

# AIDS Brief

for professionals

## The Legal Profession



“The protection of human rights is essential to safeguard human dignity in the context of HIV/AIDS and to ensure an effective, rights-based response to HIV/AIDS. An effective response requires the implementation of all human rights, civil and political, economic, social and cultural, and fundamental freedoms of all people, in accordance with existing international human rights standards.” (Extract from *HIV/AIDS and Human Rights: International Guidelines*)

This AIDS Brief covers the responsibilities of people in the legal profession in the areas of ethics, policy and the law.

### BACKGROUND

**Definition:** The legal profession includes those who:

- administer the law, usually magistrates and judges.
- practise law on behalf of individuals, companies or government departments: lawyers, attorneys, advocates and barristers.
- draft, interpret or reform the law: legislators, academics and legal officers linked to the executive branches of government.



During the 1990s the Human Immuno-deficiency Virus (HIV) has spread to every country in the world. Today HIV and AIDS are most seriously affecting developing countries, especially in Africa, Asia and Latin America. But HIV has not disappeared in industrialised nations. In different degrees, it will continue to impact on all of the world's nations for many

years to come. Within each country, it has had an influence on every sector of society, impacting on issues as diverse as health care, education, economic development, employment practice, media and, of course, the law.

The law has been assigned a unique responsibility in the AIDS epidemic. For the first time in history lawyers have been called

upon not only to adjudicate disputes over existing laws, but to play a proactive role in influencing the practice of public health and guiding the rest of society towards an appropriate and humane response to AIDS. In common with other professions there are many dimensions to the practice of law and HIV/AIDS impacts similarly and sometimes differently on these.

### KEY PERFORMANCE AREAS

#### Public health and the law

Most countries in the world support the notion of individual rights. These rights are entrenched in a variety of common, statutory, customary, constitutional and international laws. The State oversees and protects these rights amongst individuals. In addition, where individuals believe that the State may be infringing these rights, the law can offer protection against the state.

Our societies also accept that there are circumstances where it is sometimes justifiable to limit human rights. One of these circumstances is in the interest of public health. However, before any such limitation takes place the State must show that it is reasonable and necessary and that there are not other less restrictive means to advance the public interest.

Public health interests do not conflict with

human rights. An enduring insight into the AIDS epidemic is that when human rights are protected, fewer people become infected and those living with HIV and their families are better able to cope.

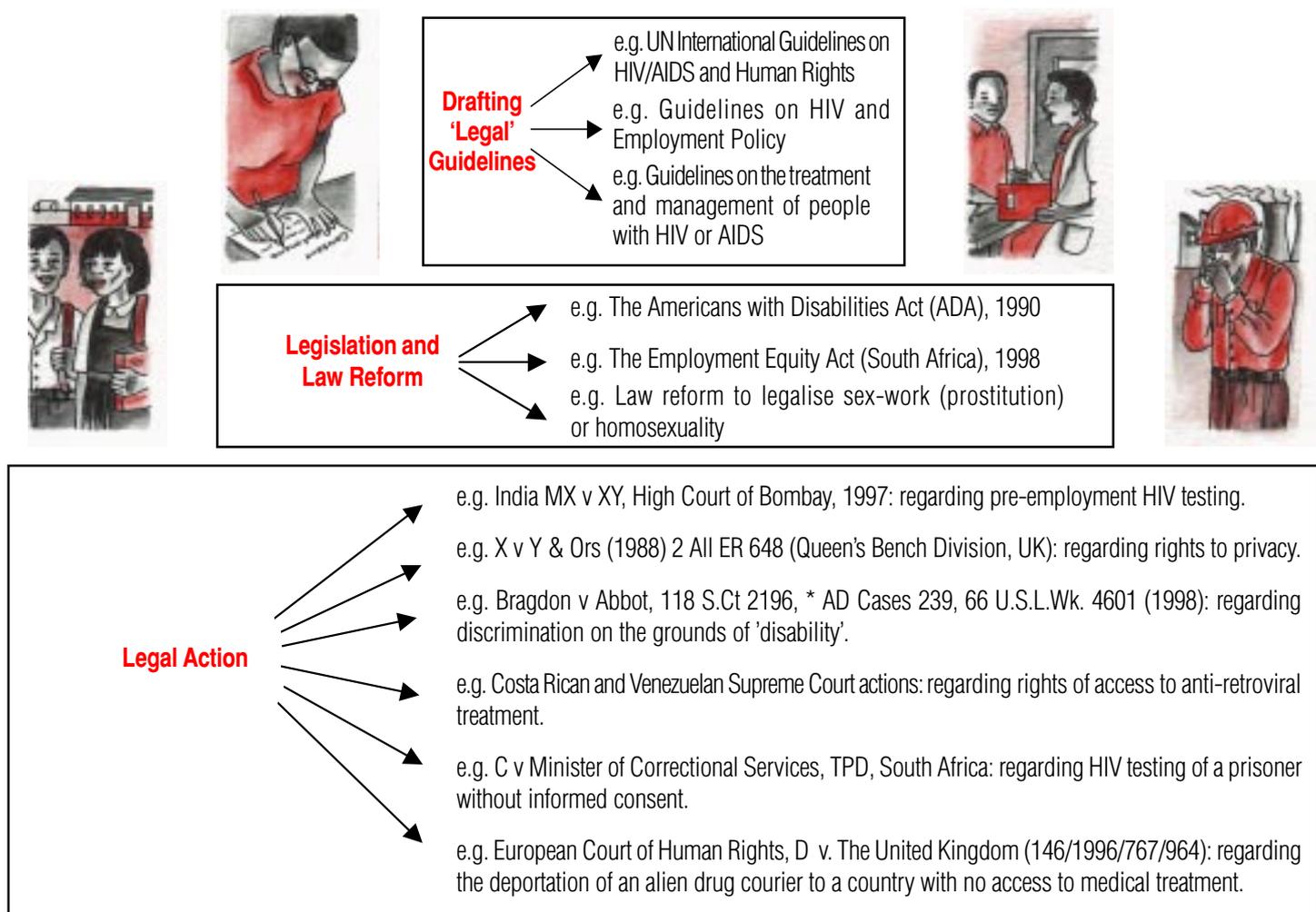
The AIDS epidemic has assumed enormous proportions. In 1998 over 35 million people worldwide had HIV or AIDS. 8 000 people are newly infected every day. Clearly AIDS has huge implications for public health. *And yet, the primary*

