

unravelling the law:



A RESOURCE FOR WOMEN LIVING WITH HIV/AIDS

halc

HIV/AIDS Legal Centre Incorporated

April 2004

foreward

We present a new legal resource designed specifically for positive women. The two main objectives of this resource are to provide general legal information on a number of issues that are relevant and often specific to positive women and to help any positive woman living in NSW with a specific legal problem to obtain legal advice or assistance.

This resource is significant because it is, as far as we are aware, the first time that a resource focussing exclusively on the specific legal issues that are of concern to positive women has been published in Australia. Because of the nature of the HIV epidemic in Australia, the needs and concerns of positive women have often been overlooked, misunderstood or simply ignored. There are no easy solutions to this problem of invisibility and marginalisation. We hope that by making this resource widely available, issues of concern to positive women will enjoy some amount of greater recognition and increased prominence.

We specially thank the many positive women who helped to develop this resource. The ideas and opinions of positive women determined the purpose and much of the contents of this resource. Most of the 'commonly asked questions' that are answered in this resource came from actual questions asked by positive women. We hope that we have produced an accessible legal resource that 'connects with' the concerns of many positive women.

The project to develop this resource was an initiative of the HIV/AIDS Legal Centre (HALC). We thank Teena Balgi and Siân Aldis from HALC who did the legal research, writing and other hard work required to produce this resource. We also thank the many other people acknowledged in the resource who contributed to its successful production.

We also gratefully acknowledge the assistance of the AIDS Council of NSW (ACON) in developing this resource.

The publication of this resource was only made possible with financial assistance from the NSW Department for Women. HALC is grateful for the generous support of the NSW Department for Women, which has enabled us to (finally) produce this resource.

Copies of this resource are available free of charge from HALC, ACON and other HIV/AIDS organisations and service providers.

We hope that all positive women and other users of this resource find it helpful, relevant and useful. We welcome your comments, feedback and criticisms about any aspect of this resource.

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HIV/AIDS Legal Centre
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PRINCIPAL SOLICITOR

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introduction

Women living with HIV face many issues. This resource provides legal information by answering questions commonly asked by positive women. The idea to develop this resource originated from family support workers at ACON, who were concerned that positive women, and service providers who work with positive women, lacked clear and accessible legal information on a range of issues.

With extensive input from positive women, ACON drafted a list of commonly asked legal questions. The answers, written in plain English, were prepared by the HIV/AIDS Legal Centre (HALC). Input was also sought from a range of key service providers, particularly the ACON Women and HIV/AIDS Project.

This resource provides basic information on a number of legal issues that are often unique to the experience of positive women. It looks at the law in New South Wales. If you need further information or legal advice, please feel free to contact HALC, or you may want to contact another community legal centre or a private solicitor. See the back of this resource for contact details.

a note to our readers

While every effort has been made to ensure that the information in this resource is up to date and accurate, it is not a substitute for legal advice. The law is complex and may change. Readers are advised to seek specific legal advice in relation to their particular situation.



1. If I practise safe sex do I have to tell the person I am having sex with that I am positive?

Yes. Sexuality is an important aspect of life and your status should not prevent you from having a fulfilling sex life. However, you should be aware that the law in New South Wales (NSW) says that if you are positive you must disclose your status to your sexual partners before you have sex, regardless of whether or not you have safe sex. This is the law despite the pressure it places on your privacy. There are three different areas of the law that deal with this issue in NSW.

A. The Public Health Act

The Public Health Act says that if you engage in vaginal or anal intercourse, or oral sex, and you know you have a sexually transmitted medical condition (including HIV), you are required to tell the person you are about to have sex with about the risk of contracting the condition. Your sexual partner must voluntarily accept this risk. Unfortunately, the law is not clear on how much you need to tell your sexual partners about 'the risk' of infection. At the time of publication of this resource you could be fined up to \$5,500 if convicted of breaking this law.

Practising safe sex is not an exception. You are still required to disclose your status to a sexual partner, even if you plan on having safe sex and reducing the risk. This places an unfair burden on people with HIV because it breaches your right to privacy even when you are having safe sex. HIV/AIDS organisations have lobbied to change the law in NSW, but have not yet been successful.

HIV positive sex workers are also covered by these provisions of the Public Health Act. Positive sex workers should tell clients about the risk of contracting HIV before engaging in oral sex or vaginal or anal intercourse. If the owner or manager of your parlour or

brothel knows that you have HIV, and lets you have penetrative sex without telling clients, they could also be guilty of an offence under the Public Health Act.

