

June 26, 2008

Reverend Joseph Mpinganjira
Chairperson
The Malawi Law Commission



Re: Report of the Law Commission on the Development of HIV and AIDS Legislation

Dear Reverend Mpinganjira and Law Commission Members:

I enclose comments on the Report of the Law Commission on the Development of HIV and AIDS Legislation (September 2007). The Canadian HIV/AIDS Legal Network (“Legal Network”) appreciates the opportunity to submit comments to the Law Commission on this Report. We note that this is a draft report and hope that our comments will assist the Commission in its work to prepare a final report and bill that fully respect, promote and protect the human rights of all persons in Malawi.

Yours sincerely,

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The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education and community mobilization. The Legal Network is Canada’s leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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Comments on the draft Report of the Law Commission on the Development of HIV and AIDS Legislation

Introductory Comments

These comments on the Report of the Law Commission on the Development of HIV and AIDS Legislation [hereinafter, “the Report”] are informed by international human rights law and policy.¹ In effective responses to the HIV/AIDS epidemic, human rights and health are fundamentally linked. When human rights are not promoted and protected, it is more difficult to prevent HIV transmission and the impacts of the epidemic on individuals and communities are worse. In view of the increasing challenges presented by HIV/AIDS, there is an intensified need for efforts to ensure respect for and observance of human rights so as to reduce vulnerability to HIV/AIDS and to prevent HIV/AIDS-related discrimination.

We have chosen to restrict our comments herein to several key issues of concern with respect to the Report, namely: gender and women rights, disclosure and privacy, HIV testing, and deliberate transmission and exposure to HIV infection. We have also restricted our comments to the proposed legislative provisions, and do not herein offer commentary on the discussion portions of the Report, noting however that the proposed provisions do not always correspond directly to the commentary and additional issues with potential human rights implications are raised in the commentary sections of the Report.

Comments on Specific Provisions

Gender and Women’s Rights

We commend the Commission on its acknowledgment of the socio-economic dimensions of the epidemic, including gender-specific vulnerabilities to and impacts of HIV/AIDS. Moreover, we welcome the proposed prohibition of harmful practices that expose individuals (particularly women) to the risk of HIV infection and restrict their rights and autonomy.

We note, however, that the proposed legislation could be improved by including provisions that address other social, cultural, economic and legal factors that make women more vulnerable to HIV infection and more prone to experience adverse effects as a result of HIV infection. The *International Guidelines* highlight the need for legislation

¹ Much of the spirit and the content of these comments on the Report is derived from applicable international human rights law, as well as the United Nations General Assembly *Declaration of Commitment on HIV/AIDS*, adopted by General Assembly resolution S-26/2 of 27 June 2001, UNAIDS/OHCHR *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, [hereinafter, “*International Guidelines*”] and UNAIDS/IPU *The Handbook for Legislators on HIV/AIDS, Law and Human Rights*, 1999 [hereinafter, “*Legislator’s Handbook*”].

addressing discrimination and violence against women. Guideline 8 of the *International Guidelines on HIV/AIDS and Human Rights* (“Women, children and other vulnerable groups”) states that:

Violence against women, harmful traditional practices, sexual abuse, exploitation, early marriage and female genital mutilation, should be eliminated. Positive measures, including formal and informal education programmes, increased work opportunities and support services, should be established.... States should support women’s organisations to incorporate HIV/AIDS and human rights issues into their programming.... States should ensure that all women and girls of child-bearing age have access to accurate and comprehensive information and counselling on the prevention of HIV transmission and the risk of vertical transmission of HIV, as well as access to the available resources to minimise that risk, or to proceed with childbirth, if they do so choose.²

Disclosure and Privacy

The privacy rights of persons living with HIV are extremely important. For women in particular, confidentiality of medical information (including HIV status) is essential to the protection of their human rights, because women may find themselves abandoned, subject to domestic violence, or ostracized if their domestic partners, families or communities discover that they are HIV-positive. Moreover, because of the stigma and shame that are still too often associated with a diagnosis of HIV infection, protecting the privacy of persons living with HIV is essential in order to protect them from discrimination and enable them to access employment, housing and services. The strong wording proposed in the Report protecting the right of a person living with HIV to privacy and confidentiality with regard to information concerning his [or her] state of health is therefore welcomed.

Sub-section 2 of the proposed provision, however, introduces several broad exceptions. In this respect, the *International Guidelines* recommend voluntary partner notification, but with provision for exceptional circumstances. According to the *International Guidelines*:

Public health legislation should authorize, but not require, that health-care professionals decide, on the basis of each individual case and ethical considerations, whether to inform their patients’ sexual partners of the HIV status of their patient. Such a decision should only be made in accordance with the following criteria:

- The HIV-positive person in question has been thoroughly counselled;
- Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;
- The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s);
- A real risk of HIV transmission to the partner(s) exists;
- The HIV-positive person is given reasonable advance notice;

² *International Guidelines*, para 9.

- The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice;
- Follow-up is provided to ensure support to those involved, as necessary.³

According to the *Legislator's Handbook*, “[i]t is recognized that coercive strategies are inappropriate, ineffective and counter-productive because they deter those at risk of infection from presenting early for counselling, testing, treatment and support.”⁴ We would therefore encourage the Commission to revise the proposed disclosure provisions to better protect the rights of persons living with HIV (PLHIV). In particular, there should be a requirement that, before breaching the confidentiality of the PLHIV by disclosing his or her HIV infection to a third party, the physician should have “reasonable grounds to believe” not only that the PLHIV’s behaviour puts another person at risk of harm, but that: (i) the PLHIV has been adequately counselled and refuses to change behaviour; (ii) that the risk to another person is a serious or significant risk in the circumstances; and (iii) the other person is not aware of the PLHIV’s infection. This Article would also benefit from including an explicit provision that, before breaching confidentiality, the physician should make reasonable efforts to convince the person perceived to be at risk to seek information about HIV and HIV testing, preserving to the extent possible the anonymity of the PLHIV.