role of law in the epidemic has been – and still is – to protect and expand individual rights, rather than to take them away. There is an easily understandable reason for this. Cholera, Typhoid, Yellow Fever and other pathogens can spread in water or the air, HIV cannot. HIV is not transmitted through casual contact. Its main path for transmission is through consensual sexual intercourse, an area of private life that in most countries the law has avoided.

Because of this, the primary responsibility that has been given to the law (in all of its dimensions) has been to prevent unfair discrimination. The rationale for this is that the existence of unfair discrimination makes it more difficult for health care workers to persuade people to change their behaviour and to avoid actions that will risk infection with HIV. Practically this has resulted in a three-tiered approach to the law (see below).

### The three tiers of legal intervention in the AIDS epidemic

The AIDS epidemic has had an impact on all levels of society and therefore on all levels of law. It is not just a “health issue”, but has also touched on criminal, civil, employment and international law. The legal response has formed into a three-tiered pyramid, with the greatest engagement of the law being with AIDS-related litigation.



### Social policy and the law

In the course of the AIDS epidemic one of the main functions of legal personnel has been to provide a legal foundation for guidelines on issues such as: how to manage and treat patients with HIV/AIDS (health), rights and responsibilities at school (education), and codes of best practice at work (employment).

Legal personnel often have to draft these guidelines and to make sure that what they recommend is in keeping with the law. Alternatively, legal personnel may be called upon to scrutinise guidelines on behalf of the enterprise for which they work, and to assess whether the responsibilities they place on an employer or a health care institution are not in conflict with other laws and are not unfairly onerous. In this respect it is important for legal personnel to become familiar with the current approaches to law in different areas of social policy, both nationally and internationally:

**Confidentiality and privacy:** Confidentiality and privacy have been widely stressed as legal

entitlements. The reason for this is that successful HIV prevention depends upon people trusting health care workers and voluntarily seeking HIV counselling, testing and care. Therefore, breaches of privacy by health care workers are considered to be justified only in exceptional circumstances. In addition, governments have taken care to make sure that confidentiality is rigorously protected when cases of HIV or AIDS are routinely reported to health authorities, to allow the epidemic to be tracked.

**Civil law:** Many legal systems have adopted the notion of individual autonomy and the principle of informed consent as a requirement for HIV testing. A great deal of jurisprudence has developed around these principles, particularly in cases where people have alleged that they were tested for HIV without their knowledge or proper agreement. These principles are particularly important for legal personnel drafting guidelines in relation to health care.

