

Guidance Note

Addressing HIV-related Law at National Level

1. The following text broadly summarizes the human rights-related commitments expressed in the *Political Declaration on HIV/AIDS* (2006). Most of these commitments need to be addressed at some level through a legal or regulatory framework and/or through law enforcement. In the *Political Declaration* governments committed themselves to:

- overcoming legal, regulatory or other barriers that block access to commodities and services
- promoting access to HIV education and information
- full protection of confidentiality and informed consent
- intensifying efforts to ensure that a wide range of prevention programmes, including information, education and communication, aimed at reducing risk-taking behaviours and encouraging responsible sexual behaviour, including abstinence and fidelity
- expanded access to essential commodities, including male and female condoms and sterile injecting equipment
- harm-reduction efforts related to drug use
- expanded access to voluntary and confidential counselling and testing
- safe blood supplies
- intensifying efforts to enact, strengthen or enforce, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV and members of vulnerable groups
- developing strategies to combat stigma and social exclusion connected with the epidemic
- eliminating gender inequalities, gender-based abuse and violence
- increasing the capacity of women and adolescent girls to protect themselves from the risk of HIV infection
- ensuring that women can exercise their right to have control over, and decide freely and responsibly on, matters related to their sexuality
- taking all necessary measures to create an enabling environment for the empowerment of women and strengthen their economic independence
- eliminating all forms of discrimination, as well as all types of sexual exploitation of women, girls and boys, and all forms of violence against women and girls, including harmful traditional and customary practices, abuse, rape and other forms of sexual violence, battering and trafficking in women.

* *summary of key provisions*

2. Thus, ***countries have made major commitments regarding enacting and enforcing laws to protect the rights and address the needs of people vulnerable to and affected by HIV.*** This note is intended to assist UNAIDS colleagues and other interested partners in addressing the legal challenges relevant to national responses to HIV. Unfortunately, however, this work is often not prioritized among donors or UN agencies in terms of providing the financial and technical support to countries to implement concrete programmes to address HIV-related law issues successfully. This can be a serious lacuna in support to national AIDS programmes that should be avoided. At national level, legal issues occur at three levels as follows.

- a. **Community empowerment to access law** – This involves implementing programmes at sufficient scale and coverage (relevant to the epidemic) that support community mobilization around and access to law related to HIV. Such programmes include:

- i. Legal support for people living with HIV and members of vulnerable and marginalised groups (women, care-givers, survivors of sexual violence, orphans and vulnerable children, injecting drug users, sex workers, men who have sex with men) in the form of legal aid, community paralegals as well as dispute resolution including working with traditional leaders, and strategic litigation.
 - ii. “Know your rights and laws” campaigns that empower those affected by HIV to know their rights and laws in the context of the epidemic and draw them down into concrete demands in terms of gender equality, non-discrimination on basis of HIV and other social status, elimination of violence against women, protection of the rights of the child, and access to HIV prevention, treatment, care and support.
 - iii. Human rights training for key service providers (judges, police, and health care workers) that focuses on non-discrimination, informed consent, confidentiality, and non-violence in the case of law enforcement.
 - iv. Stigma and discrimination reduction programmes which actively seek to reduce stigma and discrimination based on HIV and related social status.
- b. **Law enforcement** – This involves assessing and improving, through capacity-building and sensitivity training, law enforcement by judges and police that impacts HIV prevention, treatment care and support. This is particularly important regarding the protection of women, children, populations at risk and people living with HIV from discrimination and violence, as well as supporting their access to HIV prevention, treatment, care and support. This work basically seeks to overcome the barriers that law and its enforcement might represent to effective responses to HIV.
- c. **Legislation or law reform** – This involves putting in place new law, or changing existing law, so that the law benefits individuals and groups in the HIV response, as well as provides a legal framework for the response (e.g. multisectoral government structures and accountabilities; nondiscrimination on the basis of HIV; right to prevention, treatment, care and support; reduction in tariffs and taxes on import of HIV-related commodities; using flexibilities in international trade law).
3. In light of limited financial and human capacity, UNAIDS suggests that, depending on the national situation and epidemic, efforts by national stakeholders, the UN system and donors should focus efforts on these three levels of legal challenges in the response to HIV in the following order of priority:
- First, community empowerment and mobilization to know the law and access the legal system
 - Second, law enforcement; and
 - Third, legislation and law reform.

The reasons for this suggested approach include the following:

Community empowerment to access the law and legal system

4. Most legal systems already have some decent law on the books that includes provisions against non-discrimination, protection of the rights of women (with limitations in some countries), and protection of the public health. In most places, however, the “average person”, and particularly those marginalized, often do not know about these laws; do not know how they are relevant in their lives, including in the

context of HIV; and do not know how to draw down these laws (or rights) into concrete and specific demands through access to the legal system.