B. Criminal law

In some circumstances, not disclosing your HIV status and having unsafe sex may be a serious criminal offence. In NSW it is a crime to maliciously, intentionally or recklessly cause or attempt to cause another person to contract a serious disease, such as HIV. If convicted, this crime is punishable by up to 25 years imprisonment. You could also be charged with other serious offences such as causing grievous bodily harm or assault. It is not possible to say with certainty what behaviour would give rise to a successful criminal prosecution. If you do not disclose your status and engage in activity that demonstrates a reckless disregard for the life and safety of another person you may be convicted of an offence. Situations where infection occurs because of an accident or unintentional conduct, for example when a condom breaks during sex, probably do not amount to criminal offences.

C. Suing for compensation

If you infect a sexual partner and did not disclose your status, your sexual partner may be able to sue you for compensation. The law says that you have a responsibility to look out for other people, including your sexual partners, if they are likely to be harmed by your actions. If you do all that is reasonable to protect your sexual partner, such as disclosing your status and having safe sex, it is very unlikely that you could be successfully sued. These matters are discussed in greater detail in questions 2 and 3.

2. My sexual partner knows I am positive and chooses to have unprotected sex with me. If they are infected, what are the legal ramifications for me?

If your partner knows that you are positive and chooses to have unprotected sex with you, it is very unlikely there will be any legal ramifications for you. It is important that any decision to have unsafe sex was made voluntarily and this may not be the case if your partner was under the influence of alcohol or other drugs at the time.

A. The Public Health Act

The Public Health Act requires you tell your sexual partner about the risk of contracting HIV. Your sexual partner must agree to voluntarily accept the risk. If your partner is fully aware of the risk of infection posed by unprotected sex and chooses to accept that risk, there is unlikely to be any legal ramifications for you under the Public Health Act.

B. Criminal law

As discussed in question 1, it is a crime to maliciously, intentionally or recklessly cause another person to contract HIV. If you inform your partner of your HIV status and the risk of transmission, and your partner voluntarily chooses to have unprotected sex with you, it is unlikely you have committed a criminal offence.

C. Suing for compensation

You have a legal responsibility to look out for the well being of your sexual partner and you must do all that is reasonable to protect your partner from harm. If you do not fulfil your responsibility, a sexual partner may be able to sue you for compensation.

There is no recorded court decision in Australia where a person has successfully sued their sexual partner after being infected with HIV. Unfortunately, this means it is not certain what is reasonable in any situation to fulfil your obligation. You are probably required to do more than just tell your partner that you have HIV. You may need to make certain that your partner understands the risk they are taking by having unprotected sex with you. If you have done that, and your partner is fully aware of the risks and voluntarily decides to have unsafe sex anyway, it is very unlikely that they could then sue you if they became infected.

3. I was infected by someone who knew they were positive but did not tell me. What can I do?

It may be possible to take legal action against the person who infected you. It is important to realise, however, that it is often very difficult for a court to determine exactly what took place between sexual partners prior to a sexual encounter. Taking legal action may be stressful, expensive, time consuming and force you to discuss personal matters (medical or sexual) that you may prefer to keep private.

We advise you to think carefully about your reasons for wanting to take legal action. You may want to help prevent other people being infected or you may be seeking some closure for yourself. Or you may have your own entirely different and personal reasons. Please read the information below and the answers to questions 1 and 2, as they discuss some of the issues raised by this question.

A. The Public Health Act

If you are concerned that other people may be at risk of being infected, you may want to report the person who infected you to the NSW Health Department. There are NSW Health Department guidelines about the procedure to be followed in such a situation. The

guidelines focus on providing counselling, education and support to people who risk infecting others. If the person who infected you continues to act in a way that risks infecting others, then, as a last resort, the NSW Health Department may try and restrict their behaviour by issuing a public health order. The first thing to do is to talk to your doctor or social worker who should be able to help you make a report to the NSW Health Department.

B. Criminal law

Any person who maliciously, intentionally or recklessly infects another person with HIV may be guilty of a criminal offence. If you have been the victim of such a crime, you can report the person who infected you to the police. To do so, you must go to your local police station and provide the police with a statement of exactly what happened. The police will then decide whether to investigate your complaint and to lay any charges. Ultimately, it is the police who decide whether or not to charge someone with an offence and the police may be reluctant to charge someone because of difficulties of proof or a lack of evidence. In order for the person to be convicted, the court hearing the charge must be satisfied beyond reasonable doubt that it was that person who infected you and they did so maliciously, intentionally or acted with reckless disregard for your life and safety. If the person is found guilty, then they may be sentenced to pay a fine, serve a community service order or go to prison.