**Employment law:** The principles that have been adopted in regard to employment are that people

with HIV should not suffer unfair discrimination during recruitment or after employment. HIV/AIDS should be treated like other life-threatening conditions and when an employee becomes ill efforts should be made at “reasonable accommodation”. Different countries have adopted different approaches to AIDS and employment. Some countries have formulated specific laws, others have interpreted existing labour law in a way that protects individuals with HIV, yet others have drafted voluntary codes or guidelines. In 1988 the International Labour Organisation (ILO) and the World Health Organisation (WHO) drafted *Guidelines on AIDS and Employment*. These are still relevant and of great assistance to legal personnel.

In addition it is widely advocated that every employer should have an HIV/AIDS policy. Although it should not be the responsibility of legal personnel to draft these policies, the informed and expert opinions of legal professionals on the content of such policies and on the extent of their enforceability is required.

**Access to public services, especially education:** There is no just reason to deny people with HIV or AIDS access to public services. This is because HIV cannot be transmitted casually, for example at swimming pools or at schools. The legal approach to these issues, therefore, has been to reinforce individual rights, opposing any kind of HIV testing for admission to schools, universities or training colleges. In a small number of occupations, such as health care work, there exists a theoretical risk of HIV infection from a person with HIV. However, it has been widely recognised that the most effective way of reducing this risk is not to test all people using these facilities. Therefore, in some countries the law has made it mandatory for public and private institutions to make “universal precautions” (infection control procedures) available and known to all

people using a particular facility.

**Criminal law:** During the history of the AIDS epidemic there have been attempts in a number of countries to introduce new criminal laws, making it an offence to transmit HIV either ‘wilfully’ or as a result of negligence. This approach has been discredited for two reasons. Firstly, the laws have been largely unenforceable, because they deal with areas of people’s private lives. For example, it is often difficult to prove an ‘intent’ to infect another person. Secondly, it has proved damaging to public health, because it risks ‘criminalising’ all people with HIV, resulting in people being afraid to come forward for HIV testing, counselling or care. If anything, the approach that is recommended by institutions such as the Joint United Nations Programme on AIDS (UNAIDS) is for the easing of criminal sanctions around issues such as sex-

work (prostitution) and injection drug use, in order to make it easier to incorporate such groups into mainstream HIV prevention and care.

Other areas of social policy that might be relevant to legal professionals are laws related to:

- The management of HIV/AIDS in prisons or amongst vulnerable groups such as children or people with mental disabilities.
- Access to welfare grants, social security and housing for people with HIV or AIDS.
- The conduct of research on human beings to test the efficacy of new drugs or potential vaccines.
- The conditions for immigration to a particular country.
- The registration or use of medicines for HIV or AIDS, or governing the quality of essential technologies such as HIV tests or condoms.

## KEY PERFORMANCE AREAS: THE IMPACT OF AIDS ON LEGAL PRACTICE

AIDS presents new and unusual challenges for all levels of the legal profession. There is no other disease in history that has attracted such a volume and a variety of legal action.

AIDS has required people working in medicine to re-tool their profession, by introducing new courses into medical teaching and re-considering ethical questions. Similarly, it requires legal personnel to appreciate new dimensions to their profession. Some of these are listed below:

- Understanding AIDS from a medical / scientific perspective: legal policy as well as the decisions of judges and magistrates must be informed by the most up-to-date scientific understanding of AIDS. This is because many of the disputes related to AIDS are caused by ignorance of the real nature of the condition. Here, for example, it must be kept in mind that HIV cannot be transmitted through casual contact; that even though people living with HIV have a life-threatening condition they are usually well and

able; that, in many countries, advances in treatment are changing the nature of AIDS from an inevitably terminal illness to a manageable but chronic condition.

- The importance of confidentiality and privacy: in most countries a great deal of social stigma and discrimination is directed at people with HIV or AIDS. This means that people are frightened to reveal that they have HIV and will only have trust in public services like the law if they are sure that their privacy will be respected. This creates unusual challenges, where judges will have to find a way to recognise the public’s interests in the substance of a case and the individual/plaintiff’s interest in having his or her privacy respected. In South Africa, for example, a judge ordered that the media could report on the progress of the case, but were forbidden from reporting the plaintiff’s name.
- The need for expedited hearings: it is known that stress contributes to disease progression

in people with HIV. In addition, people with HIV or AIDS have a shortened life-expectancy. However, law is often both slow and stressful. Magistrates and judges may consider it necessary to order parties in the dispute to proceed as rapidly as possible and to change their own timetables to take account of the needs of a person with HIV or AIDS.

- Legal assistance and advice to people affected by HIV: people from poor and marginalised communities are often at a great risk of HIV infection. For example, in many countries poverty forces women to resort to sex work to raise money. But in addition, once people from disadvantaged communities are infected with HIV, they usually have very limited access to the law or to remedies against unfair discrimination. Legal professionals who volunteer a part of their services to these communities can play a crucial role in HIV prevention and care.