5. On the other hand, where the most significant advances have been made regarding HIV is in countries where networks of people living with HIV and HIV legal/human rights groups have mobilized around their rights and law through “know your rights/laws” campaigns and legal advocacy, including strategic litigation (i.e. cases with societal level impact taken against government or others, such as pharmaceuticals). Where this form of social and legal mobilization has taken place, there have been major social and legal developments in the form of protecting people living with HIV against discrimination, realizing the right to health in terms of governments’ obligations to provide treatment, and better protecting the rights of prisoners (See *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*, UNAIDS and Canadian HIV/AIDS Legal Network, 2006).
6. At the individual level, such social and rights/law mobilization results in individual empowerment in terms of being better able to negotiate safe sex, avoid violence, go through HIV testing and counselling and disclose status, and be treatment literate and compliant. This is particularly the case where mobilization and capacity-building include training on rights/laws for key services providers, such as training of health care providers on nondiscrimination, informed consent and confidentiality, and sensitizing police to non-discrimination and non-violence against people living with HIV and members of key populations.

Law enforcement in the context of HIV

7. With regard to law enforcement, this is second in priority, though ideally should be dealt with at the same time as community empowerment. It concerns how police and judges enforce the laws, particularly with regard to key populations at risk: sex workers, drug users, men who have sex with men and prisoners. For these groups, law enforcement is highly relevant to their access to HIV prevention, treatment and care and support, as well as protection from violence and nondiscrimination. Taking steps to improve law enforcement related to HIV can have an immediate impact on the lives and health of individuals belonging to these key populations at risk of HIV.
8. In some places the activities of key populations are criminalized. In most places, these groups are highly stigmatized. In both situations and in the absence of the possibility to change and improve the laws, many pragmatic solutions have been found and objectives accomplished by working with local police to understand why it is critical that law enforcement does not block access to HIV prevention, treatment, care and support and helping them to identify concrete ways to implement this.
9. Law enforcement is also highly relevant to the rights and vulnerabilities of women in the context of HIV. In this sense, it is important to support police to take domestic violence seriously and see its links to HIV, and do their part to ensure access to justice and provision of post-exposure prophylaxis to survivors of sexual violence.

Legislation and law reform

10. With regard to law reform and legislation, UNAIDS has always recognized how critical an enabling legislative environment is. However, getting new legislation on the books or changing existing legislation is time-consuming and labour intensive, politically complex, and fraught with risks. Before beginning any process of legislation or law reform, it should be realized that there is just as great a risk of getting bad law passed

as getting good law passed. Furthermore, the effort spent will bear little result if the law is not implemented or is not accessible by those who need to use it.

11. Thus, while recognizing that enabling legislative frameworks can be very helpful to an effective response to HIV, UNAIDS cautions that great care should be taken:
 - First, to assess whether law reform is necessary, and if so in what areas;
 - Second, to ensure that Parliamentarians and civil society are fully empowered, educated and committed to taking forward legislation or law reform in such a way that is based on evidence and protects human rights (not the opposite); and
 - Third, to implement a follow-up plan to empower affected communities to be able to access the law towards positive outcomes (nondiscrimination, informed consent and confidentiality, freedom from sexual violence, gender equality and access to HIV prevention, care, treatment and support).

12. A second major issue that arises with regard to legislating and HIV is the value of “omnibus HIV laws”. These are laws that a number of countries have passed that attempt to deal with “all things HIV-related” in one law. The benefit of such a law is just that – in one legislative stroke it ostensibly creates an enabling legislative framework for the national response to HIV. The problems associated with such laws however include the following:
 - If not done well, they can contain unclear and/or punitive provisions; and/or can leave out important concerns
 - They may conflict with existing laws in other legislative areas, and these older, better known laws will often be the ones that are implemented by the courts, police and executive branch,
 - The executive branch, judges, police, civil society often do not know about these omnibus laws, so they have little impact.

13. Rather than implementing omnibus laws, another approach is to seek to reform, as necessary, all existing law that might be relevant to HIV. This is a daunting and perhaps unrealistic task as such law includes, at the least: public health law, anti-discrimination, privacy law, drug enforcement law, nuisance law, criminal law, domestic relations, trade and tax law, intellectual property law and disability law. Rather than taking on the reform of all relevant law, the priorities for law reform should be considered in light of epidemiological and political realities.

14. Thirdly, if a country is engaging in law reform, it is very important to seek to influence the reform process toward positive outcomes early on. Law reform should be as much about process as about content. In this regard, law reform can be a great opportunity to bring stakeholders together for discussions on the critical issues. Parliamentarians and legislative drafters should meet with affected groups to get input about their needs and realities. It is often necessary for there to be capacity-building/discussion among affected populations before they meet with Parliamentarians. At some point in the process, if useful and necessary, UNAIDS can provide official comments to draft legislation. It is important, however, to use this role strategically, which means knowing when and if such comments will be helpful in the process. Often, law reform efforts come to the attention of UNAIDS too late when positions are firm and the legislation is at its very final stages.

