



*Empowered lives.
Resilient nations.*

Legal protections against HIV-related human rights violations

Experiences and lessons
learned from national HIV laws
in Asia and the Pacific

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John Godwin
May 2013



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Glossary of acronyms and terms

ACHIEVE	Action for Health Initiatives, Inc. (Philippines)
ADR	Alternative dispute resolution
AMTP	AIDS Medium Term Plan (Philippines)
ART	Antiretroviral therapy
ARV	Antiretroviral
AusAID	Australian Agency for International Development
BABSEA CLE	Bridges Across Borders Southeast Asia Community Legal Education
BAHA	Business Coalition Against HIV/AIDS (PNG)
CAP+	China Alliance of People Living with HIV/AIDS
CBO	Community based organization
CCLPHH	Centre for Consultancy on Health Policy and Law on HIV/AIDS (Viet Nam)
CD4 test	Immune system test
CEDAW	Convention on Elimination of all forms of Discrimination Against Women
CHR	Commission on Human Rights (Philippines)
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DECS	Department of Education, Culture and Sport (Philippines)
DepEd	Department of Education (Philippines)
DOJ	Department of Justice (Philippines)
DOLE	Department of Labor and Employment (Philippines)
DSWD	Department of Social Welfare and Development (Philippines)
ESCAP	Economic and Social Commission for Asia and the Pacific
FHI	Family Health International
FWLD	Forum for Women, Law and Development (Nepal)
HACC	HIV/AIDS Coordinating Committee (Cambodia)
HAMP Act	HIV/AIDS Management and Prevention Act (PNG)
HBV	Hepatitis B Virus
HKEOC	Hong Kong Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDLO	International Development Law Organization
IEC	Information, education and communication
ILO	International Labour Organization
INP+	Indian Network of Persons living with HIV/AIDS
IRR	Implementing rules and regulations (Philippines)
KHANA	Khmer HIV/AIDS NGO Alliance (Cambodia)
LCC	Legal Consultancy Collaborators (Viet Nam)
LGU	Local Government Unit (Philippines)
M&E	Monitoring and evaluation
MNT	Mongolian currency, Tugrik
MSM	“Men who have sex with men” or “males who have sex with males” (either term is intended to include adolescents)
NACO	National AIDS Control Organization
NACS	National AIDS Council Secretariat
NGO	Non-government organization

NCCD	National Centre for Communicable Diseases (Mongolia)
NHRC	National Human Rights Commission (India)
NHRI	National human rights institution
NPC	National People's Congress (China)
NSP	National Strategic Plan
OFW	Overseas Filipino worker
OHCHR	Office of the High Commissioner for Human Rights
OPS	Office of the Public Solicitor (PNG)
OWWA	Overseas Workers Welfare Administration (Philippines)
PHA	Philippine Hospitals Association
PICT	Provider-initiated Counseling and Testing
PLAC	Provincial Legal Aid Centre (Viet Nam)
PLD	Institute for Research on Policy, Law and Development (Viet Nam)
PLHIV	People living with HIV
PLWHA	People living with HIV/AIDS
PNAC	Philippine National AIDS Council
PNG	Papua New Guinea
PNGDLA	Papua New Guinea Development Law Association
PNP	Philippine National Police
POEA	Philippine Overseas Employment Administration
PPA+	Pinoy Plus Association, Inc.
PRC	People's Republic of China
PWID	Person who injects drugs
RA	Republic Act (Philippines)
RPNGC	Royal Papua New Guinea Constabulary
SELNA	UN Joint Programme of Support to an Effective Lao National Assembly
SHC	Social Hygiene Clinic (Philippines)
STI	Sexually transmitted infection
SRH	Sexual and reproductive health
UDHR	Universal Declaration of Human Rights
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
USAID	United States Agency for International Development
UNDP	United Nations Development Programme
VCS	Village Courts Secretariat (PNG)
VCT	Voluntary counseling and testing
VLA	Viet Nam Lawyers Association
VNP+	Viet Nam Network of People Living with HIV/AIDS
WHO	World Health Organization
YAFA	Youth AIDS Filipinas Alliance, Inc.

Key populations

The term 'key populations at higher risk of HIV' or 'key populations' refers to those who are most likely to be exposed to HIV or to transmit it, and whose engagement is critical to a successful response. In all countries, key populations include people living with HIV. In most settings, men who have sex with men, transgender persons, people who inject drugs, sex workers and their clients, and sero-negative partners in sero-discordant couples are at higher risk of exposure to HIV than other people.

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Summary of recommendations

1. National frameworks

- 1.1 National HIV strategies and plans should include specific targeted actions for: law reform; increased access to justice for people living with HIV (PLHIV) and key populations; and capacity development of parliamentarians, judiciary, police and other key institutions to implement and enforce HIV-related human rights and protective laws.
- 1.2 Donors including the Global Fund to Fight AIDS, Tuberculosis and Malaria should support government and civil society programming on HIV-related human rights, including access to justice programmes.
- 1.3 Governments should support research to inform efforts to improve the legal environment for HIV responses, including monitoring and evaluation of the impact of HIV-related laws, and of capacity development, legal empowerment and access to justice interventions. Governments should support participatory evaluations of HIV-related human rights legislation in partnership with PLHIV organizations.

2. Law reform

- 2.1 Law reform should be informed by systematic legislative reviews that assess laws against the *International Guidelines on HIV/AIDS and Human Rights*. Governments should ensure comprehensive protective legislation is in place that addresses the following rights:
 - a. Right to equality and protection from discrimination.
 - b. Right to protection from HIV-related vilification, stigmatization and insult.
 - c. Right to protection from violence.
 - d. Right to privacy and confidentiality.
 - e. Right to voluntary and informed consent to HIV testing and treatment.
 - f. Rights of young people. This includes consideration of young people's rights to confidentiality and to consent to testing and treatment, independent of their parents.
 - g. Right to pre-test and post-test counseling.
 - h. Right to participation of PLHIV and key populations in planning and delivering HIV programmes.
 - i. Right to access to the means of HIV prevention.

- j. Right to education and information on HIV prevention, treatment and care.
 - k. Right to the highest attainable standard of health, including access to ARVs.
 - l. Sexual and reproductive health rights of PLHIV and key populations.
- 2.2 Anti-discrimination laws should include a clear and comprehensive definition of conduct that constitutes unlawful HIV-related discrimination, including:
- a. Discrimination in the areas of employment, health care, access to places, accommodation, education, childcare, insurance, funerals and provision of other goods and services.
 - b. Discrimination on the grounds of HIV status and presumed or suspected HIV status, and discrimination against family members or other associates of PLHIV.
 - c. Discrimination by public and private sector bodies.
- 2.3 Protective legislation should prevail over other legislation.
- 2.4 Protective laws should include provisions to make laws enforceable and accessible for PLHIV and key populations, including:
- a. provisions empowering individuals to claim redress (such as compensation or reinstatement) through the courts, alternative dispute resolution (ADR) processes or other mechanisms;
 - b. provisions establishing criminal and administrative offences and penalties, for violation of provisions relating to non-discrimination, non-consensual testing, breach of confidentiality and other human rights violations;
 - c. provisions enabling PLHIV to lodge complaints to courts and/or national human rights institutions (NHRIs) or other bodies without risking public disclosure of their HIV status; and
 - d. provisions for public interest litigation and for the making of court orders to address systemic issues, such as changing discriminatory policies.

3. Access to justice and legal empowerment

- 3.1 Governments, lawyers' associations and funders should give priority to supporting access to justice and legal empowerment programmes for PLHIV and key populations.
- 3.2 Legal aid services should be provided for PLHIV and key populations for complaints relating to discrimination, violence protection and other human rights violations.

Specialist HIV legal advice services should be provided to PLHIV and key populations through telephone hotlines and outreach.

- 3.3 Support should be provided to 'know your rights' campaigns and community legal education.
- 3.4 Support should be provided to peer-led advocacy initiatives, so that PLHIV and key populations can self-advocate their rights and negotiate resolution of complaints and protection of their rights in relation to health care services, police, and other bodies.
- 3.5 Support should be provided to community-based HIV organizations to provide human rights advocacy services including advising clients of their human and legal rights, referring clients to relevant grievance bodies, collecting data on human rights issues and conducting advocacy campaigns for law and policy reform.

4. Capacity development

- 4.1 Governments should ensure that parliamentarians are sensitized and trained in HIV-related human rights issues.
- 4.2 Governments should provide training for police and public security personnel on HIV and human rights to address police abuses and to ensure that police act to protect and promote the rights of PLHIV and key populations.
- 4.3 Justice Ministries and professional associations should include HIV-related legal and human rights issues in training of judges, magistrates and prosecutors.
- 4.4 NHRIs should ensure that their staff are trained on HIV-related human rights issues and handling of complaints from PLHIV and key populations.
- 4.5 Ministries of Justice working in partnership with the legal profession should ensure the creation of a trained and sensitized legal work force with expertise in providing legal services to PLHIV and key populations on issues such as discrimination, police abuses and violence protection.
- 4.6 NGOs and community based organizations including PLHIV organizations should be supported to conduct sensitization, education and training of key sectors such as the law and justice sector, health care services, schools and colleges on HIV-related legal and human rights issues.
- 4.7 Media organizations should ensure staff are sensitized to HIV and human rights issues to ensure media coverage of HIV reduces, rather than compounds, stigma.
- 4.8 HIV-related human rights considerations should be mainstreamed into law and justice programming.

PART I

Introduction, findings and
recommendations

1. Introduction

1.1 Objectives

The objectives of this study were to:

- i. document the experiences of countries of Asia and the Pacific in enacting and enforcing the provisions of national HIV laws addressing HIV-related discrimination and other HIV-related human rights violations;
- ii. describe additional or alternative approaches (other than inclusion of protections of rights within national HV laws) that have been pursued in Asia and the Pacific for the protection and promotion of human rights in the context of HIV;
- iii. supplement the findings of the review with inputs from consultations with civil society, government partners, UN agencies and other stakeholders; and
- iv. provide recommendations to improve legal protections for people living with HIV (PLHIV) and other key populations.¹

1.2 Methodology

The study was conducted in the period June 2012 – December 2012. It involved the following steps:

- i. Development of a draft paper based on a literature review. The focus of the paper was on low and middle-income countries of Asia and the Pacific, with particular attention to case studies of the experience of states with national HIV laws (Cambodia, China, Fiji, Lao PDR, Mongolia, Papua New Guinea, Philippines and Viet Nam).
- ii. Circulation of the draft paper to receive inputs from stakeholders including national legal experts, UN country offices, PLHIV networks and other civil society stakeholders.
- iii. Travel to Papua New Guinea (September 2012) to further explore the case study and consult on recommendations with UN, government and civil society partners. Travel to China (November 2012) to attend a national legal workshop and consult with UN agencies and legal experts on the case study.
- iv. Revision of the draft paper to develop a final report, based on all inputs. The final report includes regional recommendations. Some suggestions for consideration are also made in the respective country chapters. Detailed country-specific

1 The term 'key populations at higher risk of HIV' or 'key populations' refers to those who are most likely to be exposed to HIV or to transmit it, and whose engagement is critical to a successful response. In all countries, key populations include people living with HIV. In most settings, men who have sex with men, transgender persons, people who inject drugs, sex workers and their clients, and sero-negative partners in sero-discordant couples are at higher risk of exposure to HIV than other people.

recommendations are provided for Papua New Guinea, where a country visit was conducted.

1.3 Rationale and focus

The UN *Political Declaration on HIV/AIDS* (2011) reaffirmed that the full realization of human rights and fundamental freedoms for all is an essential element in the global response to HIV (see Annex III for a description of the human rights relevant to HIV recognized by international human rights law). The enactment of laws to protect the human rights of PLHIV and key populations at higher risk of HIV is essential to creating an enabling environment for effective HIV responses.² The UN Economic and Social Commission for Asia Pacific (ESCAP) *Resolution 66-10* (2010) calls on member states to ground universal access to HIV services in human rights and to address legal barriers to HIV responses, and ESCAP *Resolution 67-9* (2011) commits states to initiate reviews of national laws, policies and practices to enable the full achievement of universal access targets with a view to eliminating all forms of discrimination against PLHIV and key affected populations.

This study is intended to inform the efforts of governments and civil society to strengthen the enabling legal environment for HIV responses. The focus is both on the content of protective laws and issues that arise in effective implementation of protective laws. Ensuring protective legislation is in place is insufficient – attention must also be paid to how the law is implemented and enforced. In his 2012 Report on HIV/AIDS to the UN General Assembly, UN Secretary-General Ban Ki-Moon observed:

The world must move from rhetoric to reality in the commitment to a rights-based approach to HIV. All countries should undertake an immediate, comprehensive review of national legal and policy frameworks to remove obstacles to effective and rights-based AIDS responses. Meaningful laws prohibiting HIV-based discrimination should be in place in all settings and should receive implementation support and include concrete mechanisms and services to increase access to justice for all people affected by the epidemic.³

The Report of the Global Commission on HIV and the Law (2012) also emphasized the need to strengthen implementation and enforcement of protective laws:

Often, legislation commits a nation to guaranteeing internationally affirmed human rights of equality, liberty and health. But for many reasons (such as lack of resources, political chaos or interpretations of religion), governments frequently fail to uphold

2 See: OHCHR & UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights* Geneva; OHCHR and UNAIDS; OHCHR & UNAIDS (2007) *Handbook on HIV and Human Rights for National Human Rights Institutions*, Geneva; OHCHR & UNAIDS; Jurgens R. et al., (2007), *Taking action against HIV and AIDS: Handbook for Parliamentarians*, Geneva; UNAIDS, UNDP and the Inter-Parliamentary Union; UNAIDS (2011), *Background note: Thematic Segment: HIV and Enabling Legal Environments 29th Meeting of the UNAIDS Programme Coordinating Board, 13-15 December 2011*. Geneva: UNAIDS.

3 *United to end AIDS: achieving the targets of the 2011 Political Declaration: Report of the Secretary-General Implementation of the Declaration of Commitment on HIV/AIDS and the Political Declarations on HIV/AIDS, A/66/757*, 2 April 2012, p.24.

these obligations. National legislation may prohibit discrimination, but the law is often ignored, laxly enforced or aggressively flouted...

To make law real on the ground, the state must educate health care workers, legal professionals, employers and trade unionists, and school faculties about their legal responsibilities to guarantee inclusion and equality. People living with or affected by HIV must be informed of their rights. The legal ideal of non-discrimination must be defended by enforcement: prompt and affordable access to redress in cases of violations, including affordable, accessible legal services and confidentiality of proceedings.⁴

This study identifies the laws that states of Asia and the Pacific have put in place to provide legal protections against HIV-related human rights violations and the lessons learned from implementation and enforcement. These laws include omnibus national HIV laws, protections enshrined in national constitutions, and rights under general laws such as laws relating to employment, disability and health.

Some countries in this region have had laws in place addressing HIV-related human rights violations for over a decade. Yet little research has been conducted to assess the impact of these laws on individuals, institutions and society more broadly. This study examines how these laws have been operationalized, enforced and applied, the obstacles that PLHIV and key populations face in claiming their rights under the law, and the experience of countries in implementing legal empowerment and access to justice approaches.

This study sought to explore the factors that might be limiting the impact of national HIV laws and other protective laws. Ongoing reports of discrimination against PLHIV and key populations across the region suggest that stronger legal, educational and community empowerment responses to discrimination are required. The *People Living with HIV Stigma Index, Asia Pacific Regional Analysis*⁵ found that HIV-related stigma and discrimination are evidenced across all areas of life, including in the key areas of employment and health care, in nine countries in Asia and the Pacific.⁶ However, most people who experienced rights abuses did not attempt to seek redress through legal mechanisms. Of the people who did attempt legal redress, most had not been successful within 12 months. Subsequent national reports of the *People Living with HIV Stigma Index* have documented similar findings.⁷

This study explores factors that contribute to the lack of utilization of protective laws by PLHIV and key populations to seek legal redress for discrimination and other human rights abuses. It seeks to assess the impact of the protective laws that exist in Asia and the Pacific, whether these laws have made a meaningful contribution to supporting a human rights-based approach to national HIV responses, and how legal frameworks can be strengthened based on the lessons that have been learned.

4 Global Commission on HIV and the Law (2012), *Risks, rights and health*, New York: UNDP, p.18.

5 GNP+, ICW, IPPF, UNAIDS (2011), *People Living with HIV Stigma Index, Asia Pacific Regional Analysis 2011*, Geneva: UNAIDS.

6 Bangladesh, Cambodia, China, Fiji, Myanmar, Pakistan, Philippines, Sri Lanka, and Thailand.

7 National reports are available at <http://www.aidsdatahub.org>.

Drawing on lessons from country experiences, the study sought to identify recommendations focusing on three key areas:

- i. *Legislation*: priority issues that protective laws should address;
- ii. *Access to justice*: the importance of legal aid, community legal education and legal empowerment; and
- iii. *Capacity development*: strengthening the capacity of law and justice institutions (including parliamentarians, the judiciary, police and national human rights institutions) and other sectors to respond to HIV-related human rights issues.

The study does not focus on the impact of criminalization of key populations, although it is important to acknowledge that punitive criminal laws and police practices contribute to reluctance to seek legal redress under protective laws and obstruct the enjoyment of human rights and fundamental freedoms of sex workers, people who inject drugs, transgender people and men who have sex with men (MSM). The harmful impacts of criminalization of key populations have been described in previous studies.⁸

2. Findings and recommendations

2.1 National HIV laws

Omnibus national HIV laws

Omnibus national HIV laws are laws that seek to comprehensively address all the legal aspects of HIV in one piece of legislation. In Asia, the first national HIV laws were introduced in the mid-1990s. Mongolia enacted its first *Law on HIV/AIDS Prevention* in 1993 and Viet Nam issued an *Ordinance⁹ on HIV/AIDS Prevention and Control* in 1995. Comprehensive omnibus national HIV laws were enacted in the Philippines in 1998 and Cambodia in 2002. By 2012, eight countries¹⁰ of the Asia Pacific region had enacted omnibus national HIV laws: Cambodia, China, Fiji, Lao PDR, Mongolia, Papua New Guinea

8 The impact of criminalization on human rights has been described in other UNDP regional studies: Godwin J. (2012), *Sex work and the Law in Asia and the Pacific*, Bangkok: UNDP; Godwin J. (2010), *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action*, Bangkok: UNDP; Global Commission on HIV and the Law (2011), *Report of the Asia Pacific Regional Dialogue*, Bangkok: UNDP Asia Pacific Regional Office.

9 This report includes ordinances within the broad definition of enforceable laws. In Viet Nam, the hierarchy of laws includes 'Laws' issued by the National Assembly and 'Ordinances' issued by the Standing Committee of the National Assembly.

10 The jurisdiction of Taiwan (Province of China) also has a comprehensive HIV law: *HIV Infection Control and Patient Rights Protection Act* (2007) (originally the *AIDS Prevention and Control Act* of 1990). Pohnpei, a state of the Federated States of Micronesia, has also enacted a comprehensive HIV law: *Pohnpei HIV Prevention and Care Act of 2007*.

(PNG), Philippines and Viet Nam. A further three countries (India,¹¹ Nepal¹² and Pakistan¹³) have prepared draft omnibus national HIV bills for consideration by their parliaments. Together, these diverse countries have accumulated substantial experience in drafting legislation for HIV-related human rights protections.

These omnibus HIV laws typically address a wide range of issues, including:

- public health requirements (such as regulation of HIV testing and safety of the blood supply);
- civil and political human rights and fundamental freedoms (such as rights to non-discrimination, equality, liberty, security of the person and privacy);
- social and economic human rights (such as the right to health and the right to information and education);
- roles and responsibilities of national agencies in the HIV response.

All of these omnibus national laws state that HIV-related discrimination and breach of confidentiality regarding HIV status are unlawful (subject to exceptions). In most cases, coerced or compulsory HIV testing is also prohibited (subject to exceptions) and informed consent is required prior to HIV testing. Some of these laws also establish an enforceable right to HIV treatment and prevention services. Each national HIV law has its unique features, strengths and weaknesses, as shaped by the legal traditions of the country concerned, the political processes surrounding the history of the legislation and the society's religious and cultural norms.

These laws include criminal or administrative penalties that apply to persons who violate rights, and some laws also explicitly enable individuals to seek legal redress such as compensation through the courts. Enforcement of these laws generally relies on individuals making complaints in the event that their rights are violated. The law may then be enforced either by an individual launching an administrative or civil court action in the individual's own name, or by a prosecutor or police officer launching a criminal prosecution against the wrongdoer on behalf of the state. In some countries, cases may be handled as administrative complaints without necessarily resorting to the courts (Viet Nam, the Philippines).

11 *HIV and AIDS (Prevention and Control) Bill 2012* (India). Several versions of a national HIV Bill have been proposed in India over the last decade but none have been passed.

12 *HIV and AIDS Prevention, Treatment and Rights Protection Bill (2007)* (Nepal). A legal audit was carried out in 2004 by the National Centre for AIDS and STD Control, the Policy Project and FWLD. As a result, a Bill was drafted but it did not make it through the Cabinet process. A revised Bill was submitted to Government in 2007.

13 *HIV & AIDS Prevention and Treatment Bill, 2007* (Pakistan). Available at: <http://www.nacp.gov.pk/introduction/national-HIV-AIDS-Law.pdf>

Enshrining human rights principles in national HIV laws

The benefit of a well-drafted national HIV law is that it can create an enabling legislative framework for the national response to HIV through a single law that defines a consistent human rights-based approach informed by an explicit statement of principles.

For example, Fiji's *HIV/AIDS Decree* is prefaced by a statement that, when interpreting or applying the Decree or exercising powers, duties or functions all persons and courts should, as far as possible, apply the principles of international human rights laws as defined by relevant treaties and the standards identified by the United Nations *International Guidelines on HIV/AIDS and Human Rights* and the United Nations *Declaration of Commitment on HIV/AIDS* (for the full text of Fiji's Guiding Principles, see Annex V).¹⁴

Another example is provided by the national HIV law of Lao PDR, which states the principle that HIV control and prevention should be carried out "ensuring that equality, justice, compassion, and non-discrimination and non-stigmatization principles are respected", and "ensuring the principles of confidentiality and privacy for people living with HIV/AIDS".¹⁵

The *Philippine AIDS Prevention and Control Act* is also prefaced with a statement of principle, as follows:

AIDS is a disease that recognizes no territorial, social, political and economic boundaries for which there is no known cure. The gravity of the AIDS threat demands strong State action... discrimination, in all its forms and subtleties, against individuals with HIV or persons perceived or suspected of having HIV shall be considered inimical to individual and national interest.¹⁶

The statement of principles in Viet Nam's national HIV law refers to principles of multi-sectoral collaboration, social mobilization, integration of HIV prevention and control activities into socio-economic development programmes, harm reduction intervention measures in the prevention of HIV transmission, elimination of stigma and discrimination and facilitation of HIV-infected people and their family members to participate in prevention and control.¹⁷

The *Pohnpei HIV Prevention and Care Act* (Federated States of Micronesia) commences with the statement that "discrimination, in all its forms and subtleties, against individuals with HIV, or persons perceived or believed as having HIV shall be considered inimical to individual and state interest".

14 Section 3, *HIV/AIDS Decree 2011* (Fiji).

15 Article 6, *Law on HIV/AIDS Control and Prevention 2010* (Lao PDR).

16 Section 2, *Philippine AIDS Prevention and Control Act of 1998*.

17 Article 3, *Law on HIV/AIDS Prevention and Control 2006* (Viet Nam).

Punitive provisions undermine a human rights-based approach

Enactment of an omnibus national HIV law provides an opportunity to proclaim overarching principles and a commitment to a human rights-based approach, but it also carries risks. The risk of a poorly drafted or misconceived national HIV law is that it may entrench punitive or discriminatory approaches that undermine public health. The following risks should be considered when deciding whether to address issues through a national HIV law:

- If not drafted carefully, national HIV laws can contain unclear or vague provisions giving rise to uncertainty or can leave out important concerns;
- Sometimes punitive provisions are introduced during the political or legislative process, such as compulsory testing for certain populations or industries, or heavy penalties for non-disclosure of HIV status to sexual partners. Once such provisions are enacted, it may be difficult to remove them.
- These HIV laws 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, and civil society including PLHIV and key populations are often unaware of these omnibus laws.¹⁸

Punitive provisions include compulsory or mandatory HIV testing of specific populations, mandatory disclosure of HIV status, HIV-specific laws that criminalize HIV exposure or transmission, and laws that criminalize sex work, homosexuality or drug use. Mandatory HIV testing and forced disclosure violate human rights to privacy, freedom and security of the person. These measures also contribute to stigma and discourage people from accessing HIV prevention, treatment, care and support services. Provisions of national HIV laws identified in this study that contradict the principles of a human rights-based approach include laws that allow compulsory testing of military personnel (Viet Nam and Fiji)¹⁹, and laws that require the consent of a parent or guardian for HIV tests conducted on adolescents under 18 years old (e.g., Cambodia).²⁰ China's *AIDS Regulations* have been criticized because they do not override other punitive laws, such as mandatory testing laws for certain industries (see 4.5.2).

Laws that impose criminal penalties for HIV non-disclosure, exposure or transmission are stigmatizing and may conflict with human rights principles. The national HIV laws of Cambodia, China and Lao PDR criminalize intentional transmission of HIV, and PNG's national HIV law criminalizes non-disclosure of HIV status to sexual partners.²¹ The

18 UNAIDS (2008), *Guidance Note: Addressing HIV-related Law at National Level*, Geneva: UNAIDS.

19 Article 20 of Decree No. 108/2007/Nd-Cp of June 26, 2007, *Detailing the Implementation of a Number of Articles of the Law on HIV/AIDS Prevention And Control* (Viet Nam); and Sections 22(2) and 29 of the *HIV/AIDS Decree 2011* (Fiji).

20 *Law on the Prevention and Control of HIV/AIDS 2002*, Article 19 & National AIDS Authority (2005) *Implementing Guidelines of the Law on the Prevention and Control of HIV/AIDS*.

21 Cambodia: *Law on the Prevention and Control of HIV/AIDS 2002*, Articles 18 & 50; China: *AIDS Regulations*

Global Commission on HIV and the Law has recommended that countries not enact laws that explicitly criminalize HIV transmission, exposure or failure to disclose HIV status, because invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counter-productive to enhancing public health. In most instances it is more effective to address sexual behavior through voluntary education, counseling and health promotion, rather than legal penalties. Where exceptional cases of deliberate HIV transmission arise, these should be dealt with under general laws such as aggravated assault offences in penal codes. The Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Global Commission on HIV and the Law recommended that states prosecute HIV transmission that is both actual and intentional, using general criminal law, rather than HIV-specific laws.²²

Fiji's *HIV/AIDS Amendment Decree 2011* provides an example of good practice. The *HIV/AIDS Amendment Decree 2011* was passed to remove HIV-specific criminal offences for HIV transmission or exposure from the original *HIV/AIDS Decree 2011*. The Government of Fiji decided that, as prosecutions could occur under general criminal laws, there was no need to provide an HIV-specific offence.

Participatory approaches to developing legislation

Participation of PLHIV and key populations in the development of legislation produces laws that are responsive to needs, protective of human rights and supported by communities. Participation also helps to build community knowledge about and confidence in the law, laying foundations for building the capacity of communities to claim their rights. Enactment of a national HIV law can provide an opportunity to bring stakeholders together (e.g., legislators, PLHIV organizations and other civil society stakeholders) to reach agreement on priorities. Examples of participatory processes include:

- Fiji's *HIV/AIDS Decree* was drafted after a lengthy consultation period engaging the Ministry of Health, UN agencies, and civil society groups.
- The *Law on HIV/AIDS Control and Prevention* of Lao PDR was enacted after a consultation process engaging civil society, including PLHIV, through the Lao Network of PLHIV (LNP+), supported by UN partners.
- In 2011, the Philippine Legislators' Committee on Population and Development conducted community consultations on a new national HIV law, which engaged UN agencies and civil society including PLHIV and key populations through Pinoy Plus Association, Inc. (PPA+, a national network of people living with HIV), Action for Health Initiatives, Inc. (ACHIEVE) and Youth AIDS Filipinas Alliance, Inc. (YAFA).

2006, Articles 38 & 62; Lao PDR: *Law on HIV/AIDS Control and Prevention 2010*, Article 69; PNG: *HIV/AIDS Management and Prevention Act 2003*, Section 24; See also Viet Nam: *Law on HIV/AIDS Prevention and Control 2006*, Article 8 (penalty not specified). The *Philippine AIDS Prevention and Control Act* Section 34 also requires disclosure of HIV status to sexual partners, no penalty is specified. The *Infectious Diseases Act 1977* of Singapore also requires disclosure to sexual partners (Section 23). *Communicable Diseases Prevention and Control Act* Section 1511 of the Marshall Islands criminalizes HIV transmission.

22 Global Commission on HIV and the Law (2012), *Risks, rights and health*, New York: UNDP, p.25; UNAIDS (2008), *Criminalization of HIV transmission: Policy Brief*, Geneva: UNAIDS.

- India's *HIV/AIDS Bill 2007*²³ was developed after extensive consultations with PLHIV, key populations, women's and children's groups, health care providers, trade unions, lawyers, State Governments, State AIDS Control Societies and Central Government Ministries. The Bill stalled after disagreements involving the Ministry of Justice, Ministry of Home Affairs and the National AIDS Control Organisation, which indicates the need to ensure all ministries are supportive of reform proposals at an early stage.

It is important that national HIV laws are periodically reviewed and updated, based on community inputs. Reviews can identify new developments that require a legislative response. For example, reform Bills tabled in 2011-2012 in the Philippines proposed measures to respond to a rapid escalation of the epidemic among MSM and people who inject drugs. Reviews can also recommend the removal of existing provisions that contradict human rights principles or are harmful to public health e.g., a review of the national HIV law conducted in Mongolia in 2012 led to the removal of HIV-related travel and employment restrictions, and strengthening of the human rights protections of the existing national HIV law.²⁴

Lessons from Africa

There may be lessons to be learned from the experience of countries in Africa. Concerns were raised by human rights non-government organizations (NGOs) after many national HIV laws were enacted in the period 2005-2010 in African countries that contained provisions that conflict with a human rights-based approach. A study of HIV legislation in Africa made the following findings:²⁵

- 19 countries in Africa had adopted HIV-specific legislation;
- Several HIV-specific laws fail to integrate human rights principles;
- Most HIV-specific laws in Africa do not integrate accurate information and proven strategies about HIV;
- Most HIV-specific laws in Africa fail to address protection and access to services for vulnerable groups.

Africa has seen the proliferation of national HIV laws that address some types of HIV-related discrimination, but also include punitive measures such as mandatory HIV-testing for members of key populations (e.g., sex workers), pregnant women or those wishing to

23 The 2007 Bill was the basis for the *HIV and AIDS (Prevention and Control) Bill 2012* (India).

24 UNAIDS (2013), *UNAIDS applauds Mongolia for removing restrictions on entry, stay and residence for people living with HIV*, Press statement, 31 January 2013, Geneva: UNAIDS.

25 Eba P. (2008), *HIV specific legislation in Africa: Are human rights concerns addressed?* (presentation) AIDS and Human Rights Research Unit, University of Pretoria. The 19 African countries with national HIV laws are: Mauritania, Guinea, Guinea Bissau, The Democratic Republic of Congo, Cape Verde, Mali, Niger, Sierra Leone, Guinea Equatorial, Chad, Togo, Burkina Faso, Benin, Burundi, The Central African Republic, Tanzania, Kenya, Mauritius and Madagascar. Eba identifies countries with rights based measures to include Madagascar: Rights to HIV services and prevention including condoms in prisons; Togo: protection of women from sexual violence including marital rape; Mauritius: Harm reduction measures.

marry. Some of these laws provide for mandatory disclosure of a person's HIV status to others, such as a spouse or sexual partner, and contain broadly worded provisions that criminalize HIV transmission and exposure.²⁶

In the African context, efforts have been made to promote model national HIV laws. For example, the Southern African Development Community Parliamentary Forum developed a rights-based *Model Law on HIV* in 2008.²⁷ In 2012 the East African Legislative Assembly passed the *HIV and AIDS Prevention and Management Act, 2012*, which is intended to provide a regional rights-based legal framework for five African countries (Tanzania, Kenya, Uganda, Rwanda and Burundi).²⁸ The East African Act was welcomed by PLHIV organizations because it contains rights protections and does not criminalize HIV transmission.²⁹

Although model legislation can be a powerful tool to promote best practice, in some instances a political backlash has occurred in response to efforts to introduce rights-based laws. For example, in Uganda an *HIV/AIDS Prevention and Control Bill 2010* and an *Anti-Homosexuality Bill* have been proposed that include highly draconian provisions (including compulsory testing of drug users, pregnant women and sex workers; and severe penalties for homosexual conduct).³⁰

2.2 Rights under general laws

2.2.1 Constitutional rights

India does not have a national HIV law. However, many PLHIV in India have successfully used the legal system to obtain redress based on constitutional rights. A body of law has been built up over the last 15 years in India that demonstrates how constitutional rights may be used to protect individual's rights in such areas as non-discrimination, access to health care and privacy (see South Asia Chapter 9.1).

Litigation based on constitutional rights in India has resulted in the establishment of important legal principles, including the right of PLHIV to non-discrimination in employment, the right of PLHIV to antiretroviral therapy, the right of prisoners to health care, decriminalization of homosexuality, and recognition of sex workers' human rights (in a context in which most aspects of the sex industry remain criminalized). This has been enabled by the ability of litigants to obtain court orders suppressing identity at the outset of the litigation so that they can seek justice without fear of being exposed.

26 Clayton M., Mabote L., Hikum F. (2012), Human rights in an era of treatment as prevention, *HIV/AIDS Policy and Law Review*, Vol 16, p.12; See also: Pearshouse R. (2008), Legislation contagion: building resistance *HIV/AIDS Policy and Law Review*, 13, No 2/3, Dec 2008.

27 See: http://www.justice.gov.za/vg/hiv/docs/2008_Model-Law-on-HIV-in-Southern-Africa.pdf

28 Eastern Africa National Networks of AIDS Service Organizations (2012), *Press release: The East African Legislative Assembly passes the EAC HIV & AIDS Prevention and Management Bill, 2012*. The Bill will now await Assent by the EAC Heads of States before it can become an Act of the East African Community.

29 East Africa: Regional HIV Bill passed without criminalization clause, *Irin News*, 27 April 2012.

30 Human Rights Watch (2010), *Comments to Uganda's Parliamentary Committee on HIV/AIDS and Related Matters about the HIV/AIDS Prevention and Control Bill*, 13 May 2010. International Federation for Human Rights (2012), *Uganda: "Anti-homosexuality" bill must be unconditionally rejected*, 7 December 2012.

In the Indian case of *MX v. ZY*,³¹ the Bombay High Court held that a public sector employer cannot deny a person employment solely because the person is HIV-positive, and that the determination of whether a person is capable of performing their job must be made by conducting an individual enquiry taking into account the state of medical knowledge. The denial of employment on the ground of HIV status was found to infringe rights under the Constitution of India to equal treatment before the law and the right to life and personal liberty. The court suppressed the identity of the employee.

The availability of a formal process for public interest litigation has also been beneficial in India. The rules relating to public interest litigation in India allow NGOs and other organizations to commence legal action on matters of public interest. This means that a case can be brought to court without exposing an individual to the costs and stresses associated with complex, lengthy litigation.

Apart from India, this review did not identify examples of the successful use of constitutional rights to protect the human rights of PLHIV through concluded court proceedings.

There are several examples of the successful use of human rights guaranteed by national constitutions in the context of human rights violations affecting key populations. The status of women and of key populations such as sex workers, transgender people and MSM have been improved as a result of litigation based on constitutionally guaranteed human rights. For example:

- Laws criminalizing sex between adult men have been held to be invalid due to violation of constitutionally guaranteed human rights to privacy and equality. Judgments in Fiji,³² Hong Kong SAR,³³ the Philippines,³⁴ Nepal³⁵ and India³⁶ have interpreted constitutional rights to equality before the law, non-discrimination and/or to privacy to apply to the protection of the rights of homosexual people in a variety of circumstances. These cases drew from international human rights principles, including the rights to equality, non-discrimination and privacy under the

31 AIR 1997 Bom 406.

32 *Nadan and McCoskar v. State* [2005] FJHC 500. The Court decriminalized homosexual sex between adults taking into account the right to privacy under the Constitution of Fiji and the right to privacy defined by Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

33 *Leung T.C. William Roy v Secretary of Justice (HK)* [2006] HKCA 106; *Secretary for Justice v Yau Yuk Lung Zigo & Another* [2007] 3 HKLRD 903.

34 *Ang Ladlad LGBT Party represented by Danton Remoto v. Commissioner of Elections*, Supreme Court of Philippines at Baguio City, 8 April 2010. The Court noted the importance of the right to non-discrimination (including in relation to electoral participation) under the *Universal Declaration of Human Rights* (UDHR) and the ICCPR.

35 *Sunil Babu Pant and others v Nepal Government and others* [2008] 2 NJA L.J. 261-286. This case addressed the rights of transgender persons and same sex couples. The Court noted the importance of the rights to equality and privacy Articles 2, 16 and 17 of the ICCPR in concluding that a state should provide the right of a transgender person to their identity.

36 *Naz Foundation India Trust v. Govt of NCT* (2009) 160 DLT 277; W.P. (C) No. 7455/2001 of 2009 (Delhi HC). The Court based its decision on rights guaranteed under the Constitution of India and noted the importance of the rights to privacy under the *Universal Declaration on Human Rights* (UDHR) and the right to health under the *International Convention on Economic Social and Cultural Rights* (ICESCR) in reading down the offence of unnatural sex so as to decriminalize adult homosexuality.

Universal Declaration on Human Rights and the *International Covenant on Civil and Political Rights*, and the right to health under the *International Covenant on Economic, Social and Cultural Rights*. The *Naz Foundation Case* took into account evidence of the adverse impact on HIV responses and public health of criminalization of homosexuality.

- Judgments in Pakistan³⁷ and Nepal³⁸ have interpreted constitutional rights to equality before the law to apply to protection of the rights of transgender people.
- In 2002, the Supreme Court of Nepal ruled that provisions of the criminal law that applied a lighter penalty to rapists in cases where the person raped was a sex worker were discriminatory and unconstitutional.³⁹ The Court held that sex workers should not be discriminated against in the criminal law with respect to penalties that apply to perpetrators of rape, given the constitutional rights to equality and to choose one's own profession.⁴⁰
- In 2011, the Supreme Court of India recognized that sex workers are protected by the right to live with dignity guaranteed by the *Constitution of India*.⁴¹
- In Bangladesh, the Supreme Court recognized the constitutional rights of sex workers who had been evicted from brothels after police raids and detained in vagrant homes. The Supreme Court held that sex workers enjoy constitutional protection of their human rights to respect, dignity, privacy, life and liberty guaranteed by the Constitution. Eviction had deprived the sex workers of their livelihood, which amounted to deprivation of their right to life.⁴²

With the exception of the *Naz Foundation case*, HIV was not a significant issue in these court cases involving key populations. Nonetheless, these cases contribute to creating an enabling legal environment for HIV responses by reducing stigma and discrimination affecting key populations at risk of HIV.

37 In response to a petition filed by Islamic jurist Dr Mohammad Aslam Khaki, the Supreme Court made a series of rulings in 2009. See: Khan H. (2010), Eunuchs in Pakistan want laws against harassment *Central Asia Online*, 20 January 2010.

38 *Sunil Babu Pant and others v Nepal Government and others* [2008] 2 NJA L.J. 261-286

39 *Muluki Ain (Country Code)*, Chapter 14 prescribes the punishment for rape.

40 Supreme Court of Nepal in *Sapana P. Malla for FWLD v. HMG/Nepal*, Publication of Judgments relating to Human Rights: Special Issue, Kathmandu: Supreme Court, 2002 at 144-151; Shreshta P. (2006), *Prostitution and Public Health: Various Forms of Regulating Methods - An Analysis of Current Legal Responses to Prostitution in Nepal*. Available at: http://www.fwld.org/administrator/uploads/free_articles/6.pdf

41 *Budhadev Karmaskar Vs. State of West Bengal* (2011) 11 SCC 538; (2011) STPL Web 133 SC JT (2011) 2 SC 115; Supreme Court seeks details of rehabilitation schemes for sex workers, West Bengal, May 2011, http://www.west-bengal.com/west_bengal/supreme-court-seeks-details-of-rehabilitation-schemes-for-sex-workers/105108.html; The Court passed the order while dismissing the appeal filed by Budhadev Karmaskar challenging the life imprisonment imposed by a court in Kolkata for the murder of a sex worker in 1999.

42 *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and Ors v. Government of Bangladesh and Ors* 53 DLR (2001) 1; (2000) 3 CHRLD 217.

The difficulty with relying on constitutional protections for addressing HIV-related rights violations is that constitutional litigation often requires protracted, complex and expensive legal proceedings in the national court system, which may be subject to appeals. For example, the *Naz Foundation case* in India commenced through a court case filed by an NGO in 2001. Appeals relating to the case were still being considered in the Supreme Court of India in 2012, more than a decade later.

Ideally, PLHIV and organizations representing the interests of PLHIV should have the option of challenging discriminatory practices and other rights violations either through formal constitutional court challenges or through more accessible and less formal complaint mechanisms such as National Human Rights Institutions (NHRIs). Many countries have NHRIs that have a general mandate to accept complaints of human rights violations. NHRIs or other specialized agencies may also be able to investigate alleged HIV-related rights violations on their own initiative.⁴³ In some cases the mandate of these agencies to receive HIV complaints is created through provisions of the national HIV law (e.g., the PNG HIV law empowers the Ombudsman Commission to receive complaints). In other cases, HIV complaints are accepted under the general human rights mandates of NHRIs as defined by national constitutions or human rights legislation. An Asia Pacific regional workshop on HIV for NHRIs held in 2010 issued a statement recommending that NHRIs:

- Inquire, investigate and provide prompt and appropriate remedies for complaints related to HIV received from PLHIV, third parties, and own motions, and refer cases to relevant authorities when necessary.
- Monitor national laws, policies, practices and programmes and ensure their compliance with international human rights standards and advocate for the rights of people living with and affected by HIV.⁴⁴

2.2.2 Application of disability discrimination laws to HIV and AIDS

Legislative protections against discrimination on the basis of disability may also provide an avenue for seeking redress for PLHIV. The *Convention on the Rights of Persons with Disabilities* (CRPD) contains a 'social model' of disability, which is broad enough to encompass HIV. The CRPD does not explicitly include HIV or AIDS within its open-ended definition of 'disability', but countries may do so in their domestic laws. This social model of disability recognizes that factors such as stigma can be disabling, as well as physical factors. Few countries in the Asia Pacific region have strong disability discrimination laws. This may change as governments ratify the CRPD, which entered into force in 2008.⁴⁵ Ratifying states must amend national laws to protect persons with disabilities from discrimination.

43 E.g., Human Rights Commissions in the Philippines and India, the Ombudsman Commission in PNG and the Hong Kong Equal Opportunity Commission.

44 Regional HIV/AIDS and Human Rights Workshop for national human rights institutions (NHRIs), 10-12 March 2010, Bangkok.

45 Asia Pacific states that had ratified or acceded to CRPD by 2010 included: Australia, Bangladesh, China, Cook Islands, India, Malaysia, Maldives, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Thailand, and Vanuatu.

There are examples of PLHIV using disability discrimination laws to enforce their rights in Hong Kong SAR (see below) and Australia.⁴⁶ In Australia, HIV-related discrimination is covered by the *Disability Discrimination Act 1992*, which includes “the presence in the body of organisms capable of causing disease” within the definition of disability. This phrase is also used in the definition of disability in New Zealand’s *Human Rights Act 1993*. A study of European legislative protections found that 16 European countries include HIV within their disability discrimination laws.⁴⁷ In the United States, the *Americans with Disabilities Act of 1990* does not mention HIV or AIDS directly. However the US Supreme Court has confirmed that HIV and AIDS are ‘disabilities’ under the Act.⁴⁸

Inclusion of HIV within disability laws is sometimes opposed by PLHIV because of the stigma of being labeled as ‘disabled’, particularly given the importance of challenging false assumptions regarding the capacity of PLHIV to work, attend schools, and live full and active lives. Some disability groups may also be concerned about inclusion of HIV within disability laws, given that these issues are traditionally dealt with in separate policies and programmes.⁴⁹ However, given the adoption of the broad ‘social model’ of disability by CRPD, countries should consider whether inclusion of HIV within national disability discrimination laws could offer an additional legal avenue to protect the rights of PLHIV.

Examples of disability discrimination laws that may offer some legal protections for PLHIV include:

- The *Law of the People’s Republic of China on the Protection of Disabled Persons* defines avenues through which persons with disabilities can seek redress for rights violations from competent authorities.
- Hong Kong’s *Disability Discrimination Ordinance* explicitly addresses HIV and AIDS.⁵⁰ PLHIV, their families and associates are protected against discrimination, harassment or vilification in the areas of employment, education, services and facilities, and clubs and sporting activities. A complaint may be made to the Hong Kong Equal Opportunity Commission (HKEOC) or the courts. The HKEOC can conciliate complaints, support court actions, commence litigation in its own name, intervene in court proceedings or conduct its own investigations. The *Richland Gardens case* demonstrates how the HKEOC can exercise powers to protect human rights of PLHIV through negotiation.⁵¹

46 See e.g., cases relating to insurance, prisons, funerals and military employment: Rule J (2001), *HREOC summit for peak disability organisations*, available at: <http://napwa.org.au/news/hreoc-summit-for-peak-disability-organisations>.

47 National AIDS Trust (2007), *Legislative and Judicial Systems in Relation to HIV and AIDS: Results of a European Survey*, London: National AIDS Trust & AIDS Action Europe, p.5.

48 *Bragdon v. Abbott*, 524 US 624. 1998.

49 See Elliott R., Utyasheva L., Zack E. (2009), HIV, disability and discrimination: making the links in international and domestic human rights law, *Journal of the International AIDS Society*, 12:29.

50 Hong Kong Special Administrative Region, *Disability Discrimination Ordinance*, No. 86 of Hong Kong Government, Section 61(2).

51 Richland Gardens - Case Settled out of Court. *EOC Newsletter*, March 2002, Issue No. 21.

- Thailand's *Persons with Disabilities Empowerment Act of 2007* prohibits discrimination against persons with disabilities. Complaints may be made to the National Commission for the Empowerment of Persons with Disabilities or to a court. Persons with disabilities or caregivers may request an organization to represent them.⁵²
- Malaysia's *Persons with Disabilities Act 2008* sets out rights to be enjoyed by persons with disabilities in access to public facilities, public transport, education, employment, information and communication. However, the Act does not explicitly confer a right to take court action for violations and does not establish a complaints procedure.
- The *Magna Carta for Persons with Disability*⁵³ of the Philippines adopts a definition of disability focusing on a person's physical or mental impairment, so HIV is not likely to be considered a disability unless the person has AIDS or is in the symptomatic phase of HIV disease. The *Magna Carta for Persons with Disability* provides remedies for persons with a disability who experience discrimination, public ridicule or vilification.
- *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995* of India provides that certain government bodies cannot dispense with, or reduce in rank, an employee who acquires a disability during his service or deny a promotion to a person on the ground of their disability.
- The *Protection of the Rights of Persons with Disabilities Act*⁵⁴ of Sri Lanka protects the rights of persons with disability relating to employment, education and access to buildings open to the public. A person with a disability or the National Council for Persons with Disabilities may seek a remedy from the High Court.

2.2.3 Other general laws

Few examples have been found of the use of non-HIV specific laws (apart from constitutional rights) to enforce HIV-related human rights in the Asia Pacific region. This may be because many countries do not have national human rights laws or strong human rights provisions in employment laws, health laws, or other general laws. An exception is India, where several successful cases have been litigated in industrial courts and labour courts.

An example of application of rights under the general law is the case of *Xiaoli (Alias) v. The China Times*.⁵⁵ In this case, a Beijing court recognized a violation of the rights of a child with HIV. The court ordered that a public apology and compensation be provided to a child by a newspaper that disclosed the child's HIV-positive status in violation of the child's rights to privacy and reputation under the general law.

52 See Namsiripongpun W. (2011), *Paper 10: Thailand (UN ESCAP series on the Convention on the Rights of Persons with Disability)*, Bangkok: UNESCAP.

53 Republic Act 7277, as amended by Republic Act 9442.

54 No. 28 of 1996.

55 *Xiaoli (Alias) v. The China Times* (Beijing Chaoyang Dist. Ct., July 17, 2006); See: Jianyuan Yang (2008), Media disclosure of individual privacy: a proposed framework for China, *East Asia Law Review* Vol.3:1, 59-84.

Another example involved a complaint filed in the Industrial Court at Mumbai, India. The complainant was a blower in a glass factory. The Industrial Court passed an order declaring that the employer had engaged in unfair labour practices in terminating the complainant's employment, as there was no workplace risk of HIV transmission. The employer was directed to allow the complainant to report on duty and pay him full wages and benefits.⁵⁶ The complainant was reinstated, however the employer refused to include him in subsequent contracts and the employer did not pay him the entire amount of wages due to him. Further court actions were filed for recovery, and for extending the benefits of the subsequent contracts to him. The complainant was successful in all the cases.⁵⁷

Fiji has included HIV non-discrimination provisions in general employment legislation (*Employment Relations Promulgation 2007*) as well as the national HIV law (*HIV/AIDS Decree 2011*).

Some countries have no HIV-specific protective laws (e.g., Thailand and Malaysia). In these countries PLHIV who experience discrimination may be able to argue that discrimination violates a constitutional right (such as the protection from discrimination on the grounds of health status provided by the Thai Constitution⁵⁸), or violates a recommended industry practice⁵⁹ or code of conduct issued by government e.g., Malaysia's *Code of Practice on Prevention and Management of HIV/AIDS at the Workplace*.⁶⁰

2.3 Implementation and enforcement issues

2.3.1 Role of laws in protecting and promoting human rights

Examples of ways in which laws can be implemented and enforced to protect and promote HIV-related human rights include:

- i. Laws can enable individuals who experience rights violations to seek redress through the courts, administrative complaints or alternative dispute resolution (ADR) mechanisms. Redress may be provided through court orders or negotiated agreements/settlements that provide for compensation, reinstatement, a public apology or other remedies intended to provide justice to the individual who has been wronged. Successful court outcomes for individuals can also set useful precedents that clarify legal obligations. This can help other people with similar cases to resolve complaints through negotiation. Successful court outcomes can

56 Lawyers Collective HIV/AIDS Unit, Mumbai. See case note at: <http://www.heart-intl.net/HEART/Legal/Comp/DisabilityLawandHIV.htm>

57 Further case detail provided by personal communication, Veena Johari, April 2013.

58 Article 30 of the *Constitution of the Kingdom of Thailand BE 2550 (2007)* states that unjust discrimination on the grounds of health status shall not be permitted.

59 E.g., Thailand Business Coalition on AIDS (TBCA) Employers' Confederation of Thailand (ECOT) International Labour Office (ILO) (2003), *Employers' Handbook on Managing HIV/AIDS in the Workplace Book*, Bangkok: ILO.

60 Malaysia Ministry of Human Resources (2001), *Code of Practice on Prevention and Management of HIV/AIDS at the Workplace*, Kuala Lumpur: Ministry of Human Resources.

also play an educative role in the community, reducing the likelihood that others will experience rights violations in similar circumstances.

- ii. Laws can enable public interest litigation on behalf of a class of individuals to achieve fundamental or systemic changes through the courts, such as a declaration that a discriminatory law is invalid or an order that a discriminatory policy or practice must be changed across an entire sector or industry. For example, in India, the law criminalizing unnatural sex was 'read down' by the courts so as to effectively decriminalize homosexuality as a result of public interest litigation taken by an HIV non-government organization concerned that the law impeded HIV prevention efforts and hence violated rights to health and non-discrimination enshrined in the Constitution.⁶¹
- iii. Laws can enable the state to prosecute individuals or organizations for human rights violations and impose criminal or administrative penalties for violations to punish the offender and deter others from offending (fines and/or imprisonment, or disciplinary proceedings against registered professionals). For example, the national HIV laws of the Philippines, Viet Nam and Fiji enable criminal or administrative penalties to be imposed for rights violations.
- iv. Laws can enable guidelines or implementing regulations to be promulgated that prevent human rights violations from occurring in specific sectors (e.g., by promoting compliance with guidelines and standards). For example: in Cambodia action to prevent discrimination in the workplace is required by implementing regulations; and in the Philippines the Civil Service Commission and the Department of Labor and Employment have issued guidelines requiring employers to put in place HIV policies addressing protection from discrimination.
- v. Laws can empower government agencies or national human rights institutions (NHRIs) to actively monitor and address systemic or institutionalized discrimination, e.g., by empowering NHRIs to monitor the human rights environment for PLHIV, to conduct inquiries into discriminatory policies and practices and to issue recommendations for amending discriminatory laws and policies and other actions required to protect human rights.
- vi. Laws can require or guide government budget allocations for particular services or programmes that are required to protect or fulfill human rights. For example, the national HIV law of Viet Nam requires HIV medicines procured from state budgets to be provided free of charge, with priority given to children with HIV.⁶²
- vii. Laws can require the review, amendment or repeal of other laws that undermine or conflict with a rights-based approach, such as HIV-related travel restrictions or laws that criminalize PLHIV or key populations. Laws can also repeal other prior laws or explicitly or implicitly override other laws where there is inconsistency.

61 *Naz Foundation India Trust v. Govt of NCT* (2009) 160 DLT 277 (Delhi HC).

62 Article 39, *Law on HIV/AIDS Prevention and Control of 2006*.

Implementation of protective HIV laws may involve a combination of any or all of these measures. Additional legal protections for key populations may be available from general laws, such as violence protection laws that enable courts to issue restraining orders to address intimate partner violence or threats directed at sexual minorities. Implementation can be supported by promotion of the law through community education, and education targeting specific sectors such as health care workers, uniformed services, the judiciary/magistracy and the legal profession. Parliamentarians can also play a role in supporting implementation.