Furthermore, section 2(a) allows disclosure of HIV-positive status where the PLHIV consents to such disclosure, and then provides that if the service providers who undertook the HIV test is of the opinion that the person has a disability or is unable to give consent, the consent of a guardian, spouse, parent or adult child can be substituted. We are concerned that this provision is overbroad and may lead to violations of the rights of person living with disabilities and others.

HIV Testing

The Report includes an extensive discussion of HIV testing issues and recommends mandatory testing of persons charged with sexual offences, sex workers, persons in polygamous unions and pregnant women. HIV testing without consent, however, is almost never justified. Because of the invasive nature of mandatory HIV testing, this practice violates an individual’s right to privacy and right to bodily integrity. Moreover, by distinguishing between certain population groups and the community in general, provisions of the laws permitting mandatory testing may in some cases unjustifiably violate the principle of non-discrimination.

The *International Guidelines* state that “[p]ublic health, criminal and anti-discrimination legislation should prohibit mandatory HIV-testing of targeted groups, including vulnerable groups.”⁵ The UNAIDS/WHO policy statement on HIV testing clearly states:

³ *International Guidelines*, Guideline 3(g).

⁴ *Legislator's Handbook*, pg. 45.

⁵ *International Guidelines*, para 30(j).

The conditions of the ‘3 Cs’, advocated since the HIV test became available in 1985, continue to be underpinning principles for the conduct of HIV testing of individuals. Such testing of individuals must be:

- Confidential;
- Be accompanied by counseling;
- Only be conducted with informed consent, meaning that it is both informed and voluntary.

UNAIDS/WHO do not support mandatory testing of individuals on public health grounds. Voluntary testing is more likely to result in behaviour change to avoid transmitting HIV to other individuals.⁶

According to WHO, mandatory testing of particular population groups can damage efforts to prevent HIV transmission — and is not therefore in the interest of public health — for the following reasons:

- Because of the stigmatization and discrimination directed at people living with HIV, individuals who believe they might be living with the disease tend to go “underground” to escape mandatory testing. As a result, those at highest risk for HIV infection may not hear or heed education messages about AIDS prevention;
- Testing without informed consent damages the credibility of the health services and may discourage those needing services from obtaining them;
- Mandatory testing can create a false sense of security especially among people who are outside its scope and who use it as an excuse for not following more effective measures for protecting themselves and others from infection;
- Mandatory testing programmes are expensive, and divert resources from effective prevention measures.⁷

It is therefore commendable that the proposed provisions include provisions explicitly prohibiting mandatory HIV testing. However, it is recommended that the exceptions be removed from the proposed law. Similarly, the recommendations in the Report to allow HIV testing as a pre-condition for employment in certain situations should be reconsidered. Such tests could result in discrimination and could constitute a violation of the prospective employee’s right to privacy, while offering little, if any, public health benefit.

Deliberate Transmission and Exposure to HIV Infection

The Report includes a provision criminalizing deliberate, reckless or negligent acts or omissions that are likely to infect another person with HIV. It is therefore important to note that there has been much concern expressed internationally about the desirability of

⁶ UNAIDS/WHO, *Policy Statement on HIV Testing*, 2004, p 2.

⁷ WHO, *Statement from the Consultation on Testing and Counselling for HIV Infection*, 1992, at 3–4.

using criminal law to deal with the issue of HIV transmission, even if there may be some limited situations where it is justifiable to do so. Criminal law is generally viewed as “a blunt instrument that can neither adequately capture the complexity of the contexts in which HIV transmission occurs nor deal effectively with matters such as the relative probability of transmission.”⁸

The *International Guidelines* recommend to States that:

Criminal and/or public health should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.⁹

In a more detailed examination of this issue, undertaken to guide policy-makers in dealing with this difficult and complex issue, UNAIDS has reiterated the recommendation that, if States decide to resort to criminal law to address HIV transmission, they should not enact HIV-specific legislation, but instead apply general criminal offences.¹⁰ UNAIDS points out that existing offences are likely adequate to deal with such exceptional cases, and that an HIV-specific law is unlikely to have any additional deterrent effect. In addition and perhaps most significantly, UNAIDS cautions that enacting HIV-specific legislation contributes to already widespread HIV-related stigma and invites further discrimination against people living with HIV by singling them out as potential criminals. The Inter-Parliamentary Union (IPU) has joined with UNAIDS in recommending that law-makers avoid enacting HIV-specific criminal legislation, and further recommends that “[p]unishment under the criminal or public health law should be reserved for the most serious culpable behaviour.”¹¹ In those cases where a new offence is created, they have recommended that “the coverage of the legislation should be limited to deliberate or intentional acts.”¹²

In light of these recommendations, we urge the Commission to reconsider its proposed approach of applying criminal liability broadly for exposure to HIV.

⁸ WHO Europe, *WHO technical consultation in collaboration with European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections* (Copenhagen, 16 October 2006), p. 3, on-line: www.euro.who.int/Document/SHA/crimconsultation_latest.pdf.

⁹ *International Guidelines*, Guideline 4, para. 21(a).

¹⁰ *Criminal Law, Public Health and HIV Transmission*, pp. 30–32.

¹¹ *Legislator’s Handbook*, p. 51.

¹² *Ibid.*