C. Suing for compensation

Your sexual partners have a responsibility to look out for your well-being. If they fail to do what is reasonable to protect you from harm you may be able to sue them for compensation. To be able to sue, you have to show that you suffered harm as a direct result of their conduct. One of the main difficulties you are likely to face is proving that it was sex with a particular person that caused your infection. The fact that HIV does not show up in tests straight away can make matters more difficult. In order to be successful, you would have to convince a court that it is more likely than not that a particular person infected you with HIV. This is a lower 'standard of proof' than the one used in criminal matters.

Generally, you must commence court action (even if a final court hearing has not occurred) within three years of the date of infection. This is called a limitation period, and is usually strictly enforced. Only in exceptional circumstances will a court allow a legal action to commence after the expiry of the three year limitation period. If you are thinking of suing for compensation or taking other court action DO NOT DELAY consulting a solicitor or other legal adviser.

Bringing your own legal action can be expensive and time-consuming. Even if you win, the person you sued may not have any money to pay you compensation or cover your legal costs. You may also not want to disclose details of your personal life in court. Generally, courts are open to the public, though you can apply to exclude the general public from the court (see question 6). You may also want to ask the court not to publish your name, to protect your privacy.

D. Victims' Compensation

If you were infected as a consequence of a violent crime, for example sexual assault, you may be entitled to claim Victims' Compensation. You may also be entitled to have counselling paid for through the Victims' Compensation scheme. Generally, you must make an application for compensation within two years of the date of infection.

Application forms for both compensation and counselling are available at the Victims' Compensation Tribunal or on their website (see contacts section). You may want to see a lawyer to help with your application for Victims' Compensation.

4. I am having unprotected sex and my sexual partner does not know I am positive. If I tell my doctor/nurse/counsellor/social worker are they required to take it further?

Yes. The NSW Health Department has issued some guidelines about how health care workers should act if they have a HIV positive patient or client who they think risks infecting others. A health care worker should provide you with appropriate counselling, education and support. They should remind you of your obligation to inform your partner of your HIV status and refer you to counselling designed to encourage you to inform your partner and support you as you do this. The aim is to help you to tell your partner about your status, without involving any other people.

If you continue to have unprotected sex with your partner there is a risk that you may infect them. While a health care worker is legally required to maintain your confidentiality, the Public Health Act states that they must also take all 'reasonable steps' to protect any known person who may be at risk of being infected.

If necessary, your health care worker may inform the Director-General of the NSW Department of Health of the risk you pose to your sexual partner. The Director-General can take further action to protect public health including informing your sexual partner of the risk of continuing sexual contact. Breaching your confidentiality in this way is an action a health care worker would only take in the most serious of circumstances.

If you are concerned about how your partner will react when you disclose your status, you should talk about your concerns with a counsellor. Your counsellor should be able to give you some helpful guidance on how to tell your partner about your status.

5. If I tell my doctor/nurse/counsellor/social worker I am a sex worker having unprotected sex with my clients, are they required to take it further?

Yes. The NSW Health Department has issued some guidelines about how health care workers should act if they have a HIV positive patient or client who they think risks infecting others. The first step in this process would be to provide you with counselling, education and support. The aim is to stop you having unprotected penetrative sex at work, without involving any other people.

Health care workers (including doctors, nurses, counsellors and social workers) have an obligation to keep the information you tell them confidential. However, there are some circumstances in which they are allowed to disclose information about you, including your status, without your permission. They may be able to talk to other health care workers who require the information to provide you with proper treatment. They may also have to disclose information if they are ordered to do so by a court.

The law covering health care workers states that they can disclose information to the relevant health authorities (usually the NSW Health Department) if they think that not saying anything would put the health of the public at risk. Taking this step is usually a last resort. Breaching your confidentiality in this way is an action a health care worker would only take in the most serious of circumstances.

The NSW Health Department guidelines outline how they will act if you continue to have unprotected sex at work. They may issue you with an official warning. The NSW Health Department can also place restrictions on your behaviour if they believe that you continue to act in a way that endangers, or is likely to endanger, the health of the public. They can make what is known as a public health order. The order can tell you, amongst other things, to stop acting in a certain way, attend counselling or undergo specified treatment. At their most serious, an order can be made for your detention, although this is considered a last resort. While these orders are not common, there are cases where they have been issued.



6. Occasionally my partner gets angry and abuses me for being positive. What can I do? What happens if I take this to court? Is there a way of protecting my privacy?

There are really two issues here: the first is about violence, and the second is about the ability to protect your privacy if you have to go to court.