2.3.2 Challenges in enforcing HIV-related rights through court action

HIV-related stigma and discrimination are widespread across the region.⁶³ However, with the exception of India, there are very few reported cases in which PLHIV have challenged discrimination or other rights violations in the courts. Most cases are resolved without resorting to court proceedings.

Successful court cases under national HIV laws

Notwithstanding the fact that omnibus HIV laws have been on the books for over a decade in some countries, the only examples in the studied countries of reported court judgments where the protective provisions of a national HIV law have been enforced are two cases in Papua New Guinea (PNG). Nine other cases under the national HIV law have been lodged in the PNG courts, but are yet to be concluded. Several other PNG cases have been settled out of court (see 14.2).

In Viet Nam, legal services report a large number of cases arising of complaints under the national HIV law, but the vast majority of cases are resolved through mediation and negotiation, rather than formal court hearings.⁶⁴ One employment discrimination case in China (based on employment law and the national AIDS Regulations) resulted in a successful settlement after a court-supervised mediation (see 4.4.3). Many other discrimination cases in China have been settled through negotiation and ADR processes (see 4.4.1).

This is not to say that other successful resolved court cases exist, but if they have occurred, the results have not been disseminated amongst civil society so as to build a body of jurisprudence and increase confidence in the courts as an avenue for redress.

Successful court cases under general laws

PLHIV and HIV organizations in India have been successful in numerous court cases based on constitutional rights, employment law, patent law and other general laws (see 9.1.3).

Court proceedings have also successfully been used protect the privacy of a child with HIV in China (see 4.3) and by HIV NGOs to challenge pharmaceutical patents for ARVs

63 GNP+, ICW, IPPF, UNAIDS (2011), *People Living with HIV Stigma Index, Asia Pacific Regional Analysis 2011*, Geneva: UNAIDS.

64 UNAIDS and UNDP (2012), *Legal services for people living with HIV and key at-risk populations in Viet Nam: an assessment of the current situation and recommendations for the future*, Hanoi: UNAIDS and UNDP, p.42.

in Thailand (see 9.4). Many HIV cases have been addressed at Village Court level in PNG under the general powers of Village Courts to address use of insulting words and to keep the peace, but the facts of these cases are not recorded (see 14.3.2). Similarly, in the Philippines some PLHIV have used the Barangay (Village) justice system to resolve complaints (see 7.6).

It is likely that many court cases have not been captured by this review. Reasons why this review may not have been able to identify all HIV-related court cases in the countries considered include:

- court actions may have been settled privately through negotiation prior to a court hearing or judgment;
- courts may have decided HIV-related cases, but the decisions of the courts may have not been formally published, or reported in the press;
- court reports may not be systematically analyzed or may not be available in English;
- complainants may not have been willing to publicly share their experiences of seeking redress through the courts.

Obstacles to enforcement of rights through the legal system

Common obstacles that PLHIV and key populations face in enforcing legal rights include:

- i. lack of knowledge of rights under the law and of mechanisms for enforcing those rights, including alternative dispute resolution (ADR) mechanisms;⁶⁵
- ii. lack of access to legal aid services with expertise in HIV-related issues;
- iii. the cost of legal proceedings and the time commitment involved in legal proceedings, including income foregone and the expense of transport to court and to attend offices of lawyers or prosecutors, particularly for rural and remote communities;
- iv. concerns regarding disclosure of identity when taking a case through the legal system; and
- v. limits on the capacity, resources, mandate and enforcement powers of national human rights institutions in relation to HIV-related complaints.

The absence of success stories in obtaining justice through the courts may act as a disincentive to PLHIV seeking to enforce their rights. The low number of successful court

65 Alternative dispute resolution (ADR) describes processes of settling disputes by means other than litigation (taking a case to court). ADR includes conciliation, mediation and arbitration processes. A conciliation or mediation process provides parties in a dispute an opportunity to settle informally with the assistance of a trained third party. An arbitration process is a more formal method that includes a decision by the arbitrator.

cases taken under HIV laws indicates the importance of ensuring a stronger focus on implementation, including community legal education and improved access to justice.

The PLHIV Stigma Index study found that there were good levels of knowledge of the existence of some national HIV laws e.g., 80 percent of a sample of PLHIV were aware of the national HIV law in Cambodia, 85 percent of a sample of PLHIV were aware of the national HIV law in the Philippines, and 31 percent of a sample of PLHIV were aware of the HIV Decree in Fiji.⁶⁶ However, awareness of the existence of the law does not mean that PLHIV are knowledgeable about the nature of the legal protections provided under these laws and how to enforce their legal rights, or have trust and confidence in the legal system as a mechanism for redress.

Some populations lack confidence that the legal system will deliver a meaningful remedy for human rights violations. In many countries, corruption is common, resulting in a general lack of confidence in the legal system. Lack of trust in the legal system may be a particular concern for criminalized populations such as sex workers, people who use drugs, and MSM. In some contexts, the judiciary and prosecutors are not perceived as independent from the executive branch of government. This may be problematic if a person is seeking to take legal action against a government agency for human rights violations or seeking to persuade authorities to initiate a prosecution of a government agency. Some PLHIV groups have reported a reluctance of the judiciary to accept, hear or enforce cases relating to HIV specifically, or relating to sensitive human rights issues more generally.

A regional study on HIV-related discrimination conducted by Reidpath and Chan observed that in some Asian countries, anti-discrimination laws that originate in countries' efforts to meet international human rights obligations are not necessarily in keeping with local custom.⁶⁷ They argue that in some contexts the legal system at a fundamental level may not be supportive of a human rights-based approach:

(PLHIV) have not sought protection through the courts, and it is clear that the failure to test the laws is not because (PLHIV) are not subject to discrimination... Rather, the system is not structurally geared towards the protection of the rights offered to (PLHIV) under the law.⁶⁸

The observations by Reidpath and Chan were made in 2005, and significant progress has been made since then in strengthening legal protections, although the general finding (that pre-existing norms and values may obstruct enforcement of human rights laws) remains a valid concern.

66 GNP+ et al (2011), op cit., p.47.

67 Reidpath D., Chan K. (2005), HIV discrimination: integrating the results from a six-country situational analysis in the Asia Pacific, *AIDS Care*, Jul;17 Suppl 2, S195-204, p.S199.

68 *Ibid.*

2.2.3 Benefits of strong rights protections and improved access to justice

It is important to emphasize the many benefits that can flow from existence of strong rights-based national HIV laws that are supported by efforts to promote implementation, particularly community legal education, legal empowerment of communities of PLHIV and key populations, access to legal aid and other legal assistance measures.

The existence of rights protections in national HIV laws and general laws can lead to effective resolution of complaints and prevention of rights violations without recourse to the formal legal system. For example, police abuses can be avoided when key populations such as sex workers, people who inject drugs, MSM and transgender people know their rights and have skills to negotiate with police. This can lead to reduced police harassment or other abuses and improved reporting of violence. Paralegals and legally empowered community members can engage in direct negotiations to seek redress for rights violations, grounded in knowledge of rights guaranteed by national HIV laws. Training for health care workers on legal obligations can reduce discrimination against PLHIV and key populations in their interaction with the health system. This has the potential of changing attitudes over time, improving quality of and uptake of health services leading to improved public health outcomes.

Even if the law has not been tested in court, the existence of protective laws may have other benefits e.g., in changing attitudes and encouraging the adoption of non-discriminatory practices. Discriminatory policies and practices will be abolished if protective laws are promoted and compliance with legal requirements is actively monitored.

Even unsuccessful court cases can be beneficial. Litigation can help to bring attention to gaps or weaknesses of the law that need to be addressed. Lawsuits that fail in court may be an important part of a broader strategy to build momentum for law reform. For example, the series of unsuccessful employment discrimination cases considered by Chinese courts in 2010-2011 highlighted the need for anti-discrimination laws to be strengthened. After attention was drawn to these cases in policy debates, the Premier of China, Wen Jiabao, called for strengthening of protective anti-discrimination laws in 2011.⁶⁹ Another Chinese court case involving a challenge to an insurance company was unsuccessful, but ultimately the case resulted in a positive outcome when advocacy associated with the case led the Insurance Association of China to request the removal of discriminatory HIV exclusion clauses from insurance policies.⁷⁰

Many examples of good practice in legal empowerment and access to justice are emerging. Examples of initiatives that have benefited PLHIV and key populations include:

- i. In Viet Nam, a comprehensive '*Learn About Your Rights*' training manual—developed by local and regional law NGOs and UNAIDS—is being used to train law students and lawyers about HIV-related rights, and to promote legal literacy among PLHIV.

69 Wen Jiabao meets HIV/AIDS patients, urges less discrimination, *Want China Times*, 20 December 2011.

70 See: Insurance fix a win for HIV patients, *China Human Rights Net*, 15 July 2009.

- ii. In China, Indonesia, Nepal, PNG and Viet Nam, needs assessments have been conducted to determine the nature and extent of unmet need for HIV-related legal aid services.⁷¹
- iii. In China, studies have been conducted by UNDP and the International Development Law Organization (IDLO) to identify stakeholders in the legal response to HIV, and a national network of lawyers engaged in delivering HIV-related legal services is being established with UNDP support.
- iv. In the Philippines, the *Aid4AIDS Network* has been established comprising legal organizations and institutions, law schools, alternative law groups, and private lawyers who provide HIV-related legal advice and representation.
- v. In Mongolia, the first training for legal aid lawyers on HIV and the law was organized by the National Legal Institute of Mongolia in cooperation with UNDP in 2012. Lawyers at the meeting examined the national *Law on HIV/AIDS* to identify provisions that breach human rights.
- vi. The PNG Development Law Association has established an HIV legal service, which has initiated claims to test the legal protections of the national HIV law on behalf of PLHIV.
- vii. Legal services in China and Viet Nam have extended their reach by providing access to legal advice through telephone hotlines and by providing outreach to sites such as methadone clinics, self-help groups of PLHIV, and drop-in centres for sex workers.
- viii. Specialist HIV legal services in Cambodia, China, India, Indonesia,⁷² Nepal⁷³ and Viet Nam have been effective in reaching marginalized communities with relatively high HIV prevalence, such as sex workers, people who use drugs, MSM and transgender people.
- ix. In Fiji, the sex worker network Survival Advocacy Network (SAN) has mobilized sex workers to advocate for sex workers' human rights. SAN found that many sex workers had limited knowledge about their rights and mechanisms for redress for police abuses and other violations. In response, SAN has implemented a programme of legal rights training, access to legal services and working with police. Sex workers report that physical violence by the police has reduced. This is, in part, a direct outcome of sex workers having better knowledge of their legal rights and being able to negotiate with police, making them less vulnerable to unlawful arrest, exploitation and extortion.⁷⁴

71 IDLO funded needs assessments in Yunnan (China), Indonesia, Nepal and PNG.

72 The Community Legal Aid Institute (LBH Masyarakat) is an NGO that provides legal aid to people who use drugs in Indonesia. See: IDLO (2010), *Stakeholder report: Rapid Needs Assessment of the Legal Needs of People Living with HIV and Key Populations in Jakarta*, Rome: IDLO.

73 In house lawyers provide HIV-related legal advice at two NGOs in Nepal: the Blue Diamond Society and the Forum for Women and Law in Development (FWLD).

74 UNFPA, UNAIDS, Asia Pacific Network of Sex Workers (2012), *The HIV and Sex Work Collection: Innovative responses in Asia Pacific*, Bangkok: UNFPA, UNAIDS, APNSW, pp.140-143.

- x. Community-based legal empowerment initiatives have played an important role in protecting and advocating the human rights of sex workers, MSM and transgender people in several South Asian countries. Examples include Durjoy Nari Sangha (a sex worker organization in Bangladesh) and Blue Diamond Society (BDS) (a community-based organization of Nepal's Federation of Sexual and Gender Minorities). Durjoy Nari Sangha provides legal rights education and legal advice and referrals for sex workers.⁷⁵ BDS provides legal advice and in 2012 was supporting around 50 court cases. People seeking legal redress for violent attacks made up the majority of cases. Civil cases usually concern property rights. Documenting human rights violations such as discrimination and violence informs advocacy strategies. BDS also supports public interest litigation and provides legal empowerment training to increase community knowledge of human rights and build skills about how to claim these rights.⁷⁶
- xi. In India, legal aid services for PLHIV have been delivered through a range of models including general non-governmental legal aid clinics, in-house lawyers at community organizations or service centres, legal outreach at healthcare sector clinics and hospitals, specialized government legal aid clinics and specialized NGO legal aid service providers. These various legal aid services are generally well connected with communities or community led. The Lawyers Collective HIV/AIDS Unit (India) provides a model of a specialist HIV legal service that has the capacity to initiate high profile public interest litigation in relation to violations of constitutional rights, in addition to providing services on a daily basis to individual clients. The *Naz Foundation case*,⁷⁷ which led to reading down of the sodomy law effectively decriminalizing homosexuality in India, demonstrates how lawyers are able to work with NGOs to mobilize resources and political support for high profile public interest litigation. On the other hand, *MX v ZY* was one example of a case that created precedent for PLHIV workplace equality based on servicing the needs of an individual client, *MX*.⁷⁸
- xii. Access to justice can be promoted by use of community-level or traditional justice systems to resolve HIV-related disputes, provided that efforts occur to ensure human rights principles are applied. In Papua New Guinea (PNG), Village Court magistrates have been trained on HIV, human rights and gender equality principles.⁷⁹

Laws that recognize that PLHIV are eligible for government legal aid can also promote access to justice. In Viet Nam, the *Decree on Legal Aid* specifies that PLHIV are entitled to receive government legal aid, if the person does not have capacity to work and requires support.⁸⁰ Pakistan's *HIV/AIDS Bill* proposes to legislate to guarantee access to legal aid by introducing the following provisions:

75 UNFPA, UNAIDS, Asia Pacific Network of Sex Workers (2012), *op cit.*, pp.94-96.

76 *Ibid*, pp.107-113.

77 *Naz Foundation India Trust v. Govt of NCT* (2009) 160 DLT 277; W.P. (C) No. 7455/2001 of 2009 (Delhi HC).

78 (1997) AIR 1997 Bom 406.

79 Women and Children Look to Community Justice, *Inter Press Service Newsagency*, 8 May 2012.

80 *Decree No. 07/2007/ND-CP, 12 January 2007, Article 2.*

Enforcement of Legal Rights. *The Federal Government, and the Provincial Governments, in consultation with the Commission and the Provincial AIDS Commissions, shall provide free legal services to members of most at risk populations to enforce their legal rights, and to help develop their expertise on HIV-related legal issues.*

Support for Provision of Legal Aid. *The Federal Government, and the Provincial Governments shall support legal practitioners to provide free legal services to persons living with HIV/AIDS and for women vulnerable and at risk for HIV and members of most at risk populations in all areas covered by this Act.⁸¹*

2.4 Recommendations

This section does not aim to provide specific recommendations in relation to each of the countries considered in the case studies. Rather, it aims to provide general regional recommendations on effective approaches to human rights protections. The recommendations apply to human rights protections found in national HIV laws, and to protections found in general laws. Each country needs to develop locally appropriate mechanisms for protection of HIV-related human rights. This may be achieved through including protective provisions in a national HIV law or in other laws such as labor protection laws, disability discrimination laws or health laws. The choice of legislative model will be influenced by a variety of factors, including local legal traditions, the existence of other pre-existing constitutional or legislative human rights guarantees, and the institutional structure for the implementation and enforcement of the legislation.

Summary of recommendations

1. National frameworks

- 1.1 National HIV strategies and plans should include specific targeted actions for: law reform; increased access to justice for PLHIV and key populations; and capacity development of parliamentarians, judiciary, police and other key institutions to implement and enforce protective laws for PLHIV and key populations.
- 1.2 Donors including the Global Fund to Fight AIDS, Tuberculosis and Malaria should support government and civil society programming on HIV-related human rights, including access to justice programmes.
- 1.3 Governments should support research to inform efforts to improve the legal environment for HIV responses, including monitoring and evaluation of the impact of HIV-related laws, and of capacity development, legal empowerment and access to justice interventions. Governments should support participatory evaluations of HIV-related human rights legislation in partnership with PLHIV organizations.

⁸¹ *Draft HIV & AIDS Prevention and Treatment Act, 2007 (Pakistan), Sections 37 & 38.*

2. Law reform

- 2.1 Law reform should be informed by systematic legislative reviews that assess laws against the *International Guidelines on HIV/AIDS and Human Rights*. Governments should ensure comprehensive protective legislation is in place that addresses the following rights:
- a. Right to equality and protection from discrimination.
 - b. Right to protection from HIV-related vilification, stigmatization and insult.
 - c. Right to protection from violence.
 - d. Right to privacy and confidentiality.
 - e. Right to voluntary and informed consent to HIV testing and treatment.
 - f. Rights of young people. This includes consideration of young people's rights to confidentiality and to consent to testing and treatment, independent of their parents.
 - g. Right to pre-test and post-test counseling.
 - h. Right to participation of PLHIV and key populations in planning and delivering HIV programmes.
 - i. Right to access to the means of HIV prevention.
 - j. Right to education and information on HIV prevention, treatment and care.
 - k. Right to the highest attainable standard of health, including access to ARVs.
 - l. Sexual and reproductive health rights of PLHIV and key populations.
- 2.2 Anti-discrimination laws should include a clear and comprehensive definition of conduct that constitutes unlawful HIV-related discrimination, including:
- a. Discrimination in the areas of employment, health care, access to places, accommodation, education, childcare, insurance, funerals and provision of other goods and services.
 - b. Discrimination on the grounds of HIV status and presumed or suspected HIV status, and discrimination against family members or other associates of PLHIV.
 - c. Discrimination by public and private sector bodies.
- 2.5 Protective legislation should prevail over other legislation.

- 2.6 Protective laws should include provisions to make laws enforceable and accessible for PLHIV and key populations, including:
- a. provisions empowering individuals to claim redress (such as compensation or reinstatement) through the courts, ADR or other mechanisms;
 - b. provisions establishing criminal and administrative offences and penalties, for violation of provisions relating to non-discrimination, non-consensual testing, breach of confidentiality and other human rights violations;
 - c. provisions enabling PLHIV to lodge complaints to courts and/or national human rights institutions (NHRIs) or other bodies without risking public disclosure of their HIV status; and
 - d. provisions for public interest litigation and for the making of court orders to address systemic issues, such as changing discriminatory policies.

3. Access to justice and legal empowerment

- 3.1 Governments, lawyers' associations and funders should give priority to access to justice and legal empowerment programmes for PLHIV and key populations.
- 3.2 Legal aid services should be provided for PLHIV and key populations for complaints relating to discrimination, violence protection and other human rights violations. Specialist HIV legal advice services should be provided to PLHIV and key populations through telephone hotlines and outreach.
- 3.3 Support should be provided to 'know your rights' campaigns and community legal education.
- 3.4 Support should be provided to peer-led advocacy initiatives, so that PLHIV and key populations can self-advocate their rights and negotiate resolution of complaints and protection of their rights in relation to health care services, police, and other bodies.
- 3.5 Support should be provided to community-based HIV organizations to provide human rights advocacy services including advising clients of their human and legal rights, referring clients to relevant grievance bodies, collecting data on human rights issues and conducting advocacy campaigns for law and policy reform.

4. Capacity development

- 4.1 Governments should ensure that parliamentarians are sensitized and trained in HIV-related human rights issues.
- 4.2 Governments should provide training for police and public security personnel on HIV and human rights to address police abuses and to ensure that police act to protect and promote the rights of PLHIV and key populations.

- 4.3 Justice Ministries and professional associations should include HIV-related legal and human issues in training of judges, magistrates and prosecutors.
- 4.4 NHRIs should ensure that their staff are trained on HIV-related human rights issues and handling of complaints from PLHIV and key populations.
- 4.5 Ministries of Justice working in partnership with the legal profession should ensure the creation of a trained and sensitized legal work force with expertise in providing legal services to PLHIV and key populations on issues such as discrimination, police abuses and violence protection.
- 4.6 NGOs and community based organizations including PLHIV organizations should be supported to conduct sensitization, education and training of key sectors such as the law and justice sector, health care services, schools and colleges on HIV-related legal and human rights issues.
- 4.7 Media organizations should ensure staff are sensitized to HIV and human rights issues to ensure media coverage of HIV reduces, rather than compounds, stigma.
- 4.8 HIV-related human rights considerations should be mainstreamed into law and justice programming.

Commentary on recommendations

1. National frameworks

- a. National HIV strategies and plans should include specific targeted actions for: law reform; improved access to justice for PLHIV and key populations; and capacity development of parliamentarians, judiciary, police and other key institutions to implement and enforce protective laws.**

An example of inclusion of human rights in national plans is the Philippines *5th AIDS Medium Term Plan 2011- 2016*, which includes support to mechanisms for stigma reduction and protection from discrimination, including human rights education for key populations, PLHIV, and “human rights protection in prevention and treatment, care and support service delivery points, and the fulfillment of human rights guarantees through operational redress mechanisms.”

- b. Donors including the Global Fund to Fight AIDS, Tuberculosis and Malaria should support government and civil society programming on HIV-related human rights.**

An example of donor support to improve access to justice is the Health and HIV Programme of the International Development Law Organization (IDLO). The programme provided support to HIV-related legal services in Papua New Guinea (PNG Development Law Association), Indonesia (LBH Masyarakat) and China (Yunnan University Legal Aid Centre), with support from the OPEC Fund for International Development.⁸²

82 IDLO (2010), *HIV and Health Law Program 2009 – 2012, First Annual Report 2009-2010*, Rome: IDLO.

- c. Governments should support research to inform efforts to improve the legal environment for HIV responses, including monitoring and evaluation of the impact of HIV-related laws, and of capacity development, legal empowerment and access to justice interventions. Governments should support participatory evaluations of HIV-related human rights legislation in partnership with PLHIV organizations.**

Systematic collection and analysis of data in relation to the number and nature of human rights cases arising and resolved under protective laws is important to inform programmes and the reform of policies and laws. A national body should be assigned the responsibility to collect, analyze and report data on implementation of protections from human rights violations through court cases and other measures. This would enable governments and communities to track the nature and extent of human rights violations, and the impact of legal protections.

Governments should invest in monitoring and evaluation of HIV-related legal empowerment and access to justice interventions. Evaluation should include assessment of the benefits that arise through different mechanisms for addressing rights violations, including the formal court system, ADR processes, informal negotiation and peer advocacy without recourse to the courts.

Very little social research has been conducted on the impact of protective laws on stigma and the quality of life of PLHIV, or on social attitudes and practices. Governments should fund social and policy research that explores issues such as:

- whether protective laws have had an impact on the enjoyment of human rights and prevalence of stigma in specific contexts such as provision of health care services;
- whether laws are effective in providing remedies for institutionalized or systemic discrimination;
- the effectiveness of court and ADR processes in determining HIV-related claims; and
- the nature of obstacles faced by PLHIV communities and key populations in gaining access to the legal system to address human rights violations and law enforcement issues.

2. Law reform

2.1 Law reform should be informed by systematic legislative reviews that assess laws against the *International Guidelines on HIV/AIDS and Human Rights*.

ESCAP Resolution 67-9 (2011) commits governments to initiate reviews of national laws to enable the achievement of universal access targets with a view to eliminating all forms of discrimination against PLHIV and key populations.⁸³ Countries should

⁸³ See also: *30th Meeting of the UNAIDS Programme Coordinating Board (PCB) Geneva, Switzerland 5-7 June 2012, Decisions, Recommendations and Conclusions*. The PCB called upon States “to review as appropriate, laws, law enforcement and access to justice and policies that adversely affect the successful, effective and

conduct systematic human rights reviews to inform the legislative agenda. In the past comprehensive reviews have been conducted in Cambodia,⁸⁴ Nepal⁸⁵ and Australia,⁸⁶ and a number of countries are conducting reviews in response to the ESCAP Resolution.

Legislative reviews should provide an analysis of the compliance of laws and law enforcement practices with the *International Guidelines on HIV/AIDS and Human Rights*. Legislative reviews can inform whether it may be more effective in the country context to address HIV through a national HIV law, or through other legislative mechanisms such as incorporation of HIV into labour laws or general human rights laws. Legislative reviews also provide an opportunity to ensure criminal laws and law enforcement practices relating to sex work, injecting drug use, homosexuality and transgender status are consistent with the human rights protections offered by national HIV laws and other protective laws.

UNAIDS recommends that legislative reviews should:

- be participatory, involving government, the UN, and civil society and (where they exist) the NHRI;
- engage key parliamentarians, the judiciary and relevant ministries;
- be informed by feedback on enforcement of law from affected women, youth and key populations at risk; and
- include discussion with civil society of strategies for improving access to the law.⁸⁷

Governments should ensure comprehensive protective legislation is in place that addresses the following rights:

- a. **Right to equality and protection from discrimination.** Laws may include a broad prohibition on all forms of HIV-related discrimination or may specify a list of areas of unlawful discrimination (preferably a non-exhaustive list). Laws that prohibit discrimination on other grounds, such as discrimination on the grounds of sex, sexual orientation, gender identity, marital status and disability, also help to address vulnerabilities to HIV created by inequality and social exclusion. Specific issues relating to drafting of anti-discrimination provisions are discussed under recommendation 2.2.

equitable delivery of HIV prevention, treatment, care and support programmes to people living with and affected by HIV"

84 Watchirs H., Ward C. (2003), *Cambodian HIV/AIDS and Human Rights Legislative Audit*, POLICY Project.

85 Forum for Women, Law and Development (FWLD), *HIV/AIDS and Human Rights: A Legislative Audit*, NCASC - National Centre for AIDS and STD Control, POLICY Project & FWLD, March 2004.

86 Watchirs H. (2002), "A Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws" *Australian Year Book of International Law* 22:77; See also: American Bar Association Rule of Law Initiative (2012), *HIV/AIDS Legal Assessment Tool*, Washington DC: ABA.

87 UNAIDS (2008), *op cit*.

- b. Right to protection from HIV-related vilification, stigmatization and insult.** Some jurisdictions address stigmatization or vilification as separate from discrimination. In PNG and Fiji, stigmatization is defined to include inciting hatred, ridicule or contempt.⁸⁸ In Viet Nam, stigmatization is defined as an attitude of contempt or disrespect towards another person because of the awareness or suspicion that such person is infected with HIV or has close relationship with an HIV-infected or suspected HIV-infected person.⁸⁹ In Mongolia, insult of PLHIV is prohibited.⁹⁰
- c. Right to protection from violence.** It is particularly important that legal protections exist to protect women and girls, and to protect MSM and transgender persons who may be targeted because they do not conform with gender or sexuality norms. Sex workers and people who inject drugs also have specific violence protection needs that are often overlooked because of their criminalized status. Issues of violence protection are not HIV-specific, so they are generally addressed in separate non-HIV specific legislation but should form part of a comprehensive legal framework for the national HIV response.
- d. Right to privacy and confidentiality.** This includes confidentiality in health care provision, court proceedings and other contexts. Duties of confidentiality should apply not just in the health care setting but to all people handling confidential information. Exceptions to the duty to protect privacy and confidentiality should be narrowly defined e.g., a court order or subpoena requiring disclosure of identity. Contact tracing practices should not breach the confidentiality of PLHIV. For example, the Philippine AIDS Act states: "*All health professionals, medical instructors, workers, employers, recruitment agencies, insurance companies, data encoders, and other custodians of any medical record, file, data, or test results are directed to strictly observe confidentiality in the handling of all medical information, particularly the identity and status of persons with HIV.*"⁹¹
- e. Right to voluntary and informed consent to HIV testing and treatment.**
- Mandatory or compulsory testing should be unlawful. There is no public health justification for compulsory HIV testing. Respect for the right to physical integrity requires that testing be voluntary and that no testing be carried out without informed consent. The *Philippine AIDS Prevention and Control Act* requires written consent to HIV testing, which is an extra safeguard.⁹²
- f. Rights of young people.** The legislation should also address the specific rights and needs of young people. This includes consideration of young people's rights to confidentiality and to consent to testing and treatment, independent of their parents. The legislation can address the circumstances in which consent may be

88 *HIV/AIDS Decree 2011* (Fiji), Section 25; *HIV/AIDS Management and Prevention Act 2003* (PNG), Section 10.

89 *Law on HIV/AIDS Prevention and Control of 2006*, Article 2.

90 *Law on Prevention of HIV and AIDS of 2004*, Article 10.

91 *Philippine AIDS Prevention and Control Act of 1998*, Section 30.

92 *Philippine AIDS Prevention and Control Act of 1998*, Article 19.

provided without the consent of a parent or guardian.⁹³ Examples of legislation that seeks to recognize the evolving capacity of young people are:

- Fiji's *HIV/AIDS Decree* provides that a person under 18 years can consent to an HIV test (without involvement of parent or guardian) if the person is, in the opinion of the person providing the pre-test information, capable of understanding the meaning and consequences of an HIV test.⁹⁴
- PNG's *HIV/AIDS Management and Prevention Act* provides that consent to an HIV test may be given by a parent or guardian only if the person is aged 12 years or less and is not capable of understanding the meaning and consequences of an HIV test.⁹⁵
- The *Pohnpei HIV Prevention and Care Act*⁹⁶ in the State of the Federated States of Micronesia provides that minors aged above 14 years may consent if in the opinion of the clinicians they have been at risk of HIV and are able to understand the nature and implications of the test.
- India's draft *HIV/AIDS Bill* provides that the informed consent of a person's representative shall be taken only in the following circumstances:
 - i. the person is under the age of 12 years, from that person's parent or legal or de facto guardian or next friend;
 - ii. the person is between the ages of 12 and 16 years and, in the written assessment of the concerned healthcare provider lacks the capacity to consent, from that person's parent or legal or de facto guardian or next friend.⁹⁷
- The *Revised Philippine HIV and AIDS Policy and Program Bill* of 2012 proposes that HIV testing be available to a child who is above the age of 15 years but below 18 years provided:
 - i. The child expresses the intention to submit to HIV testing and counseling and other related services;
 - ii. Reasonable efforts were undertaken to locate, provide counseling to, and to obtain the consent of, the parents, but the parents are absent or cannot be located, or otherwise refuse to give their consent;
 - iii. Proper counseling is conducted by a social worker, healthcare provider or other accredited healthcare professional; and

93 The *Convention on the Rights of the Child* (Articles 5 and 12) requires States to recognize the evolving capacity of minors to exercise consent, and to be guided by the principle of the best interests of the child.

94 *HIV/AIDS Decree 2011*, Section 29(2)(b).

95 *HIV/AIDS Management and Prevention Act 2003*, Section 14(2).

96 *Pohnpei HIV Prevention and Care Act*, Section 130.

97 Article 8(2) of the *HIV/AIDS Bill 2007*.

- iv. The licensed social worker, healthcare provider or other healthcare professional determines that the child is at higher risk of HIV exposure, and that the conduct of the testing and counseling is in the child's best interest and welfare.⁹⁸
- g. Right to pre-test and post-test counseling.** Rights to counseling are sometimes also provided in national HIV legislation (e.g., Cambodia, Fiji, Lao PDR, Philippines, PNG, Viet Nam).
- h. Right to participation of PLHIV and key populations in planning and delivering HIV programmes.** Some national HIV laws include provisions requiring the government to promote participation of PLHIV in HIV programmes. Such legal provisions send out a message that the law supports PLHIV to participate in programmes affecting their lives, to encourage community ownership and confidence in the HIV response. For example, Viet Nam's *Law on HIV/AIDS Prevention and Control of 2006* promotes participation of PLHIV in HIV prevention and control efforts, and promotes peer outreach to deliver harm reduction programmes.⁹⁹ Some laws also promote participation of PLHIV in planning and policy. India's *HIV/AIDS Bill 2007* requires appointment of a PLHIV to be a full time member of the National HIV/AIDS Authority.¹⁰⁰
- i. Right to access to the means of HIV prevention.** National HIV laws can support measures to reach key populations with HIV prevention tools, even though behaviors of these populations may be criminalized due to laws relating to sex work, injecting drug use and homosexuality. The national HIV laws of Fiji and PNG include legal rights of access to the means of prevention including access to condoms and lubricant, and sterile needles and syringes.¹⁰¹ The provision in the Fiji law is intended to ensure that sex workers can access HIV prevention, notwithstanding the criminalization of sex work. Laws in Viet Nam promote harm reduction measures including access to condoms, syringes and methadone.¹⁰²
- j. Right to education and information on HIV prevention, treatment and care.** Provisions in relation to HIV education and/or information are provided in the national HIV laws of Fiji, Lao PDR, the Philippines, PNG and Viet Nam.¹⁰³
- k. Right to the highest attainable standard of health, including access to ARVs.** A legal right of access to ARVs is included in the national HIV laws of China and

98 Section 10.

99 Article 20 of Viet Nam's *Law on HIV/AIDS Prevention and Control of 2006*, and Article 2 of the *Implementing Decree of 2007*.

100 Section 39.

101 *HIV/AIDS Decree 2011* (Fiji), Section 26; *HIV/AIDS Management and Prevention Act 2003* (PNG), Section 11.

102 *Decree No. 108/2007/Nd-Cp of June 26, 2007, Detailing the Implementation of a Number of Articles of the Law on HIV/AIDS Prevention And Control*, Article 4.

103 *HIV/AIDS Decree 2011* (Fiji), Section 26; *HIV/AIDS Law 2010*, (Lao PDR) Article 14; *Philippine AIDS Prevention and Control Act of 1998*, Article 1; *HIV/AIDS Management and Prevention Act 2003* (PNG), Section 11; *Law on HIV/AIDS Prevention and Control of 2006* (Viet Nam), Article 9 (requires education that is non-discriminatory).

Viet Nam.¹⁰⁴ People should also have a legal right to post-exposure prophylaxis, and prevention of mother-to-child transmission services including ARVs to prevent transmission.¹⁰⁵ Cambodia's HIV law includes a right to primary health care for PLHIV,¹⁰⁶ and the Philippines HIV law includes a right to basic health services for PLHIV in government hospitals.¹⁰⁷

- I. Sexual and reproductive health rights of PLHIV and key populations.** People living with HIV and key populations should have rights to access sexual and reproductive health services.¹⁰⁸ Women, men and young people living with HIV have specific sexual and reproductive health needs. Sex workers should not be denied access to sexual and reproductive health services or treated less favorably by services. The law should prohibit coerced sterilization and other forms of non-consensual medical treatment affecting women and girls.

2.2 Anti-discrimination laws should include a clear and comprehensive definition of conduct that constitutes unlawful HIV-related discrimination, including:

- a. Discrimination in the areas of employment, health care, access to places, accommodation, education, childcare, insurance, funerals and provision of other goods and services.**
- b. Discrimination on the grounds of HIV status and presumed or suspected HIV status, and discrimination against family members or other associates of PLHIV.**
- c. Discrimination by public and private sector bodies.**

Anti-discrimination laws are difficult to enforce if the definition of unlawful discrimination is unclear or vague. Exceptions should be narrowly defined. The national HIV laws of Fiji and PNG, the *Disability Discrimination Ordinance* of Hong Kong SAR and India's *HIV/AIDS Bill 2007* contain comprehensive human rights protections (see Annex IV for example of a comprehensive anti-discrimination provisions). The anti-discrimination provisions of these laws provide detail in relation to specific areas of discrimination (such as education, employment, insurance and access to services), hence providing more clarity and certainty than a broadly worded prohibition. A broadly-worded prohibition may be useful as a 'catch all' provision if it is supported by additional provisions or regulations that clarify the application of the law to specific contexts.

Good practice is to include protection from discrimination not only for PLHIV but also associates including family members and carers, people assumed to have HIV (whether or not they have actually been diagnosed with HIV) and people who have requested a test for HIV. Discrimination protections should also be provided to key populations,

104 *Law on HIV/AIDS Prevention and Control of 2006* (Viet Nam), Article 39; *AIDS Regulations 2006* (China), Article 44 (rural PLHIV and those in economic difficulty).

105 *HIV/AIDS Law 2010* (Lao PDR) Article 17; *HIV/AIDS Decree 2011* (Fiji), Section 26.

106 *Law on the Prevention and Control of HIV/AIDS of 2002*, Article 26.

107 *Philippine AIDS Prevention and Control Act of 1998*, Section 22.

108 See: UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, Chap. I.

particularly sex workers, people who use drugs, men who have sex with men and transgender people. Some countries have included reference to people 'affected by HIV' without specifying key populations. Hong Kong SAR provides legal protections against discrimination on the grounds of sexuality, and China provides legal protections against discrimination for former drug users who are receiving treatment.

It is good practice to address both direct and indirect discrimination (e.g., Fiji's *HIV/AIDS Decree 2011*, India's *HIV/AIDS Bill 2007*). Indirect discrimination is less obvious than direct discrimination. An example of indirect discrimination is where all people are subject to the same policy, but the policy has an unfair impact on a subgroup. A policy that requires all employees to comply with strict working hours may seem to not discriminate because it applies to everyone in a workplace. However, it may in effect be discriminatory if it has an unfair impact on PLHIV who need flexible working hours to be able to attend medical appointments.

Some countries have issued detailed regulations or guidelines to clarify responsibilities and support implementation of non-discrimination requirements. In Cambodia, the National AIDS Authority published *Implementing Guidelines* to provide specific detail of the responsibilities of people and institutions to implement the national HIV law. In Viet Nam, prohibitions of discrimination in the national HIV law have been strengthened by a *Decree on Handling Administrative Violations*,¹⁰⁹ which supplements the national HIV law by setting specific administrative penalties for various forms of discrimination against PLHIV (restricting access to health services, employment and education). In contrast, the prohibition on discrimination of China's *AIDS Regulations* (2006) has been criticized for being a poorly defined normative statement that lacks specificity and is difficult to enforce through the courts.

Implementing regulations should provide for detailed standards to be enforced to ensure non-discrimination in specific sectors such as health care services, insurance and prisons. For example:

- The Hong Kong Equal Opportunity Commission has the power to develop Codes of Practice, which are intended to provide detailed guidance on the implications of the discrimination statutes.¹¹⁰
- In the Philippines, implementation of workplace provisions of the national HIV law has been supported by government guidelines that require private sector workplaces to have HIV workplace policies in place that address discrimination, and government agencies are required to submit an annual report to the Philippine National AIDS Council on the status of implementation of their workplace HIV policies and education programmes.¹¹¹

109 *Decree No. 69/2011/ND-CP of 08/08/2011*.

110 E.g, see: HK EOC (2011) *Code of Practice on Employment under the Disability Discrimination Ordinance*.

111 *Guidelines for the implementation of HIV and AIDS Prevention and Control in the Workplace Program*, Department of Labor and Employment, 2010; *Civil Service Commission Guidelines in the Implementation of Workplace Policy and Education Program on HIV and AIDS*, 2010.

- In Australia, complaints regarding the provision of insurance services made up a high proportion of the HIV complaints received by that country's Human Rights and Equal Opportunity Commission in the 1990s. A number of these complaints were successfully conciliated resulting in industry-wide changes to policy provisions. The Human Rights and Equal Opportunity Commission issued a guideline, in consultation with the insurance industry, on how insurance companies should address HIV-related claims based on statistical and actuarial information.¹¹²

2.3 Protective legislation should prevail over other legislation.

Legislation should clarify that the provisions protecting people from HIV-related discrimination or other rights violation prevail over other legislation, such as public health laws, criminal laws or employment laws. An example of such a provision exists in the national HIV law of Fiji, which provides that where the provisions of any other law are inconsistent with the provision of the *HIV/AIDS Decree*, the Decree prevails to the extent necessary for the purposes of the Decree.¹¹³ In China, the non-discrimination provision of the *AIDS Regulations* is difficult to enforce because the *AIDS Regulations* do not prevail over other discriminatory laws, such as public sector employment laws requiring HIV testing of job applicants and laws that require testing of sex workers and people who use drugs.

2.4 Governments should ensure protective laws include provisions to make legal protections more enforceable and accessible for PLHIV and key populations, including:

- a. provisions empowering individuals to claim redress (such as compensation or reinstatement) through the courts, NHRIs and other accessible mechanisms;**
- b. provisions establishing criminal or administrative offences and penalties for discrimination, breach of privacy and other human rights violations.**

Complaint mechanisms

Complaint mechanisms, judicial and ADR processes should be affordable, speedy and confidential. As an alternative to courts, complainants should have the option of having their complaints addressed through NHRIs or other bodies with authority to conduct mediation or conciliation.

Some legislative models provide for initial consideration of discrimination complaints by an administrative agency (such as an equal opportunities commission, disability rights commission, human rights commission or ombudsman), which may seek to conciliate or mediate the complaint. For example, in the Philippines, workplace HIV discrimination must be reported to the Department of Labor and Employment or the Civil Service Commission, which are required to resolve cases and can apply administrative

112 The Asia Pacific Forum of National Human Rights Institutions (2001), *HIV/AIDS and Human Rights: The Role of National Human Rights Institutions in the Asia Pacific*, Bangkok: UNAIDS, p.16.

113 *HIV/AIDS Decree 2011* (Fiji), Section 4(1). See also: *HIV/AIDS Management and Prevention Act 2003* (PNG), Section 3.

sanctions.¹¹⁴ Consideration of the complaint by the administrative agency may be required before the matter can be taken to court, or may be offered as a parallel option to court proceedings. Decisions of NHRLs in most countries are not legally binding, but are affordable to citizens. NHRLs should promote their complaint-handling mandate to PLHIV communities, and involve NGOs and community-based organizations in the investigation of complaints.

Community-level dispute resolution bodies may be appropriate to resolve some HIV-related complaints. For example, HIV-related disputes have been considered by Village Courts in PNG and the Katarungang Pambarangay (district or village-level dispute resolution body) in the Philippines.

If ADR is not appropriate as a way of resolving a complaint (for example, if there are concerns that power imbalances between the parties may be exacerbated to the detriment of a PLHIV, or a complainant is seeking a public hearing), complainants should be able to access a court that can make binding, enforceable orders to remedy human rights violations.

Another model involves establishment of a body with specific expertise in HIV-related issues. India's *HIV/AIDS Bill 2007* proposed establishment of a 'Health Ombud' to be appointed at district level, with a mandate to address complaints of violations of the national HIV law. Kenya's *HIV/AIDS Prevention and Control Act 2006* has established a specialist HIV Equity Tribunal, which was set up to hear complaints of HIV-related human rights violations while also providing for simplified procedures, such as witnesses and speedy procedures. However, it may be difficult to find political support for HIV-specific models in settings with relatively low-level or concentrated epidemics.

Civil, criminal and administrative remedies

The national HIV Law of Lao PDR is an example of good practice in relation to remedies, as it provides that a finding of unlawful conduct may result in a range of outcomes including civil compensation, warnings, education, disciplinary proceedings or criminal penalties.¹¹⁵ PNG's national HIV law and Pakistan's HIV/AIDS Bill also represent good practice by specifying a wide range of orders that courts may make to remedy unlawful discrimination.¹¹⁶

Redress for violations should be available under civil, criminal and administrative laws. Criminal prosecutions should be reserved for the most serious violations of human rights. It is good practice to provide an option to make a civil or administrative claim for rights violations, especially as a lower standard of proof is generally required in non-criminal matters (which means that it is easier for a complainant to prove their case).

Enforcing the criminal law against an offender who violates rights may be of limited benefit to the person who experienced the violation. A criminal prosecution results in

114 IRR Section 46.

115 *Law on HIV/AIDS Control and Prevention 2010*, Articles 66-68.

116 See Section 28(3) *HIV/AIDS Management and Prevention Act 2003* (PNG); Section 40, (Draft) *HIV/AIDS Prevention and Treatment Act 2007* (Pakistan).

a penalty such as a fine paid to the state, or imprisonment. Although this punishes the wrongdoer, it does not necessarily rectify the complainant's situation. In jurisdictions where discrimination is a criminal offence, a very high standard of proof applies and police officers or public prosecutors take the court action on behalf of the state, rather than individual citizens. Whereas defining discrimination as a criminal offence may be beneficial in deterring people from committing acts of discrimination, it also may deter some PLHIV who have experienced discrimination from lodging a complaint if they fear that the case will be difficult to prove, that they will not receive compensation, or they fear or distrust the police or prosecutors' office.

Remedies for discrimination, breach of privacy rights and other human rights violations should be available under administrative and/or civil court processes. Legislation should enable courts or tribunals to make orders to remedy discrimination, e.g., an order for compensation, an order that a person be reinstated, that policies or practices be changed or that a public apology be given.

A reverse burden of proof should apply in discrimination cases where action is taken under civil or administrative law.¹¹⁷ Where a reverse burden of proof applies, the burden is on the defendant to show they did not contravene the law.¹¹⁸ Once the person claiming discrimination has produced *prima facie* evidence of possible discrimination, the burden should shift to the alleged discriminator to produce evidence that the person was not the victim of discrimination. To make it easier for people to obtain a legal remedy for unlawful discrimination, laws in some European and Latin America countries provide a reverse burden of proof in non-criminal discrimination cases. 'Onus' or 'burden' of proof is an important legal concept, particularly in adversarial legal systems (such as the common law countries of Asia and the Pacific). A reverse burden of proof makes it easier for people to take legal action because it means that the complainant does not have to prove their case.

c. provisions enabling PLHIV to lodge complaints to courts and/or national human rights institutions (NHRIs) or other bodies without risking public disclosure of their HIV status;

A factor that deters PLHIV from taking legal action is concern about disclosure of identity. To address this, some national HIV laws have specific provisions to ensure confidential court proceedings. Provisions can require courts to suppress the identity of PLHIV and to enable individuals to sue under a pseudonym or nominate someone to file a case on their behalf. Some Chinese courts have issued orders to protect the confidentiality of PLHIV who have lodged cases in the courts, at the request of their attorneys. Indian courts also allow the identity of PLHIV to be suppressed in the reporting of cases. PNG's national HIV law empowers a court to exclude all or any persons from the room where the proceedings are being conducted, to order that only persons specified by

117 See: Roberts C. (2012), Far From a Harmonious Society: Employment Discrimination in China, *Santa Clara Law Review* 52(4) 1531, p.1555

118 See e.g., *Equality Act 2010* (United Kingdom); European Commission Directives: Sex discrimination: Directive 1997/80/EC; Discrimination relating to equal treatment of persons irrespective of racial or ethnic origin: Directive 2000/43/EC; Discrimination relating to equal treatment in employment and occupation: Directive 2000/78/EC.

the court may be present during the proceedings, or to order that the publication of a report of the proceedings be prohibited. The court has discretion to make such orders where it considers that because of the social, psychological or economic consequences to the person to whom the information relates, the information should not be publicly disclosed.¹¹⁹

d. provisions for public interest litigation and for the making of court orders to address systemic issues, such as changing discriminatory policies.

A complaint-based mechanism is important for redressing individual wrongs, but it may not be effective in bringing about systemic change. The system for providing remedies should not be confined to an individual complaint-based system of redress. It should also allow for public interest litigation and class action-type challenges so that cases can be taken on behalf of groups whose rights are harmed by particular policies or practices. Where systemic discrimination is causing human rights violations, NGOs or other institutions should be able to lodge complaints in the public interest – it should not be necessary for the victim of a violation to personally approach a court.

Protective laws should provide for a monitoring/enforcement body with the ability to initiate public inquiries into rights violations on its own initiative. Courts or other appropriate agencies should be given broad remedial powers to address not just individual cases, but also systemic violations. This might take the form of broad investigatory power or the power to conduct public inquiries. For example, in relation to other (not HIV-related) human rights issues, the National Human Rights Commission of India and the Hong Kong Equal Opportunity Commission have used their powers to conduct inquiries to review systemic discrimination in particular areas, and to recommend changes to policies and practices.

The National Human Rights Commission of India is able to self-initiate inquiries or investigations if there is an issue that it deems to be a matter of public interest, and can intervene in court proceedings involving human rights. It does not need to rely on the receipt of an individual complaint to investigate a matter. It is also able to handle cases on behalf of groups. These powers allow the Commission to address systemic discrimination.¹²⁰

3 Access to justice and legal empowerment

3.1 Governments, lawyers' associations and funders should give priority to access to justice and legal empowerment programmes for PLHIV and key populations.

3.2 Legal aid services should be provided for PLHIV and key populations for complaints relating to discrimination, violence protection and other human rights violations. Specialist HIV legal advice services should be provided to PLHIV and key populations through telephone hotlines and outreach.

119 *HIV/AIDS Management and Prevention Act 2003* (PNG), Section 19; See also: *HIV/AIDS Decree 2011* (Fiji) Section 35.

120 See *Protection of Human Rights Act 1993* (India), Section 12.

Access to justice should be promoted through making legal aid services readily available to PLHIV and key populations for discrimination complaints and other human rights cases. Legal aid should be available from lawyers who are independent from government, so that people can be confident in the advice provided if they are seeking to challenge discriminatory government practices.

Ways of providing legal aid may include government payments to subsidize the fees of private lawyers, the provision of lawyers in offices of NGOs or community based organizations (such as human rights NGOs or PLHIV organizations), the provision of *pro bono* legal services provided at no charge by the private legal profession, or providing access to government legal aid offices where appropriate.¹²¹ Consideration may also be required to waive any court fees for lodging claims or filing appeals in human rights cases. Legal aid services should include provision of community-level paralegals who can provide legal information, advice and referrals through outreach to clinics, drop-in centres and other community sites.¹²²

Country reports submitted to UNAIDS in 2012 indicate that most countries in Asia and the Pacific report having some form of legal services available for responding to HIV-related human rights violations.¹²³ However, the scale and quality of most of these programmes is not known, and responses to the PLHIV Stigma Index in the region suggest that there remain unmet needs in terms of HIV-related legal services.

3.3 Support should be provided to ‘know your rights’ campaigns and community legal education.

3.2 Support should be provided to peer-led advocacy initiatives, so that PLHIV and key populations can self-advocate their rights and negotiate resolution of complaints and protection of their rights in relation to health care services, police, and other bodies.

3.3 Support should be provided to community-based HIV organizations to provide human rights advocacy services including advising clients of their human and legal rights, referring clients to relevant grievance bodies, collecting data on human rights issues and conducting advocacy campaigns for law and policy reform.

Legal literacy and human rights education programmes can be delivered by community-based organizations such as networks of PLHIV and other key populations, human rights NGOs and lawyers’ associations. An example of a legal empowerment approach is the Community Legal Aid Institute of Indonesia (LBH Masyarakat):

121 IDLO, UNAIDS and UNDP (2009), *Toolkit: Scaling up HIV-related Legal Services*. Rome: IDLO.

122 See e.g., Thapar S. (2009), *UNDP-Supported Legal Aid Services for People living with HIV in Tamil Nadu and Andhra Pradesh*, New Delhi: UNDP; Godwin J. (2010), *Scaling Up HIV-Related Legal Services Report of Case Studies: Ukraine, Kenya, and India*, Rome: IDLO & UNAIDS.

123 See National Commitments and Policies Instrument country data: <http://www.unaids.org/en/dataanalysis/knowyourresponse/ncpi>

The model aims to build trusting, long term, sustainable relationships with communities, by enhancing community knowledge, skills, confidence, and leadership capacity to take action for themselves wherever possible. The key elements of our community legal empowerment model are:

- Investing in intensive legal education through discussion and forums driven by communities' needs;
- Training and supporting community paralegals to provide 'legal first aid' to resolve issues, to determine whether or not legal action is possible, and to provide community legal education on specific issues identified by communities;
- Providing high quality legal advice and casework, including representation where legal action is possible and necessary;
- Identifying laws and policies that are inadequate or that hinder the protection and promotion of human rights, and advocacy with communities to bring about changes to laws and policy.¹²⁴

4. Capacity development

4.1 Governments should ensure that parliamentarians are sensitized and trained in HIV-related human rights issues. An example of good practice is Cambodia's *Parliamentary Handbook on HIV/AIDS*. The Parliamentary Handbook encourages parliamentarians to play a leadership role in advocating implementation of Cambodia's *HIV/AIDS Law* through discussions with provincial leaders and communities.¹²⁵

4.2 Governments should provide training for police and public security personnel on HIV and human rights to address police abuses and to ensure that police act to protect and promote the rights of PLHIV and key populations. An example of good practice is the Poro Sapot project in PNG, which delivers sensitization to police on HIV and human rights using MSM and sex workers as educators. In 2011, the project reached over 500 police in three provinces.¹²⁶ In Thailand, a sex worker led organization (SWING) has delivered HIV training to 36 police cadets and works in partnership with tourist police to improve responses to violence directed at sex workers.¹²⁷

4.3 Justice Ministries and professional associations should include HIV-related legal and human rights issues in training of judges, magistrates and prosecutors. The Lawyers Collective has conducted training of judiciary in HIV, law and ethics

124 IDLO (2010), *op cit*.

125 Parliament of Cambodia (2009), *Parliamentary Handbook on HIV and AIDS*, UNAIDS, National AIDS Authority, UNDP, Prasit, Asia Pacific Leadership Forum on HIV/AIDS.

126 *Save the Children, Poro Sapot Project in PNG is committed to building genuine partnerships to combat the spread of HIV*, Presentation to International Congress on AIDS in Asia Pacific, Kobe, 2011.

