)* ss 17(2), 17(4)

- ⁴⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23(f), 24-27. For the unborn child, reporting by health care workers is not mandatory. Upon birth it is mandatory where there was a pre-natal report made and the birth mother has not 'engaged successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report'.
- ⁴⁶ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 25
- ⁴⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 25. The definition of 'risk of significant harm' is found in s 23
- ⁴⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chapter 3 Part 3 Investigations and Assessment
- ⁴⁹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chapter 4 Children and Young Persons in Need of Care and Protection
- ⁵⁰ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 34, 36, 39, 40, Chapter 5 Children's Court Proceedings and Chapter 6 Children's Court Procedure
- ⁵¹ [1999] NSWSC 787
- ⁵² [2006] NSWSC 1137
- ⁵³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 44
- ⁵⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 157 (a) and (b)

RAISING CHILDREN

- ⁵⁵ *Public Health Act* (NSW) s 17(2)
- ⁵⁶ *Public Health Act 1991* (NSW) s 17(4)
- ⁵⁷ *Health Records and Information Privacy Act 2002* (NSW) s 11 and Schedule 1
- ⁵⁸ *Health Records and Information Privacy Act 2002* (NSW) ss 21, 42 and *Privacy and Personal Information Protection Act 1998* (NSW) Part 5
- ⁵⁹ *Health Records and Information Privacy Act 2002* (NSW) s 42(3) and *Privacy and Personal Information Protection Act 1998* (NSW) s 45(5)
- ⁶⁰ *Anti-Discrimination Act 1977* (NSW) s 49B, s 49L and *Disability Discrimination Act 1992* (Cth) ss 5, 6, 22
- ⁶¹ *Anti-Discrimination Act 1977* (NSW) Part 9 and *Australian Human Rights Commission Act 1986* (Cth) Part IIB
- ⁶² *Family Law Act 1975* (Cth) s 55A and Part VII Children
- ⁶³ *Family Law Act 1975* (Cth) ss 60B, 60CA, 60CC
- ⁶⁴ *Family Law Act 1975* (Cth) s 60CC(2)
- ⁶⁵ *Family Law Act 1975* (Cth) s 60CC(3)(f)(i)
- ⁶⁶ *Family Law Act 1975* (Cth) s 60CC(3)(f)(ii)
- ⁶⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27
- ⁶⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 30

- ⁶⁹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(b)
- ⁷⁰ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248
- ⁷¹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 34
- ⁷² *Children and Young Persons (Care and Protection) Act 1998* (NSW) Part 3 Division 1 especially s 152(1)
- ⁷³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 151(2)
- ⁷⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 151(4)
- ⁷⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 152(1)(a)
- ⁷⁶ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 152(2)
- ⁷⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 152(4)
- ⁷⁸ *Family Law Act 1975* (Cth) s 64B
- ⁷⁹ *Family Law Act 1975* (Cth) s 60CA
- ⁸⁰ *Family Law Act 1975* (Cth) s 60B
- ⁸¹ *Children and Young Person's (Care and Protection) Act 1998* (NSW) s 34
- ⁸² by the *Adoption Amendment Act 2008* (NSW)
- ⁸³ *Adoption Act 2000* (NSW) s 91
- ⁸⁴ *Adoption Act 2000* (NSW) Part 5 Consents to Adoptions and s 90
- ⁸⁵ *Adoption Act 2000* (NSW) Part 2 Placement of Children Division 2 Aboriginal Children (ss 33-36) and Division 3 Torres Strait Islanders (ss 37-39) as well as ss 4, 8, 90(1)(e) and (f)
- ⁸⁶ *Adoption Act 2000* (NSW) s 90
- ⁸⁷ *Adoption Act 2000* (NSW) s 90

FAMILY VIOLENCE

- ⁸⁸ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16
- ⁸⁹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 35, 36
- ⁹⁰ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 5, 6
- ⁹¹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 79
- ⁹² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4, 12, 13, 14
- ⁹³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 26
- ⁹⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13
- ⁹⁵ *Victims Support and Rehabilitation Act 1996* (NSW) s 6
- ⁹⁶ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58
- ⁹⁷ *AM v Department of Community Services (DOCS); ex parte Nationwide News Pty Ltd* [2008] NSWDC 16 (11 Feb 2008)

CONTACTS

CONTACT HALC

HIV/AIDS Legal Centre

(02) 9206 2060 (Sydney) or 1800 063 060

www.halc.org.au

OTHER CONTACTS

ACON

(02) 9206 2000 (Sydney) or 1800 063 060 or TTY (02) 9283 2088

www.acon.org.au

Immigrant Womens Speakout Association

(02) 9635-8022

<http://www.speakout.org.au>

Law Access NSW Free Legal Helpline

1300 888 529

NSW Community Services Domestic Violence Line

1800 656 463 or TTY 1800 671 442 24 hours 7 days

NSW Victims Services Victims Access Line

(02) 8688 5511 (Sydney) or 1800 633 063 24 hours 7 days

<http://www.lawlink.nsw.gov.au/vs>

POZHET

Support for HIV positive heterosexual people

1800 812 404

<http://www.pozhet.org.au>

Sex Workers Outreach Project (SWOP)

(02) 9206 2166 (Sydney) or 1800 622 902

www.swop.org.au

Women's Domestic Violence Court Advocacy Program

For contact details of your local Women's Domestic Violence Court Advocacy Service, go to: www.legalaid.nsw.gov.au/what-we-do/community-partnerships/womens-domestic-violence-court-advocacy-program.

Or call Women's Domestic Violence Court Advocacy Program Manager: 02 9219 5791

Wurringa Baiya Aboriginal Women's Legal Centre

(02) 9569 3847 or 1800 686 587

www.wurringabaiya.org.au

Women's Legal Service

Women's Legal Contact Line: (02) 8745 6988 (Sydney) or 1800 801 501

Domestic Violence Legal Advice Line: (02) 8745 6999 (Sydney) or 1800 810 784

Indigenous Women's Legal Contact Line: (02) 8745 6977 (Sydney) or 1800 639 784

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