If you are afraid that your partner may assault, intimidate or harass you, you can apply for an Apprehended Domestic Violence Order (ADVO). An ADVO is an order made by a court restricting the behaviour of the person you take the order out against. An ADVO usually states that a person cannot assault, harass, threaten, stalk, or intimidate you. Other orders can be included if necessary, such as a person cannot go within a certain distance of your home or workplace.

If you have fears for your safety you can inform the police of the situation and they can apply for the ADVO on your behalf. You can also apply for an ADVO by making a complaint to the chamber magistrate at a Local Court. Depending on your location in NSW both the police and/or chamber magistrate should refer you to your local Women's Domestic Violence Court Assistance Scheme. This organisation can assist you with support while you attend Court for the ADVO (see contacts section). It is important to note that in some regional, remote and rural areas of NSW these schemes do not operate.

If you are actually assaulted or harmed you should also consider reporting the matter to the police, who may lay charges. You may also have the right to seek compensation or be entitled to access counselling at the Victims' Compensation Tribunal. Generally, you must make an application for compensation within two years of the date of the assault or other criminal conduct that caused you harm.

Application forms for both compensation and counselling are available at the Victims'

Compensation Tribunal or on their website (see contacts section). You may want to see a lawyer to help with your application for Victims' Compensation.

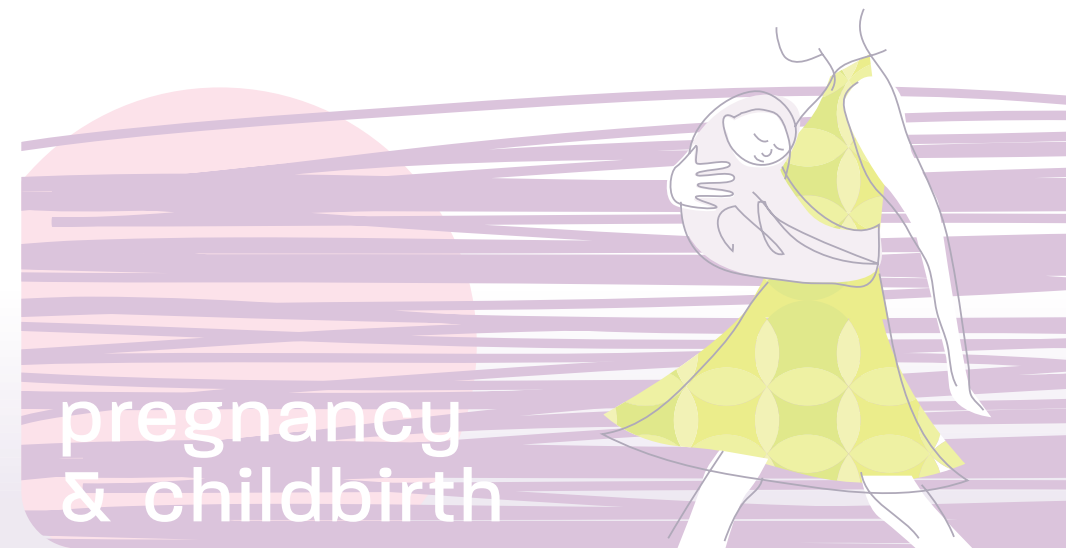
If you have any further queries you can contact the Domestic Violence Liaison Officer at your local police station or the Domestic Violence Advocacy Service, the Women's Legal Resources Centre or the Indigenous Women's Legal Contact Line, all part of Women's Legal Services NSW. Aboriginal women can also contact Wirringa Baiya Aboriginal Women's Legal Centre (see contacts section).

If you do go to court in order to get an ADVO it is important to remember that court proceedings are usually open to the public, and that an application for an ADVO may involve discussion of matters that you would prefer to keep private. There are a few options if you wish to maintain your privacy. One option is to ask the magistrate or judge to close the court to the public.

Closed courts can be granted when it is considered that parties' details should not be released because of the stress and other social disadvantages it might cause. This is usually done where there are sensitive issues, such as when children are involved. It is important to note that an order for a closed court is not made lightly, because the administration of justice is meant to be open, and it is rare for courts to be closed in ADVO proceedings.

In each case, you will need to make an application to the magistrate or judge. The best way to do this is to get a medical report from your doctor stating that you are HIV positive which you can hand to the magistrate or judge. You could then ask them to close the court because of the matters in the report. That way no one will need to hear the reason why you are asking for the closed court.

If the request for a closed session is refused, an alternative way to protect your privacy is to request that your HIV status be masked. That is, instead of the court saying 'HIV' the court could instead refer to it as a 'disability' or 'medical condition'. You could do this the same way as a request for a closed court, by handing up a report to the magistrate or judge and asking them to refer to the condition in the report as your 'medical condition'.