127 UNFPA, UNAIDS, Asia Pacific Network of Sex Workers (2012), *op cit*, pp.57-66.

in several Indian States.¹²⁸ India's Human Rights Law Network convened a National Judicial Colloquium on HIV/AIDS and the Law in 2007, which brought together over 50 judges from the various High Courts and the Supreme Court of India.¹²⁹ Providing resources on HIV-related jurisprudence can also be useful for the judiciary, e.g., an HIV 'benchbook'.¹³⁰

4.4 National human rights institutions (NHRIs) should ensure that their staff are trained on HIV-related human rights issues and handling of complaints from PLHIV and other key populations. The Office of the United Nations High Commissioner for Human Rights and UNAIDS have published a Handbook on HIV and Human Rights for National Human Rights Institutions.¹³¹ The Handbook emphasizes the importance of ensuring that NHRIs are accessible to PLHIV communities:

In addition to physical accessibility, services need to be provided in ways that empower people. If those whose rights have been violated find a national institution unapproachable, unfriendly or discriminatory, it will not be accessible to them. To facilitate the active involvement of people living with HIV, national institutions can meet representatives of networks of people living with HIV to learn about their experiences and concerns, and discuss what support would be useful in order to build their human rights capacity. National institutions should identify the key human rights-related issues for people living with HIV, and what actions and services by the national institution would be considered most useful and most urgent.¹³²

The Handbook recommends:

- New staff induction and internal training programmes should include a component on HIV and human rights. Local groups of PLHIV, and AIDS service organizations, can be good sources of information or possible trainers and educators.
- Efforts should be made to hire, at managerial, professional and administrative levels, staff with the requisite skills who come from marginalized communities or who identify closely with the people they are working for.
- NHRIs need to develop the necessary expertise to adjudicate HIV-related cases and have procedures in place to protect confidentiality. It is essential to ensure the involvement of PLHIV in programme design and outreach.¹³³

128 Lawyers Collective HIV/AIDS Unit, *Positive Dialogue*, Newsletter no.4, January 2000.

129 Human Rights Law Network, <http://www.hrln.org/hrln/hiv-aids.html>.

130 See e.g., Bachrach J., Knox C. (2012), *HIV and AIDS Benchbook*, Chicago: American Bar Association AIDS Coordinating Committee.

131 OHCHR and UNAIDS (2007), *Handbook on HIV and Human Rights for National Human Rights Institutions*. Geneva: Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS.

132 *Ibid.*, p.13.

133 *Ibid.*, p.12.

Examples of recent capacity development initiatives include:

- The HIV Working Group of the Commission on Human Rights of the Philippines is working in partnership with MSM community group and UNAIDS to strengthen redress mechanisms for HIV-related discrimination, hate crimes and other human rights violations.
- UNDP and IDLO are implementing a project that aims to strengthen the capacity of NHRIs in South Asia and South East Asia to address the human rights issues of sexual minorities.

4.5 Ministries of Justice working in partnership with the legal profession should ensure the creation of a trained and sensitized legal work force with expertise in providing legal services to PLHIV and key populations on issues such as discrimination, police abuses and violence protection. UNAIDS and the International Development Law Organization have published a Toolkit on HIV-related legal services. The Toolkit includes an example of a training module and a two-day workshop programme for legal service providers. The Toolkit emphasizes participatory methods of learning and involving community representatives including PLHIV to ensure relevance to local needs.¹³⁴

4.6 NGOs and CBOs including PLHIV organizations should be supported to conduct sensitization, education and training of key sectors such as the law and justice sector, health care services, schools and colleges on HIV-related legal and human rights issues. In India, PLHIV networks of the Indian Network of People Living with HIV/AIDS (INP+) have addressed stigma and discrimination through collaborations with medical associations for training of health care workers, and with business federations and industries for workplace training (with support of the International Labour Organization (ILO)).¹³⁵

4.7 Media organizations should ensure staff are sensitized to HIV and human rights issues to ensure media coverage of HIV reduces, rather than compounds, stigma. Media organizations can provide leadership in combating stigma and discrimination by challenging prejudicial attitudes and portraying PLHIV positively, rather than invoking fear or demonizing PLHIV. Media regulation including industry codes of practice should discourage reporting that violates privacy rights, spreads misinformation about infection risk, or incites violence towards or hatred of PLHIV or key populations. Fear of disclosure of HIV status in the media deters PLHIV from taking legal proceedings or other action to challenge rights violations. Media organizations should avoid sensationalist coverage of court cases involving HIV and respect the confidentiality of PLHIV involved in legal proceedings.

4.8 HIV-related human rights considerations should be mainstreamed into law and justice programming. Many of the challenges faced in implementing and enforcing

134 IDLO & UNAIDS (2009), *Toolkit: Scaling Up HIV-Related Legal Services*, Rome & Geneva: IDLO & UNAIDS.

135 Abraham K., et al. (2006), *Strengthen networks of people living with HIV/AIDS (PLHA) for national and state advocacy in India; experience of INP+*. AIDS 2006 - XVI International AIDS Conference: Abstract no. THPE0926.

HIV-related human rights protections are challenges that are not unique to HIV. Consideration should be given to integration of HIV into mainstream law and justice initiatives aimed at promoting access to justice for all socially disadvantaged and marginalized populations. For example, HIV issues should be included in the general training of legal aid lawyers and the judiciary. HIV issues can also be integrated into efforts to improve the law and justice sector response to related issues such as responding to and preventing violence and promotion of gender equality.

PART II

Country case studies:
National HIV laws in Asia



3. Cambodia

3.1 Overview of the *Law on the Prevention and Control of HIV/AIDS*

The National Assembly of Cambodia enacted the *Law on the Prevention and Control of HIV/AIDS*¹³⁶ (*HIV/AIDS Law*) in 2002. The *HIV/AIDS Law* includes wide-ranging provisions relating to public health and human rights. The key human rights protections of the *HIV/AIDS Law* are summarized below.

Rights to equality and non-discrimination

The *HIV/AIDS Law* prohibits discrimination against people known or suspected of having HIV/AIDS and their families. Article 2 of the *HIV/AIDS Law* states that the HIV epidemic requires a multi-sectoral response to prohibit all kinds of discrimination against people suspected or known to be infected or affected by HIV/AIDS. Article 42 states that PLHIV have the same rights as other Cambodian citizens, as set out in Chapter 3 of the *Constitution of the Kingdom of Cambodia*.

Article 36 provides that it is illegal to discriminate against a person or a member of their family based on their actual, perceived or suspected HIV/AIDS status:

- When deciding who to recruit for a job;
- When deciding who gets a promotion at work; or
- When deciding the tasks to be allocated to workers.

It is also illegal to dismiss a person from their job due to knowledge or suspicion that they or a member of their family has HIV/AIDS.

Article 37 addresses discrimination by educational institutions and provides that discrimination against students is illegal, where it is based on the knowledge or suspicion that the student or a member of the student's family has HIV/AIDS. Discrimination against students on the grounds of HIV/AIDS is prohibited in:

¹³⁶ This report relies on the unofficial translation of *Law/Kram No. NS/RKM/0702/015 of 10 July 2002 on the Prevention and Control of HIV/AIDS*, available at: http://www.ilo.org/aids/legislation/WCMS_113128/lang-en/index.htm.

- Refusing to accept a student into an educational institution
- Dismissing a student from an educational institution
- Imposing a disciplinary sanction or punishment on a student
- Depriving a student of their right to any benefit or service.

Article 38 makes it illegal to place any restrictions on a person's right to freedom of movement, or their right to choose where to live, due to the knowledge or suspicion that the person or a member of their family has HIV/AIDS. It is also illegal to quarantine or isolate a person, or to expel them from any place, due to the knowledge or suspicion that the person or a member of their family has HIV/AIDS.

Article 39 provides that it is illegal to discriminate against any person who is seeking public office based on the knowledge or suspicion that the person or a member of their family is living with HIV/AIDS.

Article 40 prohibits discrimination against PLHIV who apply for credit or loans, or who apply for insurance, provided the person can meet the same eligibility criteria as other people who do not have HIV/AIDS.

Article 41 prohibits hospitals and other health care providers from discriminating against a person based on the knowledge or suspicion that the person or a member of their family has HIV/AIDS.

Under Article 52 of the law, a person found guilty of HIV/AIDS-related discrimination¹³⁷ is liable for punishment including a fine of between 100,000 Riels and 1,000,000 Riels, and imprisonment for between one month and six months, as well as revocation of any relevant professional licenses. In the case of repeated offences the punishment shall be doubled, and civil servants face the possibility of administrative sanctions in addition to any punishment imposed by a court.

Rights to privacy and confidentiality

Articles 19-25 deal with HIV testing and counselling. HIV testing is confidential and identities must not be disclosed to the national monitoring system.

Article 33 lists people and institutions with a particular duty to protect confidentiality of HIV/AIDS information:

- All health professionals;
- Workers;
- Employers;

137 In breach of Article 36, 37, 38, 39, 40 or 41.

- Recruitment agencies;
- Insurance companies;
- Data encoders;
- Custodians of medical records;
- People who have other relevant duties that involve access to personal HIV/AIDS-related information.

Confidentiality in the context of the *HIV/AIDS law* means not disclosing information about a person's HIV/AIDS status, or any behavior they have engaged in that might make them vulnerable to HIV infection, or the fact that they have been tested or considered being tested for HIV, without that person's consent.

Articles 33-35 require HIV/AIDS-related information to be kept confidential, subject to limited exceptions. The penalties defined by Article 51 for failing to maintain confidentiality of HIV/AIDS information as required by Article 33 are a fine of between 50,000 Riels and 200,000 Riels, and imprisonment for between one and six months. Civil servants may also be liable for administrative punishments.

Informed consent to testing

Article 19 provides that all HIV tests shall be done with voluntary and informed consent. For those who are minors (under 18 years)¹³⁸, a written informed consent must be obtained from a legal guardian.

Article 20 prohibits compulsory HIV testing as a condition of employment, admission to educational institutions, or for the exercise of freedom of abode, traveling, and the provision of medical services or other services. Compulsory HIV testing may only be made by court order (Article 21).

Article 23 requires all centres offering HIV testing services to be accredited by the Ministry of Health, which is required to maintain accreditation standards. *Policy, Strategy and Guidelines for HIV Counseling and Testing* were published by the Government in 2002.

Article 24 provides that testing centers shall provide pre-test and post-test counseling services for those who request HIV testing.

Right to treatment

Article 26 provides that the State shall ensure that all persons with HIV/AIDS receive primary health care services free of charge, and that participation of the private sector in providing treatment and care is encouraged.

138 National AIDS Authority (2005), *Implementing Guidelines of the Law on the Prevention and Control of HIV/AIDS*, Phnom Penh: National AIDS Authority and the Policy Project, states: "Although the age at which a person ceases to be a "minor" varies under different Cambodian laws, the appropriate definition of a minor for the purposes of HIV testing is a person who is under the age of 18 years." (p.22).

Obligation not to transmit HIV

Any practice or acts of those who are HIV positive, which have the intention to transmit HIV to other people, are prohibited. (Article 18) A penalty of between 10 and 15 years imprisonment applies for intentional HIV transmission. (Article 50)

Other issues

The *HIV/AIDS Law* also addresses:

- the role of the State in providing public HIV awareness programmes, education programmes targeting women and girls, HIV education in schools, education and training on HIV to health care workers, workplace education, and HIV information for tourists and travellers;
- safe medical practices, including universal infection control precautions during normal procedures, HIV testing of blood, tissue and organs;
- the establishment of a comprehensive HIV monitoring programme to monitor
- behaviors and epidemic trends;
- the establishment of the National AIDS Authority to lead the multi-sectoral response, with the Prime Minister as Chairman; and
- the role of the State in timely disbursement of funds for the national AIDS program.

3.2 Implementation of the *HIV/AIDS Law***3.2.1 Promotion and enforcement of the *HIV/AIDS Law***

HIV-related stigma and discrimination remain widespread in Cambodia, despite the existence of the *HIV/AIDS Law* for over ten years. The National Stigma Index study conducted in Cambodia in 2010 was based on interviews with 399 PLHIV. The study found 51 percent of respondents lost employment because of HIV status; 12 percent were forced to change place of residence or unable to rent accommodation because of their HIV status; 9 percent of children were dismissed, suspended or prevented from attending schools because of their parents' HIV status; and 4 percent of respondents were denied health services including dental care. Only 7 percent of PLHIV who were aware that their rights had been violated had attempted to access legal assistance, but only 6 percent of respondents knew of legal services or human rights organizations that could be approached for help.¹³⁹

There have been significant efforts by government and civil society to promote compliance with the non-discrimination provisions of the *HIV/AIDS Law*. The National

¹³⁹ Cambodian People Living With HIV Network (2010), *People living with HIV Stigma Index. HIV-related stigma & discrimination in Cambodia: Summary of recent findings*. Phnom Penh: Cambodian People Living With HIV Network.

AIDS Authority and the specialized commissions of the National Assembly and Senate¹⁴⁰ have led the efforts of the Government in promoting the *HIV/AIDS Law*. In 2004, the Cambodian People Living with HIV/AIDS Network, the HIV/AIDS Coordinating Committee, the National AIDS Authority and the National Centre for HIV/AIDS Dermatology and STDs Control developed a booklet explaining the key provisions of the *HIV/AIDS Law*, aimed at the general public, PLHIV and HIV-affected communities.¹⁴¹ In 2009, the National Assembly and Senate published a *Parliamentary Handbook on HIV/AIDS*. The Handbook encourages parliamentarians to play a leadership role in advocating implementation of the *HIV/AIDS Law* through discussions with provincial leaders and communities. The Handbook also encourage parliamentarians to review and reform legal frameworks with the aim of removing barriers to prevention, treatment, care and support:

It is vital, as the epidemic evolves and new laws emerge and older ones become amended, that Members of Parliament continue educating their constituents and become advocates for the intended meaning and impact of the laws. Leaders must lead by example. By becoming engaged in fostering public participation and working with people living with HIV, with networks concerned with HIV and AIDS, and with members of key populations, they can improve democracy and oversight of the response to the epidemic.¹⁴²

Despite extensive efforts to promote the *HIV/AIDS Law* by government and civil society, there are no reports of prosecutions or formal legal actions taken by citizens to enforce the provisions of the *HIV/AIDS Law* in response to human rights violations. The Government's *2012 Country Progress Report* to UNAIDS noted: "Stigma and discrimination and the weak enforcement of specific policies and laws protecting the human rights of PLHIV have remained a challenge in the current reporting period."¹⁴³

Little analysis appears to have been conducted of the reasons for non-enforcement of the human rights provisions of the *HIV/AIDS Law*. Lack of access to legal advice and representation services and lack of confidence in the legal system are likely to be factors.

NGOs are becoming more active in initiatives to promote access to justice for PLHIV and key populations. In 2011, a specialized Community Legal Service was established by the NGO Women's Network for Unity to provide legal education, advice and representation to entertainment workers. The service specializes in legal issues affecting women who sell sex, including rights under the *HIV/AIDS Law*.¹⁴⁴

140 Commission 8 on Public Health, Social Work, Veterans, Youth, Rehabilitation, Labor, Vocational Training and Women's Affairs.

141 Cambodian People Living with HIV/AIDS Network, the HIV/AIDS Coordinating Committee, the National AIDS Authority and the National Centre for HIV/AIDS Dermatology and STDs Control (2004), *We Participate Together for our Safety and Society: Selected Articles from the Law on Prevention and Control of HIV/AIDS*. Phnom Penh: PACT.

142 Parliament of Cambodia (2009), *Parliamentary Handbook on HIV and AIDS*, UNAIDS, National AIDS Authority, UNDP, Prasit, Asia Pacific Leadership Forum on HIV/AIDS.

143 National AIDS Authority (2012), *Cambodia Country Progress Report: Monitoring the Progress towards the implementation of the Declaration of Commitment on HIV and AIDS*, p.40.

144 See 'Community Legal Service', Global Network of Sex Work Projects, <http://www.nswp.org/members/asia-and-the-pacific/community-legal-service>

The Khmer HIV/AIDS NGO Alliance (KHANA) advocates for stronger enforcement of the *HIV/AIDS Law*. For example, KHANA has referred to the anti-discrimination provisions of the law in advocating for the rights of HIV-affected families facing eviction.¹⁴⁵ KHANA identified the following concerns with the *HIV/AIDS Law*:

In practice, Article 40 (discrimination regarding loans/ credit) is not properly, effectively or consistently applied, although this is extremely difficult to prove. Similarly, Article 41 (discrimination in hospital and health settings) is not properly, effectively or consistently applied, although this is also extremely difficult to prove. In a hospital in Sihanouk Province, a doctor elected not to perform necessary surgery on a pregnant HIV+ patient, and the patient died as a result. It is particularly difficult to assess whether this Article is upheld in private hospitals and medical facilities. Once again, in practice, Article 52 (penalties for discriminatory conduct) is not upheld.

Regarding confidentiality, regardless of laws protecting PLHIV, it is impossible to determine whether or not various institutions or individuals disclose PLHIV status without consent. No data has been collected to confirm whether these laws related to disclosure and confidentiality are upheld. We recognize that a major problem in terms of the difference between the law and how it is (or is not) upheld stems from insufficient or misinformed public understanding about the rights of PLHIV and other marginalized individuals. Because individuals are unaware of their rights, they are unable to harness existing laws to enact justice.¹⁴⁶

3.2.2 Implementing Guidelines

The National AIDS Authority published *Implementing Guidelines* for the *HIV/AIDS Law* in 2005.¹⁴⁷ The Guidelines explain the *HIV/AIDS Law* in plain language, and provide specific detail on the responsibilities of people and institutions to implement the law and to increase awareness and understanding of the law. The *Implementing Guidelines* were developed by the National AIDS Authority, and were informed by a series of consultations with Government, NGOs, and UN agencies. The *Implementing Guidelines* are intended to inform the activities of the National AIDS Authority in promoting and implementing the *HIV/AIDS Law*. A training programme developed by the National AIDS Authority assisted dissemination of the Guidelines.

The *Implementing Guidelines* stress the human rights aspects of the *HIV/AIDS Law*, and provide further information as to how to implement a rights-based response. For example in relation to participation of PLHIV in HIV responses the Guidelines state:

People living with HIV should be involved in all aspects of responding to the epidemic, including the design, delivery, and evaluation of policies and programs for HIV/AIDS prevention, treatment, care and support... It is important for people

145 IHAA (2009), *HIV-affected families evicted in Cambodia* see: <http://www.aidsalliance.org/NewsDetails.aspx?id=400>

146 Email to UNDP from Dr. Oum Sopheap, Executive Director KHANA, 8 October 2012.

147 National AIDS Authority (2005), *Implementing Guidelines of the Law on the Prevention and Control of HIV/AIDS*, Phnom Penh: National AIDS Authority and the Policy Project.

living with HIV/AIDS to be involved in all aspects of the response to the epidemic because they are the people most affected by the epidemic, and the life experiences of (PLHIV) should inform the development of all HIV/AIDS policies and programs. This involvement will help to promote respect for the human rights of people living with HIV/AIDS, and policies and programs will be more effective because they are informed by the experiences of (PLHIV).¹⁴⁸

The *Implementing Guidelines* contain important policy statements on a human rights-based approach relevant to implementation of potentially controversial parts of the *HIV/AIDS Law*. For example, the *Implementing Guidelines* caution against over-reliance on the exercise of power to prosecute PLHIV for intentional HIV transmission as a way of combating HIV:

There is a risk that over-reliance on the criminal law, and on punitive approaches to HIV transmission, will undermine HIV prevention education initiatives by contributing to stigma and discrimination against people living with HIV/AIDS. In this context, people living with HIV/AIDS may come to be viewed as criminals, ostracized or isolated from their families and communities. It is well established that stigma and discrimination help fuel the HIV/AIDS epidemic, by making people living with or at risk of HIV infection harder to reach with prevention, treatment, care, and support programs. Because of the complex issues associated with criminal prosecutions for HIV transmission, the National AIDS Authority, in partnership with the Ministry of Justice and the Ministry of Interior, will develop guidelines for court officials on the circumstances in which the use of Article 18 of the *HIV/AIDS law* should be considered.¹⁴⁹

3.2.3 Implementation of the HIV/AIDS Law in workplaces

After the *HIV/AIDS Law* was enacted, additional regulations ('*Prakas*' – regulations issued by the relevant Minister) were issued to further implement the *HIV/AIDS Law* in the context of employment. The *Prakas on the creation of the HIV/AIDS committee in enterprises and establishments and the prevention of HIV/AIDS in the workplace*, issued by the Minister of Labour and Vocational Training in 2006 aimed to stimulate discussion, raise awareness and promote workers' education on HIV prevention in the workplace. Enterprises are required to establish HIV/AIDS Working Groups or HIV/AIDS Committees. In relation to discrimination, the *Prakas* states:

In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS hinders efforts aimed at promoting HIV/AIDS prevention.

The *Prakas* also addresses gender equality as follows:

The gender dimensions of HIV/AIDS should be recognized. Women are more likely to become infected and are more often adversely affected by the HIV/AIDS epidemic

148 *Ibid*, pp.7-8.

149 *Ibid.*, p.20.

than men due to biological, socio-cultural and economic reasons. The greater the gender discrimination in societies and the lower the position of women, the more negatively they are affected by HIV/AIDS. Therefore, more equal gender relations and the empowerment of women are vital to successfully prevent the spread of HIV infection and enable women to cope with the consequences of HIV/AIDS.

Concerns have been raised that the *Prakas* omits specific reference to the rights of girls in relation to gender equality.¹⁵⁰ To demonstrate leadership, line ministries should encourage relevant stakeholders to establish and/or reinforce HIV/AIDS workplace policies to support staff members who are living with or affected by HIV.¹⁵¹

Another *Prakas* was issued that addresses the rights of Cambodian migrant labourers to HIV information.¹⁵²

3.2.4 Implementation under the National HIV/AIDS Plan

Cambodia's *Third National Strategic Plan for a Comprehensive and Multisectoral National Response to HIV and AIDS* (NSP III) (2011-2015) includes a specific commitment to "ensure a supportive legal and public policy environment for the national response to HIV and AIDS (Strategy 5)". The Plan states that there will be strategic focus under NSP III on implementation and enforcement of the provisions of the *HIV/AIDS Law*. NSP III includes a specific Objective as follows:

Objective 1: Intensify implementation and enforcement of the Law on Prevention and Control of HIV and AIDS. While the HIV and AIDS law is robust, its enforcement and monitoring needs to be strengthened under NSP III to eliminate discrimination against PLHIV and respond to findings of the National Stigma Index Study. *Interventions:*

1. Promotion of awareness of the HIV and AIDS Law among policy makers, HIV programme implementers, health care providers, justice and law enforcement officials, and the general public.
2. Improvement of systems to monitor the progress of the HIV and AIDS Law at national and sub-national levels, with engagement of PLHIV and MARPs.
3. Alignment of all other laws and policies with the provisions of the HIV Law, particularly the *Law on Suppression of Human Trafficking and Sexual Exploitation Law* and the *Drug Law*.

150 Email to UNDP from Dr. Oum Sopheap, Executive Director KHANA, 8 October 2012.

151 Email to UNDP from Mr. Sorn Sotheariddh, National Coordinator, of Cambodian People Living with HIV/AIDS Network (CPN+), 8 October 2012.

152 See: Ministry of Labour and Vocational Training, *Prakas/Guidelines No. 108 M.L.V.T. of 31 May 2006 on Education on HIV/AIDS, Safe Migration, and Labour Rights for Cambodian Workers Abroad*, Ministry of Labour, 3 May 2007.

Activities:

- Intensify public understanding and awareness of the Law on Prevention and Control of HIV and AIDS through mass and focused communications, and integration into community-based HIV education messages.
- Orient justice and law enforcement officials on the guidance for implementation of the *Law on Prevention and Control of HIV and AIDS*.
- Work with key line ministries to oversee the implementation and development of a system to intensify monitoring and enforcement of the provisions of the Law on the Prevention and Control of HIV and AIDS.
- Review the implementation progress of the *Law on the Prevention and Control of HIV and AIDS*, amend it as needed, and ensure its clauses are adequately reflected in other legislation related to HIV and AIDS.
- Facilitate oversight visits by parliamentarians and parliamentary/public hearings to monitor and promote the implementation of the Law on the Prevention and Control of HIV and AIDS.

NSP III also notes the need to establish an enabling environment for prevention particularly in the area of entertainment work and harm reduction, including protection of human rights and access to prevention, care and treatment services without fear of harassment, arrest or punishment. NSP III states that there will be an assessment of the impact of enforcement of criminal laws on vulnerability to HIV or access to HIV services for most-at-risk populations, with particular attention to the *Law on Suppression of Human Trafficking and Sexual Exploitation* and the *Law on Drug Control*.

The Government's 2012 Country Progress Report to UNAIDS on implementation of the UN Declaration of Commitment on HIV/AIDS noted that some laws and policies present obstacles to effective HIV responses. The *Law on Drug Control* and the Village/Commune Safety Policy may have made it more difficult to access people who use drugs due to law enforcement practices at commune level. In response, new policy initiatives such as the Community Most at Risk Populations Partnership Initiative and the Continuum of Prevention, Treatment and Care have been introduced to mitigate the unintended impact of legislation such as the *Law on the Suppression of Human Trafficking and Sexual Exploitation*, the new Drug Law and the Commune/Sangkat Safety Policy.¹⁵³

Stakeholders have also raised concerns about the need for revision or clarification of some provisions of the HIV/AIDS Law. The HIV/AIDS Coordinating Committee (HACC) has called for amendment to Article 19, which is interpreted by the *Implementing Guidelines* as requiring parental consent for all HIV tests conducted on persons under 18. Lowering the age at which parental consent is required for testing would encourage more younger people to be tested, particularly MSM who may not want their parents to be aware of risk behaviors. HACC has also called for clarification of entitlements that flow from Article

153 National AIDS Authority (2012), *Cambodia Country Progress Report: Monitoring the Progress towards the implementation of the Declaration of Commitment on HIV and AIDS*, p.37.

26, which provides that the State shall ensure that all PLHIV receive primary health care services free of charge. The components of primary health care that PLHIV are entitled to receive for free need to be defined, and health insurance or other financing measure need to be provided by the State to ensure that PLHIV can access these health services.¹⁵⁴

The HIV-specific offence for intentional HIV transmission carries a severe penalty of 10 to 15 years imprisonment (Article 50). Such HIV-specific punitive provisions are stigmatizing to PLHIV. There is a risk that this provision may be used inappropriately to target vulnerable populations such as sex workers and MSM. UNAIDS recommends that states prosecute intentional transmission using general criminal law, rather than HIV-specific laws.¹⁵⁵

3.3 Other legal redress mechanisms for human rights violations

The *Constitution of the Kingdom of Cambodia* recognizes all human rights guaranteed under the *Universal Declaration of Human Rights* (UDHR). Article 31 states that the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.

Although, in theory, citizens can take legal action under the Constitution to seek a remedy for HIV-related human rights violations, there are no reports of such court actions. In theory the Cambodian Human Rights Committee may accept and investigate complaints of human rights violations, however communities lack confidence in use of this mechanism¹⁵⁶ and there are no reports of its use to address HIV-related complaints. As an alternative to lodging a complaint with the Cambodian Human Rights Committee, PLHIV may lodge a complaint through the court system, however this is complex and difficult for poor people to access due to cost factors.

3.4 Conclusion

Cambodia's *HIV/AIDS Law* is a central component of the national HIV/AIDS response and provides a human rights-based legal framework for prevention, treatment, care and support efforts. Promotion of the *HIV/AIDS Law* has contributed to broader efforts to reduce stigma and discrimination by promoting non-discriminatory attitudes and practices. However, the impact of this law is undermined by the lack of practical mechanisms to enable PLHIV to seek redress for HIV-related human rights violations. Although, in theory, violations of the law can be addressed through administrative or criminal law sanctions, enforcement of the human rights provisions of the *HIV/AIDS Law* through the courts has not occurred to date.

Addressing the needs of PLHIV within mainstream access to justice programmes requires consideration in Cambodia. UNDP's Access to Justice Project has piloted mechanisms to

154 Correspondence from HACC to UNDP, 12 October 2012.

155 Global Commission on HIV and the Law (2012), *Risks, rights and health*, New York: UNDP, p.25; UNAIDS (2008), *Criminalization of HIV transmission: Policy Brief*, Geneva: UNAIDS.

156 Correspondence from HACC to UNDP, 12 October 2012.

provide disadvantaged people in the general population with alternatives to the formal justice system. For example, as a result of the Access to Justice Project, Commune Dispute Resolution Committees were established to provide free mediation services for people at commune level and Justice Houses were established at district level to provide free legal advice, information and mediation services to rural populations.¹⁵⁷ Integrating capacity to address HIV-related issues within mainstream access to justice initiatives could help to make the human rights protections contained in the *HIV/AIDS Law* more relevant to PLHIV.

157 UNDP (2010), *Access to justice project*. <http://www.un.org.kh/undp/what-we-do/projects/access-to-justice-project>



4. China

4.1 Overview of the *AIDS Regulations*

HIV-related discrimination in China

A number of studies conducted over the last five years confirm that HIV-related discrimination is widespread in China.¹⁵⁸ The China Stigma Index study found that HIV-related discrimination in employment, education and health care is widespread.¹⁵⁹ Findings included:

- Of 2,096 PLHIV surveyed, 41.7 percent report having faced some type of HIV-related discrimination.
- 12.1 percent of respondents had been refused medical care
- 21 (2.2 percent) of 962 who responded had been pressured into undergoing sterilization by a healthcare professional.
- Of female respondents who were married or who had had sexual partners since being infected, 11.9 percent (44 of 369 responding to this question) had been pressured into terminating a pregnancy by medical staff/family planning department staff.
- 14.8 percent of a total of 1,877 respondents said they had been refused employment or a work opportunity because of their HIV status
- 9.1 percent of those with children said that their children, although not necessarily HIV positive themselves, had been forced to leave school because of the HIV status of their parents.

158 National Center for AIDS/STD Control and Prevention (2011), *HIV and AIDS Related Employment Discrimination in China*. ILO Country Office for China and Inner Mongolia; China Center for Disease Control and Prevention & International Labor Organization (2011), *Discrimination against People Living with HIV within Healthcare Centers in China*, Beijing: International Labor Organization; See also: Yanhai W., Ran H., Ran G., Arnade, L. (2009), "Discrimination against People with HIV/AIDS in China," *The Equal Rights Review* 4, 15–25.

159 Institute of Social Development Research, China Central Party School (2009), *China Stigma Index Report*. Beijing: UNAIDS and partners, pp.12-13.

- 36.2 percent of respondents said that teachers had shown a “discriminatory” or “very discriminatory” attitude on learning of their HIV status.
- Of the 1,892 respondents who responded to the question on accommodation, 7.1 percent (134 respondents) had, on at least one occasion since being diagnosed with HIV, been forced to move residence or had been unable to find accommodation because of their HIV status.

Another survey conducted in Beijing, Kunming, Shanghai, Shenzhen, Wuhan and Zhengzhou found that 47.8 percent of respondents would be unwilling to eat a meal with a PLHIV, 41.3 percent would be unwilling to work in the same place as a PLHIV and 30 percent did not believe that students with HIV should attend the same school as uninfected students.¹⁶⁰

AIDS Regulations

The *Regulations on AIDS Prevention and Treatment (2006)*¹⁶¹ (*AIDS Regulations*) is an administrative law issued by the State Council of the People’s Republic of China. The *AIDS Regulations* provide a legal statement of the rights of PLHIV, including the right to marry, to access health-care services, to enjoy equal employment opportunities and education. The *AIDS Regulations* have also provided a legal basis for implementation of politically sensitive prevention measures by government, including condom promotion, methadone maintenance therapy and needle and syringe programmes.¹⁶²

Rong Tang described the significance of the *AIDS Regulations* as follows:¹⁶³

This regulatory document summarises the lessons and experiences in the legislation for HIV in the past years... It clearly forbids discrimination against PLHIV and their relatives, and identifies intervention strategies for high risk groups. The document also establishes the mechanism for voluntary counseling and testing (VCT); and the privacy rights of, and the relief system for, PLHIV and their relatives. Supported with penalty clauses, it clarifies and specifies the mandates and responsibilities of the government, health and medical organizations and the testing and quarantine institutions, and further clarifies the legal consequence of offending the lawful rights and interests of PLHIV and their relatives.

Chapter I of the *AIDS Regulations* contains general provisions, including a broadly worded right to non-discrimination, in the following terms:

160 China HIV/AIDS Media Partnership et al., (2008), *AIDS-Related Knowledge, Attitudes, Behavior, and Practices: A Survey of 6 Chinese Cities*. Beijing.

161 Decree No. 457 of the State Council.

162 Xinhua Sun, Fan Lu, Zunyou Wu, et al (2010), Evolution of information-driven HIV/AIDS policies in China. *Int. J. Epidemiol.* (2010) 39 (suppl 2): ii4-ii13.

163 Rong Tang (2008), *Report on the Policy and Legal Environment and Legal Needs for HIV and AIDS Prevention and Control: Yunnan, China*, Yunnan Daytop Drug Abuse and Rehabilitation Center, the Yunnan Righteous Law Firm, Asia Pacific Council of AIDS Service Organizations and the International Development Law Organization.

Article 3. The Law protects the legal rights of PLHIV and AIDS and their relatives. It includes the rights of marriage, employment, assessment of medical treatment and education. Any institute or individual shall not discriminate against PLHIV, AIDS patients and their relatives.

Chapter II addresses education and communication, and includes a requirement that government agencies not discriminate against PLHIV and their relatives in the following terms:

Article 10. The people's governments and the relevant departments of the people's government at various levels shall organize and develop education and care for, and shall not discriminate against, PLHIV and AIDS patients and their relatives. The people's governments and the relevant departments of the people's government at various levels shall advocate health and civilized life-style, shall build well-supportive social environment for AIDS prevention and treatment.

Chapter III addresses HIV prevention and public health measures, including provisions relating to national disease surveillance, voluntary counseling and testing, behavior change programmes with vulnerable high-risk populations (defined to include sex workers, men who have sex with men or people who inject drugs), methadone maintenance treatment for people who inject drugs, condom supply and promotion, peer-education for the purpose of raising individual health literacy and reducing risk behavior, HIV prevention and treatment for prisoners, implementation of standard infection control precautions to prevent occupational transmission in health care settings and safety of donated human tissue and the blood supply.

Chapter III also states the legal obligations of PLHIV, in the following terms:

Article 38. People with HIV and AIDS patients shall perform the following obligations:

1. Accept epidemiological investigation and direction of agencies of diseases control and prevention or inspection/quarantine;
2. Inform the fact of being infected or suffering the disease to their sexual partner;
3. Inform the fact of being infected or suffering the disease to their medical doctor;
4. Take necessary precaution measures to prevent others being infected.

People with HIV and AIDS patients shall not, on purpose, spread the infection to others by any means.

Article 39. When the agencies of diseases control and prevention, and inspection/quarantine carry out AIDS epidemiological investigations, the institute or individual being investigated shall provide relevant facts. Any institute or individual shall not release the information that may be used to identify people with HIV, AIDS patients and their relatives, such as their name, address, workplace, picture, medical history etc.

Chapter IV addresses treatment and support, and provides a legal basis for the 'Four frees and one care' policy, including rights to prevention of mother to child transmission for pregnant women, free access to HIV testing and ARVs for rural and poor urban PLHIV, and rights of AIDS orphans to education. There is also a general obligation on health care services to provide services to PLHIV:

Article 41. Medical care institutions shall provide services of counseling, diagnosis and treatment to HIV positives and AIDS patients. Medical care institutions shall not reject or make excuse to HIV positives or AIDS patients in treating their other diseases.

Chapter V relates to implementation responsibilities of government agencies including budget allocations and monitoring.

Chapter VI addresses legal liabilities. Government officials may be held liable for failing to implement prevention, treatment, care or support measures as required by the Regulations, and officials may be subject to administrative or criminal liability.

Article 55 provides that health care workers who fail in their duties may be penalised by demotion, dismissal, loss of certification or prosecution in the case of criminal conduct. Such duties include the duty to provide health care to PLHIV.

Article 56 creates sanctions for breach of confidentiality by health care services, (see Article 39), which may include sanctions under the law on prevention and treatment of infectious diseases and revocation of certification.

Article 62 provides that people with HIV or AIDS who spread HIV on purpose shall have legal liability for compensation in accordance with the civil law, and if a crime is committed, an investigation shall be carried out for criminal liability in accordance with the law.

To supplement the *AIDS Regulations*, the State Council issued a *Notice on Further Strengthening the HIV Response* in 2010.¹⁶⁴ The Notice is an important statement of policy that courts may have regard to if seeking to apply the *AIDS Regulations* or other HIV-related laws. The part of this Notice addressing the rights of PLHIV states as follows:

(11) *Enhance the protection of rights and interests to promote social harmony.* Relevant policies shall be implemented to eliminate social discrimination and protect the legitimate rights and interests of PLHIV and their families in health seeking, employment and schooling. Development and capacity building of designated general hospitals and infectious disease hospitals shall be enhanced to strengthen their capacity in diagnosis and treatment and protect the rights and interests of PLHIV in access to diagnosis and treatment services. HIV/AIDS in prisons and other custody settings shall be incorporated into national and local HIV/AIDS plans. Efforts shall be made to strengthen HIV/AIDS IEC, HIV testing and ART for AIDS patients for incarcerated inmates, establish and improve regulations on the management of PLHIV who have committed crimes, ensure their access to treatment and support

164 Document of the State Council, Guo Fa [2010] No. 48.

services after they are discharged, strengthen legal and moral education for PLHIV to raise their sense of social responsibility, guide PLHIV to actively participate in HIV/AIDS activities and intensify strict crackdown against illegal acts that lead to the transmission of HIV on purpose and crimes committed with the abuse of HIV status.

This re-statement of the obligation of non-discrimination and the rights of incarcerated PLHIV is helpful. However, the reference to the need for moral education of PLHIV and an intensified crackdown on purposeful HIV transmission suggests a punitive approach that may jeopardize efforts to combat stigma.

4.2 Legal status of the *AIDS Regulations*

The *AIDS Regulations* of 2006 update existing regulations. The first regulations addressing the public health aspects of HIV were issued in 1988 and numerous other regulations were subsequently promulgated focusing on public health aspects of HIV.¹⁶⁵ The 2006 *AIDS Regulations* update and consolidate measures addressing the public health aspects of HIV and additionally address rights to non-discrimination and confidentiality.

It is important to understand that the *AIDS Regulations* are only administrative regulations and are subject to overriding laws that have a higher priority in the legal hierarchy, such as laws that permit discrimination in some forms of state employment and criminal laws relating to sex work and drug use.

Jinmei Meng, an expert in Chinese HIV-related law, describes the limited legal impact of the *AIDS Regulations* as follows:

Where there are conflicts between the prohibitive laws against prostitution and drug use on the one hand and the specific legislation on HIV prevention on the other, the former always takes priority because it has a more powerful legal effect. In China, the descending order of legal effect of different legislation begins with constitutional law, followed by laws made by the National People's Congress and its Standing Committee, then administrative regulations introduced by the State Council of the PRC (People's Republic of China) and local regulations formulated by local congresses, and finally rules of departments and rules of local government.

The top specific legislation on HIV is the Regulations on AIDS prevention and treatment, an administrative regulation issued by the State Council. The majority of specific legislation on HIV is formulated by administrative departments such as the Ministry of Health. In contrast, the key pieces of anti-prostitution and anti-drug legislation are made by the National People's Congress (NPC) or its Standing Committee, such as Criminal law (The National People's Congress of the PRC 1997), Public order administrative punishment law (The Standing Committee of the National People's Congress 2005) and the Law on the prohibition of drugs (The Standing Committee of the National People's Congress of the PRC 2007).

165 *Certain Regulations on the monitoring and control of AIDS*, Approved 26 December 1987 by the State Council and jointly promulgated 14 January 1988 by the Ministry of Public Health, the Ministry of Foreign Affairs, the Ministry of Public Security, the State Education Commission, the National Tourist Administration, the Civil Aviation Administration of China and the National Foreign Experts Bureau.

The hierarchical order of China's law making bodies (from high to low: NPC -> State Council -> Ministry of Health and local bodies) has predetermined the weak effectiveness of regulations issued by the bodies ranked lower in the hierarchy, especially when these contradict laws promulgated by bodies ranked higher. In other words, the legal effect of this legislative arrangement determines that the enforcement of anti-prostitution and anti-drug laws takes priority over the enforcement of HIV-related public health law, a ranking which undermines the efficacy of responses to HIV.¹⁶⁶

Rong Tang describes the limitations of the *AIDS Regulations* and the subordination of the *AIDS Regulations* to other conflicting laws as follows:¹⁶⁷

Since promulgation of the Regulations is based on the legislative principle of nationalism, and other national laws have not been amended to enable the Regulations, there is still a lack of sufficient safeguards for the human rights of the groups affected by HIV.

The articles concerning the safeguarding of rights are very general and are not practical to enforce from case to case. The core element for HIV prevention and control is anti-discrimination. Although the Regulations define the principle of non-discrimination against PLHIV ... the concept of *discrimination* is not further defined explicitly, nor are the legal liabilities for discriminatory behaviors, nor the means for relief and assistance.

The Regulations on HIV/AIDS Prevention and Control is a normative administrative document for national governance that the State Council formulated based on the Constitutions and other relevant laws. Many laws conflict with the Regulations, however, and legitimacy of the Regulations is secondary to the Constitutions and laws. If the Regulations conflict with other laws, the laws with higher level of legitimacy should be observed. The laws that conflict with the Regulations include:

(A) Medical practitioners are legally authorized to forbid the sufferers of some diseases to marry.¹⁶⁸

(B) The rights of PLHIV are constrained by laws (*General Standards on Physical Examinations Relating to the Employment of Civil Servants (Provisional)*; *The Measures on Implementing the Regulations on the Qualifications of Teachers*; *The Physical*

166 Jinmei Meng (2012), HIV Governance through law: achievements and challenges of China's legal environment, *International Journal of Asian Pacific Studies*, Vol. 8, No. 1, 57–75, p.64.

167 Rong Tang (2008), *op cit.*, pp.11-13.

168 Ibid; *The Law of the People's Republic of China on Maternal and Infant Health Care* (1994, NPC) stipulates: "Physicians shall, after pre-marital medical examination, give medical advice to those who are in the infective period of any target infectious disease or who are in the morbid period of any relevant mental disease; both the male and female planning to be married shall postpone their marriage for the time being". Infectious diseases include HIV, gonorrhoea, syphilis, leprosy and other infectious disease that are medically considered to adversely affect marriage and reproduction as stipulated in *The Law of the PRC on the Prevention and Treatment of Infectious Diseases*. HIV is incurable and remains transmissible in all phases. Consequently, according to the law, PLHIV in China (including individuals in the promotion period) should not just temporarily postpone the marriage but need to postpone marriage indefinitely.

Checklist and Standards of the Public Security Organs for Employment Police Staff; The Regulations on the Sanitary Administration of Public Places).¹⁶⁹

(C) *The Education Law of the People's Republic of China* fails to mention the equal rights to education of citizens of different health status.

4.3 Other legal redress mechanisms for human rights violations

Laws in addition to the *AIDS Regulations* that provide legal protections for HIV-related human rights include:

- The *Employment Promotion Law* (2008), which prohibits refusal to employ people with infectious diseases, subject to exceptions (see below).
- The *Law on Prevention and Treatment of Infectious Diseases* (2004), which states: "No units or individuals shall discriminate against infectious disease patients, pathogen carriers and suspected infectious disease patients. The infectious disease patients, pathogen carriers and suspected infectious disease patients shall, before they are cured or cleared of suspicion, be barred from jobs which laws or administrative regulations or the health administration department under the State Council prohibit them from doing because of the likelihood of causing the spread of infectious diseases."¹⁷⁰
- The *Law on the Protection of Persons with Disabilities* (2008), which prohibits discrimination on the basis of disability.¹⁷¹ Chapter 8 of the Law sets out avenues through which persons with disabilities can seek redress from the "competent authorities" for rights violations. By defining enforcement mechanisms, the *Law on Protection of Disabled Persons* provides stronger protections than the *AIDS Regulations*. To use this law to seek legal redress, it would need to be established that PLHIV have a 'disability' as defined by this law.¹⁷²

169 Rong Tang, *ibid.*, cites the following: *General Standards on Physical Examinations Relating to the Employment of Civil Servants (Provisional)* Ministry of Health 2005, Article 18, "Persons positive for ... HIV disqualify." In *The Measures on Implementing the Regulations on the Qualifications of Teachers* (Ministry of Education, 2000), Article 9 stipulates, "...the teacher's qualifications shall comply with the following requirements: ... free from infectious disease." *Physical Checklist and Standards of the Public Security Organs for Employment Police Staff* (Ministry of Public Security, 2005), Article 13 stipulates that PLHIV are disqualified from employment. *The Regulations on the Sanitary Administration of Public Places* (State Council, 1987), Article 7 stipulates "staff who provide direct services to customers in public places should present a 'health qualifications certificate' before engaging in the current occupation. Patients with ... other diseases that are detrimental public health should not engage in direct services to customers before complete treatment and recovery." According to *The Detailed Regulations on the Sanitary Administration of Public Places* (Ministry of Health, 1991), "other diseases that are detrimental to public health" include venereal disease. According to Article 2 in *The Measures on the Management and Control of Venereal Diseases* (Ministry of Health, 1991), HIV is included in the category of "venereal diseases."

170 *Chinese Law on the Prevention of Infectious Diseases*, passed by the Standing Committee of the National People's Congress on 21 February 1989, revised 28 August 2004, Article 16.

171 Article 3.

172 A person with disabilities refers to one who has abnormalities of loss of a certain organ or function, psychologically or physiologically, or in anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal. (Article 2)

- The *Anti-Drugs Law* (2007) provides that persons receiving treatment for drug addiction shall not be discriminated against in terms of enrollment in schools, employment, or enjoyment of social security. The relevant departments, organizations and persons shall provide them with the necessary guidance and help in these respects. Where a unit discriminates against a person receiving treatment for drug addiction in terms of enrollment in schools, employment, enjoyment of social security, etc., it shall be ordered to rectify by the administrative department and compensation may be paid.¹⁷³
- Some provincial HIV regulations include provisions relating to the rights of PLHIV. For example, regulations in Yunnan Province prohibit refusal of medical care to PLHIV¹⁷⁴ and prohibit employing units from discriminating against PLHIV and their family members in recruitment, promotion, wage distribution, medical services, pension benefits and dismissal (unless the discrimination is justified by provisions in other laws or regulations).¹⁷⁵ Yunnan Province has also introduced regulations that restrict rights, such as requirements for mandatory HIV testing before marriage in high HIV prevalence regions and HIV testing every six months for entertainment venue workers.¹⁷⁶
- The *Constitution of the People's Republic of China* states: "All citizens have the same right to employment, and any employer or individual may not infringe upon a citizen's equal right to employment." The Constitution provides for freedom of speech, of the press, of assembly, of association, and of demonstration. Citizens have the right to complain to state agencies for violation of the law or dereliction of duty by any state organ or functionary. The Constitution also addresses unlawful deprivation or restriction of citizens' freedom by detention, unlawful searches and interference with privacy of correspondence and provides the right to work, the right to material assistance from the state and society when ill or disabled, and that women enjoy equal rights with men in political, economic, cultural, social and family life. However, Chinese courts may be reluctant to apply constitutional human rights provisions in civil and administrative litigation. The prevailing view of judges is that the court's role is not to interpret the Constitution (this being the function of the National People's Congress or its Standing Committee), and therefore the courts should not quote the Constitution as a legal basis in a judgment.¹⁷⁷

Employment Promotion Law (2008)

The *Employment Promotion Law* provides:

When hiring personnel, an employer may not refuse to employ someone on the grounds that he or she is a carrier of an infectious disease. However, a certified

173 Articles 52 and 70.

174 *HIV/AIDS Prevention and Treatment Regulations* (2007), Regulation 41.

175 *Yunnan Province Guidelines on HIV/AIDS in the Workplace*, May 2008.

176 *HIV/AIDS Prevention and Treatment Regulations* (2007), Regulations 20 and 30.

177 Guo S. (2009), Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects, *Chinese Journal of International Law*, 8:1, 161-179.

carrier of an infectious disease may not, until he or she has recovered, or the suspicion of infectiousness has been eliminated, engage in work prohibited by laws, administrative statutes or the State Council's health authority, due to the fact that it would facilitate the spread of the disease.¹⁷⁸

The *Employment Promotion Law* confirms that courts may consider employment discrimination cases and that workers are entitled to initiate civil lawsuits to remedy discrimination. Although the *Employment Promotion Law* was a significant advance in protecting the rights of workers with infectious diseases, procedural barriers exist and the law needs to be strengthened. The *China Labour Bulletin* identified the following factors to be addressed:

The *Employment Promotion Law* clearly remains deficient in several areas of administration, effectiveness, and coverage.

- The law relies on already under-staffed and over-worked local labour bureaus to oversee and implement anti-discriminatory policies and regulations.
- Since prospective employees are not actually employees under the law, cases of employment discrimination in hiring are not subject to the labour dispute arbitration system and victims must use the formal court process, which can cost a lot more and can take much longer to complete proceedings.
- Fines for violations of the *Employment Promotion Law* are hopelessly inadequate. A 1,000 yuan fine for conducting HBV screening does not deter employers from conducting such tests. Moreover, employers can simply require individuals to sign documents indicating that they took the test "voluntarily."

The law states that those who have been discriminated against are entitled to initiate legal proceedings, but it offers no explanation to the courts on what standards are to be followed, what types of compensation should be paid to victims and what punishments should be meted out to violators. Chinese courts are known to be unwilling to hear cases without regulations or laws that adequately explain how cases should be tried.¹⁷⁹

Roberts has identified fundamental weaknesses in protections from discrimination under Chinese employment law:

Litigation costs are often too high, and the likelihood of success at a discrimination claim is too low, to make pursuing litigation worthwhile. The lack of incentive to bring discrimination claims against employers is exacerbated by the lack of a clear or guaranteed remedy upon a successful case.

Plaintiffs must satisfy a heavy burden of proof in employment discrimination claims. In the United States, once the plaintiff establishes his prima facie case

178 See: Webster T. (2011), Ambivalence and Activism: Employment Discrimination in China, *Vanderbilt Journal of Transnational Law*, 44:643-707, p. 694.

179 Employment discrimination in China, *China Labour Bulletin*, 21 November 2012.

of discrimination, the burden of proof shifts to the defendant to provide a non-discriminatory reason for its decision. If the defendant meets that burden, the burden then shifts back to the plaintiff to prove why the proffered reason is merely pretext for discrimination. This burden-shifting standard levels “the playing field” between a plaintiff and a defendant, since a defendant often possesses all of the necessary information for the claim.

In contrast, Chinese laws do not articulate an evidentiary standard and do not include the same burden-shifting between plaintiffs and defendants. As a result, employers do not have to produce information and plaintiffs must rely on “stray comments or circumstantial evidence to prove their case.” This high bar provides a strong disincentive for workers to enforce their rights under the existing laws.¹⁸⁰

The Ministry of Labour and Social Security issued regulations in 2007 to complement the *Employment Promotion Law*, which specifically prohibit using Hepatitis B Virus (HBV) status as a ground for denying employment (but do not address HIV). Unlike previous laws and regulations that failed to specify a penalty for violations, the 2007 regulations introduced a fine of 1,000 yuan for employers who discriminate on the grounds of HBV status. The *Employment Promotion Law* has primarily been used by people with HBV, rather than PLHIV. There is only one reported case where a PLHIV has succeeded in achieving legal redress for discrimination under the *Employment Promotion Law* (see *Xiao Qi’s case*, below). By contrast, many HBV cases have been successful:

Studies indicate that over 70 percent of HBV discrimination cases are now accepted in the courts, with more than 200 reported cases by 2011. Prior to the law’s implementation, the anti-discrimination group Yirenping brought less than 20 cases per year; that number immediately rose to 70-80 cases per year after implementation. In addition to bringing more cases before the courts, the stronger laws and greater willingness of courts to accept these cases has also given workers greater leverage and bargaining power in out-of-court settlements.¹⁸¹

This suggests that HIV claims may be more successful if the Ministry of Labour and Social Security issued detailed HIV regulations clarifying non-discrimination requirements in specific industries or contexts, to complement the *Employment Promotion Law*.

Webster conducted an analysis of all types of discrimination cases brought under the *Employment Promotion Law*, which provides legal protections for five disadvantaged groups: women, ethnic minorities, disabled persons, people with infectious diseases, and rural workers. Webster found that the majority of law suits (twenty-two of twenty-five) were brought by people with HBV. Of the nineteen fully adjudicated cases, fifteen resulted in compensation for the plaintiff. According to Webster:

HBV lawsuits follow a pattern: Plaintiff passes the written and oral examinations of his prospective employer, who then makes a job offer, possibly conditioned on a medical examination. When the applicant’s medical examination reveals that he carries HBV,

180 Roberts C. (2012), Far From a Harmonious Society: Employment Discrimination in China, *Santa Clara Law Review* 52(4) 1531, p.1555.

181 Employment discrimination in China, *China Labour Bulletin*, 21 November 2012.

the employer either rejects the application or rescinds the offer. After an attempt at mediation, the applicant sues in court (avoiding the sidestep of labor arbitration) for economic damages, emotional distress damages, or breach of contract. He or she may also request an apology.

Chinese courts have some discretion in deciding whether to accept cases. Some courts refuse to accept cases of discrimination in hiring because it is not listed in the Supreme People's Court's causes of action. Nevertheless, many judges have accepted these cases, interpreting the disputes as implicating the right to health or the right to privacy. The first hurdle for many plaintiffs, then, is to find a judge or court willing to hear the case.¹⁸²

Civil law and tort liability

It is possible to bring an action based on general principles of China's civil law relating to injury to reputation and violation of privacy. Jianyuan Yang describes the case of *Xiaoli (Alias) v. The China Times*¹⁸³ in which the rights of a child with HIV were protected by a Beijing court:

In 2005, the *China Times* disclosed Xiaoli's photo, her real name, and her HIV positive status to the public through its newspaper. Her guardian Jin Wei brought a lawsuit to Beijing Chao Yang District Court, alleging that the *Times* had infringed upon Xiaoli's right to privacy... The result of this case was for Xiaoli, because she was granted compensation for her emotional distress in the sum of 20,000 RMB... Chao Yang District Court not only held that the article infringed upon Xiaoli's privacy, but it also added damage to reputation as a result of the disclosure of privacy.