## CHECKLIST

AIDS has an effect on everything that happens in society. In poor countries, however, it is presenting challenges to development and adding to the demands faced by over-burdened resources such as health. Legal professionals dealing with AIDS-related issues need to have checked:

### 1. Relevant international law:

Has your government ratified international covenants that influence the way we should respond to AIDS? For example:

- The International Covenant on Civil and Political Rights.
- The International Covenant on Economic, Social and Cultural Rights.
- The Convention on the Rights of the Child.
- The Convention on the Elimination of all

Forms of Discrimination against Women.

### 2. Relevant national law:

Is there National, Federal, or Provincial legislation that determines certain responses to AIDS? For example:

- Acts explicitly relating to non-discrimination against people with HIV, such as the Americans with Disabilities Act (USA) or the Employment Equity Act (South Africa).
- Acts explicitly relating to aspects of HIV infection, for example, a person’s right to privacy or treatment, or specific criminal laws that make ‘unsafe sex’ (sex that risks HIV transmission) a criminal offence.
- Public Health regulations that refer to HIV or AIDS, for example regulations that require mandatory testing of newborn children, or

compulsory ‘notification’ to health authorities of people who are diagnosed with HIV or AIDS.

### 3. Relevant case-law:

- Have there been any matters before the Courts that have established precedential case-law? For example:
- The United States Supreme Court has decided that at all stages HIV should be classified in law as a disability (Bragdon v Abbot).
- The High Court in Bombay has declared pre-employment HIV testing to be unconstitutional and therefore unlawful.
- A South African Supreme Court has ruled that people with HIV are legally entitled to expect the fullest confidentiality from their doctors.

## INTERNATIONAL NORMS

In 1996 UNAIDS convened an international consultation of experts from different disciplines including human rights, law, public health and people living with HIV. The Consultation finalised a set of International Guidelines on HIV/AIDS and Human Rights. The Guidelines take into account national and international law as well as best practices in dealing with HIV/AIDS. They make 12 detailed sets of recommendations to States:

**GUIDELINE 1:** States should establish an effective national framework for their response to HIV/AIDS which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV/AIDS policy and programme responsibilities across all branches of government.

**GUIDELINE 2:** States should ensure, through political and financial support, that community consultation occurs in all phases of HIV/AIDS policy design, programme implementation and evaluation and that community organisations are enabled to carry out their activities effectively, including in the field of ethics, law and human rights.

**GUIDELINE 3:** States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

**GUIDELINE 4:** States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

**GUIDELINE 5:** States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasise education and conciliation, and provide for speedy and effective administrative and civil remedies.

**GUIDELINE 6:** States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of qualitative prevention measures and services, adequate HIV prevention and care information and safe and effective medication at an affordable price.

**GUIDELINE 7:** States should implement and support legal support services that will educate people affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilise means of protection in addition to the courts, such as offices of ministries of justice, ombudspersons, health complaint units and human rights commissions.

**GUIDELINE 8:** States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.

**GUIDELINE 9:** States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatisation associated with HIV/AIDS to understanding and acceptance.

**GUIDELINE 10:** States should ensure that government and the private sector develop codes of conduct regarding HIV-related issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.

**GUIDELINE 11:** States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV/AIDS, their families and communities.

**GUIDELINE 12:** States should cooperate through all relevant programmes and agencies of the United Nations system, including UNAIDS, to share knowledge and experience concerning HIV-related human rights issues and should ensure effective mechanisms to protect human rights in the context of HIV/AIDS at international level.

## SUMMARY

In conclusion, the role that legal personnel should aspire to play in mitigating the effects of the AIDS epidemic is perhaps most eloquently summarised by Justice Michael Kirby, once President of the New South Wales Court of Appeal in Sydney, Australia. In a paper that he presented on AIDS and the Law Kirby said: "AIDS laws must not be based upon ignorance, fear, political

expediency and pandering to the demands of the citizenry for 'tough' measures. There must be no more branding of cheeks. Good laws, like good ethics, will be founded in good data. Because this is a major health crisis, the least we can expect from our politicians, bureaucrats and judicial officers is that they will inform themselves about the features of this epidemic before they make laws and policies

or hand down decisions relating to it. Nothing less will do. This is an area of the law's operation where people's lives are at risk and millions will die.

In the little part that the law has to play in this great drama we should be protectors of basic rights. They matter most when they are most at risk. This is when lawyers and law makers have a special responsibility."

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