If you are pregnant or are considering having a baby and would like more information, the Paediatric HIV Service at the Sydney Children's Hospital Randwick has produced a resource called *Positive Pregnancy*. This booklet should be available through your HIV specialist, obstetrician, antenatal clinic or ACON.

7. I would like to become pregnant by insemination. Is this possible?

Yes. There is no law in NSW that prevents HIV positive women from accessing reproductive technology. The law and rules relating to reproductive technology vary between the Australian states. In NSW, reproductive technology will soon be governed by new legislation. The new legislation (see Assisted Reproductive Technology Bill) does not impose any restrictions on who may access reproductive technology. Individual doctors or clinics determine access to reproductive services in accordance with NSW Department of Health guidelines.

Both Commonwealth and NSW legislation make it unlawful to discriminate against someone in the provision of services because they are HIV positive. If a clinic refuses you access to reproductive technology because you are positive, it may amount to discrimination. If this occurs, you should consider making a discrimination complaint against that service provider. Generally, you have six months from the date of the act of discrimination to make a complaint under NSW anti-discrimination legislation and twelve months from the date of discrimination under Commonwealth anti-discrimination legislation.

Artificial insemination is a complicated issue and you may feel you need further information and support in making any decisions. You may want to talk to a range of different people and organisations including your local ACON branch, People Living With HIV/AIDS (PLWHA) groups and supportive doctors (HIV specialists, obstetricians and gynaecologists).

8. Is the Department of Community Services informed when I have a baby because I am positive?

No. The Department of Community Services (DoCS) will not be notified when you have a baby just because you are positive. DoCS will only intervene if it receives a notification that a baby or child is being neglected or abused, or an unborn child is at risk of harm after his or her birth. There is absolutely no reason to think that HIV positive women cannot care for their children as well as any other person. One instance where HIV may be an issue is where an HIV positive mother is caring for her child in such a way as to expose the child to an unreasonable risk of infection. This is discussed in more detail in the next question.

9. What are my rights in making decisions relating to:

- taking treatments (such as anti-retrovirals) during pregnancy
- having a vaginal delivery or a Caesarean section
- treatments for my baby after birth
- breastfeeding?

There are several methods now available to women, which have been accepted by the NSW Supreme Court (see *Re Baby A* [1999]), as reducing the risk of HIV transmission from mother to child, so called 'vertical transmission'. These include taking treatments during pregnancy, having a Caesarean section birth, administering treatments to your baby after birth and formula feeding.

Generally, the decision to undergo or not to undergo any treatment is yours, as is the decision on how to care for your child. However, the law can act to stop you from acting in a certain way or compel you to do something if it will prevent harm to your child.

Any decision you make should be an informed one. Any proposed treatment or method should be fully explained to you and discussed in as much detail as you need with an appropriately qualified health care worker.

You have a right to reproductive freedom. Australian law recognises the reproductive rights of all pregnant women. Until a child is actually born, it enjoys no legal rights of its own and a pregnant woman has the right to make decisions, reproductive or otherwise, about her own body.

Whether or not you take treatments while you are pregnant, in what combination and for what duration are decisions for you to make, in consultation with your doctor. Whether

your child is born vaginally or by Caesarean section is also your choice.

However, where an unborn child may be at risk of harm after his or her birth, a notification can be made to the Department of Community Services (DoCS). If you refuse to take treatments during your pregnancy or plan on having a vaginal rather than Caesarean birth, an interested person could make such a notification. While such reports have been made in the past, to date, there are no instances of women being forced to take treatments while pregnant or have a Caesarean section.

It is also possible that a notification could be made to DoCS if you refuse to administer treatments to your new baby or you decide to breastfeed your baby. Where there is reason to believe that there is a risk of harm to a child, it is mandatory for anyone who works with children, such as health care workers, teachers, welfare workers and police, to make a notification to DoCS.

Once a notification has been made to DoCS, an assessment is made of the risk posed to your child. Any investigation conducted by DoCS will usually involve speaking to you, your family and any other professionals involved in your care. DoCS then decide how best to proceed to promote the safety of your child. Possibilities include providing support, drawing up care plans, and supervising you and your child. It is also possible that DoCS could obtain a court order instructing or prohibiting you to act in a certain way, but this is considered a last resort.

10. What happens if my child is born HIV positive?

In the vast majority of cases, where a child is born HIV positive, infection is totally unintentional. Nevertheless, it can be very difficult if your child is born HIV positive, and you may feel like you need assistance and support. There are health care workers and support services available to help both you and your child. See the contacts section at the back of this booklet for relevant services, including the Paediatric HIV Service at the Sydney Children's Hospital Randwick.