Another report of this case describes the outcome as follows:

The child sought an injunction against the China Times to prevent further publication of the photograph, requested that the China Times be ordered to apologize, and claimed for damages caused to her reputation. The child succeeded in her claim: the Court ordered the China Times to publish an apology (the contents of which had been approved by the Court) on the front page of the newspaper. The Court further ruled that, in the event that the China Times failed to publish the apology, the judgment against the China Times would be made public. The China Times was also ordered to compensate the child for damage caused to her reputation in the amount of RMB 20,000 within 15 days of judgment. After the case, Professor Jin (one of her lawyers) stated that the main purpose of the case was to raise awareness in relation to the introduction of the Regulation on HIV Prevention and Treatment in China.¹⁸⁴

182 Webster T. (2011), *op cit.*, pp.696-697.

183 *Xiaoli (Alias) v. The China Times* (Beijing Chaoyang Dist. Ct., July 17, 2006); See: Jianyuan Yang (2008), Media disclosure of individual privacy: a proposed framework for China, *East Asia Law Review* Vol. 3:1, 59-84.

184 Labor Law and Social Security Law Institute at Peking University Law School (2010), *Mapping Initiatives to Strengthen the Legal Environment for the Response to HIV in China*, Rome: IDLO, p.11.

China's *Tort Liability Law* (2010) does not specifically address HIV, but strengthens general legal protections for individual citizens, including in relation to personal information.¹⁸⁵ The *Tort Liability Law* states a general principle that any person who infringes on and harms "civil rights and interests" of other persons shall assume tort liability.¹⁸⁶ A right to privacy, right to reputation, right to life and right to health are included in the list of the protected civil rights and interests. The law requires medical institutions and their personnel to keep medical records private and confidential.¹⁸⁷ The law also establishes the right of an injured party to take legal action against a medical institution if medical personnel disclose patients' private matters without a patient's consent and by doing so cause harm.¹⁸⁸ Under the *Tort Liability Law*, courts may make orders stopping infringements on civil rights and interests, removing the obstruction, eliminating the danger, requiring restoration of the original status, compensating for losses, or requiring an apology, elimination of consequences or restoration of reputation.

Rights to information

Another possible avenue for enforcing rights is to seek information about government policies and practices. The following describes actions taken under the *Regulations on Freedom of Information* 2008:

In March 2009, the Beijing Aizhixing Institute supported three groups to make freedom of information requests in Beijing, Henan and Hubei. By December 2009, the groups had submitted a total of 35 requests for government information and received 23 valid responses. The requests sought information on:

- the public health budget;
- the public health system's proposed implementation of Regulation on HIV Prevention and Treatment;
- regulation on false medical information;
- government policy on PLHIV; and
- details on government assistance for PLHIV.

In the same year, Aizhixing Institute initiated a series of freedom of information requests with a view to establishing a long-term mechanism for HIV prevention and treatment. Requests sought disclosure of:

185 See: *New Chinese Tort Liability Law Contains Provisions Affecting Personal Data*, Hunton & Williams Client Alert, 2010. The Law builds on pre-existing laws on tort liabilities e.g., *General Principles of the Civil Law*, the *Consumer Protection Act*.

186 Articles 2 and 6.

187 Articles 61 and 62.

188 Article 62.

- the Ministry of Health's *Circular on Implementation of HIV Antibody Screening of Persons in Prisons, Labor Camps and Education-through-Labor Centers*;¹⁸⁹
 - information from the Ministry of Health, Ministry of Education, Ministry of Civil Affairs Division of Social Assistance and the State Council AIDS Prevention Working Committee Office, on disclosure and privacy of PLHIV; and
 - information from the Ministry of Health, People's Government of Yunnan Province and the Department of Health of Yunnan Province on current data on HIV in China and Yunnan Province.
2. Administrative review and litigation on freedom of information

In the event a government department failed to respond to a request for information, the Aizhixing Action Group of Beijing Institute lodged an application for administrative review to the Ministry of Health and commenced litigation in the Jinshui District of Zhengzhou City, Henan Province (on the grounds of administrative law).¹⁹⁰

The issue of compensation for HIV acquired through blood transfusion or donation procedures has not been adequately addressed under existing laws. Compensation claims have succeeded in a number of provinces (e.g., Heilongjiang, Inner Mongolia, Shanghai, Hebei and Hubei). However, Wilson cautions that these are exceptional cases:

These cases, however, arose in the early 2000s and in provinces with relatively few HIV/AIDS cases caused by the blood scandal. The provinces with the highest rates of HIV/AIDS infection are also some of China's poorer ones, and some of the provinces such as Henan and Anhui were sites of the illicit blood collection stations. In those provinces very few court cases have been allowed, and since 2006, courts throughout China have tried very few HIV/AIDS cases. In Henan, the courts have been particularly loath to accept cases filed by HIV/AIDS carriers.¹⁹¹

The Health Governance Initiative (an NGO) has proposed a scheme for state compensation for people infected by HIV through blood transfusion or blood products.¹⁹²

189 No.369 [2004], China Disease Control Centre of the Ministry of Health.

190 Labor Law and Social Security Law Institute at Peking University Law School (2010), *op cit.*, p.35.

191 Wilson S. (2012), Settling for discrimination: HIV/AIDS carriers and the resolution of legal claims, *International Journal of Asia-Pacific Studies*, 8:1, 35-55.

192 See: *Core Plan of the Establishment of Compensation Mechanism of People Infected by HIV/AIDS Contaminated Blood*. Health Governance E-Newsletter, Issue No. 1, November 2012. Three types of cases of people infected by blood contaminated with HIV are found in China: (i) infection through re-transfusion of red blood cells to donors who had donated their blood, a practice centered in Henan; (ii) the exposure through blood transfusion during surgery; (iii) hemophiliacs who received the blood product Factor VIII.

4.4 Litigation to protect the rights of PLHIV to non-discrimination

4.4.1 Overview

PLHIV have low levels of trust in the legal system, which affects their willingness to take legal action to enforce their rights. The China Stigma Index study found that of the respondents who had experienced rights violations, 110 respondents (31.2 percent) had tried to seek redress. Of those that chose not to take any action against a violation of their rights, the primary reason given was a lack of faith in the possibility of success:

This lack of faith in the possibility of success seems to be based on a solid reality: of those that had sought redress for a violation of their rights, only 19.8 percent had been successful in their action, while for 68.3 percent the matter had still not been resolved. 37.8 percent of people who had had their rights violated had sought help from government employees to obtain redress. Of those people, 15.8 percent had had the matter resolved.¹⁹³

There have been five court cases reported in the media in which PLHIV have sought to enforce their rights to legal protection from discrimination in China, one in relation to insurance and four in relation to employment. There are indications that the courts may be more willing to consider HIV cases in the future. Over twenty cases of discrimination on the grounds of Hepatitis B status have been taken to court under employment laws, and others have been settled through mediation, resulting in imposition of fines and payment of compensation.¹⁹⁴

Wilson conducted a study of HIV-related discrimination litigation in China based on interviews conducted in 2007–2010. Wilson's study found that many HIV discrimination cases are settled out of court because the courts have been reluctant to accept employment discrimination cases brought by PLHIV. Wilson argues that the popularity of alternative dispute resolution (ADR) means that few HIV cases have been brought to court:

Instead of litigation, legal aid lawyers have employed alternative dispute resolution (ADR), primarily negotiating out-of-court settlements. Legal aid stations seek to try impact litigation cases and to change popular attitudes toward HIV/AIDS carriers' legal rights, but the negotiated settlements that they reach are struck without formal legal judgment or society's knowledge. Usually, the settlements provide HIV/AIDS carriers with financial compensation in exchange for instituting discriminatory practices such as restricting an employee's right to work or right to education.¹⁹⁵

193 Institute of Social Development Research, China Central Party School (2009), *op cit.*, p.15.

194 See: Webster T. (2011), Ambivalence and Activism: Employment Discrimination in China, *Vanderbilt Journal of Transnational Law*, 44:643-707, p.697; China's First Successfully Litigated Hepatitis B Employment Discrimination Case, *China Labour Bulletin*, 19 August 2009; China fines first enterprise for Hep. B discrimination, *People's Daily Online*, 21 September 2010.

195 Wilson S., *op cit.*, p.40.

...In China, potential plaintiffs face many challenges, including difficulty having cases accepted by courts, loosely defined laws and regulations, poorly trained judges and weak enforcement of rulings.

...Why would HIV/AIDS carriers opt to settle for discrimination rather than seek to litigate against discriminatory practices? There are many reasons for the small number of trial cases, ranging from the government's discouragement of cases to societal prejudice faced by HIV/AIDS carriers and their families.

Wilson found that financial settlements had been provided to PLHIV who participated in ADR proceedings, but this allows discriminatory practices to continue:

The pattern of using ADR to negotiate for cash settlements that leave discriminatory practices intact may prove cold comfort for HIV/AIDS carriers. Due to the anxiety of exposing themselves, their families and friends to the stigma associated with HIV/AIDS-positive status and due to the courts' reluctance to hear their cases, HIV/AIDS carriers have sought to keep their claims out of the courts.¹⁹⁶

According to Rong Tang (2008), the enforceability of the *AIDS Regulations* must be understood in the context of a judiciary that may be reluctant to accept cases for consideration due to a range of policy and local political considerations:

... the present enforcement status of policies and laws for HIV prevention and control depends much more on the social and cultural environment. HIV prevention and control is a complex systematic program that involves multiple issues, including those in politics, law, policy, religion, morality, and the preconceptions of individuals and institutions... The issue of judicial judgment concerning HIV is that some cases are often rejected by the courts. Some jurists are of the opinion that all issues involving laws should be appealed to the courts where the judge will make the ultimate determination. However, the scope for courts to accept cases is still very limited at the present time. Many non-legal factors need to be taken into account in deciding whether a case is to be accepted or not. Moreover, in a lawsuit concerning HIV, administrative authorities, human rights and vulnerable groups are often involved. In the end, the principled judgment of the courts is often interfered with by many external factors.¹⁹⁷

4.4.2 Insurance discrimination

Li Wei v. Ping'an Health Insurance Company (2008) was the first case to test the anti-discrimination provisions of the *AIDS Regulations*. The case was unsuccessful in that the court did not find that the insurance company had committed unlawful discrimination by excluding PLHIV from medical benefits. However, ultimately the case resulted in a positive outcome for PLHIV as a result of pressure being placed on the insurance industry to end discriminatory practices. Advocacy associated with the case succeeded in securing

¹⁹⁶ *Ibid*, p.50.

¹⁹⁷ Rong Tang (2008), *op cit.*, pp.13, 15.

a change in the national policy of the Insurance Association of China directing health insurance companies (e.g., accidental death and disability) not to exclude HIV.¹⁹⁸

Li Wei's case is described by Wilson as follows:

Li alleged that the Ping'an Health Insurance Company, which provided his insurance policy, discriminated by excluding HIV/AIDS carriers from medical benefits. The policy lumped HIV/AIDS in with health damages caused by warfare, actions of soldiers, bombs, rioting or the actions of criminals. Li claimed that such an exclusion against HIV/AIDS, which stood out as a medical condition in a list of violent acts, discriminated against a category of more than 700,000 persons.

On June 25, 2009, a Kunming municipal court heard the complaint but ultimately rejected it... The attorney representing Li contended that although the policy had been approved in 1999, it violated China's *AIDS Law*... The insurance company failed to have an attorney ensure that its policies were updated to comply with relevant state law and regulations. The plaintiff also argued that the policy did not include required calculations on insurance coverage costs in its brochures... The attorney challenged the insurance company representative to offer calculations that would show it would be prohibitive for the company to insure medical costs related to HIV/AIDS. Second, the plaintiff's counsel alleged that the policy discriminated against HIV/AIDS carriers by failing to cover medical claims related to an HIV/AIDS carrier who was involved in an accident such as being hit by a car... the court could not determine if the written policy would exclude coverage for a HIV/AIDS carrier who had an ordinary accident such as being struck by a car. The court determined that the exclusion, on the face of it, did not inherently constitute discrimination, despite the non-discrimination article in China's *AIDS Law* and *AIDS Prevention Rules*.

...Although the courts did not find that Ping'an Insurance Company had infringed upon Li Wei's right to medical coverage, the Insurance Association of China issued a paper requiring all insurance companies not to exclude HIV/AIDS carriers from health coverage, effective 1 October 2009.¹⁹⁹

According to the Asia Pacific Council of AIDS Service Organisations, important lessons from this case were:

- i. The advocacy campaign inspired PLHIV to be aware of and use legal tools to protect their rights.
- ii. Involvement of PLHIV and other HIV affected communities was crucial in actions that impact on their rights.

198 See: Insurance fix a win for HIV patients, *China Human Rights Net*, 15 July 2009.

199 Wilson S. (2012), *op cit.*, p.45.

- iii. Public opinion could be swayed and support given when people realize that PLHIV were unjustly discriminated against. Involvement of legal professionals and the media was significant in bringing about change.²⁰⁰

4.4.3 Employment discrimination

Four cases have arisen in the period 2010-2012 in which PLHIV have requested courts to consider complaints of unlawful discrimination due to rejection of applications for teaching positions. These discrimination cases sought to challenge the discriminatory conduct of the relevant Education Bureau based on provisions of the *Employment Promotion Law* and *Infectious Diseases Law*, as well as the *HIV Regulations*. The names used to describe the cases are pseudonyms. Only one case resulted in a positive outcome for the complainant, when compensation was agreed at a court supervised mediation. However, as yet, no court has ordered an education bureau to employ a PLHIV.

(i) *Xiao Wu's case (2010)*

Wilson describes *Xiao Wu's case (2010)* as follows:

Xiao Wu was a student in Anhui Province who upon graduation applied for a teaching position at the Municipal Education Bureau and the Personnel Office of Anqing City. In May 2010, Xiao Wu passed a written exam for the position, and in June, his interview qualified him for the job. During a required physical examination as part of the application process, authorities discovered that he was HIV positive. Based upon that discovery, the school found him unfit for employment. After a period of angry reflection and consultation with lawyers, Xiao Wu filed a case in court in Anqing City, Anhui Province.

Xiao Wu and his lawyer, Yu Fangqiang, from Yirenping, a public interest law firm in Beijing, claimed discrimination based on legal principles found in *China's Constitution*, *Labor Law*, *Employment Promotion Law*, *China's Infectious Diseases Prevention Law*, and *AIDS Prevention Rules*...The rules on civil service employment, however, ran against these general statements against discrimination in employment. *The Standards Used for Civil Servant Physical Examinations (Trial Implementation)* flatly states, "HIV/AIDS, inappropriate," and *The Handbook on Physical Examinations Used for Civil Servants* notes that "physical examinations cannot be completed once it is discovered that an applicant is discovered to have HIV."

...The defendants argued that they acted within the legal guidelines of the relevant regulations, so the case should be dismissed. The court decided with the defendants in their lawful use of regulations to deny Xiao Wu employment. One commentator lamented that the various laws related to discrimination and employment lacked a common "equal standard" (*pingdeng yuanze*) and detailed definitions by which to judge discrimination claims. Implicitly, the courts, by failing to act on such cases, have indicated that they do not take it upon themselves to help settle such

200 Global Commission on HIV and the Law (2011), *Report of the Asia Pacific Regional Dialogue*, Bangkok: UNDP Asia Pacific Regional Office.

discrepancies in terminology in legal expressions, instead waiting for implementing guidelines or instructions from legislative bodies.

Xiao Wu's case is extraordinary in several respects. First and against the basic argument of this paper, Xiao Wu overcame his fear of public exposure to use litigation (rather than alternative dispute resolution) to address his grievance. Second, the courts have been reluctant to hear cases related to discrimination, but they accepted this case. Third, the case alleges discrimination by a state-run unit, which may suggest a change in the courts' willingness to hear more cases related to discrimination, even against state agents.

Significantly, China's courts, at the request of their attorneys, have protected the confidentiality of Xiao Wu and Li Wei, both HIV carriers who have successfully brought their cases claiming discrimination to the courts...

The Chinese courts, however, by refusing to hear cases on HIV/AIDS have shifted the balance in favour of would-be defendants. Potential defendants have little reason to comply with anti-discrimination principles or to eliminate negligence. In the context of discrimination in access to medical treatment, one doctor said, "Every hospital knows that according to the law they cannot reject HIV patients. ...Without concrete punishment, hospitals do not consider the law as a restriction on their behavior."

Xiao Wu's and Li Wei's cases may evince a new trend by the courts to allow discrimination cases against HIV/AIDS carriers to be heard. Even though both cases resulted in the courts' denial of damages, at least one case has resulted in a non-binding policy change among insurance companies, ... The fact that Xiao Wu's and Li Wei's cases received hearings, which China's press widely reported, may encourage others to come forward to test try their cases in the courts.²⁰¹

Xiao Wu's case was appealed, but the appeal was unsuccessful. Although ultimately this was a disappointing outcome for PLHIV, some commentators observed that the fact that the initial court accepted and heard the case was a very positive development:

This is positive news in most respects. The standard operating procedure for Chinese courts up until now is to dismiss these discrimination cases, including HIV. We've seen some very positive trends with sexual harassment over the past few years, and now perhaps HIV cases will begin to be accepted by judges. The Central Government has, via legal reform in 2006, made their intentions clear that such cases should be taken seriously. By hearing the case, the issue was indeed taken seriously.²⁰²

(ii) *Xiao Jun's Case (2011)*

The second employment discrimination case was *Xiao Jun's Case (2011)*, which arose in Sichuan. This case was also unsuccessful and has been described as follows:

201 Wilson S. (2012), *op cit.*, pp.48-52.

202 Harris D. (2010), *China Law Evolving - Businesses Take Note, Part VII*, www.chinalawblog.com, 2 December, 2010, (quoting Stan Abrams of China Hearsay).

The Education Bureau refused to offer a position to Xiao Jun because of his HIV status. Xiao Jun filed a lawsuit at Yanbian County Court. Xu Xinghua from Beijing Changjiu Law Firm and Huang Xiang from YULAC were entrusted by Xiao Jun as representing lawyers for this case. Yanbian County Court accepted the case on October 28, 2010. The first trial was held on February 18, 2011. The two lawyers spoke in defense of the client at the court. On March 21, 2011, the Court issued an administrative verdict, which found against the plaintiff. The Court found that the action of the Education Bureau was consistent with relevant public service regulations and not unlawful. Xiao Jun appealed to the Mediation Court of Panzhuhua on March 28, 2011. The appeal was unsuccessful.²⁰³

(iii) *Xiao Hai's case (2011)*

A third employment case arose in Guizhou Province in 2011. The Court refused to accept Xiao Hai's case for consideration. In rejecting the case, it was reported that the judge suggested that he turn to the local government to solve the issue rather than the courts.²⁰⁴ It was reported in the *Global Times* as follows:

An HIV carrier, rejected for a position as a primary school teacher, launched a lawsuit against local authorities in Guizhou Province for employment discrimination Wednesday. The candidate, giving the name Xiaohai, was told by the Human Resources and Social Security Bureau in Sandu Shui Autonomous County that he was not hired as a teacher on April 3 this year because he carried the HIV. He was also told he passed the written test and interview. An officer surnamed Wei at the county bureau told the *Global Times* that the bureau refused to hire Xiaohai because the physical test standard for civil servants indicates people with HIV/AIDS cannot be hired. Chen Wensheng, Xiaohai's attorney at Qiance Law Firm in Guizhou Province, submitted the indictment against the county government and the human resources and social security bureau to the intermediate people's court in Qiannan Buyi and Miao Autonomous Prefecture Wednesday afternoon.

"First we require the court to confirm that the rejection of Xiaohai is employment discrimination and illegal, and get them to repeal the rejection," said Chen. "Secondly, we request the court make authorities reconsider whether Xiaohai can be hired as teacher, as their basis for the refusal is against law."

According to Chen, all citizens in China have the right and obligation to work. Also, the Employment Promotion Law implemented in 2008 formulated in the 30th article that employers may not refuse applicants because they carry an infectious disease.

Moreover, Chen said, the Law on Prevention and Treatment of Infectious Diseases, and AIDS Prevention and Control Regulations dictate employers must not discriminate against AIDS patients or HIV carriers. And the regulations also stressed AIDS patients and HIV carriers are protected by law in regards to marriage and

203 *Lessons learned from an HIV legal aid service operating in Kunming, Yunnan Province, China: Yunnan University Legal Aid Center 2009-2011 & Daytop Legal Service Project 2011-2012, Health Policy Initiative / Greater Mekong Region and China, May 2012.*

204 Li Li (2012), Opening the door of opportunity, *Beijing Review*, 19 January 2012.

employment. The physical standards test is a must for many public sector jobs and Chen said it's a major fault in the system. Chen told the *Global Times* that, although he cannot guarantee victory for Xiaohai, their effort may play a part in strengthening laws to protect AIDS/HIV infected people. "In fact, I don't think HIV carriers are not suited to be teachers," said Wei. "But we are just doing what the standard says." The HR officer said that Xiao Hai could submit materials to the bureau to apply for a review and he has not.²⁰⁵

(iv) *Xiao Qi's case (2012)*

Xiao Qi's case was the first reported case of a PLHIV in China obtaining compensation for HIV-related employment discrimination. Compensation was obtained as a result of a mediation agreement between the parties, rather than after a formal court hearing. Xiao Qi claimed that he was discriminated against by Jinxian County Educational Bureau in Jiangxi Province for being denied a teaching post because a pre-employment health check showed that he was HIV-positive. He cited the *Employment Promotion Law* and *AIDS Regulations* to support his claim. Jinxian People's Court presided over a mediation of the case, which resulted in an agreement for payment of 45,000 yuan compensation. However, the agreement only relates to compensation and the Educational Bureau is not required to employ Xiao Qi.²⁰⁶ This court-approved settlement received significant media coverage, hence may have some impact on future practices in employment and the willingness of PLHIV to seek redress.

4.5 Issues arising in implementation of the *AIDS Regulations*

4.5.1 Enforcement of anti-discrimination provisions is problematic

Several commentators have raised concerns regarding the enforceability of the non-discrimination provisions of the *AIDS Regulations*. Jinmei Meng states:

... the enforceability of the legal provisions on the prohibition of HIV-related discrimination is questionable. These provisions are highly abstract, resembling political declarations. They cannot be applied to individual discrimination cases. Victims of HIV discrimination have to seek protection from other laws such as employment law or public health law and often find that there are insufficient concrete provisions on available legal remedies for them. The legal responsibilities of hospitals that refuse to admit PLWHA are unclear in public health law. Similarly, in employment law, HIV-related discrimination victims who are denied employment opportunities cannot claim compensation from potential employers who refuse to employ them because no employment contract has yet been established between them...

The Chinese anti-discrimination legal mechanism is rather weak and does not specify a clear legal definition of discrimination. There is no specific government agency dealing with non-discrimination and equal opportunity. To establish an effective

205 Pang Qi (2011), HIV carrier sues local govt., *Global Times*, 8 September 2011.

206 China's first successful AIDS discrimination claim, *People's Daily Online*, 26 January 2013.

anti-discrimination legal system would be one condition enabling the prohibition of HIV-related discrimination.²⁰⁷

The three applicants for positions as teachers whose court cases failed submitted a petition to the State Council to register dissatisfaction with the lack of enforcement of the non-discrimination provision of the *AIDS Regulations*. Advocates requested the State Council to take action to resolve existing conflicts between national and provincial laws:

Guidelines state that civil servants should not be carriers of an infectious disease. However, a five-year-old national law in China is supposed to safeguard the employment rights of people with HIV... Mr Yu (Yu Fangqiang, an HIV activist who heads the Nanjing-based organisation Tianxia Gong) told the BBC: "Local governments often tend to obey regulations set up by a higher level which are against the national law. The State Council has the responsibility to check if there is any contradiction between departmental regulations and the law of the state: if there is, the regulations of the departments should be removed."²⁰⁸

The policy justification for continued discrimination against applicants for teaching positions is unclear. Justifications that have been suggested include concerns regarding reduced life expectancy and the fact that HIV cannot be 'cured'; anticipated workplace absences due to illness, liability of public sector employers for health insurance costs, infection risk to staff and students, concern that the moral status of teachers may be undermined in the eyes of the community, and concerns regarding the generally hostile reaction of parents and students. None of these reasons provide a convincing justification for discrimination, particularly given advances in HIV treatment and the lack of evidence of workplace infection risk. Yet discrimination against applicants for civil service positions continues to be reported. As at 2012, the Government of China was conducting internal consultations regarding the future role of HIV testing in the Health Check Requirements for Civil Service Recruitment.

4.5.2 Voluntary testing has not been universally implemented

Although the *AIDS Regulations* promote voluntary testing, mandatory testing practices are widespread and are justified by other laws and policies. Jinmei Meng notes:

In 2005, two ministries jointly issued the Provisional work plan on HIV testing of detainees in prisons and all incarceration establishments (The Ministry of Health of the PRC; The Ministry of Public Security of the PRC 2005). This work plan required that from 2006 onward monthly mandatory HIV testing must be administered to newly-admitted detainees.²⁰⁹

207 Meng J. (2012), *op cit.*, p.68. See also: Meng J. (2010), *Can China law effectively prohibit HIV-related discrimination?* AIDS 2010 - XVIII International AIDS Conference: Abstract no. THPE0923.

208 HIV-positive teachers urge China to end discrimination, *BBC News online*, 28 November 2011.

209 Jinmei Meng (2012), *op cit.*, p.66, citing: The Ministry of Health of the PRC and The Ministry of Public Security of the PRC (2005). *Provisional Work Plan on HIV Testing of Detainees in Prisons and All Incarceration Establishments*. Beijing.

UNAIDS issued a statement in 2012 noting with concern the existence of provincial and local regulations requiring mandatory HIV testing for employees in certain industries and requirements for HIV pre-marital HIV testing. These regulations include the “*Hunan Province Regulations on Implementation of “AIDS Prevention Regulations”*” and “*Yili Kazakh Autonomous Prefecture Provisions on HIV Prevention and Control*”. The UNAIDS statement called for removal of such mandatory provisions:

The inclusion of HIV testing in recruitment processes and as a condition of continued employment has no proven public health benefit since HIV cannot be transmitted through the casual contact in a working environment. As well as denying people living with HIV the right to employment, the inclusion of such provisions is likely to prove counter-productive to public health goals by further stigmatizing HIV and preventing those most at risk from accessing HIV testing and other prevention, treatment, care and support services... UNAIDS urges relevant government departments to reconsider policy stipulations requiring employees to demonstrate HIV negative status as a precondition for recruitment or continued employment, including those stipulations contained in China’s Standardized Health Check Requirements for Civil Service Recruitment.²¹⁰

4.5.3 The role of NGOs in HIV responses is not fully recognized

Rong Tang argued (in his 2008 report) that the *AIDS Regulations* neglect the role of NGOs in HIV prevention and control:

Article 6 of the Regulations stipulates that, “[t]he government encourages and supports the Labor Union, the Communist Youth League, Women’s Federations and the Red Cross and other groups to assist the government at all levels to implement work in HIV prevention and control.” Although the Regulations recognize the role of social groups in HIV prevention and control, the relevant social groups mentioned include only the Labor Union, the Women’s Federation and the Communist Youth League as organizations with official status. The roles that a large number of NGOs (both national and international) have played in the response to the HIV epidemic are neglected. However, these roles cannot be fulfilled by the government.²¹¹

The State Council *Notice on Further Strengthening the HIV/AIDS Response* (2010) provides further detail on civil society roles as follows:

Mobilize social participation in HIV/AIDS response. People’s organizations (e.g., trade union, youth league, women’s federation, Red Cross and association of industry and commerce), social groups, foundations, people-run non-enterprise units and grassroots organizations (e.g., residents’ committees and villagers’ committees) shall be fully mobilized to participate in HIV/AIDS response. The purchase of services can be adopted to encourage their involvement in IEC, preventive interventions, care and support. Enterprises and volunteers shall also be inspired to participate in HIV/AIDS response. Guidance and management shall be strengthened to promote social

210 UNAIDS China Country Office (2012), *Statement Regarding Provisions on HIV Testing in Provincial- and Local-level Regulation*, 13 July 2012.

211 Rong Tang (2008), *op cit.*, p.13.

participation in HIV/AIDS response. The civil affairs departments shall facilitate legal registration of social organizations, and relevant government departments shall fulfill their responsibilities as sponsoring agencies.

UNAIDS has noted the need for the government to improve laws and policies affecting community based organizations (CBOs):

Currently, despite important progress in this area, the majority of CBOs working on HIV do not have legal identities or the legal right to raise funds. This leads to instability and unpredictability for organisations, and severely impedes their ability to contribute to the response. Developing a CBO-friendly policy environment, in which CBOs can register, operate and develop healthily, will serve to magnify the impact of CBOs, and produce more efficient, consistent results.²¹²

4.5.4 Refusal of health care

Access to HIV medicine

Concerns have arisen that treatments for HIV-related opportunistic infections (OIs) are not readily available, despite the provisions of the *AIDS Regulations* requiring health care services to provide treatments. Media reports in 2012 highlighted restrictions on access to treatment as a result of lack of enforcement of the *AIDS Regulations*.²¹³

Access of PLHIV to hospital services for non-HIV related care

After a case came to media attention in 2012 of a PLHIV who was refused cancer treatment by a cancer hospital in Tianjin, the Ministry of Health issued a circular directing health authorities at all levels to take substantial measures to guarantee equal rights to medical treatment for PLHIV.²¹⁴

In 2010, China Alliance of People Living with HIV/AIDS (CAP+) collected 38 case studies of refusal of surgical operations on PLHIV. The study also found that mandatory pre-operative HIV testing is a widespread practice. The study found cases at different levels of the health system across the country, including large general hospitals and privately run hospitals. Refusal of surgical services was found to be pervasive across a range of operations including complicated and simple surgical procedures. In the Chinese health system, PLHIV have historically been treated at HIV/AIDS designated hospitals, which are not equipped for conventional surgical operations. The study found that the existence of designated HIV hospitals has been used an excuse for other hospitals not to provide general medical services to PLHIV.

CAP+ noted the lack of adequate complaint handling processes:

212 Speech by UNAIDS China Officer-in-Charge, Ms. Nana Kuo, at opening ceremony of Fourth Red Ribbon Beijing Forum Meeting, 12 December 2012.

213 Wang Ruoyao, Cheng Qun (2012), Protests mount over free AIDS clinics' closure, *Xinhua*, 6 June 2012.

214 Ban on HIV discrimination, *CNC World*, 24 November 2012.

According to China's laws and regulations, the public health administrative departments shall receive the complaints regarding medical services within their jurisdictions; in real situation, however, the local public health administrations rarely set up effective platforms (telephone hotline, Internet, affairs handling hall, etc.) for the patients to seek assistance. As a result, it is very difficult for the patients to seek assistance on their own. Some areas have announced the channels available for raising complaint regarding medical services, but most of the channels only exist in name and the rest cannot ensure smooth complaint filing. In addition, the poor access to surgical operations is generally not due to limited physical conditions such as technologies and resources conditions, but mostly due to the attitudes of personnel at the health facilities. Therefore, to establish smooth channels for filing complaints, the key is to change the people's attitudes. Moreover, complaints are the last resort for PLWHA when they are in critical conditions or the disease allows no more delay, while the absence of standard procedures for complaint filing and failure to handle the complaints timely often lead to huge losses to the patients. Therefore, we propose to establish a platform for supervision and complaint to address the lawful complaints of the patients and avoid preventable losses.

CAP+ made the following recommendations to government:

Recommendation 1

It is recommended that State Council AIDS Working Committee Office or the Ministry of Health immediately carry out law enforcement inspection and supervision on the implementation of Article 41 of the *Regulations on HIV/AIDS Prevention and Control*, and make extensive publicity through the media. Such campaign shall be designed to address the behaviors of the evasiveness and refusal of health facilities to give surgical operations on PLWHA...

Recommendation 2

It is recommended that the Ministry of Health formulate relevant supporting regulations and protocols and establish long-acting mechanism to ensure and promote the implementation of Article 41 of the Regulations (including establishing a platform for supervision and complaint, provide for the timeline of case handling, investigation and evidence collection, hearing and notification, etc) ...

Recommendation 3

It is recommended that local health administrations cancel the designation of "HIV/AIDS designated hospitals" of all types and incorporate HIV/AIDS treatment into conventional health care systems. Diagnosis and treatment of HIV/AIDS shall be provided by the infectious disease department in each medical institution, while diagnosis and treatment for other diseases than HIV/AIDS in PLWHA shall be provided by specific departments in each medical institution. In case that several departments are involved, the leading department should organize joint consultation sessions...

4.5.5 Preference to resolve matters out of court

Wilson argues that the legal culture of China promotes private settlement of conflicts:

Previous works have claimed that, due to China's legal culture, citizens prefer non-litigious settlement of social conflict and that the state attempts to channel disputes toward administrative resolutions. The private settlement of social conflict has similarly affected China's administrative response to grievances related to HIV/AIDS. In 2003, China's central government sought to address HIV/AIDS carriers' needs with its Four Free and One Care (*simian yiguanhuai*) policy, which guarantees access to medical treatment, including anti-retroviral therapy (ART) for rural citizens and those with low incomes... State officials use the policy to stave off litigation, arguing that the state has addressed HIV/AIDS carriers' needs with the policy. Therefore, litigation is not necessary for HIV/AIDS carriers. One attorney and legal scholar recalled his experience in trying to file cases on behalf of HIV/AIDS carriers and hemophiliacs, "The courts can say there is already the Four Frees, One Care policy that gives you free medicine, so you don't really need anything and we won't take the case." Judges avoid openly using such an excuse for refusing to hear cases, but the policy and political pressure from health bureaus and local governments combine to discourage judges from accepting filings by HIV/AIDS carriers....

A significant stumbling block to the pursuit of potential anti-discrimination cases brought by HIV/AIDS carriers is the underdeveloped nature of Chinese law. China lacks an anti-discrimination law, and the general legal expressions banning discrimination against HIV/AIDS carriers lack implementing instructions. Chinese courts are not bound to follow judgments in analogous cases, but courts tend to follow precedents. Without model verdicts in HIV/AIDS discrimination cases to emulate or clear implementation guidelines, the courts are reluctant to hear cases involving HIV/AIDS carriers' claims. A Chinese attorney trained in AIDS law and who has worked on anti-discrimination cases complained about the anti-discrimination clause in China's AIDS Prevention Law,

Discrimination is not defined. It says that people should not discriminate against each other in three ways [employment, access to healthcare, and access to education]. It is written beautifully, but it does not stipulate what you are to do if someone discriminates against an HIV or AIDS carrier...With regard to what should be done about discrimination, it just says, "hospitals should not discriminate." ...We think that it is great that the anti-discrimination clause is there, but we would like to have something that clarified assuming responsibility by persons (: Officer of HIV/AIDS INGO (2008-12), interview by author, Beijing (17 January 2008)).

The vagueness of China's laws and the contradictory statements in laws and regulations impede judges from converting general anti-discrimination principles into awards for HIV/AIDS carriers who encounter discrimination. Moreover, Chinese courts are still heavily influenced by political considerations, so judges are reluctant to render verdicts that they fear will be overturned or that will have repercussions for

their pay or their careers. Local officials can exercise sway over lower courts because they (rather than Ministry of Justice) evaluate and pay the salaries of judges.²¹⁵

Confidentiality is also a concern:

An attorney noted that a plaintiff who pursues litigation could request a closed hearing, but the plaintiff must enter a true name (rather than a pseudonym) in court documents, and court documents would include the true name of the plaintiff. When such documents are put into circulation, they effectively reveal the identity of the HIV/AIDS carrier-plaintiff, a problem that the courts have begun to resolve in three recent cases involving alleged discrimination described below. Although Chinese courts have developed procedures to protect the privacy of HIV/AIDS carriers in court proceedings, some infected people have had their cases revealed to the public, which has brought further discrimination.

Rather than risk the exposure that a trial might bring, HIV/AIDS carriers who face discrimination typically turn to alternative dispute resolution (ADR) to seek settlement of their grievances. Additionally, the numerous obstacles to litigating HIV/AIDS-related cases encourage most would-be plaintiffs toward ADR, which has a greater chance of gaining compensation for HIV/AIDS carriers than litigation. A Shanghai lawyer who advocates for HIV/AIDS carriers and the gay community argued that ADR was more useful than litigation in handling employment discrimination for the following reason: "If we don't go to courts and use non-litigious means, using ADR or petitions, then the government or work unit can make plans, or a hospital or unit can arrange, with an individual to resolve the problem. Because our country's laws lack detail, I can only go through human sentiment [and not legal rules] to negotiate."

Another attorney who specialised on HIV/AIDS made a similar point: "When we have had cases, the mediators and judges have often sympathized with the worker. In some cases, the defendant also sympathizes with the plaintiff. You could say that sentiment (*qingli*) is involved in such settlements." The lawyer concluded, however, that "ADR is good at winning a claim for an individual, but it does not help the rest of society. It does not demonstrate the case for others to see."²¹⁶

Yunnan University Legal Aid Center also identifies fear of disclosure as a major disincentive to litigation for PLHIV:

Confidentiality and fear of disclosure are a major concern of clients. Some clients are aware of their legal rights and options for protecting their rights through legal proceedings, but are afraid of utilizing the legal system. They are worried that their identities will be revealed during the litigation or negotiation procedure, which may result in discrimination or other adverse consequences. Because of such worries and fears, the Center could only provide legal counseling to them instead of further legal aid, such as legal representation.²¹⁷

215 Wilson S. (2012), *op cit.*, pp.39-43.

216 Wilson S. (2012), *op cit.*, pp.43-44.

217 *Legal Aid Center at Yunnan University, First Annual Report 2009-2010*. IDLO, p.8.

4.6 Legal empowerment and legal aid services

Lack of access to legal aid services is a constraint on enforcement of rights. There are number of legal aid centres, private law firms and legal academics who have developed expertise in HIV related law, although the coverage of these services remains limited. In separate reviews, UNAIDS China office (2011)²¹⁸ and Peking University (2010)²¹⁹ have documented the range of HIV-related legal services provided in China. NGOs active in provision of HIV related legal representation, advice and education include the Yunnan Daytop Drug Abuse Treatment and Rehabilitation Centre, Beijing Yirenping Center, and the Dongjen Centre for Human Rights Education.

A workshop of legal service providers held in 2011 reported the following conclusions about HIV-related legal service provision in China:

Legal aid centres provide training and education to PLHIV, men who have sex with men (MSM), sex workers (SW), people who inject drugs (IDU), NGO activists, students and lawyers across China. This is encouraging, but there is still room for improvement in the following areas:

- Target groups: key providers of public services (e.g., healthcare workers, police, teachers, judges, government officials) are not being reached. This is a concern, since these groups wield considerable social influence.
- Regional coverage: although HIV training is available to lawyers from the whole of China, coverage of other groups is patchy. One legal aid centre has succeeded in training local police (in Yunnan), but this has not been repeated elsewhere. Students and vulnerable populations from around 10-15 provinces are able to access education and training, but are neglected elsewhere, especially in the west of China.
- Scale: according to the mapping exercise, only 500 or so individuals receive specialized training each year – for a country as large as China, there is clearly room for scaling-up.
- Materials: there is a shortage of suitable, standardized legal handbooks that could be used for training purposes; educational activities could also be more imaginative.

Legal aid centres and lawyers provide legal counselling, mediation and litigation services to clients from across the country. Moreover, they have succeeded in covering all the major groups. These achievements deserve to be recognized, however, there are still numerous weaknesses that need to be overcome, the most serious of which is that the majority of resources are still being directed to relatively high-profile regions, populations and issues at the expense of the most marginalized...

218 UNAIDS (2011), *Strengthening the Response of Legal Service Providers to HIV/AIDS: Workshop report*, Yunnan Kunming Hotel, 15-16 September 2011, UNAIDS.

219 Labor Law and Social Security Law Institute at Peking University Law School (2010), *Mapping Initiatives to Strengthen the Legal Environment for the Response to HIV in China*, Rome: IDLO.

- **Service efficiency:** legal aid centres show varying degrees of efficiency in handling HIV/AIDS enquiries, with some reporting 100 cases per year, and others less than 20. It would be useful for service providers to compare their methods to see if there is such a thing as “best practice”....
- **Weak demand and follow-up:** the UNAIDS study revealed that 30-40 percent of enquiries have no follow-up whatsoever. Participants in the workshop confirmed that owing to a mixture of lack of awareness of their rights, distrust of the legal system and concerns over privacy, many potential clients are afraid of taking action. This effect tends to be compounded by regional differences, with individuals in locations with no local legal resources (e.g., Xinjiang, Guangxi) much less likely to ask for help...
- **Scale and sustainability:** individual lawyers have limited ability to handle client enquiries, and can only take on a small number of cases, especially if they are working pro-bono; legal aid centres face similar problems in scaling up their consultation services and ensuring long-term sustainability.²²⁰

There are some reports of cases settled out of court. For example, the Dongjen Centre for Human Rights Education's Korekata AIDS Law Center provided legal counselling in 43 cases in 2011, and represented clients in three cases involving litigation.²²¹ In 2008, the Beijing Aizhixing Institute acted in three disputes involving HIV infection via blood transfusion, two cases concerning children orphaned by AIDS, and 15 cases related to PLHIV rights.²²² In its first year of operation, the Yunnan University Legal Aid Center, which specialized in HIV-related advice, had 131 client contacts (2009-2010). However, the focus of the service was legal counselling and few cases proceeded to court. The Yunnan Daytop Drug Abuse Treatment and Rehabilitation Centre provided legal services to 224 clients by June 2012, most of whom were PLHIV, people who use drugs, or MSM.²²³

4.7 Lessons from Hong Kong SAR²²⁴

Hong Kong's *Disability Discrimination Ordinance* includes an explicit statement that persons who are HIV-positive or have AIDS are protected by the Ordinance.²²⁵ PLHIV, their families and associates are protected against discrimination, harassment or vilification

220 UNAIDS (2011), *Strengthening the Response of Legal Service Providers to HIV/AIDS, Yunnan Kunming Hotel 15-16 September 2011, Workshop Report*.

221 Dongjen Centre for Human Rights Education and Action *Annual Report 2011*.

222 Labor Law and Social Security Law Institute at Peking University Law School (2010), *Mapping Initiatives to Strengthen the Legal Environment for the Response to HIV in China*, Rome: IDLO, p.22.

223 UNDP praises HIV legal service in SW China, *English.news.cn*, 13 December 2012.

224 Lessons may also be learned from Taiwan (Province of China). Taiwan's *HIV Infection Control and Patient Rights Protection Act* (2007) provides, Article 4: The dignity and the legal rights of the infected shall be protected and respected; there shall be no discrimination, no denial of education, medical care, employment, nursing home, housing or any other unfair treatment; regulations governing the protection of their relevant rights shall be formulated by the central competent authority in consultation with various central competent enterprise authorities.

225 Hong Kong Special Administrative Region, *Disability Discrimination Ordinance*, No. 86 of Hong Kong Government, (Cap 487) Section 61(2).

in the areas of employment, education, services and facilities, and clubs and sporting activities. The *Disability Discrimination Ordinance* provides an aggrieved individual with the right to lodge a complaint with the Hong Kong Equal Opportunity Commission (HKEOC) and the courts. The HKEOC can conciliate complaints and has the power to support court actions, to commence litigation in its own name, to intervene in court proceedings and to institute its own investigations and inquiries into systemic inequality and discrimination on the ground of disability.

In addition to protections offered by the *Disability Discrimination Ordinance*, the *Personal Data Privacy Ordinance* provides rights to privacy.

The application of the *Disability Discrimination Ordinance* to resolve a HIV-related dispute was demonstrated by the Richland Gardens case. Legal action was taken by PLHIV against three residents of a housing estate (Richland Gardens) who protested against the location of an HIV treatment centre. Patients and the Health Centre workers were harassed and vilified by a group of Richland Gardens' residents. It was claimed that the defendants obstructed staff of Kowloon Bay Health Centre, which provided a HIV treatment service. Several attempts at conciliation failed. The HKEOC settled the case after obtaining written apologies from the defendants.²²⁶

4.8 Conclusion

The *AIDS Regulations* represent an important milestone in China's HIV response, and have a strong focus on rights to non-discrimination, to health care and confidentiality. The *AIDS Regulations* play a normative role and have clarified the role of government in various aspects of the HIV response. However, in practice the *AIDS Regulations* have not provided effective protection for PLHIV who have experienced discrimination or other rights violations. The literature review identified only five HIV-related discrimination cases that have been taken to court, only one of which resulted in a favorable settlement for the complainant. PLHIV who take matters to court do so with a low expectation of legal success, but may take such action as a deliberate strategy to bring attention to injustices.

In addition to the lack of a strong national law on discrimination, enforcement of rights is difficult because of lack of confidence that complaints will be accepted by the courts, lack of access to legal aid services, concerns about disclosure of identity during legal proceedings and concerns regarding stigma.

A strength of China's legal system in handling HIV-related complaints is the availability of negotiated settlements and well-established ADR processes as an alternative to the formal court system.

In the absence of a strong national HIV law, PLHIV need to look to other laws for protection. However, there are very limited remedies available from employment law or public health law, and constitutional guarantees of human rights are generally not enforceable by individuals in the courts. The *Employment Promotion Law* has been useful to challenge discrimination related to HBV (in relation to which more detailed regulations

226 Richland Gardens - Case Settled out of Court. *EOC Newsletter*, March 2002 Issue No. 21.

have been issued), and may also be useful in HIV cases as indicated by the successful settlement of Xiao Qi's case. The *Tort Liability Law* of 2010 offers an untested alternative for PLHIV seeking a civil legal remedy for violation of rights to privacy and health care.

Advocacy regarding the need to strengthen anti-discrimination laws given the unsuccessful employment cases led to a breakthrough on World AIDS Day 2011, when Chinese Premier Wen Jiabao emphasized the importance of eliminating discrimination in laws and policies.²²⁷ In 2012, incoming Premier Li Keqiang criticized discriminatory practices of health facilities that refused to treat PLHIV.²²⁸ This will increase pressure on government to rectify the legislative situation, and may encourage the courts to accept more claims of discrimination for consideration when they arise.²²⁹ The central government has repeatedly stated a commitment to elimination of HIV-related discrimination, and in its 2012 report to UNAIDS, the Government of China reported the following action in relation to human rights:

- research has been organized to identify and remove clauses of laws and policies which may contain discriminatory content;
- steps to eliminate discrimination in healthcare settings have been incorporated into the annual work plan;
- content regarding AIDS response services, domestic violence and protection of vulnerable communities has been incorporated into the National Human Rights Action Plan.²³⁰

The impact of the protective provisions of the *AIDS Regulations* has been limited due to the administrative nature of the regulations, which are of lesser priority than the laws defining standards relating to employment of public servants, and the anti-prostitution and anti-drug laws. The impact of the *AIDS Regulations* has also been limited by the lack of detail as to the remedies available for violations of rights and enforcement mechanisms.

China's legal system is evolving and there have been some modest developments in legal redress for health consumers, as evidenced by successes in use of the courts by people with HBV seeking redress for discrimination.²³¹ The growing number of lawyers and NGOs that offer assistance to address HIV-related legal issues and efforts to develop a national network of lawyers with an interest in HIV are important developments that may help improve access to justice and advocacy for stronger legal protections.

227 Wen Jiabao meets HIV/AIDS patients, urges less discrimination, *Want China Times*, 20 December 2011.

228 UNAIDS (2013), *Media release: Addressing HIV-related discrimination in health care settings: a key part of the response*, 4 April 2013, Beijing: UNAIDS China.

229 See: Howard R., Wu R., Chang K., Hsu L. (2012), *Successful advocacy for the revision of discriminatory employment policies for civil servants and teachers in China*, Poster, XIX International AIDS Conference. Washington; UNAIDS China Country Office (2012), *Statement Regarding Provisions on HIV Testing in Provincial- and Local-level Regulation*, 13 July 2012.

230 *2012 China AIDS Response Progress Report*, Beijing: Ministry of Health.

231 See Webster T. (2011), *op cit.*; in relation to environmental rights, see: Wang A. (2011), Green litigation in China today, *China Dialogue*, 18 July 2011.



5. Lao PDR

5.1 Overview of the *Law on HIV/AIDS Control and Prevention of 2010*

The main human rights protections of the *Law on HIV/AIDS Control and Prevention (HIV/AIDS Law)* are found in the provisions of Articles 34, 35 and 52. Article 34 provides that PLHIV and people affected by HIV are equal to other people in the society and have the right to live without stigmatization and discrimination.

Article 35 provides that medical professionals and people working in the area of HIV/AIDS control and prevention should keep strictly confidential all information concerning PLHIV, whether alive or dead, unless there is a court order or the consent of the person concerned has been given.

Article 52 provides that individuals and organizations must not deny treatment or fail to provide care and support to PLHIV for whom they are responsible, and must not discriminate, stigmatize, use violence or threaten PLHIV or HIV-affected people, or expel a healthy person with HIV from their job or refuse to employ them.

A range of remedies is available if a violation has occurred, including civil compensation, warnings, education, disciplinary proceedings or criminal penalties.

Other provisions of the *HIV/AIDS Law* relevant to human rights include:

Article 5 states the Government's policy commitment to focus on treatment, care and support for PLHIV without stigmatization and discrimination, and that the Government provides an enabling environment for people living with HIV/AIDS and those affected to support their employment if possible.

Article 6 states a number of core principles, including:

- Ensuring that equality, justice, compassion, and non-discrimination and non-stigmatization principles are respected;
- Ensuring the principles of confidentiality and privacy for people living with HIV/AIDS.

Article 14 provides that advocacy and education on HIV/AIDS is to include provision of information on harms of HIV/AIDS, modes of transmission, ways of prevention, treatment,

care, and living in harmony without stigmatization and discrimination against people living with HIV and AIDS.

Article 17 provides that HIV-positive pregnant women shall receive ARV drugs, and babies born to an HIV infected mother shall receive ARV drugs according to national treatment guidelines.

Article 18 provides that everyone has the right to voluntary counselling and testing for HIV unless required to be tested by law; in the case of an unconscious patient or a child under 14 years of age, parent or guardian or the next of kin should give consent for HIV testing. Test results must be kept confidential unless disclosure is required by law.

Article 19 provides that treatment for PLHIV and those who have opportunistic infections should follow instructions from medical personnel, and PLHIV should receive ARV drugs according to national guidelines.

Article 21 provides that a medical professional or a person working in the area of HIV/AIDS control and prevention must maintain confidentiality for people living with HIV/AIDS unless required by court. In addition, he or she should respect rights to survival, daily activities and dignity of a patient, and their relatives without discrimination and stigmatization.

Article 22 provides that medical staff should provide care to PLHIV including those with opportunistic infections in an equal manner as any other patients.

Article 23 provides that communities should provide care for PLHIV without discrimination and stigmatization, providing support, care, and encouragement including educating them not to transmit the HIV virus to other people and live a normal life with others. Civil society organizations, NGOs and other organizations can establish foundations, associations, funds and provide facilities for caring for PLHIV in communities in accordance with the law.

Article 24 provides that families should be responsible, offer moral support, and provide care and support to PLHIV without stigmatization and discrimination.

Article 25 provides that pre and post-HIV test counseling processes should be followed, and confidentiality must be maintained.

Article 30 provides that PLHIV may get treatment at a general treatment facility. ARV drugs are only available at identified ARV sites. The expenses of treatment with ARVs and opportunistic infection drugs should be in accordance with identified regulations.

Article 32 provides that Lao citizens, aliens, foreigners and people with no nationality residing in Lao PDR have rights to access information on HIV/AIDS control and prevention.

Article 33 provides that PLHIV and people affected by HIV have rights to access to health insurance scheme in order to guarantee an equitable medical service as defined by relevant regulations.

The *HIV/AIDS Law* also defines the role of government bodies in HIV responses including providing economic and social support. Article 37 provides that the Committee for the Control of AIDS is a governmental structure comprising of representatives from different sectors in which the health sector is a focal point. The Law further defines the rights and duties of the National, Provincial and District Committees for the Control of AIDS.

Article 46 provides that PLHIV should adhere to their treatment and report on their health status to concerned authorities, and strictly follow advice and instructions from medical personnel on their treatment and care. In addition, PLHIV have the following rights and duties:

1. Right to equality in employment and education;
2. Duty to participate in HIV/AIDS control and prevention by providing advisory and counselling services to other PLHIV and other people, especially vulnerable populations;
3. Duty to avoid behaviour that transmits HIV infection to other people.

Article 50 provides that PLHIV are prohibited from:

1. Transmitting HIV infection to other people by all means;
2. Donating blood, tissues and organs;
3. Bribing officials or authorities responsible for HIV/AIDS control and prevention;
4. Not following advices and instructions from medical personnel on HIV/AIDS control and prevention.

Article 51 provides that health service providers are prohibited from the following actions:

1. Taking a blood test for HIV without consent (unless required by law);
2. Informing or reporting positive blood test results if no confirmation is validated;
3. Disclosing the HIV/AIDS status of a person (unless required by law);
4. Giving blood transfusion to a patient without blood screening for HIV;
5. Denying to provide treatment, care and support to PLHIV;
6. Using unsafe medical equipment for treating a patient;
7. Forging documents on HIV/AIDS;
8. Taking bribes.

Article 52 provides that individuals and organizations must not:

1. Obstruct and ignore the duty undertaken by concerned authorities concerning HIV/AIDS control and prevention;
2. Promote the spread of HIV infection;
3. Engage in risky behaviour spreading HIV infection;
4. Deny to treat, or fail to provide care and support to PLHIV for whom they are responsible, while they are able to perform the tasks;
5. Take or offer bribes to concerned authorities concerning HIV/AIDS control and prevention;
6. Discriminate, stigmatize, look down on, use violence, threaten or insult PLHIV or affected people and health service providers;
7. Expel a healthy HIV positive person from his/her jobs or refuse to employ him/her;
8. Engage in any actions prohibited by relevant regulations and laws.

Articles 66-68 provides that a finding of unlawful conduct may result in a range of outcomes including civil compensation, warnings, education, disciplinary proceedings or criminal penalties. Article 69 provides that it is a criminal offence for a person to intentionally transmit HIV infection to others. Penalties are imprisonment from five to ten years and a fine from 10,000,000 to 50,000,000 Lao Kip.