15. These then are key roles for members of the UNAIDS programmed and others to play to ensure that any law reform results in good outcomes: (a) building capacity on law, (b) supporting dialogue among stakeholders, (c) identifying champion

Parliamentarians, and (d) helping to establish a HIV Advisory Group in Parliament which is regularly provided with information on the epidemic. (For instance, many Parliamentarians have never been informed by the Executive Branch about the *Declaration of Commitment on HIV/AIDS* (2001) or *Political Declaration on HIV/AIDS* (2006)).

Legal audits

16. As a possible way forward, UNAIDS recommends that countries undertake a **legal audit**. This is an analysis of how the legal environment is impacting the response to HIV. The legal environment, and thus the legal audit, should include:

- Assessing the existing laws on the books in critical areas that are relevant to HIV prevention, treatment, care and support
- Assessing how law enforcement through the courts, police and prisons impacts HIV
- Assessing the role of Parliamentarians in leadership, legislation and budget authorization for the response to HIV
- Assessing whether the Ministries of Interior, Justice, Immigration, and Gender are engaged, and have the capacity to be engaged, in a meaningful multisectoral response.

17. Such legal audits should:

- Be participatory involving government, the UN, and civil society (perhaps also the National Human Rights Institution if there is one)
- Engage key stakeholders in Parliament, the judiciary and relevant Ministries for ownership
- Get feedback on enforcement of law from affected women, youth and key populations at risk
- Include discussion with civil society strategies for improving access to the law, and
- Occur in the context of, and be integrated into, an ongoing review of the national HIV response.

Such an audit is a recommended and necessary step before undertaking advocacy and programmatic support to address legal issues relevant to HIV.

Recommendations for immediate action:

- Find out about what is going on in the area of HIV-related law in the country and region.
- Identify, and support if necessary, a national or regional NGO/center of excellence on HIV and the law, and establish regular communication with them.
- Establish contacts with the Ministries of Justice and Interior, as well as with Parliamentarians, the judiciary and the National Human Rights Institution.
- Build into the budget support to HIV-related law issues.
- Consider support to a legal audit at national level.
- Contact the Technical Support Facility in the region to identify and include technical support on HIV and law.
- Work with UNDP as lead co-sponsor on human rights, law and governance within the UNAIDS technical support division of labour.

For further information, or to discuss legal concerns and technical support needs, contact the UNAIDS Human Rights and Law team in Geneva: Susan Timberlake, Senior Advisor, Human Rights and Law, timberlakes@unaids.org; Jason Sigurdson, Human Rights and Law Programme Officer, sigurdsonj@unaids.org; Lina Nykanen, Human Rights and Law Programme Officer, nykanenl@unaids.org

Resources on HIV and the Law:

- ***Taking Action against HIV: Handbook for Parliamentarians***
UNAIDS, UNDP, and Inter-Parliamentary Union (2007)
http://data.unaids.org/pub/Manual/2007/20071128_ipu_handbook_en.pdf

- ***Reducing HIV Stigma and Discrimination: a critical part of national AIDS programmes***
UNAIDS (2007)
http://data.unaids.org/pub/Report/2008/jc1420_stigma_discr_en.pdf

- ***Handbook on HIV and Human Rights for National Human Rights Institutions***
Office of the UN High Commissioner for Human Rights and UNAIDS (2007)
English: http://data.unaids.org/pub/Report/2007/jc1367-handbookhiv_en.pdf
Spanish: http://data.unaids.org/pub/Report/2008/jc1367handbookhiv_es.pdf

- ***Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV***
UNAIDS and Canadian HIV/AIDS Legal Network (2006)
English: http://data.unaids.org/pub/Report/2006/jc1189-courtingrights_en.pdf
Arabic: http://data.unaids.org/pub/Report/2007/JC1189-CourtingRights_ar.pdf
French: http://data.unaids.org/pub/Report/2006/JC1189-CourtingRights_fr.pdf
Russian: http://data.unaids.org/Publications/IRC-pub07/JC1189-CourtingRights_ru.pdf
Spanish: http://data.unaids.org/Publications/IRC-pub07/JC1189-CourtingRights_es.pdf

- ***International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated Version)***
UNAIDS and Office of the UN High Commissioner for Human Rights (2006)
English: http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf
Spanish: http://data.unaids.org/pub/Report/2008/jc1252_int_guidelines_es.pdf
French: http://data.unaids.org/pub/Report/2008/jc1252_int_guidelines_fr.pdf
Russian: http://data.unaids.org/pub/Manual/2007/jc1252-humanrights_ru.pdf