If your child is born HIV positive, you will no doubt be grappling with a range of issues. One legal issue that may come up relates to the responsibility of HIV positive pregnant women to their unborn children. Parents have a responsibility to look after their children and not act in a way that causes them harm, both before and after birth. If your child is born HIV positive, and you have not done all that was reasonable to prevent your child's infection, you may have breached your responsibility. While it is possible that your child could sue you, this is most unlikely to happen. There have been no cases in Australia of HIV positive children suing their mothers because they were born HIV positive.

If you have done all that is reasonable to prevent your child from being infected, it is unlikely that you have breached your legal responsibility to your child. There are treatments and methods available to pregnant women and the mothers of newborns that significantly reduce the likelihood that your child will be infected (see question 9 for more detail). Health care workers and support services can help provide you with information about these treatments and methods and discuss your options with you. It is only if you act in a reckless or unreasonable way, with respect to reducing the risk of vertical transmission, that you may breach your legal responsibility and could possibly be sued by your child.

Of greater concern is the possibility of intervention by the State in the decision making freedom of pregnant women. The State could classify certain 'unreasonable conduct' during pregnancy as so serious it amounts to a criminal offence. This is particularly so for acts that are of minimal risk or inconvenience to the pregnant woman but have potentially significant benefit for the unborn child. At this time, so long as a pregnant woman acts 'reasonably' there is unlikely to be any criminal liability for conduct during pregnancy.



raising children

11. What happens if I am unable to care for my children temporarily?

A. Informal arrangements

If you need someone to look after your children, you can always make informal arrangements with family (including your child's father) or friends. You should note that the law only allows you to leave your child with a person who is not related to your child for a maximum of 28 days in any 12-month period. If you would like a friend who is not related to your child to look after your child for a longer period, you should seek legal advice about the best way to make a more formal and legally recognised arrangement. This could mean applying for a parenting order from the Family Court. If the Department of Community Services (DoCS) is involved, it may be wise to draw up a care plan with DoCS and your friend, outlining each party's responsibilities. You can ask the Children's Court to give the care plan legal effect.

B. Voluntary care arrangements with the Department of Community Services

You can also place your child in voluntary care, which involves DoCS organising for an authorised carer to look after the day-to-day needs of your child. You can recommend to DoCS that the carer be someone you know and trust. If you do not have a family member or a trusted friend who is willing and able to look after your child, then DoCS can find someone else to be the authorised carer. Voluntary care arrangements can only be made for a period of up to three months, and can be terminated at any time at your request. Under special circumstances, an extension to six months can be made.

The formal or informal arrangements you make for your child will generally continue until you terminate the arrangements, an interested person successfully challenges them in the Family Court, or DoCS intervenes (see question 12 for further information on the Family Court and DoCS).

12. What happens if I am unable to look after my children long-term?

A. Informal arrangements

You can make an informal arrangement for your child to be cared for by family (including your child's father) or friends who are willing and able to look after your child. However, the law does not allow you to leave your child with a person who is not related to your child for more than 28 days in any 12-month period. If you would like to leave your child with a unrelated friend for a longer period, you may want to make a more formal and legally recognised arrangement. This usually means applying for a parenting order from the Family Court. If the Department of Community Services (DoCS) is involved it may be wise to draw up a care plan with DoCS and your friend, outlining each party's responsibilities. You can ask the Children's Court to give the care plan legal effect. You may also want to consider whether it is appropriate for your friend to adopt your child (see below). We recommend that you seek legal advice about the best way to formalise an arrangement for your friend to care for your child long term.

B. Family Court parenting orders

The formal or informal arrangements that you have made for the care of your child will continue while everyone is happy with those arrangements. However, anyone who has an interest in the welfare of your child, including you, your child, and your child's father and grandparents, can make an application to the Family Court of Australia if they are unhappy with the care of your child or concerned about the welfare of your child. Also, if you have organised for your child to be cared for by your family or friends and the carer wants more permanency or certainty in the arrangement they can apply to the Family Court for a parenting order.

Parenting orders can determine issues like who your child lives with, who can have contact with your child and who can make decisions regarding your child's future. In determining the order, the paramount consideration for the court will be what is in the best interest of your child. Factors affecting this include your child's wishes, your child's relationships with all relevant people, your child's cultural background and the capacity of relevant people to care for your child. It is important to know that the Family Court has the ability to make a wide range of orders to suit the circumstances. It may be that you retain some responsibility for the long-term decisions regarding your child, even if the court orders that your child lives with someone else.