5.2 Development of the HIV/AIDS Law

The *HIV/AIDS Law* was enacted in 2010 after an extensive consultation process engaging government and civil society. A Committee of the National Assembly with the support of the Ministry of Health's Centre for HIV/AIDS and STIs (CHAS) led the consultation process in 2009-2010. Consultations were held with relevant ministries, state agencies, mass organizations and local administrations. Technical assistance to the consultation process was provided by the UN Joint Programme of Support to an Effective Lao National Assembly (SELNA), which is a programme implemented by the National Assembly with the support of the United Nations.

An Opinion Paper was developed by SELNA and the Joint UN Team on AIDS to provide recommendations relating to the draft *HIV/AIDS Law* for the National Assembly Committees on Social / Cultural Affairs and Law.²³² Consideration was given to legislative best practice in Asian countries, and international standards set in international conventions and treaties ratified by Lao PDR. UNAIDS also provided recommendations on provisions to be included in the legislation. A working team harmonized proposed amendments to assist the finalization process. This process resulted in amendments to

232 Support to an Effective Lao National Assembly (SELNA) (2010), *Opinion paper and analysis of the draft project on a law on HIV/AIDS in the Lao PDR*. (unpub.)

strengthen the initial draft, such as inclusion of provisions relating to key populations affected by HIV such as sex workers, MSM and people who inject drugs.

A number of provisions recommended by the SELNA Opinion Paper were not included in the final version of the *HIV/AIDS Law* and remain to be addressed e.g., provisions regarding access to harm reduction services such as syringe programmes and methadone programmes. The SELNA report was also critical of some provisions that remain in place, such as the requirement of the HIV/AIDS Law for voluntary counseling and testing before marriage and monogamy as prevention measures (Article 15). This provisions was criticized due to the lack of evidence that premarital HIV testing is an effective prevention approach.

5.3 Implementation and enforcement of the HIV/AIDS Law

Stigma and discrimination in Lao PDR

The PLHIV Stigma Index Survey²³³ was conducted in 2011-2012 in the provinces of Luang Prabang, Vientiane Capital, and Champasack, which represent three regional centers (North, Center and South). Data collection took place at ARV centers in these regions. The target population of the study was PLHIV who access ARV treatment centres.

The survey found that only 22 percent of 305 PLHIV interviewed had heard of the *HIV/AIDS Law*. Only 21 percent of respondents believed that government policies could effectively protect their rights. PLHIV in the south had lowest level of knowledge regarding declarations, laws, and policies that deal with the protection of rights of PLHIV. The study found that, independent of region, knowledge of supportive non-discrimination policies is associated with 39 percent lower incidence of stigma. It also showed that geographical region is a highly significant predictor of the incidence of social stigma events, with the south experiencing about 97 percent more social stigma events than the central region.

Other key findings of the Stigma Index survey included:

- The main forms of stigma and discrimination reported by PLHIV were being gossiped about (23 percent of sample), being forced to change their place of residence (4 percent), and being verbally insulted (11 percent).
- 8 percent of respondents reported losing their job or income because of their HIV status (4 percent because of co-worker discrimination, 4 percent because of poor health, and 10 percent because of a combination of both or another reason). PLHIV prefer not to be disclosed in the workplace because they worry about losing their job, losing respect or loyalty from people, receiving bad reactions, behaviors, or discrimination from the people around them.

233 Lao Red Cross, Lao Network of People living with HIV, French Red Cross (2012), *The People Living with HIV Stigma Index, Results from 3 provinces in Lao P.D.R.: Luangprabang, Vientiane Capital and Champasack*, 18th May 2012 (Unpublished Draft).

- 2 percent of respondents had been dismissed, suspended or prevented from attending an educational institution because of their HIV status and an additional 2 percent of those who have children had their child face similar discrimination events in school.
- Less than half (43 percent) of PLHIV are aware of an organization where they can seek help if they experience stigma and discrimination.
- Disclosure of HIV status by healthcare professionals is reported. 11 percent of disclosures to social workers or counselors happened without consent, 30 percent of those disclosed to community leaders were disclosed without consent, and 5 percent of disclosures to family members occurred without the respondent's consent. Disclosing a person's HIV status without his consent, is a violation of the rights of PLHIV that is unfortunately highly prevalent in Lao PDR, even in the health sector
- The proportion of people that fear discrimination is higher than the percent of people that actually suffer discrimination, indicating that they are aware that these events have occurred to other PLHIV.
- PLHIV reported higher incidences of stigma if they were in the younger age group (16-29), were an ethnic minority, had a low level of education, were sexually active, were migrant workers, had a poor health status, and were not taking their medications.

Implementation of the HIV/AIDS Law

As yet, there are no reports of the human rights provisions of the *HIV/AIDS Law* being actively enforced to protect PLHIV from violations. The Government has indicated the intent to develop further regulations to provide more detailed directions regarding implementation and enforcement. Implementing regulations are required to support enforcement of the *HIV/AIDS Law*. The *Global AIDS Response Progress Country Report, Lao PDR 2012* states that action in the period 2012-2015 will include support to implementation:

Policy and legal environment: Enhance the new *HIV Law* enforcement, including dissemination of the law and development of the under law decree for implementation; improving the registration process for national associations, especially a legal aid system to support HIV casework.

...The section of the Decree relating to enforcement of the law and which will stipulate how the law should be implemented is still under consideration.²³⁴

Some provisions of the *HIV/AIDS Law* relating to HIV transmission are punitive in nature, and have given rise to concerns that enforcement may be harmful to public health and the human rights of PLHIV. The *Global AIDS Response Progress Country Report, Lao PDR 2012* states that the international community is concerned about the clause in Article

234 Center for HIV/AIDS/STIs (CHAS) (2012), *Global AIDS Response Progress Country Report, Lao PDR 2012*, CHAS & UNAIDS, p.18.

52 that prohibits individuals from engaging in risky behaviour influencing the spread of HIV.²³⁵ An approach that emphasizes mutual responsibility for risk reduction of both partners in sexual relationships may be more effective than imposing legal responsibility on PLHIV. The SELNA Opinion Paper, which argued against inclusion of a prohibition on PLHIV infecting others, stated as follows:

Criminalizing HIV transmission is likely to damage proven HIV prevention efforts by making people fearful to get tested or disclose their status, and undermine the message that all people must take steps to protect themselves from HIV transmission rather than rely on the knowledge of status and disclosure of their sexual partner. The criminalisation of HIV transmission does not serve a public health or HIV prevention function. There may be rare circumstances of intentional, wilful HIV transmission where criminal prosecution may be indicated in the interest of retribution or justice. However, this is best carried out through general criminal law provisions. UNAIDS asks governments to limit criminalization of HIV transmission to the intentional transmission of HIV, that is, where someone engaged in acts with the deliberate purpose of transmitting HIV and did indeed transmit the virus. Following these concerns, some jurisdictions have recently passed HIV laws without any provisions criminalising HIV transmission and/or exposure.

The *International Guidelines on HIV/AIDS and Human Rights* state: “legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases.”²³⁶

Access to justice

Lack of access to legal services and the formal court system limits the extent to which the *HIV/AIDS Law* provides meaningful redress to individuals who experience HIV-related rights violations. There is limited access to the formal court system in Lao PDR. Most people use customary or semi-formal justice systems (e.g., Village Mediation Units) to resolve disputes rather than the courts.²³⁷

Other protective laws relevant to HIV vulnerability of women and children

Protective legislation relevant to populations at risk of HIV include the *Law on Development and Protection of Women* (2004), and the *Law on the Protection of the Rights and Interests of Children* (2007). The *Law on Development and Protection of Women* advances gender equality and addresses gender-based violence and discrimination against women. A Decree was issued in 2006 to make the *Law on Women's Development and Protection* fully enforceable. The violence protection provisions of the *Law on Development and Protection of Women* are limited in that they only cover violence in matrimonial relationships and exclude violence occurring against women in other relationships.²³⁸

235 Article 52 prohibits PLHIV from engaging in risky behaviour influencing the spread of HIV infection.

236 OHCHR and UNAIDS (2006), *op cit*.

237 UN and National Assembly of Lao PDR (2011), *Concept Note: GBV Legal Review Assessment, Towards a Comprehensive Anti-GBV Legislation in Lao PDR*.

238 *Ibid.*, p.13.

It has been noted that anti-trafficking measures introduced by Lao PDR targeted at preventing trafficking of children into exploitative situations assist in reducing HIV vulnerability, given that trafficked children risk exposure to HIV.²³⁹ The 2006 Decree promulgating the *Law on Women's Development and Protection* established severe penalties for human trafficking as a criminal act and provides survivors comprehensive rights including safety, privacy and medical assistance.

A UNICEF report describes the link between involvement of young women in sex work, violence and HIV:

Many girls involved in sex work come from poor rural areas, have dropped out of school and arrive in urbanized centres in the hope of securing employment. Unable to find work they often turn to commercial sex largely driven by clients that are classified as businessmen, professionals and immigrant workers within the Lao PDR.

Their experiences are often violent. Forced sex, sexual coercion and sexual exploitation are experienced by girls engaged in high risk sexual behaviour. Female sex workers report that clients will pay more for unprotected sex and older male clients leverage more power through coercion, threats not to pay if sex is with a condom, or providing misinformation about HIV.²⁴⁰

There is a need therefore to ensure that sex workers are able to access legal protections from violence and exploitation, without fear of arrest or police harassment.

5.4 Conclusion

The *HIV/AIDS Law* addresses public health and human rights aspects of the epidemic, and represents a significant advance for Lao PDR in positioning the national HIV response within a human rights-based framework. The findings of the Stigma Index study confirm that HIV-related stigma and discrimination persist at significant levels. Issues that need to be addressed to ensure the human rights of PLHIV and key populations are protected include improved knowledge of PLHIV about the content of the *HIV/AIDS Law* and other protective laws, and improved access to legal aid services and the courts. It is important that the authorities responsible for enforcing the *HIV/AIDS Law* concentrate efforts on reducing discrimination targeted at PLHIV in contexts such as employment, health care and education. The *HIV/AIDS Law* should not be enforced against PLHIV for engaging in risky behavior. Should an exceptional case of deliberate HIV transmission arise, this should be dealt with under the *Penal Code* rather than an HIV-specific law, consistent with the recommendations of the *International Guidelines on HIV/AIDS and Human Rights*.

239 *Ibid.*, p.3.

240 *Ibid.*, citing: *Just Starting Out: A preliminary research finding on most at risk adolescents and young people to HIV in the Lao PDR*, unpublished UNICEF, APSCC 2010.

6. Mongolia

6.1 Overview of the *Law on HIV/AIDS Prevention*

2004 Law

The Government of Mongolia enacted its first *Law on HIV/AIDS Prevention* in 1993.²⁴¹ This was the first comprehensive national HIV law in the Asia Pacific region. The 1993 Law was updated in 2004 and further revised in 2012.

The main provision of the 2004 *Law on Protection of the Rights of PLHIV* is Article 10, which provides:

- The rights and freedoms of a person with HIV or AIDS shall not be restricted on a basis of the presence of his/her disease, unless otherwise stipulated by law.
- Any form of insult or discrimination against a person with HIV or AIDS shall be prohibited.
- An official or citizen shall be prohibited to divulge information on people with HIV or AIDS.

The penalty for breach of Article 10 is a fine of 20,000-50,000 MNT (Mongolian Tugrik) (in the case of an individual), 40,000-60,000 MNT (in the case of an official), or 200,000-250,000 MNT (in the case of a business entity or organization).

Article 2 provides that if the Law is inconsistent with any international treaty to which Mongolia is a party, then the provisions of the international treaty shall prevail.

Article 6 defines the powers of state bodies and local self-administrative bodies in the prevention of HIV. Hural of Citizens Representatives, at all levels, are required to take measures for preventing and combating HIV/AIDS in their respective areas, to involve citizens, business entities and NGOs in related educational and awareness activities, and shall take measures to address the economic and social issues in preventing and combating HIV/AIDS.

²⁴¹ The Law was preceded by Decree No.103 of the Presidium of the Great Khural of the Mongolian People's Republic on *Measures to Prevent Acquired Immune Deficiency Syndrome*, issued in 1987.

Article 7 defines the role of Health Organizations to include:

- to take measures regarding the detection and confirmation of HIV and AIDS, as well as the treatment of people infected;
- to organize counselling activities to prevent the spread of HIV;
- to create conditions to prevent the spread of HIV through the provision of needles, syringes, and other medical equipment;
- shall not use blood, blood derivatives, and donor organs with the treatment purpose unless tested and certified.

Article 8 defines duties of Medical Doctors and Health Workers to be

- to inform appropriate health organizations upon detecting and diagnosing HIV/AIDS;
- to counsel a person determined to have HIV/AIDS, his/her parents, legal guardians or custodians regarding appropriate behavior and personal care, and the prevention of the spread of the disease;
- to not deprive health care services to any person having HIV/AIDS.

Health care workers who are negligent in the duties stipulated by Article 8 shall be fined.

Article 9 states that citizens have the following rights:

- to be presented with the official certification authorizing a particular health worker or doctor to conduct the physical examination, test and epidemiological control with the purpose to detect HIV/AIDS;
- to undergo tests and examinations for detection and confirmation of HIV/AIDS on a voluntary basis;
- to receive accurate and objective information on HIV/AIDS, and to have training on methods for preventing HIV/AIDS.

Article 9 states that citizens of Mongolia have duties:

- to participate in activities to prevent and combat HIV;
- to not discriminate against the legal rights and interests of people with HIV/AIDS.

Article 11 provides that persons infected with HIV or AIDS have the following duties:

- to provide a health organization with the true and accurate information on the means and cause of infection;

- to undergo tests and examinations within the terms required by an appropriate health organization;
- to inform a health organization about known HIV/AIDS status when receiving health care services;
- to refuse donation of blood, tissues, or organs;
- to prevent the spread of the infection, to decline any activity that may cause the spread of the disease, and to take appropriate measures for self-protection and the protection of others against the disease;
- to follow strictly advice and instruction provided by respective health organizations, medical doctors, and health workers.

Article 11 also requires that a person diagnosed with HIV must immediately inform his wife or her husband, or a partner on the disease. Penalty for a breach of Article 11 is a fine 20,000-50,000 MNT.

Article 7 provides that a person infected with HIV/AIDS shall be treated in isolation if he or she cannot fulfill the duties set forth in this Law based upon his or her inability or unwillingness to control his or her behaviour.

Article 11 provides that:

- a citizen of Mongolia who has lived abroad and has been infected with HIV/AIDS shall inform the state board organization responsible for hygiene and epidemiological control about his or her condition upon arrival in Mongolia.
- a foreign citizen who is determined to have been infected with HIV/AIDS shall face deportation in accordance with appropriate legislation if he or she refuses to meet the legal requirements of a health organization of Mongolia.

Article 12 provides that mass media, religious and non-governmental organizations and business entities shall participate in HIV/AIDS awareness activities and training.

To ensure the HIV Law operates as intended, changes have been made to other laws. For example, in 2011 the Law on Health was amended as it stated that citizens have responsibilities to be involved in disease diagnosis. This article conflicted with an article in the HIV law stating that HIV testing should be on a voluntary basis.

2012 law reforms

In 2009, a working group of five parliamentarians and a technical working group were convened to revise and update the law on HIV. UNAIDS participated in the technical working group. An early version of the draft law was subject to revisions as a result of extensive consultations. A Revised Draft Law was prepared for submission to parliament in 2012. The Revised Draft Law excluded certain provisions of the 2004 law that were considered problematic from a human rights perspective and included strengthened

protections of human rights of PLHIV, particularly in relation to non-discrimination, confidentiality and consent to testing.²⁴²

As a result, law reforms were passed by Parliament in 2012 that removed all travel restrictions and some other discriminatory provisions for PLHIV. The *Law on Prevention of Human Immunodeficiency Virus Infection and Acquired Immune Deficiency Syndrome of 2012* removed all HIV-related restrictions on entry, stay and residence, and employment restrictions that prevented people living with HIV from undertaking certain jobs, including in the food industry. The new law also requires the creation of a multi-sectorial body comprised of government, civil society and private sector representatives to guide the national response. Changes that were supported included:

1. The removal of :
 - the power of government to define the jobs and services that are restricted for people living with HIV;
 - the obligation on PLHIV to immediately disclose their HIV status to their partner, wife or husband upon learning of it;
 - the provision allowing isolation of PLHIV who fail to fulfill legal obligations;
 - the provision allowing for the deportation of foreign nationals living with HIV.
2. The introduction of:
 - a new section devoted to the powers and role of non-health sectors, private sector and non-governmental organizations in HIV prevention, treatment, care and support, including for people at risk of HIV infection.
 - a provision on the national coordination structure with a multi-sectoral mandate (National Committee on AIDS) and;
 - provisions on protecting of rights and privacy of PLHIV and as well as elimination of stigma and discrimination due to HIV/AIDS (no compulsory testing, provision for equal employment opportunity).²⁴³

2010 NGO Recommendations to the Universal Periodic Review

The following submission by the National AIDS Foundation and other NGOs was made to the UN Human Rights Council's Universal Periodic Review of Mongolia.²⁴⁴

242 National Committee on HIV and AIDS (2012), *Country AIDS Response Progress Report 2012*, Government of Mongolia, p.16.

243 Email correspondence from Altanchimeg Delegchoimbol (UNAIDS), 7 December 2012.

244 *Mongolian Minorities' Report – Ninth Round of the Universal Periodic Review* (2010).

Discrimination and human rights violations against PLWHIV:

PLWHIV are subject to discrimination and a range of human rights violations. They are routinely blamed for contracting HIV/AIDS and are told they deserve it. In terms of employment, pre-vocation HIV testing is mandatory, which violates the rights of HIV-positive people to freely choose their employment. At present, 27 percent of HIV-positive people are employed, 20 percent run private businesses and the rest are unemployed...

The confidentiality of an HIV-positive person's status or identity is not upheld. According to Article 26.1.5 of the Health Law, "health status confidentiality includes all information about diseases except defects in an individual's body parts or organs and certain infectious diseases that pose a particular threat to the public". However, it is unclear whether HIV/AIDS is an infectious disease that poses a particular threat to the public...

Recommendations:

- It is strongly recommended that the Government of Mongolia enact legal protections through an amendment to the Labour Law on non-discrimination in the workplace based on HIV status in order to ensure employment security for PLWHIV.
- It is strongly recommended that the Government of Mongolia enacts an anti-discrimination law that explicitly reflects non-discrimination based on HIV/AIDS status and establishes a mechanism for monitoring the implementation of the anti-discrimination law.
- It is strongly recommended that the Government of Mongolia amends the Health Law to ensure the protection of the confidentiality of PLWHIV.
- It is strongly recommended that the Government of Mongolia harmonizes the Law on HIV/AIDS Prevention with the Law on Confidentiality to ensure the right to privacy in relation to HIV/AIDS status.

6.2 Enforcement of the national HIV law

No reports were found of PLHIV seeking to enforce non-discrimination, confidentiality or other human rights protections through legal proceedings.

The *Mongolian National Strategic Plan on HIV, AIDS and STI 2010-2015* includes commitments to a human rights based response. For example, one of its guiding principles is:

4.2.3 Promoting human rights – The Mongolian national response to HIV and AIDS and STIs builds on the fundamental human rights of all Mongolian citizens, including the freedom from: discrimination on account of race, sex and gender roles; the right to health; the right to participation; and the right to information. Protection of

these human rights is particularly important in the context of HIV and AIDS, which disproportionately affects marginalized population groups such as people living with HIV, MSM, SWs (sex workers) and IDUs (injecting drug users), who often face stigma, discrimination, social exclusion and denial of their human rights. In this context, a human-rights-based approach emphasizes the legal obligations of the state in realizing the rights of all its citizens – including the right to health – as well as the importance of empowerment and active involvement of communities and individuals infected or affected by HIV and AIDS.

The Strategic Plan further states:

Legislation needs to protect the basic human rights of people living with HIV in terms of their health, labor and other human rights, and the human rights of sexual minorities.

The Strategic Plan states that the following activities will be carried out:

- Assessment of stigma, discrimination and human rights violations as part of a broader needs assessment of most at risk populations.
- Preparation of legal amendments to strengthen the human rights position of most at risk populations.
- Development of a training programme on human rights issues, to empower most at risk populations through increased knowledge and skills for self protection of their human rights.
- Advocacy among policy makers and legislators to support the creation of a more supportive legal environment.
- Health care workers, law enforcement staff and media workers will be sensitized on the importance of HIV prevention services among most at risk populations.

According to the 2012 UNGASS Progress Report, NGOs rated the government's HIV-related human rights policies at 7 out of 10, but rated enforcement of the policies at 3 out of 10:

...enforcement of human rights policies has progressed very slowly and rates very lowly at three out of ten. No progress has been made in the reporting period to establish mechanisms to monitor and enforce human rights policies and appoint a specific organization, department or team that is dedicated to working on HIV-related human right issues. PLHIV communities reported that NCCD's (National Centre of Communicable Disease) health service providers' attitude has been improved. But PLHIV still face stigma and discrimination when receiving health services from the professional clinics or in rural areas.²⁴⁵

245 *Op cit.*, National Committee on HIV and AIDS (2012), p17.

6.3 Other legal redress mechanisms for human rights violations

Other general laws such as the Health Law, Labor Law and human rights guarantees in the Constitution offer legal protections for the human rights of PLHIV. Citizens of Mongolia, either individually or in a group, have the right to lodge complaints to the National Human Rights Commission of Mongolia, for violations of human rights and freedoms guaranteed in the Constitution, laws and international treaties. The Labor Law prohibits discrimination in employment and education against persons with disabilities.

However, there are no reports of legal actions to enforce HIV-related rights under these general laws.

In 2007, the Government of Mongolia published a Tripartite Declaration on HIV/AIDS Prevention in the World of Work. The Declaration commits government, employers and trade unions to adhere to the principles stated in the ILO Code of Practice on HIV/AIDS and the World of Work. The Declaration states that the response to HIV in the workplace should include actions in the following areas:

- Develop an HIV prevention policy at the workplace;
- Establish an HIV/AIDS prevention committee;
- Organize training on HIV prevention;
- Encourage and support efforts to combat stigma and discrimination against workers living with the HIV;
- Promote care and support of workers living with HIV and AIDS;
- Maintain workers' privacy regarding their HIV status;
- Carry out the risk assessment to establish healthy and safe workplace and develop and implement risk decreasing activity;
- Eliminate HIV testing as a prerequisite for employment or as an excuse for terminating employment, and to replace such unacceptable practices with the offer of voluntary confidential counseling and testing.

6.4 Conclusion

The Government of Mongolia has established a strong human rights policy framework for the national HIV response by updating the 2004 HIV Law to bring it into line with policy developments. HIV prevalence is low in Mongolia, with a cumulative total of only 120 reported diagnoses by June 2012. There are no specialist legal services focusing on HIV-related rights. Although there are reportedly very high levels of stigma and discrimination, there are no reports of PLHIV using legal mechanisms to protect their human rights.

The lack of use of the law to protect HIV-related rights may reflect low levels of access to and trust in the formal legal system, and concerns of PLHIV that disclosure of identity in the course of legal proceedings will result in stigma and discrimination. Considerations of cost and limited access to legal aid impede access to the formal justice system, not just for PLHIV but for most Mongolian citizens. Although recent efforts have been made to establish a network of legal aid centres, most legal services are concentrated in major cities and lawyers rarely practice in rural areas and in the new urban settlements.²⁴⁶

In 2012 training for lawyers on HIV/AIDS and the law was organized by the National Legal Institute of Mongolia with support from UNDP Mongolia. Lawyers who attended the training included lawyers in private practice and representatives of Legal Aid Centres located in border provinces and the capital. This was the first training for lawyers on HIV/AIDS to be held in Mongolia. Lawyers at the meeting examined the *Law on HIV/AIDS* to identify provisions that breach human rights. This provided a chance to review whether the new Revised Draft Law on HIV/AIDS of 2011 addressed all concerns.²⁴⁷

246 UNDP Mongolia, *Access to justice and human rights*. <http://www.undp.mn/a2jhr.html>

247 UNDP Mongolia (2012), *Mongolian lawyers to contribute to reduction of HIV/AIDS related stigma and discrimination*, *UNDP Mongolia News*, 23 June 2012.



7. The Philippines

7.1 Overview of RA 8504 and the 2012 AIDS Bill

Republic Act (RA) 8504

The Philippine National AIDS Council (PNAC) has the responsibility to oversee the implementation of the *Philippine AIDS Prevention and Control Act* (RA 8504). *Implementing Rules and Regulations* (IRRs) issued under the Act prescribe guidelines, procedures, penalties and standards.

RA 8504 addresses prevention of HIV, protection of the rights of people living with HIV, establishment of a national monitoring system and strengthening of PNAC. The Act provides for: a nationwide HIV educational and information campaign; protection of the human rights of PLHIV; promotion of universal precautions in procedures that carry risks of HIV transmission; and recognition of the role that people living with HIV (PLHIV) play in promoting information and messages about HIV. The Act states that local governments are to provide community-based HIV/AIDS prevention, control and care services.

RA 8504 and the IRRs prohibit discrimination based on actual, perceived or suspected HIV status in the areas of health care, employment and livelihood, admission to schools, access to credit and insurance and burial services.²⁴⁸

Compulsory HIV testing is prohibited as a precondition to employment, admission to educational institutions, freedom of abode, entry or continued stay in the country, or the right to travel, the provision of medical service or any other kind of service.²⁴⁹ The Rules issued under the Act prohibit imposing testing as a precondition for enjoyment of human rights and civil liberties, including the right to enter into marriage and conduct a normal family life.²⁵⁰ PLHIV are guaranteed the right to confidentiality.²⁵¹ Written and informed consent of the person being tested must be obtained prior to an HIV test (subject to

248 See e.g., RA 8504 Section 35 (workplace discrimination); IRR Sections 46-53.

249 RA 8504 Section 16.

250 IRR Section 27.

251 Section 30.

strictly defined exceptions).²⁵² HIV testing centers accredited by the Department of Health are required to provide free pre and post-test counseling.²⁵³

The Rules require the content of HIV education to portray positive images or messages of the male and female sex and be neither anti-women nor anti-homosexual, and to not impose a particular moral code on the target audience and not condemn the attitudes or behaviors of any individual or population group.

Discriminatory acts are punishable with a penalty of imprisonment for six months to four years, and a fine not exceeding ten thousand pesos. A prosecution for unlawful discrimination under RA 8504 requires court action to be taken by a prosecutor (fiscal) or police. Costs of a prosecution are borne by the state. In addition, the Act provides that licenses or permits of schools, hospitals and other institutions found guilty of committing discriminatory acts and policies shall be revoked.²⁵⁴ Acts of discrimination against an individual seeking employment, or in the course of employment, must be reported to the Department of Labor and Employment by those in the private sector and to the Civil Service Commission by those in government employment. The Department of Labor and Employment and the Civil Service Commission are required to resolve any such matters brought to their attention, including by administrative sanctions.²⁵⁵

Penalties are not prescribed for compulsory HIV testing, failure to obtain informed consent prior to testing, failure to provide pre and post-test counselling, or breach of confidentiality. Although no penalty is prescribed, a remedy may be available to enforce these statutory obligations through civil or administrative court proceedings.

Many of the provisions of RA 8504 are implemented at local level through city AIDS ordinances, which typically call for the creation of Local AIDS Councils to serve as planning and policy making bodies for prevention and control programmes. These ordinances usually require regular STI testing of entertainment establishment workers, among other measures (but not compulsory HIV testing, as this is prohibited by RA 8504).

2012 HIV Bill

Several Bills were filed in 2011-2012 intended to update RA 8504.²⁵⁶ The *Revised Philippine HIV and AIDS Policy and Program Act of 2012*²⁵⁷ was passed by the House of Representatives in early 2013 but stalled in the Senate. Key provisions of this Bill are as follows:

252 Article 19.

253 Sections 19, 20.

254 IRR Section 53.

255 IRR Section 46.

256 Flores H., (2012), Lawmakers urged to support bill seeking funds for HIV programs, *The Philippine Star*, 26 May 2012; Press release: *Miriam: HIV law useless, outdated*, Senate of the Philippines, 30 November 2011.

257 House Bill 6751 (House of Representatives) was approved by the House in January 2013. However, the Senate version only reached first reading at the Senate Committee on Health: email correspondence Mr J. Acaba, 2013; Pacpaco R. (2013), New AIDS Law to curb HIV outbreak, *Journal Online*, 31 January 2013, <http://www.journal.com.ph>.

Section 8:

Evidence-Informed, Gender-Sensitive, Age-Appropriate and Human Rights-Based Preventive Measures. – The HIV and AIDS preventive programmes shall be based on up-to-date evidence and scientific strategies and shall be age-appropriate. The government shall therefore actively promote safer sex behavior, especially among key populations; safer practices that reduce risk of HIV infection; access to treatment; consistent sexual abstinence and sexual fidelity; and the consistent and correct use of condom. “Key populations” refer to those persons whose behavior make them more likely to be exposed to HIV or to transmit the virus, as determined by the PNAC. The term includes children below the age of eighteen (18), youth and adults living with HIV; men who have sex with men; transgender persons; people who inject drugs; and people who sell sexual services or favors.

The State shall educate the public, especially the key populations and vulnerable communities, on HIV and AIDS and other sexually transmitted infections, with the goal of reducing risky behavior, lowering vulnerabilities, and promoting the human rights of persons living with HIV.

To ensure that HIV services reach key populations, the State, through the PNAC and in collaboration with HIV and AIDS civil society organizations, shall support and provide funding for HIV and AIDS education programmes, such as peer education and outreach activities that target key populations and vulnerable communities.

Harm Reduction. – The Department of the Interior and Local Government (DILG) and the Department of Health (DOH) shall establish a human rights and evidence-based HIV prevention policy and programme for people who use and inject drugs.

Section 10:

Stigma Reduction and Human Rights. – The country’s response to the HIV and AIDS phenomena shall be anchored on the principles of human rights and human dignity, and public health concern shall be aligned with the following internationally recognized human rights instruments and standards:

- a. *Prohibition on Compulsory HIV Testing.* – As a policy, the State shall encourage voluntary HIV testing. However, written consent from the person taking the test must be obtained before HIV testing. If the person is below fifteen (15) years of age or is mentally incapacitated, such consent shall be obtained from the child’s parents, legal guardian, or whenever applicable, from the licensed social worker, licensed health service provider, or a DOH-accredited health service provider assigned to provide health services to the child. In keeping with the principle of “evolving the capacities of the child” as defined in Section 3(f) of this Act, HIV testing and counseling shall be made available to a child under the following conditions:
 1. The child, who is above the age of fifteen (15) years but below eighteen (18) years, expresses the intention to submit to HIV testing and counseling and other related services;

2. Reasonable efforts were undertaken to locate, provide counseling to, and to obtain the consent of, the parents, but the parents are absent or cannot be located, or otherwise refuse to give their consent;
 3. Proper counseling shall be conducted by a social worker, healthcare provider or other healthcare professional, accredited by the DOH or the Department of Social Welfare and Development (DSWD); and
 4. The licensed social worker, healthcare provider or other healthcare professional shall determine that the child is “at higher risk of HIV exposure”, as defined in Section 3(o) of this Act, and that the conduct of the testing and counseling is in the child’s best interest and welfare.
- c. Stigma-Free HIV and AIDS Services. – The PNAC, in cooperation with public and private HIV and AIDS service providers and civil society organizations, and in collaboration with the Commission on Human Rights (CHR), shall ensure the delivery of stigma-free HIV and AIDS services by government and private HIV and AIDS service providers.

Section 11:

Immunity for HIV Educators, Licensed Social Workers, and Other HIV and AIDS Service Providers. – Any person involved in the provision of HIV and AIDS services including peer educators shall be immune from suit, arrest or prosecution, and from civil, criminal or administrative liability, on the basis of their delivery of such services as provided in Section 8 hereof, or in relation to the legitimate exercise of protective custody of children, whenever applicable.

Section 17:

Prohibition on the Use of Condoms and Other Safer Sex Paraphernalia as Basis for Raids and Similar Police Operations. – It shall be unlawful to use the presence of used or unused condoms or other safer sex paraphernalia to conduct raids or similar police operations in sites and venues of HIV prevention interventions.

Section 19:

Duty of Employers, Heads of Government Offices, Heads of Public and Private Schools or Training Institutions, and Local Chief Executives. – It shall be the duty of private employers, heads of government offices, heads of private and public schools or training institutions, and local chief executives over all private establishments within their territorial jurisdiction, to prevent or deter acts of discrimination against persons living with HIV, and to provide for procedures for the resolution, settlement or prosecution of acts of discrimination. Towards this end, the employer, head of office or local chief executive shall:

- a. Promulgate rules and regulations prescribing the procedure for the investigation of discrimination cases and the administrative sanctions.

- b. Create a permanent committee on the investigation of discrimination cases. The committee shall conduct meetings to increase the knowledge and understanding of HIV and AIDS, and to prevent incidents of discrimination. It shall also conduct the administrative investigation of alleged cases of discrimination.

7.2 Enforcement of human rights protections of RA 8504

There have been no reported prosecutions for HIV-related discrimination, non-consensual testing, breach of confidentiality or violations of other provisions of RA 8504. No court proceedings have been taken to enforce rights under RA 8504.²⁵⁸

The UN Development Assistance Framework (UNDAF) 2012-2016 argues for a strengthened legislative framework:

(T)he law does not include provisions to address the needs of key populations at higher risk, and may no longer be responsive to current AIDS situation. Furthermore, a large segment of society – including personnel of key national and local agencies who are supposed to implement it – is still largely unaware of the law’s existence. More so, even some of those who may be aware of the law are unsure of how to operationalize it. As a result, the law is hardly enforced. The capacities of key institutions to carry out their mandates remain weak; programmes are unfunded or under-funded, and programme implementation, monitoring and coordination has been largely at the “project” level.

...Moreover, certain provisions of the Dangerous Drugs Act, which prohibit the distribution of clean needles and injecting equipment, and restrict the provision of information and services to people who need them are inconsistent with the AIDS Law, which promotes the right of (key populations) and people living with HIV to prevention services. Other laws are discriminatory or either applied selectively, such as anti-vagrancy ordinances, anti-loitering, anti-trafficking, or other ordinances intended to promote “public order” but which seem to specifically target female sex workers and MSM.

The Stigma Index Philippines report compiled by Pinoy Plus assessed reports of rights abuses in the previous twelve months and found that 18 PLHIV of a sample of 80 had experienced rights abuses, three of whom had attempted to seek legal redress. In only one case had the matter been resolved (presumably through negotiation rather than court action). Fifty nine percent reported a past experience of forced medical and health procedures (including forced HIV testing). The report found that 85 percent of the sample of PLHIV was aware of and had read or discussed RA 8504. However, the report notes the concern:

...barely 28 percent had the courage to confront, challenge or educate someone who was stigmatizing and/or discriminating against them. This is indeed a cause for concern because even though most of them are knowledgeable of their rights

258 UNAIDS Philippines & Pinoy Plus (2011), *Seeking redress for HIV-related violations of human rights*, Quezon City: UNAIDS, p.52.

as PLHIV, only three in ten would dare to challenge those who had violated their rights.²⁵⁹

PNAC's 2012 progress report to UNAIDS quotes from a submission made to PNAC by the NGO ACHIEVE on access to justice for people living with HIV:

People living with HIV continue to experience stigma and discrimination in their everyday lives because of their status. Despite this, only 1 out of 4 PLHIV thought of seeking legal redress based on research conducted by ACHIEVE in 2010 titled '*Positive Justice: Utilization of People Living with HIV of the Philippine AIDS Prevention and Control Act of 1998*'. Reasons include fear of disclosure, fear of discrimination, and no idea where to get help.²⁶⁰

According to the UNAIDS report on legal redress mechanisms (2011), reasons why PLHIV have not sought legal redress include:

- lack of understanding as to what constitutes a human rights violation;
- lack of knowledge on available redress mechanisms;
- unwillingness to be identified in public in the course of seeking redress; and
- the prohibitive cost of legal actions, including payment for the services of lawyers.²⁶¹

In 2011, the Philippine Legislators' Committee on Population and Development Foundation conducted a community consultation on RA 8504. A report of the consultation noted concerns about privacy as a deterrent to PLHIV lodging complaints:

RA 8504 has been described as a step forward in the area of redress; however, discussants attributed the dearth of jurisprudence in cases of discrimination against PLHIV, despite the number of cases reported, to the lack of confidence of would-be complainants in the judiciary's capacity to guarantee anonymity.

To help address this problem, respondents suggested looking at the Supreme Court ruling on cases involving victims of violence against women and their children and use these cases as a basis to implement a similar system to protect the identities of persons who experienced HIV-related discrimination during the course of the litigation and encourage them to seek legal redress.²⁶²

259 GNP+, ICW, IPPF, UNAIDS (2011), *People Living with HIV Stigma Index, Asia Pacific Regional Analysis 2011*, Geneva: UNAIDS, p.51.

260 PNAC (2012), *Philippines Global AIDS Response Progress Report 2012*.

261 UNAIDS Philippines & Pinoy Plus (2011), *op cit*, p.19.

262 Ramon San Pascual, Philippine Legislators' Committee on Population and Development Foundation, post of 6 April 2011 to: *Solution Exchange for the HIV & AIDS Community, Informing the AIDS Law Amendment Process by Identifying Gaps*, available at: <http://www.solutionexchange-un.net/repository/ph/cr2-en-06042011-1.pdf>

Although RA 8504 is underutilized by PLHIV as a redress mechanism, PNAC is able to use its position to promote compliance with RA 8504 through informal processes. For example, in 2011 PNAC issued an advisory note in response to specific complaints of breach of privacy through the internet. The Advisory stated:

Beginning late July 2011, PNAC Secretariat received complaints on Internet-based communications activities contrary to policies and provisions of R.A. 8504. The Secretariat confirms that individuals or groups behind these activities blatantly disregarded rights to privacy of persons perceived, suspected or living with HIV... Content producers who made publications that violated provisions of R.A. 8504 are asked to voluntarily withdraw all offending information immediately. To prevent future unlawful provision of HIV and AIDS information or services, the PNAC Secretariat also strongly recommends review of R.A.8504, specially its standards on information and education.²⁶³

A study conducted by the Remedios Foundation and University of the Philippines explored HIV discrimination in the context of health services in Manila.²⁶⁴ The study found that despite the existence of RA 8504, serious discrimination in the provision of health care services still occurs. This was attributed to an absence of written regulations and inadequate training among health staff. Key findings were as follows:

(T)he data reveals that this is particularly problematic in the practice of private hospitals. Here, not only did the hospitals appear to have failed to integrate RA 8504 into their internal regulations, but key informants working in those hospitals appeared to be completely unaware of the legislation and their obligations under it. This highlights the fact that the establishment of the law without adequate investment in education and enforcement is insufficient to achieve real change. The failure of private health care settings to adopt appropriate internal policies conforming to RA 8504 creates serious opportunities for discrimination.

7.3 Government initiatives under RA 8504

With the passage of Republic Act 8504 in 1998, key government agencies formulated policies in support of a comprehensive response, including:

- Policy Guidelines on HIV/AIDS Prevention and Control.
- Policy and Strategies for STD/HIV/AIDS in the workplace.
- Integration of HIV/AIDS education in all schools nationwide.
- Guidelines on the Entry of People with HIV/AIDS to the Philippines.
- Policy Guidelines on HIV/AIDS testing among children.

263 PNAC (2011), *Public Advisory: PNAC cautions on unlawful HIV and AIDS information*.

264 Ortega N., Bicaldo B., Sobritchea C., Tan M. (2005), Exploring the realities of HIV/AIDS-related discrimination in Manila, Philippines, *AIDS Care*, July 2005; 17(Supplement 2): S153/S164.

- Memorandum circular enjoining all Local Government Units (LGUs) to implement RA 8504. Local AIDS Councils were created and local budgets were allocated for HIV/AIDS programmes.

Implementation of workplace provisions of RA 8504 has been supported by the following government guidelines:

- i. *Guidelines for the implementation of HIV and AIDS Prevention and Control in the Workplace Program*, Department of Labor and Employment, 2010. These Guidelines apply to all workplaces and establishments in the private sector. The Guidelines state:
 - it is mandatory for all private workplaces to have a policy on HIV and AIDS and to implement a workplace programme in accordance with RA 8504 and the *ILO Code of Practice on HIV and AIDS and the World of Work*.
 - the workplace policy shall include non-discrimination and confidentiality requirements, and employers should take measures to accommodate workers with AIDS-related illnesses such as flexible leave arrangements, re-scheduling of working time and arrangements for return to work.
- ii. *Civil Service Commission Guidelines in the Implementation of Workplace Policy and Education Program on HIV and AIDS*, 2010. The guidelines require Government agencies to submit an annual report to PNAC on the status of implementation of their workplace policy and education programmes on HIV.
- iii. *Guidelines for the implementation of STI, HIV and AIDS prevention and control policy and program in Department of the Interior and Local Government*, 2011. These guidelines apply to all employees of the Department of the Interior and Local Government, including Central/Regional Offices, Local Government Academy, the Philippine National Police, Bureau of Fire Protection, Bureau of Jail Management and Penology, and the Philippine Public Safety College, and the National Police Commission. These guidelines restate the requirements of RA 8504 and IRR.

A handbook developed by ILO and the Employers Confederation of the Philippines has also supported implementation of the workplace provisions of RA 8504.²⁶⁵

One of the key implementation challenges for agencies seeking to promote compliance with RA 8504 has been the decentralized system of government. Local Government Units (LGUs) and local AIDS Councils are primarily responsible for implementing HIV prevention and control responses. LGUs are largely autonomous, and are not bound by national policy. This underscores the importance of allocation of resources for promotion of RA 8504 and implementation at the local level.²⁶⁶ In 2011, UNDP and the government launched a three-year programme targeting LGUs (Promoting Leadership and Mitigating

265 International Labour Office, ILO Subregional Office for Southeast Asia and the Pacific and the Employers Confederation of the Philippines, (2008), *Managing HIV/AIDS in the workplace: employers handbook for action*, Makati City: ILO, 2008.

266 See: UNDP (2011), *Innovative approaches: UNDP Philippines, Decentralizing AIDS Responses– Local Government*, Bangkok: UNDP Asia Pacific Regional Centre.

the Negative Impacts of HIV and AIDS on Human Development). The programme develops leadership capacities of local governments and Regional AIDS Assistance Teams comprising representatives from the Department of Interior and Local Government, the Department of Health, and the Department of Social Welfare and Development (DSWD).

The DSWD with UNDP support implemented a project on Mitigating the Economic and Psychosocial Impact of HIV and AIDS, which established HIV care and support referral systems. Sections 34 and 35 of the IRR refer to the need for HIV referral systems to be developed for delivery of community-based services. The project resulted in publication of *A Referral System for Care and Support Services for Persons Living with HIV (PLHIV) and their Families in the Community* (2010). An accompanying document, *Program Manual on Care and Support Services for Persons Living with HIV and AIDS and their Families* (2011) is an operations manual to guide implementers in the delivery of care and support services to PLHIV, their children, and their families. These documents adopt a rights-based approach and emphasize principles of non-discrimination, privacy, confidentiality, informed consent, gender equality, empowerment, and greater and meaningful involvement of PLHIV.

7.4 RA 8504 under the Philippine HIV/AIDS Medium Term Plan

Successive HIV/AIDS Medium Term Plans have committed to action to implement, review and strengthen RA 8504 since it was enacted in 1998. However, progress has been slow.

Amendment of RA 8504 is a specific indicator under the 5th AIDS Medium Term Plan (AMTP) 2011-2016. The 5th AMTP includes a new focus on legal services for PLHIV and recommends that social care services for PLHIV include legal support for cases of “discrimination, stereotyping, and other legal offenses” and provision of legal updates on human rights and RA 8504.²⁶⁷ The 5th AMTP includes a commitment to establish mechanisms and processes to protect rights and address grievances of people living with or at risk of HIV:

Redress mechanisms²⁶⁸ refer to the systems by which guarantees to the protection of rights, as embodied RA 8504, are fulfilled. In addition, a framework that demonstrates a strong shift toward a client-oriented approach, with a mechanism through which PLHIVs and HIV-vulnerable persons can avail of legal services for the redress of their grievances arising from situations related to their health condition, will have to eventually integrate and cover all domains of the response. The mechanism’s accessibility is also meant for integration into design development and the adoption of comprehensive programs, into capacity building of services and personnel, and into standards for education and other communications activities where its content is relevant. The M&E system must be enhanced to assure compliance with the mechanism, the effective functioning of the institutional arrangements, and safekeeping of records of resulting actions on investigations and the administration of justice for the sake of the aggrieved.

267 *Comprehensive Package of Services for People Living with HIV, 5th AIDS Medium Term Plan (2011-2016) The Philippine Strategic Plan on HIV and AIDS*, p.98.

268 Activity 3.2.3 of 5thAMTP.

The 5th AMTP includes commitments to strengthen compliance with workplace policies issued under RA 8504.²⁶⁹ The 5th AMTP also highlights the need to improve the provisions of RA 8504 relating to children and young people:

D: Strategic Framework on the HIV Response on Children and Young People

The lack of consistency in the interpretation and implementation of the pertinent provision of the AIDS Law (R.A. 8504); the absence of supportive laws; the presence of punitive laws (e.g., The Dangerous Drugs Act, the Sanitation Code, and relevant provisions of the Revised Family Code and the Penal Code, among others) negatively affecting access to good health; the lack of trained service and care providers; and, the absence of an active referral system of relevant social protection services are just some of the realities that have yet to be addressed so that more doors would open and serve these children and young people.²⁷⁰

7.5 Reviews conducted of RA 8504

7.5.1 Review commissioned by PNAC and UNAIDS (2005)²⁷¹

The 2005 review found that the Act's strengths included the intent to translate human rights principles into professional codes of conduct and the law's inter-agency and community partnerships ensuring a coordinated and accountable approach. The review described the weaknesses of the legislation to include:

1. While the Act provides for penalties for unethical practices, unsafe practices and procedures, and discriminatory acts and policies, the Act itself is largely ineffective in enforcing compliance with specific preventive campaigns, such as pre-and post testing counseling by private testing laboratories and clinics.
2. The Act fails to provide workable mechanisms for redress of grievances against discriminatory acts, policies, or human rights violations.
3. There is no provision in the Act or its IRR for legal support services for PLHIV, many of whom are poor, marginalized and financially burdened by the cost of prevention and care.
4. With its focus on HIV as primarily a health issue, a fully supportive and enabling environment appears to be the responsibility mainly of the health sector alone with the rest simply acting as supporting groups.
5. Provisions pertaining to overseas Filipino workers are inadequate.

²⁶⁹ Activity 5.3.2 of 5th AMTP.

²⁷⁰ 5th AMTP, page 86.

²⁷¹ *Review of the Effectiveness and Impact of Philippine Legislation in the HIV/AIDS Arena: Focus on R.A. 8504 and its IRR (2005)* a study commissioned by PNAC and supported by UNAIDS, available at: <http://www.solutionexchange-un.net/repository/ph/cr2-res2-en.pdf>

6. In spite of the focus of the law on HIV as a health issue, provisions on care and treatment, low cost ARVs, distribution of drugs and support are absent.

7.5.2 Congressional Committee Review of RA 8504 (2006)²⁷²

In 2006 a meeting on RA 8504 was convened by the Special Committee on the Millennium Development Goals of the Philippine Congress. The meeting was attended by representatives from the PNAC, Department of Education (DepEd), Department of Justice (DOJ), Department of Social Welfare and Development (DSWD) and several NGOs. Points made at the meeting included:

- Monitoring of the law's implementation should be strengthened as a primary function of the PNAC.
- Strengthen the PNAC by making it a separate entity independent from the DOH to enable the Council to have its own funds for the implementation of HIV/AIDS programmes.
- PNAC should have regional offices to better implement the law.
- DepEd said the department has started the integration of modules on the causes and prevention of HIV/AIDS into the elementary and secondary level curricula. AIDS education has been incorporated in grade school subjects such as Science and Health, Civics and Culture, Home Economics, Livelihood Education, Pilipino, and Values and Physical Education. School supervisors should undergo trainings on these modules, and they, in turn, train their teachers on the subject.
- Pinoy Plus, an NGO, suggested that the DepEd impart HIV education to students via youth development training or physical education subjects and pushed for HIV orientation as well as gender and sexuality seminars for parents.
- DOJ proposed the inclusion in the law of a penal provision to ensure compliance with the requirement of integrating HIV education into the school curriculum.
- The law should specifically address the plight of overseas Filipino workers diagnosed with HIV/AIDS, pointing out their unique and special needs.
- The law does not contain any provision that ensures legal representation for people with HIV/AIDS, as well as proper training for prosecutors assigned to handle cases concerning the rights of PLHIV.
- DOJ suggested that the law should more clearly spell out the rights of PLHIV.

²⁷² Congress of the Philippines *Committee News*, Vol 13, No 108. 15 May 2006. Committee Affairs Department.

7.5.3 Consultation of RA 8504 amendments (2011)

In 2011, the Philippine Legislators' Committee on Population and Development Foundation conducted a community consultation on amendments to RA 8504. Findings included as follows:

Respondents shared a range of experiences that highlighted the widening gap between the intent of the law and the current status of HIV epidemic in the country. The majority of experiences shared demonstrate the need to revisit the sections of RA 8504 that deal with confidentiality, testing, pre and post-test counseling, stigma and discrimination, local response to HIV, and conflicts with policies on drug control.

...The amendments to RA 8504 also need to address emerging issues in HIV-related stigma and discrimination. Anticipated challenges in anti-retroviral (ARV) treatment financing in the near future and an increasingly accessible financial market, is encouraging many people living with HIV (PLHIV) to look into insurance and health maintenance options available to them.

The implementing rules and regulations (IRR) of RA 8504 mandate the creation of a task force to formulate life or health insurance packages for PLHIV. The Philippine Health Insurance Corporation (PhilHealth) has an Outpatient HIV/AIDS treatment package for PLHIV on antiretroviral drugs. However, many private health maintenance organizations still exclude HIV from their coverage, despite recommendations from policymakers on insurance packages in relation to HIV.

...Many contributors noted the policy conflict between RA 8504 and Republic Act 9165 (RA 9165) or the *Comprehensive Dangerous Drugs Act of 2002* that has delayed the implementation of evidence-informed intervention programs such as harm reduction for persons who inject drugs (PWID) in high-burden sites like Cebu City. Section 12 of RA 9165 criminalizes possession of drug paraphernalia, including needles and provides that possession of such equipment is prima facie evidence of drug use, which has serious implications for personnel carrying out needle-exchange programs for PWID. Discussants pointed out that this amendment process is an opportunity to reconcile policies on HIV prevention with existing policies on drug control.²⁷³

7.5.4 Review of RA 8504 and local government

A study undertaken in 2011 assessed the implementation of RA 8504 by local government authorities in Quezon City and Pasay City. Findings included:

While the law has provided the national government a legislative basis to expect or believe that responsibility for HIV prevention, treatment, care, and support will be dutifully shared by LGUs (Local Government Units), this spirit of the law has not been

273 Ramon San Pascual, Philippine Legislators' Committee on Population and Development Foundation, post of 6 April 2011 to: *Solution Exchange for the HIV & AIDS Community, Informing the AIDS Law Amendment Process by Identifying Gaps*, available at: <http://www.solutionexchange-un.net/repository/ph/cr2-en-06042011-1.pdf>

implemented fully at the local government level. Most LGUs still lack the instruments and management systems, if not political will, to mobilize resources and plan for specific activities that are vital to prevention...

This study also probed on the implementation in Quezon City and Pasay City of the provisions in the AIDS Law that are oriented towards LGU response. Provisions of the AIDS Law related to IEC (information, education, communication) at the local and community level (Sections 10, 11, 14 and 18) seem to have been mainstreamed into local social welfare programs. Health Centers, on the other hand, are not equipped yet to do a thorough going provision of information on HIV and AIDS as part of their services in the barangays. Mobilization of local resources for prevention, particularly for the production of IEC materials (Section 18), has been highly inadequate especially in Pasay City. The AIDS Law's provision on universal precautions (Section 24) is also not observed or heeded due to the lack of popularization of the Law. The section related to counseling and testing (Section 31) should not be difficult to implement as the Social Hygiene Clinic (SHC) physician, nurse and midwife are trained in counseling. However, the provision of counseling services in the SHCs faces quality assurance issues. In both cities, care and support are not yet part of the activities of the health and social welfare offices.²⁷⁴

In 2013, Quezon City Council approved a new Ordinance addressing HIV-related discrimination. The Ordinance requires local government and private employers to develop an official protocol for handling HIV in the workplace. Employees can report discrimination to the Quezon City Public Employment Service Office and the local Tripartite Industrial Peace Council. Should an employer or business entity be found guilty of committing discriminatory acts, its business license and permit will be revoked.²⁷⁵

7.6 Other legal redress mechanisms for human rights violations

Some PLHIV have used the Barangay (Village) justice system to resolve complaints related to breach of confidentiality, defamation, gossiping or speculating about their HIV status. Some of these cases have resulted in resolutions such as public apologies and written agreements that the offender will not repeat the offence.²⁷⁶

The following general (not HIV-specific) statutes (in addition to RA 8504) or legal processes offer protections that could be used by PLHIV or key populations to protect and promote their human rights:

- Article III of the *Constitution of the Republic of the Philippines* provides a Bill of Rights including the right to equal protection of the law. Article XIII consists of provisions to promote social justice and human rights. Article 32 of the *Civil Code* lists various freedoms which, if breached, can be cause for civil action, including the right to freedom of speech; the equal protection of the laws; to be secure in one's person,

274 Acaba J., (2011), *Policy Review: The AIDS Prevention of Quezon City and Pasay City*, Pasig City: Local Government Academy.

275 QC ordinance penalizes discrimination against people with HIV, *Inquirer News*, 13 March 2013.

276 Input from UN Joint Team on HIV & AIDS, July 2012.

house, papers, and effects against unreasonable searches and seizures; to liberty of abode and of changing the same; to privacy of communication and correspondence; to become a member of associations or societies for purposes not contrary to law; to take part in a peaceable assembly to petition the government for redress of grievances.

- Court proceedings to enforce the human rights guaranteed under the Constitution or the *Civil Code* are typically costly and complex. An alternative to court proceedings is to seek an investigation by the Commission on Human Rights (CHR) of the Philippines. Under the Constitution, the CHR is empowered to investigate human rights violations. CHR does not have the power to adjudicate complaints, but it can mediate disputes. The CHR provides legal aid and counseling services, monitors complaints with concerned agencies and conducts public inquiries into human rights issues. The CHR's Legal and Investigation Office investigates cases and may resolve cases through mediation. The CHR may recommend further legal action such as a criminal prosecution. A study conducted by ACHIEVE found only three HIV-related cases that had been brought before CHR for investigation.²⁷⁷
- The decision of the Supreme Court in the *Ang Ladlad Case* (2010) clarified that the provisions of the Constitution relating to equality before the law and non-discrimination extend to LGBT populations.²⁷⁸ This may have far-reaching (but as yet untested) implications in terms of challenging discriminatory practices (particularly in government services and the public sector) and application of laws. The *Ang Ladlad Case* established that the Constitutional principle of non-discrimination requires laws of general application relating to elections to be applied equally to all persons, regardless of sexual orientation. Other laws that are applied unequally to homosexual or transgender people can be challenged under the Constitution.
- The *Magna Carta for Persons with Disability*²⁷⁹ provides remedies for persons with a disability who experience discrimination, public ridicule or vilification. Disability is defined as "(1) a physical or mental impairment that substantially limits one or more psychological, physiological or anatomical function of an individual or activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." Where a violation of a persons' rights under the Act is established, a court may order equitable remedies (e.g., order for change in policy or practice) or a penalty may be imposed. Although neither HIV nor AIDS are specifically referred to in this law, PLHIV may be able to argue that they have an impairment coming within the definition of this law (particularly if they are experiencing HIV-related illnesses).
- The *Magna Carta for Women* includes provisions relating to women's rights to comprehensive, culture-sensitive, and gender-responsive health services and programmes (including for HIV).

277 Positive Justice Report, referred to in: UNAIDS Philippines & Pinoy Plus (2011), *op cit.*, p.19.

278 *Ang Ladlad LGBT Party represented by Danton Remoto v. Commissioner of Elections*, Supreme Court of Philippines at Baguio City, 8 April 2010. <http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/190582.htm>.

279 Republic Act 7277, as amended by Republic Act 9442.

- In theory, other general laws that could be used to protect HIV-related human rights include:
 - › the *Labor Code* (for workplace disputes);
 - › the *Family Code* and RA 9262 *Anti-Violence Against Women and their Children Act of 2004* for family disputes;
 - › provisions of the *Revised Penal Code*, which can be enforced for PLHIV experiencing threats, harassment or violence.
- In 2012, Cebu City became the first City in the Philippines to provide legal protection from discrimination on the grounds of sexual orientation.²⁸⁰ The ordinance prohibits excluding, refusing or dismissing any person from public programmes and services and educational institutions on the basis of disability, age, health status, sexual orientation, gender identity, ethnicity and religion. It prohibits discriminating against any organization or group. It also makes it unlawful to deny medical and other health services, transportation and other facilities based on those biases. First-time offenders will be fined 1,000 pesos or imprisoned for one day to 30 days. Second-time offenders may be fined 3,000 pesos or be imprisoned from one day to 30 days. In 2013, a draft Ordinance was prepared to extend legal protection on the grounds of sexual orientation to all of Cebu Province.²⁸¹
- The *Responsible Parenthood and Reproductive Health Act of 2012*²⁸² provides that adults have a legal right to access family planning services, however this is subject to the following exceptions:
 - › Young persons under 18 are not allowed access to modern methods of family planning without written consent from their parents or guardian/s, except when the person under 18 is already a parent or has had a miscarriage.²⁸³
 - › Hospitals owned and operated by religious groups are not required to provide family planning services.²⁸⁴ It is an offence for a health care service provider to refuse to extend quality health care services and information on account of the person's marital status, gender, age, religious convictions, personal circumstances, or nature of work; provided that the conscientious objection of a health care service provider based on his/her ethical or religious beliefs shall be respected; however, the conscientious objector shall immediately refer the person seeking such care and services to another health care service provider within the same facility or one which is conveniently accessible.²⁸⁵

280 Passage of Cebu's anti-discrimination law lauded, *Sun Star*, 18 October 2012.

281 Ordinance to protect gay rights in Cebu up in next PB session, *Cebu Daily News*, 17 February 2013.

282 Republic Act 10354, due to commence April 2013. The Act is subject to a constitutional challenge in the Supreme Court, which delayed its commencement.

283 Section 7.

284 Section 7.

285 Section 23.

Concerns have been raised that the human rights of seafarers living with HIV are not adequately protected by the law as a result of a Supreme Court case denying benefits to a seafarer on the ground that his infection was self-inflicted and not work-related.²⁸⁶

In 2010-2011, the UNAIDS Philippines Country Office conducted a study on redress for HIV-related human rights violations. The study resulted in the publication of a resource manual on redress mechanisms for human rights violations. The resource manual identifies that there may be a variety of legal avenues of redress available in any given case involving violation of HIV-related legal rights, e.g., a criminal prosecution under RA 8504 or another Act that defines criminal offences such as the *Revised Penal Code*, a civil court claim, an administrative court claim, (e.g., disciplinary action against government employees by the Civil Service Commission), proceedings to resolve workplace disputes in the National Labor Relations Court, National Labor Relations Commission or National Mediation and Conciliation Board, or other forms of alternative dispute resolution (e.g., through private mediation, court annexed mediation or mediation by the CHR; and other forms of mediation, conciliation or arbitration).

Less serious cases can be resolved through the disputes resolution mechanisms at barangay level, which may resolve cases through arbitration, mediation and conciliation (Katarungang Pambarangay system). According to this report on redress mechanisms, this system:

...is appropriate, especially since it is required by law, to address many of the acts of discrimination and violations against PLHIV. In particular, cases involving relatively light offenses (such as less serious physical injuries, slight physical injuries, light threats, threatening to publish a libel, slander and intriguing against honor) need to go through the Katarungang Pambarangay first, before they can be relayed to regular courts, if need be. Violations of RA 8504, however, are not among the offenses subject to Katarungang Pambarangay.²⁸⁷

According to the UNAIDS Philippines report, factors informing the choice of a redress mechanism include the type of offense, purpose of the victim, status of the offender, and the gravity of the offense.²⁸⁸ Some cases may warrant criminal prosecution to punish offenders and deter others from committing the offence. Other cases may be more appropriate to settle through negotiation or ADR if the parties are seeking to repair their relationships and avoid court.

Legal aid and access to justice

The Aid4AIDS Network is a loose network of law organizations and institutions, law schools, alternative law groups, and private lawyers who can provide legal services including HIV-related legal advice and representation. Member organizations include:

286 Cajuat J. (2012) *Reversing the culture of blame: The case for HIV-AIDS as a workplace issue for seafarers*, International Seafarers Action Center (ISAC) Philippines Foundation.

287 UNAIDS Philippines & Pinoy Plus (2011), *op cit.*, p.53.

288 *Ibid*, p.57.

1. Initiatives for Dialogue and Empowerment through Alternative Legal Services (IDEALS, Inc.)
2. Office of Alternative Dispute Resolution - Department of Justice (OADR-DOJ)
3. Integrated Bar of the Philippines – Quezon City Chapter
4. Public Attorney’s Office
5. Ateneo Human Rights Center
6. Ateneo Public Interest and Legal Advocacy (APILA) Center, Ateneo De Davao University.

The NGO ACHIEVE functions as secretariat for the Aid4AIDS network. ACHIEVE documented five cases of violations of rights guaranteed under RA 8504.²⁸⁹

7.7 Conclusion

RA 8504 has provided a human rights-based policy framework for development of the national HIV response. However, enforcement mechanisms require strengthening and PNAC is urging that the Act be updated particularly given recent rapid rises in HIV prevalence among people who inject drugs and MSM.

RA 8504 has provided a framework for policy development in the health, education and local government sectors. Policies developed for public hospitals and public sector workplaces may have helped to prevent discrimination by raising awareness about the provisions of RA 8504 and explaining how the law applies in different contexts. However, although several supporting policies have been issued to promote implementation, implementation has been inconsistent and slow, and the Act is not systematically promoted to communities of PLHIV and key populations, or to the sectors responsible for implementation.

Several reviews of RA 8504 have been conducted since 2005 by legislators, community stakeholders and academics. The various reviews that have been conducted mean that RA8504 has been subject to more analysis and debate than any other national HIV law in the region.

Concerns regarding disclosure of identity during court proceedings mean that PLHIV have been deterred from pursuing formal complaints under RA 8504. Formalizing access to low cost mediation, conciliation or arbitration services is likely to facilitate greater use of the law to protect rights. The Act has lacked a process for lodging confidential complaints in relation to human rights violations, except through a formal prosecution. Speedy, transparent and effective mechanisms for enforcement are required.

²⁸⁹ *Positive Justice: Utilization of People Living with HIV of the Philippine AIDS Prevention and Control Act of 1998 (RA 8504).*

The Act should provide for a range of mechanisms for redress that could include administrative procedures or informal dispute resolution processes. With respect to labour rights, the Act could highlight the role of both the judiciary and the labour inspectorate in ensuring effective implementation. Revision of the Act should include a reference to the ILO international labour standard on HIV and AIDS adopted in 2010.²⁹⁰

Stakeholders have also highlighted the need to give more attention to the gender dimensions of the epidemic, including intimate partner violence and the disproportionate impact of HIV on women and girls in HIV-affected households.²⁹¹ The Stigma Index study found that 30 percent of HIV-positive Filipino women surveyed reported that they were coerced into the method of giving birth, and the Philippines had the highest level of reported coercion into infant feeding practices in the region (37 percent of the sample).²⁹² These aspects could be specifically addressed in legally enforceable guidance on mother-to-child transmission. A comprehensive gender analysis of the current law and the proposed amendments currently under consideration would help to ensure specific issues such as these are addressed.

An updated national HIV law is anticipated in the near future. The Bill approved by Congress in 2013²⁹³ proposes significant improvements, including strengthened mechanisms for handling discrimination complaints, intensified prevention efforts with key populations including MSM and new harm reduction measures for people who inject drugs, clarification of the rights of young people to consent to testing, and prohibition of the use of condoms as a justification for police raids.

290 International Labour Office (2010), *Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200)*, Geneva: ILO.

291 Email correspondence from UN Women (2012).

292 GNP+, ICW, IPPF, UNAIDS (2011), *op cit.*, p.85.

293 House Bill 6751 (House of Representatives), was approved January 2013 but stalled at Senate Committee stage. See also: Pacpaco R. (2013), New AIDS Law to curb HIV outbreak, *Journal Online*, 31 January 2013, <http://www.journal.com.ph>.



8. Viet Nam

8.1 Overview of the Law on HIV/AIDS Prevention and Control

The Government of Viet Nam issued an *Ordinance on HIV/AIDS Prevention and Control* in 1995, which included a declaration against discrimination.²⁹⁴ This Ordinance was replaced by a more comprehensive *Law on HIV/AIDS Prevention and Control of 2006 (HIV/AIDS Law)*, which incorporated a stronger human rights-based approach to HIV.²⁹⁵ *Implementing Regulations for the HIV/AIDS Law* were issued in 2007.²⁹⁶ A Decree issued in 2011 (Decree 69) provides more detail about the handling of administrative violations of the *HIV/AIDS Law* and increases the number and types of sanctions for administrative violations.²⁹⁷

The key protective provision of the *HIV/AIDS Law* is Article 8, which prohibits stigmatizing and discriminating against HIV-infected people, and making public the name, address or images of an HIV-infected person or disclosing information on a person's HIV infection to another without consent.

Article 2 defines '*stigmatization*' against an HIV-infected person as an attitude of contempt or disrespect towards another person because of the awareness or suspicion that the person is infected with HIV or has a close relationship with an HIV-infected person or a suspected HIV-infected person.

Article 2 defines '*discrimination*' against an HIV-infected person as an act of alienation, refusal, isolation, maltreatment, disgrace, prejudice or restriction of rights towards another person because of the awareness or suspicion that the person is infected with HIV or has a close relationship with an HIV-infected or suspected HIV-infected person.

294 See: Government of the Socialist Republic of Viet Nam, *Ordinance on the Prevention and Fight Against HIV/AIDS Infection*, 31 May 1995; Government Decree No. 34-CP of 1 June 1996 guiding the implementation of the Ordinance on the prevention and control of HIV/AIDS infection. The law in Viet Nam is sourced from legislation (Codes and Laws) enacted by the National Assembly, and Ordinances issued by the Standing Committee of the National Assembly when the National Assembly is not in session.

295 Law No. 64/2006/QH11.

296 Decree No. 108/2007/Nd-Cp of June 26, 2007, *Detailing the Implementation of a Number of Articles of the Law on HIV/AIDS Prevention And Control*.

297 Decree No. 69/2011/ND-CP on handling administrative violations in health prevention, the medical environment and HIV/AIDS prevention and control). See: National Committee for AIDS, Drugs, and Prostitution Prevention And Control (2012), *Viet Nam AIDS Response Progress Report 2012*, p.28.

Article 3 provides principles in HIV prevention and control, including the principle of the “elimination of stigma and discrimination against HIV-infected people and their family members”.

Article 4 defines rights and obligations of HIV-infected people to include:

Rights:

- a. To live in integration with the community and society;
- b. To enjoy medical treatment and healthcare;
- c. To have general education, learn jobs and work;
- d. To have their privacy related to HIV/AIDS kept confidential;
- e. To refuse medical examination and treatment for AIDS.

Obligations:

- a. To apply measures to prevent the transmission of HIV to other people;
- b. To inform their HIV positive test result to their spouse or fiancé (fiancée);
- c. To observe instructions on treatment with ARVs.

Article 8 defines prohibited acts as follows:

1. Purposefully transmitting or causing the transmission of HIV to another person;²⁹⁸
2. Threatening to transmit HIV to another person;
3. Stigmatizing and discriminating against HIV-infected people;
4. Parents abandoning their HIV-infected minor children;
5. Making public the name, address and images of an HIV-infected person or disclosing information on a person’s HIV infection to another without consent of that person, (except as specified in Article 30);
6. Falsely reporting HIV infection of a person not infected with HIV;
7. Forcing HIV testing, (except as specified in Article 28);
8. Conducting transfusion of HIV-contaminated blood or blood products, transplantation of HIV-contaminated tissues or body parts into another person;

²⁹⁸ The *Viet Nam Penal Code* punishes the intentional transmission of HIV. (Article 117)

9. Refusing to provide medical examination or treatment to a patient for knowing or suspecting that such person is infected with HIV;
10. Refusing to bury or cremate bodies for HIV/AIDS related reasons.

Articles 9-12 address the purposes, content and requirements of information, education and communication on HIV/AIDS, including the requirement that information and education be non-discriminatory, not affecting gender equality and not using negative information on or images of HIV-infected people, and that educational content address stigmatization and discrimination against HIV-infected people.

Article 11 provides that everyone has the right to access information, education and communication on HIV/AIDS prevention and control, and that certain populations will be given priority including drug users, sex workers and MSM.

Article 14 prohibits HIV-related discrimination in employment, prohibits requiring job applicants to be HIV tested (subject to exceptions), and provides that employers are responsible for organizing HIV education measures and anti-stigmatization and anti-discrimination measures.

The *Implementation Decree* provides a list of occupations that may require HIV testing prior to employment to include flight crew and special occupations in the security and defense domains.

Article 15 prohibits HIV-related discrimination in education.

Articles 16 and 17 address HIV/AIDS prevention and control (including anti-stigma and discrimination efforts) among mobile populations and communities

Article 18 addresses HIV/AIDS prevention and control in educational establishments, reformatories, medical treatment establishments, social relief establishments, prisons and detention camps.

Article 20 addresses participation of PLHIV in HIV/AIDS prevention and control.

Articles 21 requires the Government to provide for the organization of implementation of harm reduction intervention measures to prevent HIV transmission.

Article 24 provides for HIV/AIDS epidemiological surveillance.

Article 26 provides that pre-test and post-test HIV counseling must be provided.

Article 27 provides that HIV testing must be voluntary, provided that HIV testing of persons less than 16 years old or persons who have lost their civil act capacity may only be conducted when there is written consent of his/her parent or guardian.

Article 28 provides that compulsory HIV testing shall be conducted in the case that there is an official request for judicial appraisal or a decision of an investigative body, a people's procuracy or a people's court; the Minister of Health shall issue regulations on

compulsory HIV testing in certain necessary cases for diagnosis and treatment purposes; and the Government shall issue a list of occupations and professions requiring HIV testing before recruitment.

Article 30 provides that positive HIV test results shall only be disclosed to:

- a. Tested persons;
- b. Spouses of tested persons, parents or guardians of tested persons who are minors or have lost their civil act capacity;
- c. Staff who are assigned to directly provide counseling and inform HIV positive test results to tested persons;
- d. Persons who are responsible for providing care and treatment for PLHIV at medical establishments;
- e. Persons who are assigned to directly care for PLHIV.

Other provisions of the *HIV/AIDS Law* address:

- Safe blood transfusion.
- Prevention and control of HIV transmission in medical establishments.
- Prevention and control of mother-to-child HIV transmission, including the rights of HIV-infected women to measures to prevent mother-to-child HIV transmission.
- Research into vaccines and medicines.
- Medical insurance for HIV-infected people.
- Rights of prisoners living with AIDS to reduction of sentences.
- Responsibility of the State to allocate resources for HIV/AIDS.
- Responsibilities in providing treatment for HIV-infected people, including:
 - › That HIV-infected people who have opportunistic infections or other HIV/AIDS related illnesses shall receive treatment, and shall be treated equally as other patients.
 - › HIV-infected people shall be facilitated by the State to have access to ARVs, to be provided free at HIV/AIDS treatment establishments in the following priority order:
 - a. HIV-infected children under 16 years old;
 - b. PLHIV who actively participate in HIV prevention and control;

- c. PLHIV meeting with particularly difficult circumstances;
- d. Other HIV-infected people.

The *Implementation Decree* of 2007 addresses:

- a. Implementation of harm reduction intervention measures;
- b. Management, distribution and use of HIV drugs;
- c. Care for abandoned HIV-infected children and others in need;
- d. Integration of HIV/AIDS activities into socio-economic development programmes;
- e. Occupations that may require HIV testing prior to recruitment.

*Decree No. 69 of 2011*²⁹⁹ sets penalties for providing incorrect information about HIV, for preventing people from accessing treatment and care, for various forms of discrimination against PLHIV (including restricting access to health services, employment and education) and for violations of rights to testing, counselling or privacy.³⁰⁰ For example,

- fines are prescribed for health care workers who refuse to provide medical treatment to PLHIV;
- schools that refuse to admit a child because of HIV status may be ordered to admit the child or pay a fine;
- individuals or organizations that disclose the HIV status of a PLHIV without permission may be ordered to pay a fine or publish a public apology;
- employers found to have violated employees rights may be ordered to pay fines or reinstate employees. An employee may take legal action by lodging a complaint to a municipal or provincial Health Service or the Chief Inspector of the Ministry of Health, or to the President of the People's Committee.

Other regulations that support implementation of the HIV/AIDS Law include:

- *Directive No. 61/2008/CT-BGDDT dated 12/11/2008 of the Ministry of Education and Training*, which provides:
 - › Schools shall not discriminate against students, teachers or staff who are living with HIV or affected by HIV;
 - › Schools shall ensure the right to education, the right to work and the right to be integrated into the community for PLHIV or people affected by HIV;

299 *Decree No. 69/2011/ND-CP dated 08/08/2011.*

300 National Committee for AIDS, Drugs, and Prostitution Prevention And Control (2012), *Viet Nam AIDS Response Progress Report 2012*, p.28.

- › Schools shall enhance informational and educational programmes to foster humanity and sympathy for PLHIV and people affected by HIV; and
 - › Schools shall encourage PLHIV to participate in HIV/AIDS prevention and control activities.
- *Decision No. 647 on Promulgation of Voluntary HIV Counselling and Testing*, which provides guidelines for the operations of VCT services and clinics, including pre-test and post-test counselling sessions.

8.2 Legal mechanisms for enforcement of the HIV/AIDS Law

Rights guaranteed by the *HIV/AIDS Law* may be enforced by administrative law mechanisms. Decree 69 of 2011 defines the sanctions available for HIV-related administrative violations.³⁰¹ Sanctions include fines, orders for a public apology, suspension of a professional licenses, and restoring the person to their original position had the violation not occurred e.g., reinstatement of employment. The process for seeking redress generally involves making a complaint to a government agency, investigation of the complaint by the agency and an administrative decision to resolve the case. If the complainant is not satisfied, a complaint can be made at a higher level (e.g., a complaint can be referred from District People's Committee to a Provincial People's Committee). The standard time for deciding an administrative case is 10 days. This period can be extended for up to 60 days in complicated cases.³⁰²

As an alternative to an administrative complaint, it may be possible to lodge a civil claim in court for a judicial remedy. This process is generally more costly, time consuming and complex than seeking an administrative decision to resolve the complaint. According to the *Learn About Your Rights Training Manual on HIV and the Law* in Viet Nam:

Most violations with respect to the rights of PLHIV are civil in nature. A civil complaint means that a PLHIV is claiming that someone has violated a law, such as the Law on HIV/AIDS Prevention and Control PLHIV's ...and has personally caused personal mental or physical harm to him/her...

An advantage associated with choosing to bring a case to court is that compensation for mental and physical damages can be awarded and the person who has had their rights violated can personally receive money. This is different from an administrative complaint where any fine paid by a person violating another person's rights goes to the national budget and not to the person whose rights have been violated...³⁰³

301 See: UNAIDS & Policy, Law and Development Viet Nam (2011), *Learn about your rights: Training Manual on HIV and the Law*, Hanoi: UNAIDS, pp.207-209.

302 *Ibid*, p.209.

303 *Ibid*., p.211.

8.3 Constraints on enforcement of the HIV/AIDS Law

HIV-related stigma and discrimination is reportedly widespread.³⁰⁴ The Stigma Index study conducted in 2011 confirmed that PLHIV face significant levels of stigma and discrimination. The Viet Nam Network of People Living with HIV (VNP+) conducted the study in five provinces (Can Tho, Dien Bien, Ha Noi, Hai Phong and Ho Chi Minh City).³⁰⁵ Findings of the study included:

- Stigma is attached both to HIV status and stigmatized behaviours – injecting drug use, sex work and homosexual activity.
- Discrimination by health care providers is reportedly low. However, stigma and discrimination is much higher outside health care settings. Many PLHIV struggle to maintain sustainable livelihoods: unemployment among PLHIV is high, and many reported losing a job or being forced to change the nature of their job, as well as stigma in the workplace. Others – particularly sex workers in Ha Noi and women – reported that they were forced to change residence or unable to rent a home (20 percent of female sex workers in Ha Noi and 8 percent of outpatient clinic-sampled women).
- Up to 3 percent of PLHIV and up to 4 percent of the children of PLHIV have been denied access to education.
- Many of the most egregious examples of stigma and discrimination occur in the family or community. Verbal insults and physical assault were particularly common among women: 31.3 percent of female sex workers in Ha Noi reported verbal insults and 20.7 percent physical assaults.
- 34 percent of female sex workers in Ha Noi and 18 percent of MSM in Ho Chi Minh City reported non-consensual disclosure of HIV status to neighbours; over 50 percent of people who inject drugs in Dien Bien reported such disclosure to community leaders.
- 13 percent of respondents reported coerced testing or testing without prior knowledge.
- Some PLHIV are receiving inadequate, inaccurate or coercive reproductive health advice. More than one-quarter of all respondents reported being advised not to have

304 See: UNAIDS and UNDP (2012), *Legal services for people living with HIV and key at-risk populations in Viet Nam: an assessment of the current situation and recommendations for the future*, Hanoi: UNAIDS and UNDP, pp.31-32. See also: Hermann C, Leach T. (2005), *Baseline survey of stigma and discrimination in the greater Mekong region: Report of qualitative surveys in Lao PDR, Thailand, Viet Nam and Guangxi and Yunnan Provinces, China*. Bangkok, Asia Pacific Network of People Living with HIV/AIDS and the Policy Project; Khuat Thu Hong, Nguyen Thi Van Anh, Jessica Ogden (2004), *Understanding HIV and AIDS-related Stigma and Discrimination in Viet Nam*, Change, International Center for Research on Women; Oanh, K., Ashburn K., Pulerwitz J., Ogden J., Nyblade L. (2008), *Improving hospital-based quality of care in Viet Nam by reducing HIV-related stigma and discrimination, a Horizons Final Report*. Washington, D.C., Population Council.

305 Viet Nam Network of People Living with HIV (VNP+) (2012), *The Stigma Index Report. Viet Nam*. (published at: <http://www.aidsdatahub.org>).

children, while a small proportion of respondents also reported being advised to undergo sterilization, or obliged to use contraception.

The Stigma Index study reported that the vast majority of respondents did not seek legal redress when faced with violations of their rights. The most common reason for not seeking legal redress was a lack of confidence in the success of the legal process, particularly among MSM in Ho Chi Minh City (60 percent) and female sex workers in Ha Noi (36.2 percent). Among those interviewed who confirmed that they had experienced rights violations, only 10.8 percent responded that they had taken action to protest or make a claim. 29 percent confirmed that they had “no or little confidence that the outcome would be successful”. Among the 10.8 percent who ever took an action to protect their rights, only 20.9 percent (i.e. 9 of 43 people) reported that they had sought and accessed legal support. Among people who inject drugs in Dien Bien, the most common reason for not taking action to protect their rights was that they were advised against doing so (22.0 percent), while 13.8 percent of female sex workers in Ha Noi also received such advice. Insufficient financial resources and a perception that the process was too bureaucratic were also cited as reasons for not seeking legal help.³⁰⁶

The Stigma Index study concluded that greater efforts are needed to ensure adherence to the law, which requires training and education for national and provincial health care providers and government workers and greater support to PLHIV in seeking legal redress for violations of their rights.³⁰⁷

It has also been argued that there may also be a clash between the focus of the *HIV/AIDS Law* on protections for individual rights and the Viet Nameese political culture, such that the focus of the law on individual rights is “juxtaposed with a strong view about community values.”³⁰⁸

The National Committee for AIDS, Drugs, and Prostitution Prevention and Control reported in the *Viet Nam AIDS Response Progress Report 2012* that the implementation of the *HIV/AIDS Law* remains weak due to “late introduction of developed policies to commune authorities, law enforcement agencies and the community, and a limited understanding of HIV-related policies among those who implement them.” Enforcement is also hindered due to “remaining inconsistencies between public security measures to control drug use and sex work and public health measures to reach the populations engaged in these activities...Low compliance with the *Law on HIV*, especially in the area of stigma and discrimination, continues. Compliance with regulations is low among law-enforcement agencies and monitoring mechanisms and sanctions are very weak.”³⁰⁹

306 See: UNAIDS and UNDP (2012), *Legal services for people living with HIV and key at-risk populations in Viet Nam: an assessment of the current situation and recommendations for the future*, Hanoi: UNAIDS and UNDP, pp.31-32.

307 Viet Nam Network of People Living with HIV (VNP+) (2012), *op cit.*, pp.62-63.

308 Dang V., Le D., Chu Q., Doan N., & Reidpath D. (2005). A situational analysis of HIV/AIDS related discrimination in Hanoi, Viet Nam. *AIDS Care*, Jul;17 Suppl 2:S181-93.

309 National Committee for AIDS, Drugs, and Prostitution Prevention and Control (2012), *Viet Nam AIDS Response Progress Report 2012*. p.122.

Specific factors constraining enforcement of the *HIV/AIDS Law* and related regulations identified in the *Viet Nam AIDS Response Progress Report 2012* are:

- lack of knowledge about the law among law enforcement officers;
- limited knowledge about Decree 69 on administrative sanctions for discrimination among people at the commune level, or in health facilities and enterprises;
- lack of mechanisms for civil society organizations to give feedback to government on whether laws are enforced;
- the mechanisms of law enforcement are very weak, with the vast majority of issues related to legal sanctions not taken seriously;
- inconsistencies regarding support for harm reduction interventions between the *HIV/AIDS Law* and laws that requires detention of people who use drugs.³¹⁰

People who inject drugs are subject to compulsory detention, and therefore may seek to avoid detection by authorities or any contact with the legal system to enforce their rights due to fear of detention. The *Law on Handling of Administrative Violations* of 2012 abolished administrative detention of sex workers, although fines for engaging in sex work may still apply.

8.4 Other legal redress mechanisms for human rights violations

In addition to the *HIV/AIDS Law*, the following laws also provide HIV-related human rights protections:³¹¹

- The *Constitution of the Socialist Republic of Viet Nam* (1992) provides that citizens enjoy a range of constitutional rights including the right to equality before the law without discrimination (Article 52), the right to education (Article 59), the right to inherit (Article 58) and entitlement to health care (Article 61).
- The *Law on Disability 51/2010/QH12* prohibits stigmatization of and discrimination against people with a disability (Article 14).
- The *Labor Code* provides that all people have the right to work, and to choose a job, career and vocational training, without being discriminated against on the grounds of gender, ethnicity, social class, religion or belief. In order to resolve a labor dispute under the Code, employees may seek negotiation, conciliation or court proceedings.
- The *Law on Child Protection, Care and Education (25/2004/QH11)* provides that all children are protected, provided with care and education and enjoy the rights prescribed by law, irrespective of sex, legitimacy, adoptive status, race, creed,

310 Decree 108/2007/ND-CP, and the *Ordinance on Administrative Violations* (No. 44/2002/PL-UBTVQH10).

311 UNAIDS & Policy, Law and Development Viet Nam (2011), *Op cit*.

religion, social class, or the opinions of their parents or guardians (Article 4). All children have the basic rights, such as:

- Right to have birth registered and acquire nationality;
- Right to be cared for;
- Right to live with parents;
- Right to be respected and have their life, body, and dignity protected;
- Right to health care.

Article 15 guarantees children the right to primary health care and free medical treatment at public medical establishments. Article 19 guarantees children the right to have assets and to inheritance rights under the law. Article 28 provides children with the right to attend school.

- *Directive No. 61/2008/CT-BGD-DT (2008) of the Ministry of Education and Training on strengthening HIV prevention and control in the field of education* provides that educational establishments must protect the right of people living with and affected by HIV to have a general education and vocational training, to work, and to live as an integrated member of the community. It is illegal for an educational establishment to request that a student, learner or candidate have an HIV test or to produce an HIV test result.
- The *Law on Gender Equality (No. 73/2006/QH11)* prohibits gender-related discrimination.
- *Decision of the Prime Minister on the Management, Care and Counseling for HIV in Prisons, Medical Establishments and Social Welfare Establishments in Viet Nam (No. 96/2007/QD-TTg)* includes provisions on the rights of prisoners to access HIV treatment (Article 4).
- *Law on Domestic Violence Prevention and Control (No. 02/2007/QH12)* provides women with protection from violence.
- *Law on Medical Examination and Treatment (No.40/2009/QH12)* describes the right of citizens to treatment and the responsibility of health facilities and physicians to diagnose and treat patients.
- Under the 1989 *Law on the care and protection of people's health*, people enjoy the right to health care. In emergencies, people have the right to seek health care at a health facility, which has to receive patients and provide medical treatment.
- *Decree Regulating Substitution Treatment of Opioid Addiction (No:96/2012/ND-CP)* defines eligibility criteria and the procedures for selection of people who use heroin for opioid substitution. The Decree provides that opioid dependent persons have the right to choose to participate in opioid substitution treatment or to undergo

rehabilitation voluntarily at home or in the community. An opioid-dependent individual who is receiving opioid substitution treatment at a treatment facility has the right to be transferred to another facility, based on employment and activities related to the individual.

8.5 Legal empowerment and access to legal aid

The *Viet Nam AIDS Response Progress Report 2012* makes the following observations about access to legal services:

Efforts to enforce the 2006 Law on HIV are still limited by a lack of awareness and understanding on the part of both rights holders and duty bearers. Programmes have been developed to raise PLHIV's awareness about their rights... Efforts have also been made to make legal support services available, including legal aid systems for HIV casework and private sector law firms providing free or reduced-cost legal services to PLHIV. However, the clinics require further capacity strengthening, especially as stigma and discrimination remain significant barriers to accessing HIV prevention, treatment, care and support services.³¹²

UNAIDS and UNDP sponsored an independent assessment on legal services for PLHIV in Viet Nam in 2012. Findings of the assessment included:³¹³

- Despite the powerful legal framework provided by the *Law on HIV/AIDS Prevention and Control*, stigma and discrimination against PLHIV and violation of their rights continue to take place in communities, health care and education facilities, workplaces and families.
- There is a lack of systematized data on the legal services provided to PLHIV and key populations.
- Legal services for PLHIV have been provided by:
 - › Provincial Legal Aid Centres (PLACs);
 - › Legal Consultancy Collaborators (LCCs) of the Viet Nam Lawyers Association. Some LCCs provide services to PLHIV as a part of their legal advice services to the general population. Some LCCs provide HIV-specific services (e.g., LCCs funded by the Health Policy Initiative from 2009-2012);
 - › LCCs of social organizations (e.g., Women's Union) and legal clinics of universities and other educational institutions.

312 National Committee for AIDS, Drugs, And Prostitution Prevention And Control, *Viet Nam AIDS Response Progress Report 2012*, p.34.

313 UNAIDS and UNDP (2012), *Legal services for people living with HIV and key at-risk populations in Viet Nam: an assessment of the current situation and recommendations for the future*, Hanoi: UNAIDS and UNDP. The assessment was conducted by N.H. Quang & Associates and the Centre for Community Health Promotion.

Provincial Legal Aid Centres (PLACs)

From 2005 to 2009, the National Legal Aid Agency expanded its operations to include HIV-related legal issues and services for PLHIV delivered at PLACs as a result of project funding from the Swedish International Development Agency (SIDA) and other European donors.³¹⁴ The activities of this project included:

- Five PLACs in Bac Lieu, Hai Phong, Hoa Binh, Lao Cai and Long An provided legal services for PLHIV on a pilot basis.
- Training courses were provided by the National Legal Aid Agency on HIV-related knowledge and skills to communicate with PLHIV for about 100 legal aid providers and legal aid collaborators and 400 members of legal aid clubs in the five provinces.
- In 2008, another HIV training course was organized by the national Legal Aid Agency in cooperation with the Centre for Consultancy on Health Policy and Law on HIV/AIDS (“CCLPHH”) for legal aid providers of 15 PLACs.

Viet Nam Lawyers Association (VLA) Legal Consultancy Collaborators (LCCs)

From 2009-2011, the VLA engaged three LCCs (two in Hanoi and one in Ho Chi Minh City) to provide legal services for PLHIV through a project managed by CARE International and funded by the European Commission. The assessment reported that after the CARE Project was completed in March 2011, there has been a reduction in legal services for PLHIV. Activities of this project included:

- PLHIV obtained advice services from the LCCs for 670 cases. 508 of these cases were inquiries by PLHIV made at dissemination meetings in community settings (e.g., workplaces, hospitals, etc.). 162 cases arose from client visits to LCC offices. Four PLHIV were supported in defending their criminal cases in court or making submissions in relation to sentencing.
- Training was provided to strengthen capacity of VLA members to provide services to PLHIV and HIV-affected people.
- Support was provided to six self-help groups of PLHIV, including small grants and internships at the three Legal Consultancy Collaborators.
- Training of trainers on HIV and human rights was provided to 19 VLA members working in 8 provinces.
- HIV and law dissemination meetings were conducted in cooperation with self-help groups in Hanoi and Ho Chi Minh City.

Legal advice was provided in relation to: civil and marriage matters (226 cases, mostly inheritance, divorce, rent, domestic violence and disclosure of health information); (ii)

³¹⁴ Support was provided by SIDA, the Swiss Agency for Development and Cooperation (SDC), Oxfam Novib and Save the Children Sweden.

administrative matters (223 cases, mostly refusal of identity card issuance, residence registration, refusal of visit to school and refusal of access to ARVs or methadone treatment); (iii) labor and social protection matters (153 cases, mostly job dismissal, issue of social aid certificate); and criminal matters (64 cases, arrest of PLHIV for crimes).

Health Policy Initiative (HPI) support to five HIV-specific legal services

The Health Policy Initiative (HPI)(funded by USAID) provided support to five LCCs under the VLA to provide specialist HIV-related legal services from 2009-2012. These centres were located in Hanoi, Ho Chi Minh City, An Giang, Hai Phong and Quang Ninh. The Hanoi centre, operated by CCLPHH also received funding from the Ford Foundation and the Global Fund to Fight AIDS, Tuberculosis and Malaria. Each of these HIV-specific LCCs was staffed by one lawyer, one legal consultant and four part-time collaborators. After HPI funding concluded in 2012, some of these services merged with either the PLAC or LCCs under VLA.

The assessment reported that the following were the most common types of HIV-related cases that these specialist LCCs handled:

Matters	Method of Settlement
Children living with HIV not allowed to attend school. Schools often blamed this on objection from other children's parents.	LCC held discussions with the school to confirm the children's rights. Meetings with parents of other children were frequently held to explain HIV transmission and HIV laws. Amicable settlement was reached subject to successfully convincing other children's parents to withdraw their objection.
PLHIV were dismissed from employment.	LCC held discussions with the employer and got relevant bodies involved to reconcile the dispute. Commencement of lawsuit was sometimes necessary.
PLHIV were requested to change their work position to another one with less favorable conditions.	LCC held discussions with the employer and got relevant bodies involved to reconcile the dispute.
PLHIV were hindered by their family to inherit property.	LCC held discussions with the family of PLHIV to reconcile the dispute.
Women living with HIV were forced to divorce without right to nurse children and own property.	LCC held discussions with their family and got relevant bodies involved to reconcile the dispute.
PLHIV were hindered from marriage by family and/or local People's Committee	LCC held discussions with their family and/or local People's Committee and got relevant bodies to clarify the rights of PLHIV and rectify the legal infringement.

PLHIV were hindered from renting house.	LCC held discussions with their family and encouraged relevant bodies involved to reconcile the dispute.
Health status of PLHIV was disclosed to others at work or residential community.	LCC held discussions with the relevant employer or local PC to request assistance with stopping the spread of information and stigmatization.
PLHIV were refused identity card or to re-register their residence by the local police after release from education/ rehabilitation camp for drug users or sex workers.	LCC held discussions with the relevant police agency and obtained letters of support or undertaking from the family of PLHIV toward requesting the re-granting of identity cards and re-registering residence for PLHIV.
PLHIV were refused by the local Peoples Committee to be certified poor to enjoy Government aid.	LCC held discussions with the relevant local People's Committee and submitted documented evidence proving the eligibility of PLHIV for Government aid.
PWID and sex workers living with HIV were sent to compulsory drug rehabilitation or education centres, respectively, regardless of their AIDS stage.	LCC initiated many legal proceedings to submit administrative claims for PLHIV, obtained letters of support or undertaking from their family, and submitted relevant medical records.
PLHIV were prosecuted, held in custody and/or sentenced in criminal case regardless of their AIDS status.	LCC initiated many legal proceedings to submit administrative claims and/or defend clients in Court.
PLHIV were held in prison regardless of their AIDS status.	LCC initiated many legal proceedings to submit administrative claims and/or defend clients in Court.

Examples of cases handled by Hanoi LCC³¹⁵

1: Mr. Huy was dismissed from military service without compensation due to his HIV status. Approaching Ha Noi Centre, he was advised and guided how to draft a claim to be sent to his military Unit. As a result the dismissal decision was revoked.

2: Mrs. Anh was removed from her position as a teacher in a kindergarten due to her HIV status. She was moved to an assistant's job with a lower salary. Ha Noi Centre relied on the Law on HIV Prevention and Control and met with the local People's Committee, local Department of Education, local Inspector of Education, the Provincial AIDS Committee, the Management and Trade Union of the Kindergarten. She was returned to her teaching position.

³¹⁵ See: UNAIDS and UNDP (2012), *op cit.*; and: UNAIDS, VLA and Centre for Consulting on Law and Policy on Health and HIV/AIDS (2010), *Legal Aid – Happiness for PLHIV*, Hong Duc Publishing House.

3: Hoa, 9 years old, was an orphan living with HIV. She lived with her paternal grandfather. The Management Board of the school refused her entry due to the pressure from other parents. Ha Noi Centre represented Hoa and her grandfather to work with the relevant communal people's committee and the school, to successfully reverse the decision so that Hoa could attend school.

4: Dong was held in custody for investigation on robbery. During the custody, his health worsened due to interrupted HIV medical treatment. In a meeting at Hanoi Centre, his family members were advised on legal procedures to be taken to protect his right for medical treatment. The Centre made representations to relevant authorities such as Police Office, Prosecutor Office, the Provincial AIDS Committee and the Medical Centre where Dong was treated requesting release from custody. Dong was sent home to continue his ARV treatment under police supervision.

The Hanoi Centre handled 8,238 cases from 2009-2011. 2,862 cases were inquiries from PLHIV in law dissemination meetings. Advice was provided in civil matters, criminal matters, administrative matters, land disputes, labor matters, matters related to social protection policy and general legal matters unrelated to HIV.

The assessment found that the vast majority of cases handled by the Hanoi Centre involved provision of advice on legal options and the process for lodging claims, and negotiations with authorities on behalf of clients. The Hanoi Centre rarely represented clients in court. There was one litigation case handled by Hanoi Centre in the period 2009-2011, in which the Centre provided a lawyer to defend a criminal matter.

In relation to the Ho Chi Minh City Centre, the assessment identified 19 success stories of settlement of legal disputes by local People's Committees and Courts as follows:

- Five labor disputes relating to unlawful dismissal without payment of material compensation, non-payment of Social Insurance and non-return of Social Insurance Book.
- Three cases where PLHIV escaped from the compulsory drug rehabilitation centres and were refused residence registration by the local People's Committee.
- One case where a drug user was exempted from compulsory drug rehabilitation because of his AIDS-related illness.
- Three civil and marriage cases related to denial of marriage, child-care or property rights due to HIV status.
- Seven cases where PLHIV enjoyed temporary suspension of imprisonment, early release from imprisonment and/or reduction of criminal charges.

The assessment found that the low number of professional personnel employed at the LCCs was a restrictive factor affecting their operations. LCCs used mediation service as the main method for dealing with legal disputes rather than formal administrative complaint procedures or litigation that required specific professional expertise. Litigation cases were

referred to other consulting offices. The LCCs lacked experienced lawyers who were able to defend clients in court.³¹⁶

The *Learn About Your Rights Training Manual on HIV and the Law* was published in 2011 by UNAIDS and the Institute for Research on Policy, Law and Development-Viet Nam (PLD Viet Nam). The Manual was developed with support from the Bridges Across Borders Southeast Asia Community Legal Education Initiative (BABSEA CLE).³¹⁷ The Training Manual encourages use of interactive teaching methods, such as role-plays, presentations and interviews to aid learning.

BABSEA CLE and the Clinical Legal Education Foundation also deliver Training of Trainers workshops on HIV and the law as part the project, *Raising Awareness of Rights Holders and Duty Bearers on the Legal Rights of People Living with HIV (PLHIV) and Key Populations in Viet Nam*. BABSEA CLE has worked with partners VNP+ (Viet Nam Network of PLHIV) and the Education and Cultural Center to train PLHIV and law students.³¹⁸ The Training Manual was pilot-tested through community teaching initiatives. Students who took part in developing the manual trained others to act as trainers. 470 people including PLHIV, law lecturers, law students, representatives from legal aid offices and local stakeholders were trained in 2010. The manual has become part of the regular curriculum for law clinics in some law schools. In 2012 a national network of law schools, NGOs and PLHIV was formed to expand rights education activities to more provinces and communities.

UNDP and UNAIDS also supported the Institute for Policy, Law and Development to develop training resources for women living with or affected by HIV (including female sex workers and female partners of men who inject drugs), and to educate 75 women living with or affected by HIV on their rights under the law on HIV.

In 2012 UNDP and UNAIDS reported that they are focusing their efforts on the following areas:

- i. Capacity enhancement of the legal sector in order to increase the quality of legal services delivered to PLHIV and key populations, building on the recommendations of the independent assessment.
- ii. Use of the Training Manual to promote legal literacy and reduction of stigma against PLHIV and MSM among health service providers, provincial leaders, the police, and other stakeholders.³¹⁹

316 UNAIDS and UNDP (2012), *op cit.*, p.42.

317 Institute for Research on Policy, Law and Development Viet Nam & UNAIDS (2011), *Learn about your rights: Training Manual on HIV and the Law*, Hanoi: UNAIDS.

318 Trang Tran Le (2012), Training of Trainers for People Living with HIV, *BABSEA CLE's Quarterly Newsletter, Bridging Borders*, July 2012.

319 UNDP (2011), *Delivering as One: HIV and the Law in Viet Nam*, Bangkok: UNDP Asia Pacific Regional Centre.

8.6 Conclusion

Although Viet Nam has established a strong legal framework for protection of HIV-related human rights, violations are reportedly widespread. To improve compliance with the *HIV/AIDS Law* requires sustained efforts to educate PLHIV, employers, health care providers and government agencies about the law and law enforcement mechanisms, and to improve access to legal aid services. The development of the *Training Manual on HIV and the Law* and the training programmes conducted based on the Training Manual provide a model for other countries in how to approach capacity building of PLHIV communities, self-help groups, law students, lawyers and NGOs.

Improving access to legal services for PLHIV and key populations will support increased enforcement of the rights protections contained in the *HIV/AIDS Law*. Legal education and legal aid services have largely been funded by foreign donors. As international support to the national HIV response reduces, many of these programmes are coming to an end. Donor support has made an important contribution to strengthening capacities for providing HIV-related legal service provision and providing access to justice. The challenge for the Government of Viet Nam is to build on this foundation and the lessons learned to develop sustainable approaches.

The recommendations of the legal services assessment published in 2012 should inform policy. The assessment included a recommendation that the Ministry of Justice, the National Legal Aid Agency, and the Viet Nam Lawyers Association should submit a Project on Development of Legal Services for PLHIV and Key Populations for the period of 2012 to 2020 to the Prime Minister, requesting the following:

- i. Development of a Government policy to promote the development of legal services for PLHIV and key populations;
- ii. Amendment to the Law on Legal Aid as to include PLHIV as eligible groups subject to state legal aid services;
- iii. Amendment to the Law on HIV Prevention and Control so as to include legal services for PLHIV and key populations as one of measures of HIV prevention and control;
- iv. Inclusion of legal dissemination and education for PLHIV in the Government Decree to guide the implementation of the Law on Legal Dissemination and Education.
- v. Amendment to regulations on functions of the Ministry of Justice, the National Legal Aid Agency and the Viet Nam Lawyers Association to define their roles in provision of legal services for PLHIV and key populations.³²⁰

320 UNAIDS and UNDP (2012), *op cit.*, p.48.



9. Other legislative models

9.1 South Asia

9.1.1 National HIV Bills of India, Nepal and Pakistan

India, Pakistan and Nepal have developed bills proposing omnibus national HIV laws. However, these bills have not been considered by the parliament of each respective country or passed into law. Bangladesh, Maldives and Sri Lanka have not drafted national HIV laws or bills. Sri Lanka's Ministry of Labour and Labour Relations has a *National Policy on HIV and AIDS in the World of Work* (2010) that addresses stigma and discrimination. However, Sri Lanka has not introduced HIV-specific legislation to protect the rights of PLHIV.

A *Regional Legal Reference Resource* for South Asia published by IDLO in 2012 summarizes developments related to HIV, MSM and transgender people. The *Regional Legal Reference Resource* makes the following observations in relation to the significance of the national HIV Bills of India, Nepal and Pakistan:

Anti-discrimination provisions in the HIV Bills drafted by India, Nepal and Pakistan, go some way in addressing discrimination on the grounds of HIV status. Importantly, anti-discrimination provisions extend beyond the public sector, to encompass the private sector (Pakistan, Nepal and India) and 'familial and personal life' (Nepal). Equally, the extension of discrimination on the basis of HIV status to presumed HIV status (for example, 'on suspicion' that a person is HIV positive – in the Indian, Nepal and Pakistan Bills) represents an important recognition of the impact of stigma on key populations at higher risk. Provisions in the Nepal and Pakistan Bills could be further strengthened by express provisions to include key populations at higher risk under these anti-discrimination provisions.

Notably, in India, Nepal and Pakistan, the HIV bills have remained in draft form, for not less than five years. There is now a reasonable argument to suggest there is a need for comprehensive review of all three bills to ensure they reflect national developments and international lessons learned. The challenge of gathering sufficient political will to pass these bills remains. Given the personal and political agendas which change and shape a bill during its passage through parliament, the question needs to be asked whether omnibus HIV laws hold the answer to protecting

HIV-related rights. These bills must be viewed in light of their potential to progress the rights agenda and potential to harm the rights-based response to HIV.³²¹

India

The *HIV and AIDS (Prevention and Control) Bill 2012* has been drafted for consideration by the Cabinet of the Government of India. This represents the culmination of a ten-year process. An advisory group chaired by the National AIDS Control Organisation first requested an NGO, the Lawyers Collective, to prepare a draft Bill in 2002. The Lawyers Collective prepared the first version of the Bill after consultations conducted in 2003-2004 with PLHIV, key populations, women's and children's groups, health care providers, trade unions, lawyers and other civil society organizations. Feedback was also sought from State Governments, State AIDS Control Societies and Central Government Ministries.

This first version of the Bill was submitted to the National AIDS Control Organisation in 2006. After the Health Ministry referred the Bill to the Law Ministry, the Law Ministry proposed a redraft of the Bill after deleting numerous provisions that PLHIV organizations had requested be included.³²² In 2012, a new version was circulated, however this version stalled after the Ministry of Home Affairs and the National AIDS Control Organisation disagreed regarding the application of the Bill to uniformed services. The Ministry of Home Affairs requested that military forces and police be exempt from the Bill's prohibition on mandatory HIV testing and from the requirement that HIV status be kept confidential.³²³

A key lesson from this experience of delay is that it is critical to ensure that the Ministries of Home Affairs and of Law/Justice are supportive of the rights-based approach early in the drafting process, and that this support continues throughout the progress of a draft law through political processes, taking into account changes in governments and bureaucracies.

The Lawyers Collective has argued that enactment of the Bill into law is required to fulfill India's international obligations, recognizing the inadequacy of the existing legal framework:³²⁴

- India has no existing anti-discrimination legislation to cover discrimination on the grounds of HIV.
- The guarantee of equality in the Indian Constitution is available only against state entities and there is no restriction on discriminatory practices in the private sector, be it in healthcare, employment, or education.
- Most legal issues that arise in the context of HIV are governed by common law – where law is defined by principles set down in prior case law by judges. This allows

321 IDLO (2012), *Regional Legal Reference Resource: Protective Laws related to HIV, Men who have Sex with Men and Transgender People in South Asia*, Rome: IDLO (International Development Law Organization), p.36.

322 Rahman A (2009), HIV-AIDS Bill draft to be discussed afresh, *iGovernment*, 22 October 2009.

323 Ghosh A. (2012), MHA red flags HIV Bill: can't take infected in paramilitary. *Indian Express*, 26 April 2012.

324 See the full list of reasons at: <http://www.lawyerscollective.org/hiv-and-law/draft-law.html>

for the personal predilections of judges to impact HIV cases, an approach that lends itself to inconsistency, and to rulings that are sometimes in opposition to government policy.

- Interventions for key populations including sex workers, people who inject drugs and MSM potentially conflict with Indian laws such as the *Immoral Traffic Prevention Act, 1956*, the *Narcotics Drugs and Psychotropic Substances Act, 1985*. The Bill can resolve this conflict to ensure HIV services reach key populations.

Provisions of the Bill as it was in 2007 (*HIV/AIDS Bill 2007*) include:

- Prohibition of discrimination in employment, education, healthcare, travel, and insurance in the public and private sectors.
- A requirement of informed consent for HIV testing, treatment and research.
- A requirement that HIV status not be disclosed, subject to strictly defined exceptions.
- A requirement that the State provide free access to HIV treatments.
- An obligation on healthcare institutions to provide universal precautions and post exposure prophylaxis.
- Legal immunity for persons implementing risk reduction programmes, including distribution of condoms, lubricants, female-controlled barrier methods, clean needles and syringes, drug substitution and needle and syringe programmes.
- A requirement that the government make HIV information accessible to all. The Bill would require the government to create educational materials with community inputs, showing sensitivity across gender and age. These resources should be multilingual, easily understood and regularly updated.
- Establishment of accessible complaint handling processes and mechanisms to receive complaints, inquire into violations of the Act, resolve grievances, and provide institutional redress, including an office at district level ('Health Ombud').
- Procedures to be followed by courts to promote access, including suppression of identity and expedited hearings.

Nepal

The first draft of the Nepal's HIV Bill³²⁵ was developed in 2003, but has been amended a number of times. As at 2012, the Bill was being reviewed by Ministry of Health and Population. It will need to be reviewed by the Ministry of Law and Justice. As at 2011, the Nepal Bill included provisions in relation to discrimination, right to privacy and confidentiality of HIV status, and a prohibition of mandatory HIV testing. The Bill proposes that consent would not be required for HIV testing in the following circumstances: (a)

325 *HIV and AIDS (Prevention, Control, Treatment, Re-integration and Protection of Rights) Bill*.

in the course of investigation of certain crimes, (b) pursuant to a court order, and (c) in the course of treatment of a minor or an individual who is unable to consent because of physical or mental state.³²⁶

Pakistan

Pakistan developed a draft HIV/AIDS Prevention and Treatment Bill in 2007.³²⁷ According to the IDLO *Regional Legal Reference Resource*:

Legal commentators suggest a lack of political commitment has impeded the passage of the Pakistan Bill... Competing political, social and economic priorities have resulted in a situation where the Pakistan Bill has been pending for five years.³²⁸

The Bill proposes to establish an enabling environment by protecting vulnerable populations against stigma and discrimination on the basis of their HIV status. The Bill defines discrimination to include: “any act or omission including a policy, law, rule, practice, custom, tradition, usage, condition or situation which directly or indirectly, expressly or by effect, immediately or over a period of time imposes burdens, obligations, liabilities, disabilities or disadvantages on, or denies or withholds benefits, opportunities or advantages, from, or compels or forces the adoption of a particular course of action by any person or category of persons, based solely on a person’s HIV status, actual or perceived.”