C. Adoption

Another option for the long-term or permanent care of your child is adoption. If the person caring for your child is a step-parent or relative of your child they can apply directly to the Supreme Court for an adoption order (step-parents must apply for permission from the Family Court as well). If your child's carer is not a step-parent or relative of your child, they will require DoCS to either bring the adoption application on their behalf or consent to the carer bringing the adoption application. Generally, your permission will be needed before an adoption can take place, although in certain circumstances, such as if you are seriously ill and unable to make decisions or have died, the court can dispense with the need for your consent. Also, if you are unable to care for your child and there is no one that you want to place your child with, you can put your child up for adoption through DoCS or another authorised adoption agency.

D. The Department of Community Services

You should also be aware that DoCS may become involved if you are unable to care for your child. Anyone can make a notification to DoCS where they have reason to suspect that there is a risk of harm to a child. This includes when your child's basic physical or psychological needs are not being met, or are at risk of not being met. It is mandatory for anyone who works with children, such as health care workers, teachers, welfare workers and police, to make a notification to DoCS in such a situation.

Once a notification has been made to DoCS, an assessment is made of the risk posed to your child. Any investigation conducted by DoCS will usually involve speaking to you, your family and any other professionals involved with you or your child. DoCS then decides how best to proceed to promote the safety and well-being of your child. Possibilities include providing support, drawing up care plans setting out the responsibilities of all parties involved and supervising you and your child. It is also possible that DoCS could obtain a care order from the Children's Court removing your child from your care, but this is usually done as a last resort. The Children's Court also has the power to make orders for shared parental responsibility, so while you may not be responsible for the day-to-day care of your child, you may be able to retain some rights and responsibilities over your child. Finally, there are situations, such as if DoCS considers your child to be in immediate danger and an Apprehended Domestic Violence Order would not be sufficient to protect your child, where your child can be temporarily removed from your care without a court order. In this event, DoCS is required to make the appropriate application to the Children's Court on the next working day of the court.

13. What legal care provisions can I make for the care of my children if I were to die?

In planning for the future, we recommend that all people with HIV make a Will. A Will is a legal document that takes effect when you die. The main purpose of a Will is to direct who is to inherit your property (such as money, shares, real estate, superannuation and other investments) when you die. You can state in your Will your wishes on who you would like to look after your children if you were to die. Your wishes will then be taken into consideration, when deciding on the care of your children should you die.

The decision of who will look after your children if you were to die will often be determined informally, unless someone challenges the arrangement. Your family and friends may discuss and decide who will look after your children if you were to die. In many situations, your children will continue to be cared for in their home by their other parent. If this is not possible, a close relative or friend may look after your children. You should be aware that none of these informal arrangements are legally binding and nor are the wishes you may have expressed in your Will. The only legally binding arrangements are those imposed by court order.

While most informal arrangements mentioned in the above paragraph are fine, you should note that the law only allows for your child to stay with someone who is not related to your child for a maximum of 28 days in a 12-month period. If you would like someone who is not related to your child to look after your child for a longer period you should seek legal advice on the best way to go about this. Again, it is always best to record your wishes in your Will. You and your friend should also consider the possibility of adoption, or of your friend applying to the Family Court for a parenting order (see question 12).

You should also be aware that anyone who is concerned with the care, welfare or development of your child (including your child's father) can make an application to the Family Court for a parenting order. Parenting orders can determine issues like who your child lives with, who can have contact with your child and who can make decisions regarding your child's future. In determining the order, the paramount consideration for the court will be what is in the best interest of your child. Factors affecting this include your child's wishes, your child's relationships with all relevant people, your child's cultural background and the capacity of relevant people to care for your child. While the court is not bound by the wishes you record in your Will, your wishes will be taken into account.

14. Do I need to disclose my own or my child's status to their kindergarten or school?

No. The law does not require you to tell the school staff, school management or other students that you or your child has HIV. It is against both Commonwealth and NSW anti-discrimination laws for a school, college, university or other institution at which education or training is provided to discriminate against a person with HIV. If you believe that your child has been discriminated against because of their or your HIV status, you can complain under the NSW legislation to the NSW Anti-Discrimination Board. You have six months from the date of the act of discrimination to make a complaint to the Board. Be aware that private schools are not covered by NSW anti-discrimination legislation. For a complaint to be made against a non-government school, you will have to complain under the Commonwealth anti-discrimination legislation to the Human Rights and Equal Opportunity Commission. You have twelve months from the date of the act of discrimination to make such a complaint.

The NSW Education Department has policies to allow students with HIV to attend school and to protect their privacy. The NSW Public Health Act also requires all service providers, including kindergartens and schools, to keep information about your child's HIV status confidential in most circumstances.