The Bill prohibits discrimination in both the public and private sectors, and prohibits anyone from publishing, propagating, advocating or communicating whether by words, or by actions, against any person on grounds of his/her suffering from HIV. The Bill provides for a fine in the event of violation of the provisions on discrimination and provides that the Courts are permitted to pass appropriate orders having regard to the circumstances of the case to prevent or redress breaches of the Act.

The Bill also addresses confidentiality of medical status and prohibits compulsory testing.

9.1.2 Other legal redress mechanisms for human rights violations

The *Regional Legal Reference Resource* makes the following findings (*inter alia*) in relation to legal protections for HIV-related human rights in South Asia:³²⁹

- The Constitutions of Bangladesh, India, Nepal, Pakistan and Sri Lanka enshrine the principles of equality and non-discrimination... broad Constitutional protections guarantee equality, non-discrimination, and some recognition of the right to health. While these articles represent significant commitments of the state, rights expressed

326 IDLO (2012), *op cit.*, p.24.

327 A copy of the Bill is available at: <http://www.nacp.gov.pk/introduction/national-HIV-AIDS-Law.pdf>; An HIV Bill that proposes to only apply to Islamabad has also been drafted: *HIV/AIDS (Safety and Control) Act, 2010*. While the Islamabad Bill proposes anti-discrimination protections for PLHIV, it also seeks to make HIV testing mandatory for marriage, prison inmates, commercial sex traders, sex offenders, certain victims of crimes, habitual drug users, truck drivers, and patients receiving repeated transfusions of blood.

328 IDLO (2012), *op cit.*, p.26.

329 *Ibid.*, pp.14-20.

within national statutes tend to be more accessible to citizens and law enforcement agencies, and easier to claim in a Court of law.

- There is no stand-alone anti-discrimination legislation which specifically protects PLHIV or sexual minority populations in Bangladesh, India, Nepal, Pakistan or Sri Lanka.
- Bangladesh has broad anti-discrimination laws, but no provisions that specifically provide for PLHIV or people of diverse sexual orientation or gender identity.
- In India, the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995* (PWD Act), provides that certain government bodies cannot dispense with, or reduce in rank, an employee who acquires a disability during his service; or deny a promotion to a person on the ground of their disability. (The Act only applies in respect of certain diseases and HIV is not included). While the application of the Act is narrow, activists have advocated for the inclusion of people living with HIV in the Act on the basis that discrimination experienced by PLHIV is similar to that experienced by other people with disabilities. The *Draft Rights of Persons with Disabilities Bill 2012* proposes to broaden the definition.
- The *Country Code* of Nepal contains some provisions related to certain types of discrimination on the basis of disease, under Chapter 19 on Decency/Etiquette (Adal). No. 10(B) of Chapter 19 provides that in the event a person commits torture or banishes any ill person from his or her place of residence (by rejecting that person or committing any inhuman or degrading treatment), on the ground that he or she has suffered from any disease, the person shall be liable to the punishment of imprisonment for a term ranging from 3 months to 2 years or a fine of 5,000-25,000 Nepali Rupees, or both. This provision may be interpreted to cover ill-treatment and/or ostracism of people living with HIV. Notably, the provision covers ill-treatment at a social level only (place of residence), not ill-treatment at an institutional level.

Incidents of discrimination against children by schools are reported in India. Over 60 children living with HIV were denied admission to schools from 2008-09 to 2011-12, according to the National AIDS Control Organisation (NACO).³³⁰ Rejection of children on the grounds of HIV by schools may be challenged as a violation of their rights under the *Right to Education Act 2009*.

9.1.3 Use of the legal system to enforce HIV-related rights in India

Although there is no overarching national HIV legislation, PLHIV have been able to access the legal system to seek remedies for human rights violations in a variety of circumstances.

Legal action under the Constitution of India and other general laws

There have been numerous cases in which PLHIV have filed claims in Indian courts seeking to enforce HIV-related rights guaranteed by the Constitution or other legislation.

330 Schools across country spurn children with HIV, *Deccan Herald*, 24 October 2012.

Most cases are resolved through negotiation prior to the court hearing. Some of the prominent cases that have been heard in court include the following.³³¹

Employment cases³³²

- In *MX v. ZY* (1997)³³³ a worker with HIV who was dismissed after he was tested for HIV by his employer, a public sector corporation. MX was found to be HIV positive. It was held that a person's HIV status should not be a reason for termination or denial of employment. The denial of employment on the ground of HIV status was found to infringe rights under the Constitution to equal treatment before the law and the right to life and personal liberty. The Court ordered that MX be reinstated, that he be taken into regular employment if further medical examination showed he was still fit, and awarded him compensation for lost income. The Court also held that the worker's identity be suppressed in reporting of the court case.
- In *CSS v. State of Gujarat* (2001),³³⁴ CSS was selected for the post of unarmed police constable in the Gujarat State Police force but was classified as "not medically fit" as he was HIV-positive. The Court directed the Respondent to restore CSS to the list of selected persons and not to deny opportunity of employment solely on the ground of HIV-positive status.
- In *X v. State Bank of India* (2002)³³⁵ the Bombay High Court applied the previous decision in *MX v. ZY*, holding that X could not be denied the opportunity of employment at the State Bank of India on the grounds of his HIV-positive status.
- Similarly, in *G v. New India Assurance Co. Ltd.* (2004)³³⁶ the Bombay High Court held that a person who is otherwise fit, could not be denied employment only on the ground that he or she is HIV positive. The Court further held that a person's HIV status cannot be a ground for rejection for employment as it would be discriminatory and would violate of the principles of right to equality, right to non-discrimination in state employment and right to life of the Constitution.
- In *X v. The Chairman, State Level Police Recruitment Board & Ors*, (2006)³³⁷ the Andhra Pradesh High Court also found that applicants for employment cannot be

331 See: Elliott R. et al (2006), *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*, Geneva: UNAIDS; and <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>.

332 In addition to the cases listed there have been several cases where the employer forced the employee to resign after detecting the worker had HIV. Cases have been brought before the Labour Commissioner, then before the Labour Court. Cases were filed for reinstatement and backwages. In some cases, the workers have accepted an amount offered by the employer as an out of court settlement, leading to a withdrawal of the case. There have also been cases of appointment of widows of workers who have died of HIV to be given employment on compassionate grounds. Personal communication, Veena Johari, April 2013.

333 (1997) AIR 1997 Bom 406.

334 Unreported Special Civil Application No. 11766 of 2000 (Gujarat High Court) (17 February 2001). See: <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>.

335 See: <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>

336 See: <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>

337 2006ALT 82. See: <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>

discriminated against on the grounds of HIV status. The High Court struck down an Order contained in the state Police Manual that prohibited appointment of HIV-positive candidates. The Court held that a person living with HIV, who was fit, otherwise qualified and posed no substantial risk to others, cannot be denied employment in a public sector entity. The Court held that denial of employment to the petitioner only because he was tested HIV positive impaired his dignity and constituted unfair discrimination. The Order in the Police Manual was found to be patently arbitrary, irrational and discriminatory in contravention of the Constitution of India. The matter was appealed in the Supreme Court, but the appeal was dismissed.

- In *RR v. Superintendent of Police & others* (2005)³³⁸ RR's appointment to the position of police constable was cancelled when a pre-employment medical screening identified him as HIV-positive. The Tribunal declared that a person who was fit, otherwise qualified and posed no substantial risk to others, could not be denied employment in a public sector entity. It further declared the policy of the state police excluding PLHIV from employment was unconstitutional and directed the Government to ensure that no denial of employment on the grounds of a person's HIV occur in the future.
- In 2011, the Madras High Court ordered the Tamil Nadu State Transport Corporation to hire two men who had been denied employment because of their HIV-positive status. The judge directed the company to employ the men within a period of eight weeks.³³⁹
- An example of a case that succeeded under industrial laws involved a complaint filed in the Industrial Court at Mumbai, India, in 1999. The complainant was a blower in a glass factory. The Industrial Court passed an order declaring that the employer had engaged in unfair labour practices in terminating the complainant's employment, as there was no workplace risk of HIV transmission. The employer was directed to allow the complainant to report on duty and pay him full wages and benefits.³⁴⁰ The complainant was reinstated, however the employer refused to include him in subsequent contracts and the employer did not pay him the entire amount of wages due to him. Further court actions were filed for recovery, and for extending the benefits of the subsequent contracts to him. The complainant was successful in all the cases over a number of years.³⁴¹

Cases on access to treatment and the right to health

- The case of *Sankalp Rehabilitation Trust v. Union of India*³⁴² demonstrates effective use of public interest litigation. A case was filed in the Supreme Court seeking to address

338 Unreported (2005) Karnataka Administrative Tribunal. See: <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>

339 Subramani A. (2011), Can't deny job to HIV-positive: HC, *The Times of India*, 5 January 2011.

340 Lawyers Collective HIV/AIDS Unit, Mumbai. See case note at: <http://www.heart-intl.net/HEART/Legal/Comp/DisabilityLawandHIV.htm>; Lawyers Collective, Positive Dialogue, News Letter# 12, Dec. 2002.

341 Further case detail provided by personal communication, Veena Johari, April 2013.

342 Sahara House v. UOI W.P. (C) 535/1998 & Sankalp Rehabilitation Trust v. UOI W.P. (C) 512/1999. See: <http://>

barriers that prevented the access of PLHIV to ARVs and health services. In 2008, the Supreme Court ordered government to implement the following actions:

- rapid scale-up of ART centres;
- increasing the number of CD4 machines and ensuring their maintenance in a timely and efficient manner;
- ensuring adequate infrastructure in ART centres;
- creation of a grievance redress mechanism at ART centres and at state level;
- provision of free treatment for opportunistic infections;
- non-discrimination of people with HIV in health care settings;
- availability of universal precautions and post exposure prophylaxis for health care providers in public hospitals.

In 2010, the Court issued an order requiring all private doctors to follow the NACO protocol while prescribing ARVs. In a further development in the case, NACO guidelines which limited the provision of second-line ARV treatment to certain categories of persons were challenged as being in violation of the right to equality, and the right to life including the right to health under the Constitution. After negotiations, NACO agreed that second-line ARVs would be provided to PLHIV as required.

- *LX v. Union of India* (2004),³⁴³ LX who was in custody tested HIV-positive and required ART. In a series of orders, the Delhi High Court directed the Government to continue to provide ART to LX.
- In *Ram @ Ramdas R. Ubale v. State of Maharashtra* (2009),³⁴⁴ an HIV-positive prisoner appealed for bail on the grounds that medical facilities in the prison were insufficient to manage his medical condition. While the application was pending, the prisoner died. The Bombay High Court ordered the government to provide comprehensive health care to prisoners living with HIV in Maharashtra.
- In *Indian Network of Positive People v T.A. Majeed & Ors* (2007),³⁴⁵ the Indian Network of Persons living with HIV/AIDS (INP+) obtained an order from the Supreme Court to prevent the manufacture and sale of a false cure for AIDS.
- In *Boehringer Ingelheim v. Indian Network for People Living with HIV/AIDS (INP+) and Positive Womens Network (PWN)*, the Delhi Patent Office rejected the patent

www.lawyerscollective.org/hiv-and-law/current-cases.html

343 *Naz Foundation v. Government of NCT and Ors* (Delhi High Court (CWP – 7330/2004, 5 May 2004).

344 Bombay High Court (Criminal Application 371 of 2008 in Appeal No. 706 of 2006).

345 Order of the Supreme Court in SLP (Civil) No(s). 5527/2004 dated 03/01/2007.

application on *Nevirapine Hemihydrate*, which is used in the treatment of pediatric HIV.³⁴⁶

Right to marry

- *Mr. X v. Hospital Z, (2002), and A, C & Others v. Union of India & Others (1998)*³⁴⁷

In these cases, the Supreme Court initially denied PLHIV the right to marry, then in a later case overturned this aspect of its earlier ruling. In *Mr. X v. Hospital Z* (1998) the Supreme Court ruled that the provisions of the *Indian Penal Code* that criminalize acts likely to spread an infectious disease dangerous to life imposed a positive legal duty on PLHIV not to marry. In 2002, the Supreme Court reconsidered its original judgment. The Court held that the observations relating to marriage in its 1998 decision were not warranted and restored the right of an HIV-positive person to marry. However, it held that this does not take away from the duty of those who know their HIV+ status to obtain informed consent from their prospective spouse prior to marriage.

Decriminalization of homosexuality

- The *Naz Foundation Case* (2009)³⁴⁸ was a case filed by an HIV/AIDS NGO challenging the validity of the law criminalizing homosexuality. The petitioner through public interest litigation challenged the constitutional validity of section 377 of the *Indian Penal Code*, which penalizes ‘unnatural sex’. The High Court held that Section 377 violates rights to equality, to life and to privacy under the Indian Constitution, to the extent that it criminalizes consensual sex between two individuals in private. The judges referred to Article 12 of the International Covenant on Economic, Social and Cultural Rights, which requires states “to fulfill everyone’s right to the highest attainable standard of health”. The court found that criminalization of sex between adults interferes with enjoyment of the right to health. The Naz Foundation Case provides an example of strategic litigation by an HIV organization, accompanied by a broader campaign to mobilize the community and allies regarding the human rights and public health arguments for decriminalization. An alliance of civil society organizations came together in support of the case, under the banner of Voices Against 377. The Lawyers Collective organized consultations throughout India to inform, educate and strategize with a wide range of community stakeholders.³⁴⁹

346 Dabade G. (2009) It’s a relief for the HIV infected, *Deccan Herald*, 9 July 2009; See also *F.Hoffmann La Roche Ag (Application No. 959/Mas/1995) v. Indian Network Of People Living With Hiv & Anr*, Chennai Patent Office (2009) (Decision of the Chennai Patent Office in the pre-grant opposition filed by HIV patients against Roche’s application for valganciclovir, used to treat CMV retinitis. *Indian Network Of People Living With HIV/AIDS & Anr v. Union Of India & Anr*, High Court Of Madras (2008) Petition filed by the Indian Network of People Living with HIV/AIDS against the Indian Patent Office’s decision to grant Roche’s Application No. 959/MAS/1995 for valganciclovir without providing a hearing for the opponent.

347 *Mr. X v. Hospital Z*, (1998) 8 SCC 296, varied 2002 SCCL.COM 701 (Civil Appeal No. 4641 of 1998), Supreme Court of India (1998 & 2002) *Mr. X v Hospital Z* (AIR 2003 SC 664, (2003) 1 SCC 500); see also: *A, C & Others v. Union of India & Others*, High Court of Judicature at Bombay [Mumbai], Writ Petition No. 1322 of 1999.

348 160 (2009) DLT 277.

349 Berry S. (2009), *What can MARPs advocates in HIV learn from India’s success APMG* <http://hivinasia.blogspot.com/2009/11/what-marps-advocates-can-learn-from.html>

‘Rehabilitation’ of sex workers

- The *Appeal of Budhadev Karmaskar* (2011)³⁵⁰ does not address HIV directly, but is important as it resulted in a declaration by the Supreme Court that sex workers are protected by the right to live with dignity guaranteed by the *Constitution of India*, and an order that all states and union territories inform the Court of the steps taken to rehabilitate sex workers. The Court directed the Central government, states and union territories to prepare rehabilitation schemes for the welfare of sex workers and set up a panel to consider rehabilitation issues. The panel was tasked to make recommendations for prevention of trafficking, for rehabilitation of sex workers who want to leave the trade, and for improving the conditions of those who want to continue sex work.³⁵¹ Taking into account recommendations of the panel, the Supreme Court directed the governments to consider providing ration cards and voter identity cards to sex workers as a step towards rehabilitation.³⁵²
- In *Tara v State* (2012), the Delhi High Court overturned the forcible detention and transportation of 15 adult sex workers to Andhra Pradesh, because it was in violation of their right to live with dignity under the Constitution.³⁵³

Complaints to the India’s Human Rights Commissions

The *Protection of Human Rights Act, 1993* enabled the establishment of the National Human Rights Commission (NHRC) and state human rights commissions. The Human Rights Commissions are able to receive complaints from individuals regarding violations of the human rights relating to life, liberty, equality and dignity guaranteed by the Constitution, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* and enforceable by courts in India.

The mandate for Human Rights Commissions includes inquiries into human rights violations by public servants; research; supporting efforts to increase awareness about human rights; and inspecting police lock-ups, prisons and juvenile homes where people are interred. Commissions may make recommendations to government, which include payment of compensation to the victim or to her/his family; disciplinary proceedings against officials; instructions to take particular action to protect human rights and/or to refrain from actions that violate human rights. However, they can only make recommendations, without the power to enforce decisions.

NHRC published a booklet on *Human Rights and HIV/AIDS* in 2011. The booklet describes the work of NHRC as follows:

350 *Budhadev Karmaskar Vs. State of West Bengal* (2011) 11 SCC 538; (2011) STPL Web 133 SC JT (2011) 2 SC 115; Supreme Court seeks details of rehabilitation schemes for sex workers, West Bengal, May 2011, http://www.west-bengal.com/west_bengal/supreme-court-seeks-details-of-rehabilitation-schemes-for-sex-workers/105108.html; The Court passed the order while dismissing the appeal filed by Budhadev Karmaskar challenging the life imprisonment imposed by a court in Kolkata for the murder of a sex worker in 1999; see <http://www.lawyerscollective.org/vulnerable-communities/sex-work/legal-interventions.html>

351 Apex Court appoints panel to rehabilitate sex workers in India, *Jagran Post*, 20 July 2011.

352 Issue ration and voter cards to sex workers: Supreme Court, *Times of India*, 16 September 2011.

353 W.P. (CRL) 296/2012 before the High Court of Delhi; <http://www.lawyerscollective.org/vulnerable-communities/sex-work/legal-interventions.html>

The Commission has taken up a number of individual cases relating to discrimination faced by persons affected / infected by HIV/AIDS with regard to access to medical treatment facilities and education. The Commission's intervention has secured proper medical treatment to an AIDS patient at a Government Hospital in Delhi. The unemployed HIV positive patient had complained to the Commission on 18 September 2003 that he had been denied proper treatment by Government and non-Government hospitals in Delhi. The Commission pursued the case with the hospitals concerned; consequently, the patient is now being given proper medical treatment. In the light of this case, the Commission has directed that in medical cases dealing with HIV positive patients, hospitals should offer proper treatment without the poor patients having to approach the Commission.

In addition to individual complaints, ...systemic recommendations on various aspects of 'Human Rights & HIV/ AIDS' were sent to the concerned authorities in the Central Government and in various States.

The Commission has mounted a multi-media campaign to disseminate information on human rights and HIV/AIDS to various target groups.

Legal empowerment, legal aid and access to justice

Community-based legal empowerment initiatives have played an important role in protecting and advocating the human rights of sex workers, MSM and transgender people in several South Asian countries. Examples include:

- Durjoy Nari Sangha is the largest sex worker organization in Bangladesh and a strong advocate for sex workers' rights. In addition to HIV prevention, services offered by Durjoy Nari Sangha include legal rights education and legal advice and referrals for sex workers.³⁵⁴
- Blue Diamond Society (BDS) is the leading community-based organization of the Federation of Sexual and Gender Minorities. BDS's advocacy strategies involves review of laws, documenting human rights abuses, advocacy campaigns and forming alliances with human rights and legal bodies, such as the National Human Rights Commission (NHRC) and the Nepal Bar Association. BDS provides legal advice for individuals who have experienced human rights violations. Complainants are assisted to consider legal and non-legal options.

In 2012 BDS was supporting around 50 court cases. People seeking legal redress for violent attacks made up the majority of cases. Where complaints are against police, these are filed with the NHRC for investigation. Based on its findings NHRC makes recommendations to the relevant ministries. Civil cases usually concern property rights. If such cases cannot be resolved out of court, BDS files the case with the relevant court. Documenting human rights violations including cases such as discrimination in health care settings, violence and denial of housing, help to build an understanding about the nature and extent of such incidents. This

354 UNFPA, UNAIDS, Asia Pacific Network of Sex Workers (2012), *The HIV and Sex Work Collection: Innovative responses in Asia Pacific*, Bangkok: UNFPA, UNAIDS, Asia Pacific Network of Sex Workers, pp.94-96.

informs legal and non-legal options of redress, and is an advocacy tool to address systemic discrimination, and for advancing law reform and social change. BDS has also supported public interest litigation in the Supreme Court and provides legal empowerment training to increase community knowledge of human rights and build skills about how to claim these rights.³⁵⁵

A World Bank/IDLO consultation (2012) reported the following findings on models and approaches to delivering legal aid services in India:

Indian participants described different service delivery models varying from general non-governmental legal aid clinics, in-house lawyers at community organizations or service centers, legal outreach at healthcare sector clinics and /or hospitals, specialized government legal aid clinics and specialized NGO legal aid service providers (including the Lawyers Collective, Tamil Nadu State AIDS Control Society's legal aid clinics, SPACE in-house lawyer, the Commonwealth Human Rights Initiative and the Human Rights Lawyers Network). In India, legal aid services appeared to be well connected with communities or community led.

Participants stated that despite the number of access points to HIV-related legal services across India, greater coverage was required in order to strengthen the enabling legal environment and to effectively boost the response to HIV. Participants also advocated for capacity building initiatives for lawyers. Indian legal aid service providers generally also conducted policy and advocacy initiatives, community legal empowerment or community legal information programs.

Indian participants relayed examples of public interest litigation; proposing that public interest litigation had contributed to a stronger enabling legal environment, and improved access to services for PLHIV and key populations. Indian participants noted that genuine partnership between legal service providers and communities was effective in advancing the rights agenda (illustrating with examples of collaboration between MSM, transgender communities and lawyers in the public interest litigation that successfully challenged the provision against sex between men in the *Indian Penal Code*).³⁵⁶

9.1.4 Conclusion

PLHIV in India have been more successful in using the formal court system to seek redress for human rights violations than in any other country in Asia and the Pacific. PLHIV have successfully asserted rights under the Constitution of India to non-discrimination, equality, life and privacy. PLHIV have been supported in taking legal action by specialist HIV legal services, including the Lawyers Collective HIV/AIDS Unit and legal services operated by NGOs and state AIDS control societies (e.g., Tamil Nadu State AIDS Control Society).

355 *Ibid*, pp.107-113.

356 Burke-Shyne N. (2012), *South Asian Video Conference Report HIV-Related Legal Services*, World Bank.

Although these successes are notable, the legal framework for protection of HIV-related human rights at the national level remains weak in India and the other South Asian countries. The HIV response would benefit greatly from national laws that clarify issues such as rights to non-discrimination, informed consent and privacy as they apply to PLHIV and key populations. The proposals for national HIV laws in India, Nepal and Pakistan have the potential to deliver a strengthened human rights-based legal response to HIV. However, there is also a risk that punitive provisions might be inserted in the legislation as it passes through the parliamentary process. It is therefore important that efforts focus not just on drafting national HIV laws, but also on strengthening rights protections available under general anti-discrimination and human rights laws, and providing legal empowerment programmes to ensure that PLHIV have improved access to the justice system.

9.2 Indonesia

Indonesia does not have a comprehensive national HIV law. There was an attempt to develop a draft national HIV law, but it was not completed:

In mid-2004, the Indonesian Forum of Parliamentarians on Population and Development began preparing a draft Bill on HIV and AIDS Management. This Bill was expected to address all matters related to the prevention and management of HIV however; in light of the urgent need to respond to SARS, Avian Flu (H5N1) and Swine Flu (H1N1), the draft Bill formulation team broadened the scope of the Bill and changed the title of the Bill to The Bill for the Prevention and Management of Dangerous Diseases. At the time of the Stakeholder Meeting, the Bill had not been finalized.³⁵⁷

A Presidential Regulation was introduced in 2006 (PR No. 75/2006 on the National AIDS Commission), which restructured the National AIDS Commission and made it directly accountable to the President.

Some provincial, district and municipal governments have introduced local HIV laws (*Perda*). Fifteen HIV regulations have been introduced at provincial level, and 34 regulations have been introduced at district or municipal / city level.³⁵⁸

There is also a Decree at the national level that addresses workplace HIV issues. The *Decree of the Minister of Manpower and Transmigration on HIV/AIDS Prevention and Control in the Workplace*³⁵⁹ draws on the ILO *Code of Practice on HIV/AIDS and the World of Work* and includes a prohibition on compulsory testing and a broad obligation to protect workers from discrimination. Article 2 of the Decree provides:

1. Employers are obliged to take steps to prevent and control the spread of HIV in the workplace.

357 IDLO (2010), *Legal Services & Human Rights in the Management of HIV & AIDS in Indonesia*, Rome: IDLO.

358 National AIDS Commission (2011), *The response to HIV and AIDS in Indonesia 2006-2011: Report on 5 Years Implementation of Presidential Regulation No. 75/2006 on the National AIDS Commission*, Jakarta: NAC.

359 No: Kep. 68/Men/2004.

2. Employers and workers are obliged to:
 - a. Develop policies on HIV/AIDS prevention and control in the workplace, which may be put into the Enterprise Regulations or Collective Bargaining Agreements.
 - b. Communicate efforts to prevent and control the spread of HIV/AIDS by disseminating information and organizing education and training.
 - c. Protect Workers with HIV/AIDS from discriminatory action and treatment.
 - d. Establish occupational safety and health schemes for HIV/AIDS prevention and control in accordance with valid regulations and standards.

Article 3 provides that workers with HIV/AIDS have rights to occupational health and employment opportunity equal to those of other workers.

Article 4 provides:

1. The Government is obliged to provide advisory and supervisory assistance to help develop HIV/AIDS prevention and control programmes in the workplace.
2. The Government, the employer and the trade union, alone or together, are obliged to implement HIV/AIDS prevention programmes in the workplace.

Article 5 prohibits compulsory testing as follows:

1. Employers or officials are prohibited to perform HIV tests as part of recruitment requirements or working status of workers or as a compulsory regular medical check up.
2. HIV tests can only be performed on the basis of a written agreement from the workers concerned.
3. If an HIV test is needed as referred to under subsection (2), the employer or the official must provide pre and post-test counseling to workers.
4. HIV tests as mentioned in subsection (2) should only be performed by specialized medical doctors in accordance with valid standard requirements and provisions.

Article 6 provides that any information obtained from counselling activities, HIV tests, medical treatment, medical care and other related activities must be kept confidential just like any medical records.

The National Commission on Human Rights has a broad mandate in relation to human rights complaints.

In 2009, IDLO and LBH Masyarakat (Community Legal Aid Institute, a local NGO) conducted an assessment of legal needs of PLHIV and key populations in Jakarta.³⁶⁰ The majority of issues identified related to stigma and discrimination against key populations. Examples included:

- Denial of access to or poor treatment in health care settings;
- Various forms of police abuse;
- Women living with HIV forced to undergo sterilization or pressured to use birth control;
- Stigmatization and discrimination by families and communities;
- Denial of access to school or expulsion from school either because child was HIV positive or the child's parents were HIV positive;
- Local regulations that force sex workers to test for HIV; and
- Refusal of employment because of gender identity.

Barriers to accessing legal advice and representation were reported to include:

- A lack of trust between key populations and lawyers;
- A lack of sensitivity to the experiences and needs of key populations by lawyers;
- Discrimination by legal aid services, such as refusal to provide legal advice or representation to people who inject drugs;
- Police routinely discouraged people from seeking legal assistance, advising that using a lawyer would only increase the penalty they received; and
- People in detention were often assaulted when they asked for access to a lawyer.

The needs assessment concluded that these barriers highlight the value of the community legal empowerment model, which focuses on building relationships with key populations, engaging and training paralegal community members to improve communities' access to legal information, advice and representation and confidence to claim their rights.³⁶¹ LBH Masyarakat implements this model with people who inject drugs and other marginalized populations.

³⁶⁰ IDLO (2010), *Stakeholder report: Rapid Needs Assessment of the Legal Needs of People Living with HIV and Key Populations in Jakarta*, Rome: IDLO.

³⁶¹ *Ibid*, p.5.

9.3 Singapore and Brunei

Part IV of the *Infectious Diseases Act 1977* (Singapore) and Part IV of the *Infectious Diseases Act 2010* (Brunei) contain very similar provisions relating to HIV.

The relevant provisions of the Singapore Act are as follows:

Section 22 provides that the Director of Medical Services may require any person who has been diagnosed as having AIDS or HIV Infection —

- a. to undergo counselling at such time and at such hospital or other place as the Director may determine; and
- b. to comply with such precautions and safety measures as may be specified by the Director.

Section 23 provides a duty to disclose HIV status to sexual partners as follows:

1. A person who knows that he has AIDS or HIV Infection shall not engage in any sexual activity with another person unless, before the sexual activity takes place —
 - a. he has informed that other person of the risk of contracting AIDS or HIV Infection from him; and
 - b. that other person has voluntarily agreed to accept that risk.
2. A person who does not know that he has AIDS or HIV Infection, but who has reason to believe that he has, or has been exposed to a significant risk of contracting, AIDS or HIV Infection shall not engage in any sexual activity with another person unless —
 - a. before the sexual activity takes place he informs that other person of the risk of contracting AIDS or HIV Infection from him and that other person voluntarily agrees to accept that risk;
 - b. he has undergone the necessary serological or other test and has ascertained that he does not have AIDS or HIV Infection at the time of the sexual activity; or
 - c. during the sexual activity, he takes reasonable precautions to ensure that he does not expose that other person to the risk of contracting AIDS or HIV Infection.

Section 25 provides for protection of the identity of PLHIV. Disclosure of identity attracts a fine of \$10,000 or imprisonment for a term not exceeding 3 months or to both. The Section states that any person who, in the performance or exercise of functions or duties under the *Infectious Diseases Act*, is aware or has reasonable grounds for believing that another person has AIDS or HIV infection shall not disclose any information which may identify the other person.

The Act defines numerous exceptions to this duty. For example, disclosure of identity is permitted: with the consent of the PLHIV; when ordered by a Court; to any medical practitioner or other health staff who is treating or caring for, or counselling, the person; or to the victim of a sexual assault.

Section 25A allows disclosure by a medical practitioner for the purpose of informing the spouse, former spouse or other contact of the infected person, provided that the medical practitioner:

- a. reasonably believes that it is medically appropriate and that there is a significant risk of infection to the spouse, former spouse or other contact;
- b. has counselled the infected person regarding the need to notify the spouse, former spouse or other contact and he reasonably believes that the infected person will not inform the spouse, former spouse or other contact; and
- c. has informed the infected person of his intent to make such disclosure to the spouse, former spouse or other contact.

Section 25A also provides that the Director of Medical Services may disclose any information relating to any person whom he reasonably believes to be infected with AIDS or HIV infection to: health care workers who have been exposed to a risk of infection from AIDS or HIV Infection; a police officer or any provider of first aid who has experienced a significant exposure to blood or other potentially infectious materials of any patient.

The Brunei legislation contains provisions modeled closely on Singapore's legislation, with minor variations, including:

- A power to require a PLHIV to undergo counselling and comply with precautions. (Section 23)
- An offence for non-disclosure of HIV status to sexual partners. (Section 24)
- An offence for unauthorized disclosure of HIV status by health authorities, subject to a range of specific exceptions. (Section 26)

9.4 Thailand

Thailand does not have a national HIV law. The Thai Constitution prohibits discrimination on the grounds of health status.³⁶²

The Thai courts have been used successfully by HIV NGOs to challenge patents on ARVs.

In 2002, Thailand's Central Intellectual Property and International Trade Court ruled in favor of the AIDS Access Foundation, the Thai Network for People Living with HIV/AIDS and two people living with HIV and ordered Bristol Myers Squibb (BMS) to amend its Thai

³⁶² Article 30 of the *Constitution of the Kingdom of Thailand BE 2550 (2007)* states that unjust discrimination on the grounds of health status shall not be permitted.

patent on the ARV didanosine. The court ruled that the company had the exclusive right to produce didanosine only in low doses, while other drug companies could produce the drug in higher doses. The Thai court ruled that because pharmaceutical patents can lead to high prices and limit access to medicines, patients are injured by them and can challenge their legality.³⁶³

In 2004, BMS reached an agreement to return its patent for didanosine to Thailand. In exchange, the Foundation for Consumers and three HIV-positive people agreed to settle the legal suit filed against BMS in 2002 challenging the patent.

These consumer victories allowed the Thai government's treatment programme to scale-up using generic medicines.

363 Ford N., Wilson D., Bunjumong O., Angerer T. (2004), The role of civil society in protecting public health over commercial interests; lessons from Thailand. *Lancet*, 363, 560-563, p.560.

PART III

Country case studies:
National HIV laws in the
Pacific

10. Overview

HIV is addressed in the public health laws of some Pacific island states and territories,³⁶⁴ but only three jurisdictions have enacted provisions that specifically address HIV-related human rights concerns. Jurisdictions that have enacted HIV legislation addressing human rights are Fiji, Papua New Guinea and Pohnpei State (Federated States of Micronesia).

The Oceania Society for Sexual Health and HIV Medicine (OSSHHM) has observed that no Pacific Islander (outside of PNG) has tried to seek legal relief for HIV-related human rights violations, and that there needs to be stronger measures in place to support PLHIV and other sub-populations to make a complaint, take legal action and see it through to judgment.³⁶⁵ Apart from Papua New Guinea, Pacific island states and territories have low HIV prevalence. The low number of PLHIV in the Pacific islands means that HIV is often not perceived as a political or legislative priority.

UNDP and the Regional Rights Resource Team of the Secretariat of the Pacific Community provide technical assistance to support development of national HIV laws. The Governments of Tuvalu and of the Solomon Islands have commenced discussions with stakeholders on drafting of human rights-based national HIV legislation, and the Government of Vanuatu has prepared a policy paper on a human rights-based HIV response.³⁶⁶

The Government of the Cook Islands prepared an *HIV (Care and Support) Bill* in 2011, in response to events surrounding the first local HIV diagnosis. A Fijian national was tested for HIV as a requirement for renewal of his work permit in 2010, and tested positive for HIV. He was forced to leave Cook Islands, as the test result was not kept confidential.³⁶⁷ The Bill proposes a human rights framework for the national HIV response and was being considered during 2012. The Cook Islands Government requested that development of the law be led by the National HIV, STI, and TB Committee, which consists of Government ministries and departments including the Ministry of Health, faith based organizations, Cook Islands Family Welfare Association, Cook Islands Red Cross Society, Cook Islands National Council of Women, key affected populations (Te Tiare Association and Cook Islands National Youth Council), organization representing the positive voice (Pacific Islands AIDS Foundation), and other development partners. A drafting project was supported by UNDP to prepare the Bill for consideration.³⁶⁸

364 See e.g., *Communicable Diseases Prevention and Control Act 1988*, Marshall Islands (Chap.13, below); *Public Health Act 1992* (Samoa) included HIV/AIDS in the schedule of notifiable diseases. In Samoa a similar amendment was made in 1987/88. In Vanuatu, the *Public Health Act 1994* made similar changes to include HIV within general public health provisions: Jowitt A. (2004), *Creating A Framework For HIV/AIDS Related Legal Reform in The South Pacific*. *Journal of South Pacific Law* 8(1).

365 OSSHHM Submission to UNDP, 2012.

366 Bad laws affecting the global response to HIV/AIDS, *Radio Australia*, 13 July 2012.

367 Wise M. (2011), HIV Fijian deported, *Fiji Times Online*, 12 April 2011.

368 See: Cook Islands prepares for HIV Bill, *Islands Business*, 15 June 2012.



11. Fiji

11.1 Overview of the *HIV/AIDS Decree 2011*

Fiji's national HIV law was enacted as a Presidential Decree³⁶⁹ in 2011 (*HIV/AIDS Decree 2011*, as amended by the *HIV/AIDS Amendment Decree 2011*). The Decree was drafted after a lengthy consultation period that engaged the Ministry of Health, UNAIDS, UNICEF, UNDP, and civil society groups. The Decree has a strong human rights orientation and explicitly requires its provisions to be interpreted so as to apply the UN *International Guidelines on HIV/AIDS and Human Rights*.³⁷⁰ The Decree provides legal protections against discrimination and stigmatization, and defines rights to confidentiality and informed consent. Unlawful acts are punishable with a fine or imprisonment for up to two years. Health professionals may also be subject to disciplinary measures.³⁷¹

The Decree was amended soon after its enactment in 2011 after representations were made by UNAIDS and legal experts requesting removal of several provisions that appeared inconsistent with human rights principles and the UN *International Guidelines on HIV/AIDS and Human Rights*. The President of Fiji announced that travel bans on PLHIV would be lifted. The amendments also included removal of the criminal offence of deliberately infecting a person with HIV or attempting to do so, removal of the power of migration officers to refuse entry to Fiji or PLHIV, and removal of the provision that allowed for mandatory HIV testing when required by a written law or by order of the Minister for Health. The HIV-specific offence of deliberately infecting another with HIV was considered unnecessary, given that the *Crimes Decree 2009* already includes an offence for negligently doing an act likely to spread a disease dangerous to life³⁷² and that the UN *International Guidelines on HIV/AIDS Human Rights* recommend against criminal offences specifically targeting PLHIV.³⁷³

Nazhat Shameem, a former judge of the High Court of Fiji, makes the following observations about the history of the Decree:

369 Fiji has a military government and currently has neither a parliament nor a constitution.

370 See: Shameem N. (2011), *The HIV/AIDS Decree 2011*, A paper delivered at the Attorney-General's Conference, Sigatoka, December 2011.

371 Section 34.

372 Section 383.

373 See: Shameem N., (2011), *Making the law work for HIV – the Fiji HIV/AIDS Decree 2011*. Address by Nazhat Shameem at the 10th International Congress on AIDS in Asia and the Pacific – 26-30 August 2011.

Why was Fiji able to so effectively pass this Decree, and then, having found that some sections in it were inconsistent with the International Guidelines, how was Fiji able to make the necessary changes so quickly? I believe that the answer is firstly in the partnership and networking approach adopted by civil society groups, the Fiji government, and UN agencies such as UNAIDS and the UNDP. Secondly, I believe that Fiji's Ministry of Health has a strong commitment to a human rights based approach to HIV/AIDS prevention and care. Thirdly, there is a strong political will, in Fiji, to ensure that the reform to HIV law is based on a framework which has long term survival and sustainability. Lastly, I believe that the support of advocates for HIV work, from the President of Fiji, to the many civil society groups represented here at this conference provides strong and enlightened leadership such that the necessary reforms could be effected. The result is an HIV law in Fiji which is now a model for the world.³⁷⁴

The Decree includes a statement of Guiding Principles, intended to ensure the interpretation and implementation of the Decree are consistent with human rights principles including the United Nations *International Guidelines on HIV/AIDS and Human Rights* (see Annex V for the text of the Guiding Principles).

The Decree also includes a provision ensuring the Decree will be given priority over other laws if there is a conflict:

Section 4(1). Where the provisions of any other written law are specifically inconsistent with the provision of this Decree, the Decree prevails to the extent necessary for the purposes of this Decree.

The Decree establishes the HIV/AIDS Board (a ministerial advisory committee) and defines its membership, including a PLHIV representing civil society organizations concerned with the protection of the human rights of PLHIV.

The most significant protective provisions of the Decree are the non-discrimination provisions (Sections 21 and 22):

Section 21. Subject to section 23 and without prejudice to the safety and human rights of the public of Fiji and elsewhere, it is unlawful to discriminate, directly or indirectly, against a person having HIV/AIDS or affected by HIV/AIDS.

Without limiting Section 21, Section 22 provides detailed prohibitions of discrimination in the following areas:

- a. employment, contract work and membership of the unformed services;
- b. business partnerships;
- c. industrial or professional organizations, clubs, sporting or other associations;
- d. childcare, education and training;

³⁷⁴ *Ibid.*

- e. prisoners and persons in custody;
- f. accommodation, including rental accommodation, hotel and guesthouse accommodation;
- g. entry or presence in a community or place of residence;
- h. surveillance or research;
- i. the provision of or access to goods, services or public facilities.

Exceptions are provided, which allow for lawful discrimination in relation to:

- recruitment, promotion, posting or discharge of members of the Republic of Fiji Military Forces (Section 22(2)); and
- insurance or superannuation, where actuarial or statistical data justifies the discrimination (see Section 23).

Section 25 provides that it is unlawful to stigmatize a person on the ground that the person is living with HIV/AIDS or affected by HIV/AIDS. “Stigmatize” includes vilifying or subjecting a person or group to harassment, or to incite hatred, ridicule or contempt against a person or group on the grounds that a person or member of a group is believed to be a person living with or affected by HIV, or tested for HIV.

Section 29 requires HIV testing to be performed with voluntary informed consent. An exception is provided for military personnel who may be subject to mandatory testing if required for operational reasons, including the requirement of overseas duties.³⁷⁵ “Voluntary informed consent”, in relation to the performance of a test for HIV, means a prior written consent specifically related to the performance of that test, freely given without force, fraud, coercion, duress, undue influence or threat and given with knowledge and understanding of the medical, domestic and social consequences of a positive or negative result, the nature of that test, that knowledge and understanding having been gained through counselling.

Section 29(2) provides that a person under 18 years can consent to an HIV test (without involvement of parent or guardian) if the person is, in the opinion of the person providing the pre-test information, capable of understanding the meaning and consequences of an HIV test.

Section 26 provides that it is unlawful to knowingly deny a person access to a means of protection from HIV infection. “Means of protection” is defined to include condoms, lubricant and other means of reducing the risk of HIV transmission.

The Act requires pre and post-test counselling and confidential reporting of test results. Section 27 provides that pre-test counselling must be provided in a form approved by the Permanent Secretary, and provides that post-test counselling must be given.

³⁷⁵ Section 5, *HIV/AIDS (Amendment) Decree 2011*.

Section 34 provides that it is an offence for a health care worker, member of the clergy or religious leader to make an unauthorised disclosure of the HIV status of another living or dead person (subject to strictly defined exceptions).

Section 35 provides for privacy of PLHIV in court proceedings.

Section 36 provides the circumstances in which a person providing treatment care or counselling of a person living with HIV may inform a sexual partner of the person's HIV status without the person's consent. Notification must be with the consent of the person with HIV, or with endorsement of the Permanent Secretary of Health, which is required if counselling has failed to achieve behaviour change and the infected person has refused to notify the sexual partner or consent to notification of sexual partners.

Section 41 provides that an unlawful act under the Decree is an offence punishable by a fine and/or imprisonment not exceeding 2 years. If the unlawful act is carried out by a health professional, it is a breach of professional standards and the professional may be subject to disciplinary proceedings. Section 41(2) of the Decree provides: "Nothing in this section affects the right of any person to seek civil remedy." Therefore, a PLHIV may pursue rights to compensation or other civil remedies available under other laws, in addition to a prosecution for an offence under the Decree.

The Act also regulates supply of blood and blood products, and provides that guidelines may be issues for the conduct of HIV-related research, and that approval of research is required from the Fiji National Research Ethics Review Committee.

11.2 Implementation of the *HIV/AIDS Decree 2011*

The Decree has been promoted through a series of workshops targeting health care workers, civil servants, police and lawyers. As yet there are no reports of enforcement of the human rights protections contained in the Decree by criminal prosecutions or other legal proceedings, or use of the Decree in advocacy or negotiations to resolve specific disputes.

Nazhat Shameem describes the challenges of implementation of the Decree as follows:

Much depends on the HIV/AIDS Board, its membership, adequate resourcing of it, and the effectiveness of the policy guidelines issued by it. Its membership gives us good reason to expect effective implementation. The Decree also provides that any policies issued by the Board will have the force of law, and that any person who contravenes the policies commits an offence. This provision gives the Board "teeth", but will require a strong partnership with the police force to ensure that police officers are aware of the provision, and of the Board's policies.

Nevertheless, with the passing of the HIV/AIDS Decree, the future for HIV/AIDS prevention and treatment in Fiji looks a great deal sunnier than it did in 2010. The Decree indicates in the clearest possible terms, a political will to adopt a law based on the International Guidelines...

Another very positive indicator for Fiji is that the Ministry of Health itself, took the initiative to train as many people as it could, on the provisions of the Decree. This shows a political will to see that the Decree works... The Ministry's work with UNAIDS and civil society shows us that the best approach, both nationally and internationally, is one based on support, networking and partnership. The implementation of the Decree will showcase the effectiveness of that partnership.³⁷⁶

The provision of the Decree that provides a right of access to protection from HIV is intended to ensure the illegal status of sex work does not prevent sex workers having access to condoms and lubricant (Section 26). As yet there is no evidence as to whether this provision has had the intended effect.

A medical practitioner from the Oceania Society for Sexual Health and HIV Medicine describes some of the challenges of implementation, and the need to ensure effective legal protection is available for all vulnerable populations:

In my work I have found that health workers still need a great deal of education and behaviour change with regards to working with and for PLHIV and other sub-population groups such as MSM, transgender persons, sex workers and others. Perhaps health care workers need to be reminded of their ethical responsibilities and furthermore be very clear that they may be charged under the law for breaching their professional obligations. This should be the very last resort after other strategies are considered. As such the Ministry of Health should establish these mechanisms and resort to legal relief if these mechanisms fail. The HIV Decree protects PLHIV very well, but it is important that under-served and marginalised groups in the population are protected as well, and that it is mandated in law that their health needs are addressed.

There is existing legislation in Fiji that make it difficult to follow specific areas of the HIV Decree. For example we have been advised that when working in a clinical setting and a 'young' person approaches a health worker for sexual health services, the Child Welfare Decree requires that we report the matter to the relevant Permanent Secretary. We have sought clarification on this matter but it remains unclear.

The Ministry of Health also made serious efforts to educate workers and the public on the HIV Decree, which is an excellent example of creating a supportive and enabling environment. This was a positive step, which also resulted in unexpected outcomes. There needs to be greater efforts to ensure that structures are in place that support the implementation of the Decree. For example consequent to the extensive education of health workers, the Decree makes it very clear that HIV testing cannot be conducted unless VCCT (voluntary and confidential HIV counselling and testing) is provided by 'trained individuals'. The issue now identified is that many health workers in the public and private sector have ceased testing for HIV because training was limited to lay counsellors and a few nurses. Very few, if any, Medical Officers and Nurses have received the types of training stipulated in the HIV Decree. This counter

376 Shameem (2011), *Making the law work for HIV – the Fiji HIV/AIDS Decree 2011*. Address by Nazhat Shameem at the 10th International Congress on AIDS in Asia and the Pacific – 26-30 August 2011.

to our public health goals of identifying PLHIV early to provide treatment both for individual quality of life and as prevention of onwards transmission.

Secondly, while there is clear legal obligations placed on health workers there needs to be mechanisms put in place to educate and address the various behaviours that impede provision of services for PLHIV and other under-served populations. Workshops are frequently conducted to provide health care workers with technical skills, but very little is being done to address stigma and discrimination issues both from health workers and the general public.

11.3 Other legal redress mechanisms for human rights violations

Constitutional protections of human rights are no longer available in Fiji because the 1997 *Constitution of the Republic of Fiji Islands* was abrogated in 2009. There are no reports prior to 2009 of PLHIV using the previous Constitution to seek legal protection from HIV-related human rights violations. Fiji is considering a new Constitution that proposes a new Bill of Rights in 2013. The Draft Constitution includes a prohibition on unfair direct or indirect discrimination on the grounds of disability, gender, sexual orientation and several other grounds.³⁷⁷

The ability to use the 1997 Constitution to address human rights violations prior to 2009 was demonstrated by a case challenging the legality of Penal Code provisions criminalizing homosexuality. Homosexuality was effectively decriminalized in Fiji as a result of the *Nadan and McCoskar Case* in 2005.³⁷⁸ In this case, the High Court of Fiji ruled that *Penal Code* offences criminalizing consensual sexual acts between adult men in private (carnal knowledge against the order of nature and gross indecency between males) were in breach of the constitutional guarantees to personal privacy and equality. These rulings decriminalized homosexuality under the 1997 Constitution. The *Crimes Decree 2009* was consistent with the outcome of this case, in that it did not incorporate provisions criminalizing consensual non-commercial sex between adults.

In addition to the *HIV/AIDS Decree 2011*, provisions protecting the rights of PLHIV to non-discrimination are included in the *Employment Relations Promulgation 2007* and the *Public Service Act 1999*.³⁷⁹ The *Employment Relations Promulgation 2007* prohibits discrimination against workers or prospective workers on the ground of real or perceived HIV/AIDS status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.³⁸⁰ The *Employment Relations Promulgation 2007* applies to public and private sectors. Fiji also has a *National Code of Practice for HIV/AIDS in the Workplace* (2008), which promotes compliance with the non-discrimination provisions of the *Employment Relations Promulgation 2007*. There are no reports of PLHIV using these general laws to seek legal protection from HIV-related human rights violations.

377 Article 26(3), *Draft Constitution of Fiji* (2013).

378 *Nadan and McCoskar v. State* [2005] FJHC 500.

379 Sections 10B and 10C *Public Service Act 1999*, as amended by the *Public Service (Amendment) Decree 2011*.

380 Sections 6 and 75.

PLHIV have rights to privacy established by common law. The Court of Appeal of Fiji defined the boundaries of the right to privacy as the basis of civil action in the case of *Alifereti Yaya v. Commissioner of Police* (2009) FCA. The test is whether the plaintiff had a “reasonable expectation of privacy” and, if there was a breach, whether it was prescribed by law and was a limitation that was reasonable and justifiable in a democratic society. No PLHIV has brought an action claiming breach of privacy in relation to HIV test results or information.

Complaints of unlawful discrimination may be made to the Human Rights Commission of Fiji on various grounds as specified in the *Human Rights Commission Decree 2009*, including the grounds of gender, sexual orientation and disability. The *Human Rights Commission Decree* does not list HIV status as a prohibited ground of discrimination, although persons with a disability are protected. Nor is privacy a right specifically protected under the Decree. However the Proceedings Commissioner may bring civil proceedings for human rights violations in relation to any breach of rights contained in international human rights conventions to which Fiji is a party. For example, the Proceedings Commissioner could bring a civil case for breach of privacy rights, because Fiji is a party to the *Universal Declaration of Human Rights*, which guarantees the right to privacy. Under the *Human Rights Commission Decree 2009*, breaches of rights can lead to declarations, damages or any other appropriate relief.

A complaint made to the Human Rights Commission in 2005 for the publication of test results of a positive person, was not taken to court by the then Proceedings Commissioner.³⁸¹

Legal empowerment approaches have been implemented by the sex worker network Survival Advocacy Network (SAN). SAN has implemented a programme of legal rights training, access to legal services and working with police. Sex workers report that physical violence by the police has reduced. This is, in part, a direct outcome of sex workers having better knowledge of their legal rights and being able to negotiate with police, making them less vulnerable to unlawful arrest and detention and exploitation and extortion.³⁸²

11.4 Conclusion

The explicit reference in the *HIV/AIDS Decree* to the *International Guidelines on HIV/AIDS and human rights* and relevant international human rights treaties is an important feature of the legislation that provides a model for other jurisdictions.

As yet there have been no occasions in which the Decree has been enforced in court. A weakness of the Decree is that enforcement of the law requires a criminal prosecution of the offender or disciplinary proceedings to be taken against a health care provider. There is no provision in the Decree for individuals or organizations acting on behalf of individuals to seek a civil remedy for a breach of the Decree’s provisions from the courts,

381 Email to UNDP from Nazhat Shameem, 2012.

382 UNFPA, UNAIDS, Asia Pacific Network of Sex Workers (2012), *The HIV and Sex Work Collection: Innovative responses in Asia Pacific*, Bangkok: UNFPA, UNAIDS, APNSW, pp.140-143.

such as an order for compensation or reinstatement.³⁸³ It may be possible to seek an injunction from a court to prevent unlawful discrimination, but it is unclear whether a court would have jurisdiction to award compensation or other relief through civil proceedings.

The exemption of military personnel from the protections of the Decree relating to discrimination and consent to HIV testing depart from a human rights based approach. In other respects, the human rights provisions are similar to those of PNG's *HIV/AIDS Management and Prevention Act 2003*, which (like the provisions of Fiji's Decree) are yet to be tested in court.

A lesson learnt from the development of the HIV/AIDS Decree is the importance of allocation of adequate time and resources to development of legislation, which requires consideration of realistic timeframes and financing including for community consultations. The development of the Decree took five years, involving multiple agencies within government, international technical assistance supported by UN partners, and extensive consultations. Informal and formal consultations were held from 2007-2010.

383 Section 41 *HIV/AIDS Decree*, c.f. Section 28 *HAMP Act* (PNG).



12. Pohnpei, Federated States of Micronesia

The State of Pohnpei (a State of the Federated States of Micronesia) introduced human rights-based HIV legislation in 2007.