If your child is denied access to a child care service because of their HIV status or is discriminated against in some other way, you may want to consider making a complaint under anti-discrimination legislation. You can also complain to the Department of Community Services or the Community Services Commission about what happened. If these bodies do not resolve the matter satisfactorily, you can complain to the NSW Ombudsman. Finally, you can also complain to your local council, if your local council operates or has overall responsibility for managing the child care service you want to make a complaint about.

The answer to this question briefly explains some options you may have to complain about HIV based discrimination. The success of any complaint will often depend on the nature and circumstances of the discriminatory conduct. Because anti-discrimination laws are complex, we strongly recommend that you seek legal advice before making a complaint (see contacts section).

contacts

HIV/AIDS ORGANISATIONS AND SERVICE PROVIDERS

ACON	www.acon.org.au
Sydney	(02) 9206 2000 / 1800 063 060
Hunter region	(02) 4927 6808
Illawarra region	(02) 4226 1163
Mid North Coast	(02) 6584 0943
Northern Rivers region	(02) 6622 1555
ACON Women and HIV/AIDS Project	(02) 9206 2054
ACON Family Support Project	(02) 9206 2079
Australian Federation of AIDS Organisations (AFAO)	(02) 9281 1999
Bobby Goldsmith Foundation (BGF)	(02) 9283 8666
HIV/AIDS Information Line	1800 451 600 / (02) 9332 4000
HIV/AIDS Legal Centre (HALC)	(02) 9206 2060 www.halc.org.au
National Association of People Living with HIV/AIDS (NAPWA)	(02) 9281 2511
NSW Users & AIDS Association (NUAA)	(02) 9557 1476
Paediatric HIV Service at Sydney Childrens Hospital Randwick	(02) 9382 1851
People Living with HIV/AIDS (PLWHA)	(02) 9361 6011
Heterosexual HIV/AIDS Service (Pozhet)	(02) 9515 3095 1800 812 404
Pozhet Women's Support Officer	(02) 9515 3145
Sex Workers Outreach Project (SWOP)	(02) 9319 4866

LEGAL SERVICE PROVIDERS

NSW Anti-Discrimination Board (ADB)	(02) 9268 5544 1800 670 812
Combined Community Legal Centres Group (Community Legal Centres provide free legal information, advice and referral. Call to find out your closest Community Legal Centre)	(02) 9318 2355
Domestic Violence Advocacy Service Part of Women's Legal Services NSW	
Sydney Metro Advice Line	(02) 8745 6999
Rural Advice Line	1800 810 784
TTY	1800 626 267
Family Court of Australia	(02) 9217 7111 www.familycourt.gov.au
Federal Privacy Commissioner	(02) 9284 9600 1300 363 992 www.privacy.gov.au

HIV/AIDS Legal Centre (HALC)	(02) 9206 2060 www.halc.org.au
Health Care Complaints Commission (HCCC)	(02) 9219 7444 1800 043 159
Human Rights and Equal Opportunity Commission (HREOC)	1300 369 711
Indigenous Women's Legal Contact Line	1800 639 784
Law Access (Information, advice and referral to legal services)	1300 888 529
Law Society of NSW (To find a lawyer)	(02) 9926 0333 www.lawsocnsw.asn.au
NSW Privacy Commissioner	(02) 9268 5588
Victims' Compensation Tribunal	(02) 9374 3111 www.lawlink.nsw.gov.au/vct
Women's Legal Services NSW (formerly Women's Legal Resources Centre)	
Sydney Metro Advice Line	(02) 9749 5533
Rural Advice Line	1800 801 501
Indigenous Women's Legal Contact Line	1800 639 784
TTY	1800 674 333
Wirringa Baiya Aboriginal Women's Legal Centre	(02) 9569 3847 1800 686 587

GENERAL SERVICES

Albion Street Centre (medical services)	(02) 9332 1090 1800 069 054
Department of Community Services (DoCS)	(02) 9716 2222
Department of Community Services - Helpline	13 21 11
Kirketon Road Centre (medical services)	(02) 9360 2766
NSW Health Department	(02) 9391 9000 1800 639 398 1800 644 413
NSW Department for Women	(02) 9287 1860
Women's Domestic Violence Court Assistance Schemes, for your nearest scheme contact: Domestic Violence Advocacy Service Part of Women's Legal Services NSW	
Sydney Metro Advice Line	(02) 8745 6999
Rural Advice Line	1800 810 784
TTY	1800 626 267
Women's Information and Referral Service	1800 817 227
Women's Refuge Referral and Resource Centre	(02) 9698 9777

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