The *Pohnpei HIV Prevention and Care Act of 2007* provides for a Pohnpei HIV Council to oversee the HIV response. The Council's responsibilities include promotion and protection of the rights of people living with HIV and strict observance of medical confidentiality. The Act includes a declaration of policy at the outset as follows:

1. The State shall promote public awareness about the causes, modes of transmission, consequences and means of prevention of HIV through a comprehensive, state-wide education and information campaign organized and conducted by the state. Such campaign shall promote value formation and employ scientifically proven approaches, focus on family, as a basic social unit, support the development of appropriate skills, and be carried out in all schools, training centres, workplaces, and communities. The programme shall involve affected communities and groups including people living with HIV.
2. The state shall extend to every person believed to be or known to be infected with HIV full protection of his or her human rights and civil liberties. Towards this end:
 - a. compulsory testing shall be considered unlawful unless otherwise provided by this Chapter;
 - b. the right to privacy of individuals with HIV shall be guaranteed;
 - c. discrimination, in all its forms and subtleties, against individuals with HIV, or persons perceived or believed as having HIV shall be considered inimical to individual and state interest;
 - d. provision of appropriate health and social services for individuals with HIV shall be assured.
3. The State shall promote utmost safety and standard precautions in practices and procedures that carry the risk of HIV transmission.
4. The State shall recognize the potential role of affected individuals in propagating vital information and educational messages about HIV and shall utilize their

experience to inform the public about HIV, promote HIV testing and encourage the modification of behaviour that may be associated with HIV acquisition. (Section 102)

The Act provides that compulsory HIV testing as a precondition to employment, admission to educational institutions, the exercise of freedom of abode, entry or continued stay in the state, the right to travel, the provision of medical service or any other kind of service, or the continued enjoyment of said undertakings shall be deemed unlawful. (Section 131)

The training of health care workers shall include discussion on HIV related ethical issues such as confidentiality and informed consent. (Section 111)

Minors aged above 14 years may consent for themselves if, in the opinion of the testing clinicians, they have been at risk of HIV acquisition and are able to understand the nature and implications of the test. (Section 130)

Compulsory HIV testing may be allowed, upon court order, when a person is charged with any crime involving the endangerment of HIV infection of another person. (Section 130)

All testing centres, clinics, or laboratories offering HIV testing are required to provide and conduct free pre-test counselling and post-test counselling for persons who avail themselves of their HIV testing services. Such counselling must be provided by persons who meet standards set by the Department. (Section 135)

The Act provides that contact tracing may be pursued by the Department provided that information shall remain confidential and can only be used for the purpose of offering HIV counselling and testing to persons who may have been exposed and for statistical and monitoring purposes. (Section 152)

The Act makes discrimination on the grounds of actual, perceived or believed HIV status an offence if it occurs in the following areas:

- Employment;
- Education;
- Right to seek public office;
- Credit and health, accident and life insurance;
- Hospitals and health institutions. (Sections 171-175)

Discrimination is a criminal offence with penalties of between six months and four years imprisonment and/or a fine not exceeding \$1,000. In addition licenses, permits of schools, hospitals and other institutions found guilty may be revoked.

The Act makes compulsory HIV testing unlawful as a precondition to employment, admission to educational institutions, the exercise of freedom of abode, entry or

continued stay in the state, the right to travel, the provision of medical service or any other kind of service, or the continued enjoyment of said undertakings. (Section 131)

The Department of Education is required to integrate instruction on the modes of transmission and ways of preventing HIV and other STI in subjects at intermediate grade, secondary and tertiary levels. All teachers and instructors of HIV education are required to undergo training on HIV prevention and care. (Section 110)

The Act provides that HIV education and information dissemination shall form part of the delivery of health services by health practitioners, workers and personnel, and it shall be a civic duty of health providers in the private sector to make available to the public such information necessary to control the spread of HIV and to correct misconceptions about this infection. The training of health workers shall include discussion on HIV related ethical issues such as confidentiality, informed consent and the duty to provide treatment and access to preventative commodities such as condoms. (Section 111)

The Act provides that all health professionals, medical instructors, workers, employers, recruitment agencies, insurance companies, data encoders, and other custodians of any medical record, file, data, and test results are directed to strictly observe confidentiality in the handling of all medical information, particularly the identity and status of the person with HIV. Exceptions are provided for notifications to health authorities and court orders. (Section 160)

The Act provides that the state shall provide a mechanism for anonymous HIV testing and shall guarantee anonymity and medical confidentiality in the conduct of such tests. (Section 133)

The Act prohibits HIV screening for employment purposes. The Act provides that compulsory HIV testing “as a precondition to employment, ...or the continued enjoyment of said undertakings” shall be deemed unlawful. Intentional violation of this section is punishable with a penalty of imprisonment for not less than six months and no more than two years, a fine of not more than \$1000, or both such fine and imprisonment. (Section 131)

The Act provides that all workers, employers, recruitment agencies, insurance companies and other custodians of any medical record, file, data, and test results are directed to strictly observe confidentiality in the handling of all medical information, particularly the identity and status of the person with HIV. (Section 160)



13. Marshall Islands

Marshall Islands addresses HIV within the context of general public health legislation addressing communicable diseases and sexually transmitted diseases (STDs). The *Communicable Diseases Prevention and Control Act 1988* includes a prohibition on discrimination in the following terms:

1. No one shall be refused housing solely because he has a communicable disease, nor shall he be denied employment, admission to a school, or access to any other services or facilities available to the public unless Public Health finds that his disease or conduct is such that his employment at a particular job, his attendance at school, or his access to such other services or facilities presents a substantial danger to public health.
2. Notwithstanding Subsection (1), no one who has an STD shall be permitted to engage in an occupation which would regularly bring him into contact with the bodily fluids of a living person. Anyone who is found in violation of this provision shall be subject to a civil fine of not more than \$1,000 in addition to any rights and remedies the afflicted person may have at law or equity.

The Act also addresses confidentiality and imposes a 'civil fine' of \$1,000 for breach of confidentiality. However, the Act provides widely drafted exceptions. Information that identifies persons infected with or tested for an STD can be released:

- a. with the consent of the identified person;
- b. to a physician retained by the identified person;
- c. to enforce the provision of the rules and regulations of Public Health relating to the prevention, control and treatment of STD;
- d. to medical personnel in a medical emergency to the extent necessary to protect the health or life of the named party;
- e. to blood banks, school, preschools and day care centers, and prisons;
- f. to a parent or guardian of a minor under the age of 14 or an incompetent; and
- g. to the spouse of a person who has AIDS or HIV.

The Act also includes a highly draconian offence for HIV transmission, carrying a potential penalty of isolation for life:

1511. Any person knowingly infected with AIDS or HIV, who purposefully or through gross negligence transmits such disease to another person, shall be guilty of a criminal offense, and shall upon conviction be liable to a fine not exceeding \$100,000 or to a life of isolated confinement under the care of the Ministry of Health Services, or both.

UNAIDS and the Global Commission on HIV and the Law have recommended that States not enact stigmatizing HIV-specific HIV transmission laws.³⁸⁴

384 Global Commission on HIV and the Law (2012), *Risks, rights and health*, New York: UNDP, p.25; UNAIDS (2008), *Criminalization of HIV transmission: Policy Brief*, Geneva: UNAIDS.



14. Papua New Guinea³⁸⁵

14.1 Overview of the HAMP Act 2003

The drafting of Papua New Guinea's *HIV/AIDS Management and Prevention Act 2003* (the HAMP Act) was informed by the principles contained in the *International Guidelines on HIV/AIDS and Human Rights* and the *Handbook for Legislators on HIV/AIDS* of UNAIDS and the Inter-Parliamentary Union.

The main provisions of the Act are as follows:

The purpose of the Act to be to give effect to the public interest in public safety, public welfare and public health, and to protect the rights and freedoms of others. (Section 1)

Section 6 makes it unlawful to discriminate against a person on the grounds that the person is infected or affected by HIV/AIDS. (Section 6)

Section 7 provides that, without limiting the generality of Section 6, an act of unlawful discrimination may take place in relation to —

- a. employment and contract work,
- b. partnerships,
- c. industrial and professional organizations, or other clubs and associations,
- d. education and training,
- e. detainees and persons in custody,
- f. provision of accommodation, including rental, hotel and guesthouse accommodation,
- g. surveillance or research,
- h. provision of or access to goods, services or public facilities.

³⁸⁵ This Chapter was informed by a country visit during which stakeholders were interviewed in Port Moresby in the period 24 September 2012 - 28 September 2012. See Annex 1.

An exception is provided for insurance or superannuation, if actuarial or statistical data justifies the discrimination. (Section 8)

An exception is also provided if the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition. (Section 6)

Requiring or coercing a person to undergo HIV testing is unlawful in various circumstances including of detainees or persons in custody, as a condition of employment, admission to an education institution, accommodation, the provision of or access to goods, services or public facilities, adoption or marriage. (Section 9)

It is unlawful to stigmatize a person on the ground that the person is infected or affected by HIV/AIDS. "Stigmatize" means to vilify, or to incite hatred, ridicule or contempt against a person or group on the grounds of an attribute of the person or of members of the group, by (a) the publication, distribution or dissemination to the public of any matter; or (b) the making of any communication to the public, including any action or gesture, that is threatening, abusive, insulting, degrading, demeaning, defamatory, disrespectful, embarrassing, critical, provocative or offensive. (Section 10)

It is unlawful to deny a person access, without reasonable excuse, to a means of protection from infection of himself or another by HIV. "Means of protection" includes HIV awareness materials, condoms, lubricant and needles and syringes. (Section 11)

It is unlawful to request an HIV test except with the voluntary informed consent of the person to be tested. Consent may be given by a parent or guardian if the person is aged 12 years or less and is not capable of understanding the meaning and consequences of an HIV test. (Section 14)

Sections 15, 16, 18 and 21 provide for confidentiality of HIV or AIDS status.

Sections 19 and 28 provide for privacy of court proceedings involving HIV.

Section 20 provides for partner notification to be made in such a manner as to conceal, as far as is possible, the identity of the infected person from the sexual partner.

Section 24 provides that a person who is, and is aware of being, infected with HIV shall take all reasonable measures and precautions to prevent the transmission of HIV to others, and inform intended sexual partner of their HIV status.

Section 25 provides that the Director of Health may issue a written notice to a person with HIV whose behaviour causes risk of infection to others if the person has been counselled without success.

The Act also includes provisions relating to research and approval of HIV test kits.

Section 23 states that intentionally transmitting or attempting to transmit HIV to another person amounts to an "assault causing bodily harm" under the *Criminal Code, 1974*, and that intentional transmission amounts to an "unlawful killing" under the *Code*. It is a

defence to a charge of intentional transmission that the other person was aware of the risk of infection by HIV and voluntarily accepted that risk; or a condom or other effective means of HIV prevention was used; or the accused person was not aware of being infected with HIV. The transmission of HIV by a woman to her child before, during or after the birth of a child is excluded from these provisions.

People can protect rights guaranteed under the HAMP Act by the following processes:

- i. lodging a complaint to the Ombudsman's Commission; or
- ii. lodging a claim in the District Court or National Court.

Section 28 provides that a Court may make any order or declaration necessary or appropriate in the circumstances, including but not limited to, the following:

- a. a declaration that the act complained of is unlawful;
- b. an order that the act is not to be repeated or continued;
- c. a declaration that an act similar to the act complained of is not to be performed in future;
- d. an order for apology or retraction;
- e. an order for damages by way of compensation for any loss, damage or injury to feelings suffered by reason of the act complained of;
- f. an order for payment of punitive or exemplary damages;
- g. an order for provision or restoration of access, admission, readmission or reinstatement to the place, facility, situation, workplace or institution from which the person the object of the act complained of has been excluded, ejected or dismissed;
- h. an order for employment, re-employment, promotion or restoration of benefits;
- i. an order for provision of or restoration of access to a means of protection from infection by HIV;
- j. an order for the performance of any reasonable act or course of conduct to redress any loss or damage suffered by reason of the unlawful act;
- k. an order declaring void in whole or in part, either *ab initio* or from such date as may be specified in the order, any contract or agreement made in contravention of this Act;
- l. a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by reason of the termination;

- m. a declaration that it would be inappropriate for any further action to be taken in the matter.

Section 27 provides that a breach of the Act is an offence, to which the following penalties apply:

- i. in the case of a corporation a fine not exceeding K10,000.00; and
- ii. in the case of a natural person a fine not exceeding K5,000.00 or imprisonment for a term not exceeding three years, or both.

Breach of the Act can also result in proceedings for professional misconduct under the *Medical Registration Act* or disciplinary offences under the *Police Act*, *Correctional Services Act*, *Military Act* or *Public Services (Management) Act*.

14.2 Implementation and enforcement of the HAMP Act

14.2.1 Cases under the HAMP Act

Very few HAMP Act cases have been dealt with by the courts or the Ombudsman Commission in PNG. This is despite the fact that HIV-related stigma and discrimination remain issues of deep concern in the community, particularly in relation to women living with HIV. A study published in 2009 reported that almost half of the people living with HIV who were interviewed experienced some form of verbal abuse as a result of their status, and almost 15 percent reported physical abuse linked to being HIV-positive.³⁸⁶ The Stigma Index study conducted by Igat Hope confirms that stigma and discrimination are widespread in HIV-affected communities. Interviews with PLHIV in Chimbu and Mount Hagen found a high percentage of respondents who had been physically assaulted in the previous twelve months because of their HIV status. Over 50 percent said they had not attended social gatherings because of their HIV status. Being gossiped about was identified as a major problem and nearly half the respondents said they had feelings of being ashamed, guilty or blamed themselves because of their HIV status.³⁸⁷ Despite the extent of stigma and discrimination, very few court cases have been commenced alleging HIV-related human rights violations.

The following two HAMP Act cases are reported in the law reports of the District Court:

- i. *State v. Tutupsel*

The first prosecution for an offence under the HAMP Act was reported in 2009.³⁸⁸ The case involved prosecution of a man for the offence of unlawful stigmatization. The man

386 Leach T. (2011), Regional feature: HIV and the Law in PNG, *HIV Australia* 9(2), Citing: Kelly A., Frankland A., Kupul M., et al. (2009). *The art of living: the social experience of treatments for people living with HIV in Papua New Guinea*. Papua New Guinea Institute of Medical Research, Goroka. pp.52–55.

387 Rule J., Liriope D. (2012), The Application of People Living with HIV Stigma Index in PNG in: Australian National University (2012), *Sexualities, Sexual Rights, and HIV in Papua New Guinea and the Pacific: Abstracts*, Canberra: ANU, p.12.

388 *State v Tutupsel* [2009] PGDC 7; DC844 (25 May 2009); See: First PNG man ever convicted for AIDS abuse,

verbally abused a former girlfriend for taking an HIV test. The defendant confronted the victim immediately after she had left the Tabubil Hospital following an HIV test procedure and publicly abused her saying (among other things):

“Yu HIV positive, yu gat AIDS na yu no go long skul inap tripela wiks” (you are HIV positive and you have the AIDS virus and therefore you did not attend school for almost three weeks).³⁸⁹

The police charged the man with unlawful stigmatization. The defendant pleaded guilty and was convicted by Tabubil District Court, Western Province. The Court made the following orders:

- a. that the defendant pay a fine of K2,000.00; and
- b. that he call a meeting within 14 days between his relatives and those of the victim apologise to the victim in their presence, and pay K1,500.00 to the victim; and
- c. that he not harass the victim in any form or manner and to maintain peace at all times for the next twelve months.

ii. *Benny v Yopa*³⁹⁰

This was a defamation case that took into account the provisions of the HAMP Act in relation to stigmatization when ordering compensation. The complainant Ms Benny complained of defamatory statements made by her sister in-law Yaya Yopo. Ms Benny requested compensation for mental suffering, stress anguish, humiliation and embarrassment. The defendant made no appearance in court. It was claimed that the following defamatory statement was made at the Goroka market:

“mi sori long yu wantaim man bilong yu long wanem, yutupela igat sik Aids so yutupela mas igo long hausik na sekim blut.”

Following the statement, Ms Benny’s husband divorced her or they separated. Rumours about her AIDS status circulated in the community, which caused people to shun her and her husband.

The District Court found that the defamatory statement was not true, because she had attended for an HIV test, the result of which was negative. The Court found that the statement was not only defamatory but also that it “stigmatized” the complainant and her husband within the meaning of the HAMP Act. The judge stated:

The published defamatory matters are definitely ‘stigmatizing.’ The complainant in my view has certainly been traumatized, ridiculed and has gone through a lot of hardship and suffering. The amount she is claiming certainly cannot make up for what has been gone through and what she may go through after this case. I consider,

PacNews, 27 May 2009.

389 Article in the *Post Courier*, 26 May 2009, see: <http://www.postcourier.com.pg/20090526/news01.htm>

390 *Benny v Yopa* [2009] PGDC 27; DC863 (24 April 2009)

that what she is claiming for must be given as not only a form of compensation, but that it be a form of punitive and deterrent to others who may want to make wild allegations without bases and facts. I therefore am awarding K8,000.00 to the complainant.

Umben v Suku was another case in which damages were awarded for making a false accusation that a person had HIV. In that case, damages were awarded under the general law of defamation and the relevance of the HAMP Act was not considered.³⁹¹

Cases represented by PNGDLA Legal Service

The PNG HIV Law Project (a project of the PNG Development Law Association (PNGDLA), supported by the International Development Law Organization (IDLO) and AusAID) commenced in 2010 with the purpose of delivering legal services to PLHIV and key affected populations, networking with PLHIV groups, performing outreach activities to promote legal services, and building the capacity of *pro bono* lawyers and civil society organizations. The project has been providing legal advice and representation since 2011. The PNGDLA Legal Service also conducts education and training activities for lawyers and PLHIV on the HAMP Act and other HIV-related legal issues. In 2012, lawyers from the service delivered a training session for students at the Legal Training Institute to raise awareness about the HAMP Act and other HIV-related issues.

As at June 2012, PNGDLA had provided legal representation, advice and information on a total of 85 matters (14 'one off' advice sessions, and 71 ongoing substantive matters). Clients included women and men living with HIV, transgender people, men who identify as gay, and women who sell sex. Approximately 20 of the 71 substantive matters related to stigma and/or discrimination. Some of these cases were settled without the need for court proceedings.

As at September 2012, the PNGDLA Legal Service had represented PLHIV in relation to the following court matters:

- 8 Interim Protection Order cases (under violence protection laws)
- 9 HAMP Act cases (8 filed in the District Court and 1 in the National Court)
- 1 bail application
- 1 defence to a prosecution
- 1 victim of crime.

The service commenced one case in the National Court for employment discrimination (unlawful termination) under the HAMP Act. Eight cases had been commenced in the District Court for unlawful stigma and/or discrimination under the HAMP Act. In two cases that had been listed for trial, the clients formally requested that the cases be heard

³⁹¹ [2009] PGDC 55; DC872 (23 June 2009).

in a court that is closed to the public as provided by the HAMP Act. Two complaints had been withdrawn.

The HAMP Act cases initiated by the PNGDLA Legal Service have the potential to set important precedents regarding the scope of anti-stigmatization and anti-discrimination protections, with an educative impact.

Cases represented by other legal services

An assessment of the need for HIV-related legal services conducted by IDLO in 2010 found that the Office of the Public Solicitor (OPS) had managed eight HIV-related legal cases since 2006, and the Legal Training Institute Legal Aid Program managed three HIV-related legal cases in 2010, and had managed a small number in previous years.³⁹² IDLO reported that some of these cases were awaiting judgment and other cases were resolved out of court.

OPS maintains records of cases related to HIV, however data is not specifically collected on HAMP Act matters. Cases related to HIV are reported under: case type (e.g., Civil), case category (e.g., Constitutional), cause of action (e.g., Discrimination related to HIV and AIDS, Supreme Court human rights references, and Other).

Ombudsman Commission

The Ombudsman Commission's Anti-Discrimination and Human Rights Unit has the power to investigate discrimination by public officials and make recommendations, but does not represent clients. The primary role of the Ombudsman Commission is to address complaints about alleged unlawful acts by Government departments or other publicly funded organizations and their employees. The Ombudsman Commission can also accept and investigate complaints against private sector entities, but has weaker powers in relation to private organizations than public bodies.

Section 27 of the HAMP Act provides that an unlawful act under the HAMP Act is a discriminatory practice that the Ombudsman Commission has jurisdiction to investigate either on its own initiative or in response to a complaint.³⁹³ The Ombudsman Commission has investigated several employment related HAMP Act cases, involving both public and private sector employees. One case involved a person who was dismissed from the military after being identified as HIV-positive as a result of a compulsory medical examination.

Writing in 2008, Howse reported that the Ombudsman Commission had begun to play a role in enforcing the Act:

Since the HAMP Act was gazetted in 2004, there have been very few cases of discrimination heard by the Ombudsman Commission relating to discrimination on

³⁹² Burke-Shyne N. (2011), *Needs Assessment of the Legal Needs of People Living with HIV and Vulnerable Populations in Papua New Guinea*, Rome: IDLO.

³⁹³ Section 27 provides that an unlawful Act under the HAMP Act falls within the meaning of discrimination in Section 219(1)(c) of the *Constitution of the Independent State of Papua New Guinea*.

the grounds of HIV infection or because of having AIDS. The Commission has taken its responsibility seriously, with the creation of a specialised unit in May 2005. Since the creation of the unit, the Commission has been concentrating on conducting awareness campaigns. As a result of the awareness and advocacy campaigns, the Commission has so far received and opened for investigations four cases of discrimination on the ground of HIV/AIDS. These comprise three cases against government bodies and one against a private organization.³⁹⁴

Howse also identifies the limited powers of the Ombudsman Commission. The Commission can only provide limited assistance to private sector complainants; it can provide limited remedies for public sector complainants, but cannot grant compensation. The Commission is also limited in its geographic reach because it has few office locations.

14.2.2 Constraints on use and enforcement of the HAMP Act

Government of PNG commitment to strengthen HAMP Act enforcement

The Government acknowledges the need to promote enforcement of the HAMP Act. The PNG *National HIV and AIDS Strategy 2011-2015* states:

The Legal Environment: The strategy recognises the challenges posed by weak enforcement of the HAMP Act and proposes that knowledge and understanding of the relevant legislation be promoted amongst partner organizations, leaders and communities.

The Government's 2012 *Country Progress Report* to UNAIDS noted that some provincial policies are inconsistent with the HAMP Act. The report also notes that the National AIDS Council Secretariat worked in partnership with civil society organizations in hosting the first National Dialogue on HIV, Human Rights and the Law in 2011, which had a particular focus on the lack of enforcement of the HAMP Act and on other laws that criminalize those most vulnerable to HIV (sex workers and MSM).³⁹⁵ The Dialogue recommended that enforcement of the HAMP Act be strengthened by development of policy guidelines and an implementation framework for the Act.

IDLO Needs Assessment

The IDLO needs assessment on HIV-related legal services conducted in 2010 was based on interviews in Port Moresby. The needs assessment made the following findings in relation to general constraints on access to justice, (which are not specific to enforcement of rights under the HAMP Act):

...vulnerable populations face the following challenges in accessing justice:

394 Howse G. (2008), Accessing rights and protections under the *HIV/AIDS Management And Prevention Act* in Papua New Guinea: Making a case for granting a limited jurisdiction to the Village Courts *Journal of South Pacific Law* (2008) 12(1), 1-16.

395 See: Kirby M. (2011), Summary of: UNAIDS, UNDP, AusAID, Papua New Guinea National AIDS Council, *Papua New Guinea National consultation on HIV, human rights and the law*, Port Moresby, 13-14 June 2011. Available at: <http://www.michaelkirby.com.au>

- stakeholders have limited knowledge of their legal rights;
- many people do not know where to seek help;
- referral mechanisms between service providers are weak;
- paper work, use of English language and the cost of pursuing legal issues represent significant deterrents;
- cases are often handled out of court and taken over by men (the heads of family units or communities) – often to the detriment of the claimant;
- the shame associated with being part of an illegal group represents a significant barrier.

...Critical challenges to access to justice for PLHIV and vulnerable groups include:

- People do not know their rights.
- People do not know where to go to get legal assistance.
- Referral pathways are weak.
- There are few accessible/affordable legal service options in Port Moresby.
- People, particularly PLHIV and vulnerable groups, experience feelings of hopelessness and fear.
- There is weak enforcement of the law.
- Service providers lack awareness of the law and rights, service providers are not held accountable for their actions and are often not sensitive to the issues faced by PLHIV and vulnerable groups.
- The Court system does not protect confidentiality.
- Lawyers and legal service providers have limited experience dealing with HIV related issues.
- With little knowledge of the law, it is difficult for people to distinguish between what is unfair and what is unlawful.³⁹⁶

A scan of the legal environment conducted as part of the IDLO needs assessment found that PLHIV are afraid to approach legal services because of their status for fear of being shamed, and exposed to stigma and discrimination. Where disputes arise, there is a

³⁹⁶ Burke-Shyne N. (2011), *Needs Assessment of the Legal Needs of People Living with HIV and Vulnerable Populations in Papua New Guinea*, Rome: IDLO, p.13..

preference to use traditional or community-based dispute resolution mechanisms rather than the formal legal system:

...clients do not use lawyers to resolve legal issues, they go back to the community and use their community leaders to mediate. Mediation has been the dispute resolution mechanism PLHIV and people affected by HIV have used for a long time. The mediation process has not always been effective for the fact that victims are not properly redressed and there are no punitive measures taken against parties who have wronged.³⁹⁷

In relation to the HAMP Act, the author of the environmental scan concluded as follows:

Currently, I find the HAMP Act to be ineffective. This legislation was enacted for the sole purpose of protecting and managing the rights of PLHIV and the affected people. However, as it is now, we cannot say it serves its purpose.³⁹⁸

Criminalization of sex work and homosexuality

Criminalization of 'prostitution' / sex work³⁹⁹ and homosexuality⁴⁰⁰ undermines implementation of the HAMP Act because sex workers and MSM lack trust in authorities and fear the police. Criminalization compounds the marginalization and vulnerability of these populations. There is a conflict between the HAMP Act provisions that seek to empower key HIV-affected populations to access condoms and other means of prevention, and provisions of the *Penal Code* and *Summary Offences Act* that drive the same key populations away from services.

The *National HIV and AIDS Strategy 2011-2015* notes that "laws that criminalise sex work and same-sex practices create barriers to people accessing services and reinforce vulnerability, stigma, and discrimination" and recommends "legislative reforms to improve the environment for effective HIV and AIDS prevention, treatment and care" as a key strategic objective.⁴⁰¹ In 2011, Cabinet requested that a review of laws governing sex work and 'unnatural sex' offences be undertaken by the Constitutional and Law Reform Commission.⁴⁰²

Access to legal aid

Given that many PLHIV are unable to afford private lawyers, access to legal aid services is essential to support greater use of the HAMP Act to protect rights. Constraints to access to legal services include under-funded and under-staffed legal aid offices, excessive private lawyer fees, inaccessibility of courts and long and cumbersome court processes.⁴⁰³

397 Burke-Shyne N. (2011), *op cit.*, p.20.

398 *Ibid* p. 20, Mr Samuel Olewale, legal consultant.

399 Sections 55-57 *Summary Offences Act 1977*.

400 Sections 210 (unnatural offences) and 212 (gross indecency) *Criminal Code 1974*.

401 National AIDS Council of Papua New Guinea (2010), *Papua New Guinea National HIV and AIDS Strategy 2011-2015*, p.52.

402 As at November 2012, the reference had not yet gone from the Attorney General's office to the CLRC.

403 Talao F. (2008), Papua New Guinea: country report on human rights. *Victoria University of Wellington Law*

The establishment of the PNGDLA Legal Service in 2011 provides PLHIV with the option of accessing legal services from an organization independent from government with expertise in HIV-related matters and violence protection. Independence from government means that the legal aid service can advise clients in relation to complaints against government services, including health care services and public sector employers.

Within government, the Office of the Public Solicitor (OPS) provides legal aid services to PLHIV and people seeking protection from violence. OPS have established a Human Rights Unit to deal with issues relating to HIV, and family and sexual violence.⁴⁰⁴ OPS provides legal aid to the general public, however this is concentrated in the major centres. Although every province now has at least a legal aid desk, OPS struggles to meet the level of demand for services and access to legal aid is often difficult for rural and remote populations.

To improve access to justice, the OPS has been funded to:

- i. establish a legal unit to deal with cross cutting issues including HIV, gender based violence, fraud and corruption;
- ii. increase legal representation of PLHIV and related cases;
- iii. increase representation of women and children in the lower courts;
- iv. increase public awareness of legal rights and responsibilities and functions and services provided by the OPS.

There are differences of opinion as to whether a model that offers an option of legal aid provided from outside government as well as OPS is sustainable in the medium to long term, given the limited overall resources available for legal aid services.

Education of the judiciary

A factor that needs to be addressed to support use of the HAMP Act is HIV awareness of the judiciary. The *White Paper on Law and Justice in PNG* (2007) states:

The sector will ensure that all levels of the judiciary from village to national courts appreciate and observe the principles laid down in the *HIV and AIDS Management and Prevention Act* and, in partnership with other key players, will support citizens to invoke the law where appropriate. Internally, the sector is largely made up of men in leadership positions whose influence can be mobilized to promote an understanding between their peers of the role that men can play in fighting the epidemic both in terms of prevention and care.⁴⁰⁵

Review, 40(1), 1-24.

404 There are OPS branches in Port Moresby, Lae, Madang, Goroka, Mt Hagen, Wabag, Kokopo, Kimbe and Buka. Legal aid desks have been established in Bulolo, Kainantu, Manus, Wewak, Kavieng, Vanimo, Kerema, Alotau, and Popondetta and are planned in Kiunga, Daru, Kundiawa and Mendi.

405 *A just, safe and secure society: A White Paper on Law and Justice in Papua New Guinea*. Port Moresby: Department of Justice and Attorney-General, p.6.

Action taken to implement this recommendation includes:

- In 2008, a national conference addressed the issues of gender, family violence, HIV and human rights in the PNG Village Court system.⁴⁰⁶
- Awareness on HIV, gender and human rights has been included in other training provided to Village Court magistrates.
- The Magisterial Service has conducted training on the HAMP Act to Senior Magistrates.
- In 2011, a retired Australian High Court judge was invited to address PNG judges on HIV and human rights. However, the meeting was poorly attended and not regarded as successful.⁴⁰⁷

The Regional Rights Resource Team based at the Secretariat of the Pacific Community provides training to magistrates and judges of Pacific island states and has prepared educational materials summarising international jurisprudence on HIV and human rights.⁴⁰⁸ This type of resource is suitable for promotion to the PNG judiciary.

14.2.3 Proposals for reform of the HAMP Act

Stakeholders raised a range of issues that could be addressed through amendment to the HAMP Act. These issues included:

- i. Inclusion of references to the international human rights treaties that PNG has ratified and the *International Guidelines on HIV/AIDS and Human Rights* in a preface to the Act;
- ii. Inclusion of a specific provision regarding the obligations of large corporations to support HIV responses and to address stigma and discrimination in economic enclaves, as an aspect of corporate responsibility;
- iii. Inclusion of specific provisions in relation to the power of Village Courts in addressing HIV-related complaints, such as provisions that require application of specific human rights principles and sensitivity to gender equality issues;
- iv. Clarification of the evidence required to support a prosecution for intentional HIV transmission under the *Criminal Code*.
- v. Amendment to Section 12 of the HAMP Act to facilitate routine, provider-initiated HIV counselling and testing.⁴⁰⁹

406 Morgan E. (2008), Law and Justice Sector at work in PNG, Village courts: gender and human rights, *Cardno Connect*, Cardno Acil, p.14.

407 Interview with Wep Kanawi (September 2012), regarding the 2011 visit of Michael Kirby to PNG.

408 *Pacific Human Rights Law Digest* (2008) Vol. 2, Suva: Pacific Regional Rights Resource Team (RRRT) http://www.rrrt.org/images/hr_law_digest_ii.pdf

409 An amendment could allow for clinicians under an 'opt out' approach to HIV testing to provide less

Other issues identified in the literature review that could be considered in future revisions to the Act were:

i. *Enabling unlinked anonymous HIV testing for epidemiological surveillance*

The HAMP Act prohibits HIV testing if specific informed consent is not obtained. There is a public interest in obtaining more reliable data on HIV prevalence, which can be obtained through unlinked anonymous HIV surveillance testing. Counter to this runs the ethical argument of the problem of detecting HIV-positive test results, but not being able to offer care and counselling to the person to whom the result relates. These arguments require community debate.⁴¹⁰

ii. *Removal of the defence that allows discrimination no more detrimental than for other serious conditions*⁴¹¹

Under the HAMP Act, discrimination is not unlawful if the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition (Section 6(3)).

This exception to the duty of non-discrimination has been justified in a government guide to the HAMP Act by the following example, which does not amount to unlawful discrimination because the person would be treated the same whether she had HIV or another serious health condition:

*Esther works in a busy office as a receptionist. Her boss knows she is a good worker and that she is HIV positive. Lately she has been suffering badly from a chest infection she can't seem to shake. She has missed a lot of days at work and sometimes she has to go home early to rest. Her boss has hired another receptionist to relieve her. He suggests that Esther should consider an easier job, such as supervising office stationery and photocopying, at least until her health is better. He also says that perhaps she should make some plans to retire on health grounds if her health does not improve and she can't continue to work.*⁴¹²

Section 6(3) is unnecessarily broad. This exception may mean that blanket discrimination against all people with life threatening conditions is considered to be lawful, even if the discrimination is unreasonable. Although being assigned to less demanding work or a narrower range of duties might be perceived by some people as not disadvantageous, or as preferential treatment, this could reasonably

information than currently required by law. Section 12 of the HAMP Act requires information to be provided to persons prior to testing on (a) the nature of HIV and of AIDS; and (b) the nature and purpose of an HIV test; and (c) the testing process and the probable time-frame for obtaining test results; and (d) the legal and social consequences, including the possibility of notifying sexual partners, of having an HIV test and being infected with HIV; and (e) the ways to prevent transmission of HIV.

410 UNDP Pacific Centre (2009), *HIV, ethics and human rights: Review of legislation of Papua New Guinea*. Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS, March 2009. http://www.undppc.org/fj/_resources/article/files/PNG_HIV_Ethics_and_HR_review_of_legislation.pdf

411 *Ibid.*

412 NACS (2004), *HIV/AIDS Management and Prevention Act: A User's Guide*, Port Moresby: National AIDS Council Secretariat (2004), p.6.

be regarded by a PLHIV (or person with another medical condition) as detrimental treatment, because of resulting reduced job satisfaction, less opportunities for promotion etc. There is a risk that the exception might be applied to justify discrimination that violates human rights. For example, applying the exception could excuse an employer who enforces a policy of dismissing any people diagnosed with a potentially life-threatening condition (cancer, heart disease, HIV) even if the reason was just to save money on absences and sick leave, or because the employer wanted to ensure 'healthy looking' staff.

An alternative to the exception of Section 6(3) would be to incorporate an obligation on employers, and other duty bearers such as service providers and schools, to make reasonable adjustments or reasonable accommodation to the person's disability. Such an obligation is required by human rights principles and the commitments of States under international law. The *International Convention on the Rights of Persons with Disability* (signed by PNG in 2011) requires disability laws to include obligations to accommodate a person's disability, and defines "reasonable accommodation" to mean:

*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*⁴¹³

iii. *Removal of the legal requirement to disclose HIV status to sexual partners*

Section 24 of the HAMP Act imposes a legal requirement on PLHIV to both disclose their HIV status to their sexual partners and to take all reasonable measures and precautions to prevent the transmission of HIV to others, including the use of a condom. This provision may at first appear to be helpful to protect vulnerable women from men who fail to disclose their HIV status and do not use condoms. However, this provision can also be used *against* women, who are often blamed for bringing HIV into the home. Many HIV-positive women are terrified of disclosing their HIV status to their husband for fear of domestic violence. If the law forces them to disclose, their lives may be placed at risk.

UNAIDS and the Global Commission on HIV and the Law have recommended that countries not enact laws that criminalize failure to disclose HIV status.⁴¹⁴ The rationale is that HIV-specific offences are stigmatizing and that it is more effective to address sexual behaviours through voluntary education, counselling and health promotion, rather than legal penalties. UNAIDS recommends that criminal law should not be applied where the person:

413 Article 2.

414 Global Commission on HIV and the Law (2012), *Risks, rights and health*, New York: UNDP, p.25; UNAIDS (2008), *Criminalization of HIV transmission: Policy Brief*, Geneva: UNAIDS. The Global Commission also recommended that countries not enact laws that explicitly criminalise HIV transmission. Rather than creating an HIV-specific offence, the HAMP Act states that intentional transmission is an offence under the 'assault occasioning actual bodily harm' provision of the Criminal Code.

- did not understand how HIV is transmitted;
- honestly believed the other person was already aware of her/his positive status;
- did not disclose her/his HIV-positive status because of fear of violence or other serious negative consequences;
- took reasonable measures to reduce risk of transmission, such as using a condom or other precautions (it should be noted that use of ARVs significantly reduces risk of transmission); or
- previously agreed on a level of mutually acceptable risk with the other person.

There is no penalty for non-disclosure prescribed by Section 24, although a fine or jail penalty under Section 27 may apply. To comply with the recommendations of UNAIDS and the Global Commission, Section 24 should be amended either to:

- Remove the requirement to disclose HIV status to sexual partners; or
- Provide that it is a defence if the accused person:
 - › took reasonable precautions to prevent the transmission of HIV; or
 - › had a reasonable apprehension that disclosure of HIV status may result in violence, abandonment or actions which may have a severe negative effect on the health and safety of the HIV-positive person or their children,⁴¹⁵ or
 - › the person previously agreed on a level of mutually acceptable risk with the other person.

iv. *Enabling the Village Courts to address HAMP Act cases*

Village Courts have no jurisdiction to enforce the HAMP Act. In 2008, Howse argued that the HAMP Act should be amended to enable people to bring complaints under the Act in Village Courts, which are much more accessible to ordinary citizens than the District Courts and National Court.⁴¹⁶ Stakeholder interviewed in 2012 expressed differing views about how to support the Village Courts to play a greater role in addressing HIV-related matters. Some stakeholders recommended amendment to the HAMP Act. Others were of the view that the Village Courts could be supported in exercising existing powers to address HIV-related cases, without a change to the law (see 14.3.2 and recommendations at 14.4).

415 See *HIV/AIDS Bill 2007* India, Section 24.

416 Howse G. (2008), Accessing rights and protections under the *HIV/AIDS Management And Prevention Act* in Papua New Guinea: Making a case for granting a limited jurisdiction to the Village Courts, *Journal of South Pacific Law* (2008)12(1), 1-16.

14.3 Other legal redress mechanisms for human rights violations

14.3.1 Overview

A Consensus Workshop on the HIV/AIDS National Composite Policy Index (2012) identified the following mechanisms for handling complaints of HIV-related human rights violations:

- a. The Village Court System.
- b. The National Court Human Rights Track.
- c. Employment related discrimination complaints can be lodged with Department of Labour and Industrial Relations, Public Services Commission or the PNG Trade Union Congress.
- d. Complaints related to discrimination by public figures, politicians, leaders and Local Level Government leaders can be lodged with the Ombudsman Commission.
- e. The Ombudsman Commission is mandated to monitor places of detention.
- f. Complaints regarding discrimination by the police (Royal PNG Constabulary (RPNGC)) can be made to the Police Commissioner, the RPNGC Internal Investigation Unit or the Ombudsman Commission. The RPNGC HIV/AIDS workplace policy acknowledges women, children, young people, drug users, sex workers, men who have sex with men, workers in the informal economy, people with disabilities and highly mobile workers as groups particularly vulnerable to HIV with which the police come into frequent contact. The policy commits the police to service as positive role models to these groups, promote understanding and provide information related to HIV.
- g. Within the Law and Justice Sector all organizations with the exception of the Office of the Public Prosecutor and the Office of the Public Solicitor have HIV/AIDS Workplace policies that prohibit discrimination on the basis of perceived or actual HIV status and on the basis of gender. Some organizations such as the National Judicial Service and RPNGC prohibit discrimination on the basis of sexual orientation.
- h. The Correctional Services HIV/AIDS workplace policy covers all corrective services personnel, their dependants and all prisoners. It commits to banning mandatory testing and providing HIV education and awareness programmes, voluntary counselling and testing, treatment and care services and condoms to all staff and prisoners.

Violence protection orders for key populations and women and children affected by HIV

Violence protection laws such as sexual offence legislation and child protection laws offer important legal protections for women and children, which may also reduce HIV vulnerability. However, gender inequality is a cultural norm affecting the willingness of police to act to protect women, and this is a major obstacle to effective law enforcement.

Women and girls are often reluctant to report sexual assault due to fears of ostracism or reprisals from family and clan members.

Survivors of family and sexual violence may seek protection orders under Section 209 and 210 of the *District Courts Act* (Chapter 40). In 2009, rules were issued under Section 21A of the *District Courts Act* to enable Interim Protection Orders to be made rapidly and at no cost to the applicant.⁴¹⁷ In practice, the District Courts consider applications for violence protection orders under these general rules much more frequently than applications under the HIV-specific provisions of the HAMP Act. For example, in the case *Nap v. Nap*,⁴¹⁸ the District Court issued orders under the *District Courts Act* that the complainant's husband be of good behavior and refrain from having sexual intercourse with his wife until an HIV test result confirmation was returned (see also, violence protection order issued in *Aitakoe v Akita*⁴¹⁹). Provisions in relation to protection of children are found in the *Lukautim Pikinini (Child Protection) Act 2007*.

Kapul Champions (a CBO for men who have sex with men (MSM)) emphasized the need for MSM to have access to violence protection services and independent complaints mechanisms for addressing police abuses.

It may be possible to sue a person for defamation if the person is spreading rumours about another person's HIV status that have no basis in truth. In the case *Umben v. Suku*,⁴²⁰ Christine Umben was awarded K2,000.00 to compensate for injury to her reputation as a result of the defendant's conduct in falsely stating to a third party that she had acquired a "bad disease", understood to be AIDS.

Some women living with or affected by HIV in PNG have been victims of sorcery-related killings, due to assumptions that they have been involved in sorcery leading to HIV-related deaths. Widows or women without family to protect them are disproportionately affected by sorcery-related violence in PNG. Amnesty International has called for repeal of the Sorcery Act and for strengthened legal responses to sorcery-related killings and HIV education of communities to address myths and misinformation.⁴²¹ There is an ongoing debate as to whether sorcery-related threats and killings should be punished under specific legislation (i.e., *Sorcery Act 1971*) or general provisions of the *Penal Code*.⁴²²

14.3.2 Village Courts

The role of Village Courts

Village Courts are established under the *Village Courts Act* and are the lowest level of the formal court system. The Government's 2012 *Country Progress Report* to UNAIDS noted:

417 Magisterial Service, *Practice Directions: Family and Sexual Violence Protection Order Rules*, available at: http://www.magisterialservices.gov.pg/PracticeDirections/Protection_Order_Rules.pdf

418 DC 472 of 2005.

419 [2005] PGDC 67; DC346.

420 DC 872 of 2009.

421 See: *Papua New Guinea: Violence Against Women, Sorcery-related Killings and Forced Evictions: Amnesty International Submission to the UN Universal Periodic Review*, May 2011. Available at: <http://www.amnesty.org/en/region/papua-new-guinea>

422 Call for PNG to repeal Sorcery Act after West Sepik Deaths, *Radio Australia*, 24 January 2012.

The Village Courts are dealing with increasing numbers of cases related to HIV, but only those that fall into the proscribed offences under the Village Courts Act as they have no jurisdiction under the HAMP Act.⁴²³

There are approximately 1,400 Village Courts across PNG. Village Courts are located in rural areas, as well as in and around cities and settlements. The primary role of the Village Courts is to ensure peace and harmony in the communities in which they operate: *Village Courts Act*, Section 57. This means that Village Court Magistrates take into account the interests of the local community when deciding cases, in addition to the arguments of the individuals before the court. Proceedings are informal and lawyers are not allowed to represent parties. Village Courts are obliged to attempt the resolution of disputes by way of mediation. Village Courts may make orders for damages, compensation and preventative orders in relation to anticipated breaches of the peace, and may request District Courts to issue imprisonment orders.

Section 57 of the *Village Courts Act* provides that Village Courts shall apply custom, whether or not it is consistent with any Act. Therefore, a Village Court may apply customary laws that conflict with the HAMP Act. However, a Village Court must exercise its powers in accordance with constitutional rights and therefore must respect gender equality rights and other human rights guaranteed by the Constitution.⁴²⁴

The *Magistrates Manual* states:

A Supervising Magistrate should be sensitive to the sometimes-conflicting need to maintain local custom, and the need to ensure that everyone who comes into contact with the Village Courts is treated in accordance with their constitutional rights. Where custom and the Constitution conflict, the Constitution takes priority. For instance, although it may be consistent with local custom to order that a woman returns to her husband against her will, such an order is unconstitutional.⁴²⁵

The National AIDS Council Secretariat (NACS) and UNDP conducted an assessment of HIV and gender-based violence service providers in PNG in 2012. The study was conducted in the provinces of Western Highlands, Simbu, East Sepik, Madang and the Autonomous Region of Bougainville. The study made the following observations in relation to Village Courts:

Village Courts are the most accessible and responsive form of legal intervention in most rural areas. However, women do not perceive village courts as fair and believe decisions are weighted against them. Different jurisdictions of village and district courts were not well understood by village court magistrates or the community. Village Court magistrates' access to ongoing training is limited. While some female magistrates have been appointed in all provinces studied, there is a long way to go before gender balance is achieved.⁴²⁶

423 National AIDS Council Secretariat (NACS) (2012), *Global AIDS Report 2012 Country Progress Report: Papua New Guinea*. Port Moresby: NACS.

424 *Constitution of the Independent State of Papua New Guinea* (1975).

425 Hill E., Powles G., (2001), *Magistrates Manual of Papua New Guinea*, Magisterial Service of PNG, at 18.8.5.

426 NACS and UNDP (2012), Interim findings.

Other commentators have observed that the emphasis given by Village Courts to restorative justice may reinforce gender power imbalances that disadvantage women.⁴²⁷

There are proposals to amend the *Village Courts Act* in 2013 to include specific reference to human rights and gender, but it is not proposed that a specific reference to HIV be included.

Several projects have been implemented that have included consideration of the role of Village Courts in addressing HIV and human rights at community level:

- FHI conducted a project on application of the principles of the HAMP Act to Village Courts.
- The Customs Project implemented by the Village Courts Secretariat in Manus has explored the ways in which custom can evolve so as to support understanding of issues such as human rights, HIV and the status of women.
- UNICEF is conducting a human rights project in Simbu, Eastern Highlands, Milne Bay, East Sepik, Southern Highlands and Enga provinces, with a focus on building the capacity of Village Courts in protecting the rights of women and children. This project includes consideration of violence protection, HIV and related human rights issues.⁴²⁸
- The Poro Sapot Project of Save the Children Fund supports sex workers and MSM to seek protection at the village or urban settlement level if they experience threats, harassment or violence. The project raises awareness of the specific issues faced by these populations among community leaders and reported that ward counsellors or Village Courts regularly resolve cases through mediation.

The Village Courts Secretariat (VCS) promotes capacity development of Village Court magistrates and officials, and has included consideration of HIV in training on violence protection and gender. VCS has been instrumental in increasing the number of female magistrates to over 3,000, representing 35 per cent of magistrates.

The VCS recognises that customary law is dynamic and evolves in response to new developments, such as the community and family impacts of HIV. The VCS emphasises the role of Village Courts in working with other local institutions to provide leadership and to shape norms on issues of community concern such as HIV.

In an article published in 2008, Howse argued that the law should be amended to enable the Village Courts to exercise jurisdiction under the HAMP Act. She argued:

427 See e.g., Macintyre M. (2012), *Gender Violence in Melanesia and the Problem of Millennium Development Goal No. 3*, in Jolly M., Stewart C., Brewer C. (2012), *Engendering Violence in Papua New Guinea*, Canberra: ANU Press, p.251.

428 *Women and Children Look to Community Justice*, *Inter Press Service Newagency*, 8 May 2012.

The present jurisdictions of the Ombudsman Commission, the National Court, and the District Court are not readily accessible to a population which is low-literate and based mainly in villages outside cities and regional centres.

...These paths to relief for actionable acts of discrimination and stigmatisation are not readily accessible to a population which is low literate and would struggle with legal forms such as summons, statements of claim and like documents, has limited resources to access legal advice and might find it very difficult to travel to a regional centre to access a fixed court, or court on circuit.

...The Village Courts have a jurisdiction which truly reaches across PNG, is known and accepted by people, and can be accessed by them in their own village and conducted in their own language. Complicated forms are not required and access is not prohibitively expensive. Small awards of compensation can be made.⁴²⁹

However, interviews with the VCS confirmed that the VCS does not want Village Courts to be given the same mandate as the District Courts to address discrimination in institutional settings such as employment, schools and hospitals, or to have a role in ordering HIV tests or addressing non-consensual HIV testing at clinics. Such issues are appropriately dealt with at the District Court level. The VCS is supportive however of other efforts to ensure that implementation of powers under the *Village Courts Act* aligns with the objectives of the HAMP Act in relation to reducing stigma.

Currently HIV-related complaints are addressed by Village Courts under general provisions relating to insults and keeping the peace. Village Court Magistrates are able to issue orders under existing power to compensate people who have been subject to insults or harassment, and preventive orders to stop harassment or insults being repeated. There is some overlap between the HAMP Act provisions that empower District Courts to address stigmatization (which includes vilifying a person living with HIV in public), and the role of Village Courts in hearing cases involving use of insulting words and breach of the peace.

UNAIDS stated that Village Courts are generally clear about their role in addressing HIV-related complaints by applying one of the specific offences that they are authorized to address – although there may be some issues in practical implementation that could be clarified.

Igat Hope emphasised the need for clear referral pathways, so that Village Court officials refer PLHIV directly to legal aid or a District Court if they experience discrimination more appropriately dealt with in the District Court.

It appears that the most important immediate priority is to integrate consideration of HIV-related issues within the general measures being undertaken to improve the capacity of Village Court Magistrates and officials in applying gender equality and other human rights principles in their work.

429 *Ibid.*

Data on HIV cases addressed by Village Courts

VCS collects data on the number of HIV cases through the Village Courts and Land Mediation Information Management System. Ninety-two complaints were recorded in the period 2007-2011. It is probable that this is an under-estimate, as many cases with an HIV aspect are likely to have been reported under another category (e.g., disturbing the peace, insult or family conflict). The following data was collected through research on HIV in the Village Court system in 2011.⁴³⁰

During 2010 and 2011 an audit of selected Village Courts in the National Capital District (NCD) was undertaken. The Village Courts visited were: Gerehu, Morata, Evedaha, Kaugere, Hohola, Tokarara and Nine Mile. Findings included:

- i. In the Village Court Secretariat Database there are nine cases listed for NCD. The courts where these are recorded are Morata, Nine Mile and Evedaha, however a total of 12 cases were identified during visits. Kaugere and Gerehu were both able to demonstrate cases related to HIV&AIDS which were not reflected in the information contained in the Village Court Secretariat database. The cases in Gerehu and Kaugere do not appear in the database as they were not marked as related to HIV&AIDS on the quarterly return. The clerk at Gerehu was able to remember the case and locate it in the register book where it was recorded as being related to HIV. The clerk at Kaugere also remembered their case. It was located in the register book where it was recorded as "using insulting words". The "order form" contained the information that the case was related to HIV. The case at Evedaha is still in progress and will be included in the Q1 2012 return.
- ii. It is likely that the cases recorded in the Village Court Secretariat database underrepresent the actual number of cases being dealt with by the Village Courts. This may be because
 - although HIV and AIDS is a reporting category on the quarterly return form it is not on the list of prescribed offences. When filling in the quarterly returns the village court clerk must refer back to the register book or the order book to see which cases involved HIV or AIDS;
 - data for 2011 is incomplete. Many returns for Quarter 4 of 2011 have yet to reach the Village Court Secretariat and be entered into the database.
 - only about 50 percent of returns actually reach the Village Court Secretariat to be recorded in the database. It is possible there are many more cases related to HIV being seen in the Village Court that are not being reported.
- iii. Although the Village Court database records six cases from Nine Mile Village Court, registers could not be located to verify any details related to these cases. There is a combined quarterly return from Nine Mile Village Court for Quarter 2 and 3 of 2010, which lists 65 cases related to HIV and AIDS. The cases could not be verified. The Provincial Village Courts Officer is investigating. In discussions with Village Court

⁴³⁰ Personal correspondence from Joanne Robinson, UNAIDS, 16 August 2012.

officials at Hohola they stated there were “lots” of cases related to HIV, however the relevant register or order books necessary to confirm this were unavailable.

- iv. With one exception all offences fall under “using insulting words” and all are about being called “AIDS carrier” or similar in a public place.
- v. Generally cases are being resolved by small compensation payments between Kina 100 – Kina 400. The exception was the Kina 5,000 fine imposed at Kaugere, however that is in the process of being revoked, as it is beyond the authority of the Village Court.
- vi. There were no cases involving PLHIV identified relating to eviction from accommodation, being fired from employment, being rejected from their family, being refused permission to go to school, marriage dissolution, family and sexual violence, sorcery or intentional or reckless HIV transmission.

14.3.3 Constitutional rights and the Human Rights Track of the National Court

There are no reports of court cases being brought to protect HIV-related human rights based on the human rights guarantees contained in the Constitution.

The Constitution contains sixteen basic rights and freedoms, including rights to life, freedom from inhuman treatment, liberty of the person, freedom of expression, freedom of association, privacy, freedom of employment, freedom of information, freedom of movement and equality. There is no general right of access to health in PNG, although the HAMP Act includes a right of access to the means of HIV prevention (Section 11). However, the National Goals and Directive Principles declare as the first Goal that every person develop as a whole person through improvement in the level of nutrition and the standard of public health to enable people to attain self-fulfilment. According to Talao, “this in itself places an obligation on the Government to ensure the provision of health services as a minimum pre-condition to good health”.⁴³¹ However, the National Goals and Directive Principles are not enforceable in a court of law.

The Human Rights Track of the National Court was established in 2011 to provide a fast track process for redressing human rights violations. The Human Rights Track allows people to submit complaints related to human rights violations directly to the National Court without having to go through the police or engage lawyers. Establishment of the Human Rights Track presents a new opportunity for advancing the rights of PLHIV. A priority should be given to raising awareness about the Human Rights Track among communities of PLHIV and key populations (sex workers and MSM), and among lawyers. Although the National Court’s *Human Rights Rules* (2010) do not specifically refer to the HAMP Act, a claim of discrimination, stigmatization, breach of privacy or non-consensual testing could be made through the Human Rights Track on the ground that it constitutes a breach of a Basic Right guaranteed by the Constitution.⁴³²

431 Talao F. (2008), *op cit.*, p.20.

432 Relevant Basic Rights include right to freedom (s 32); right to life (s 35); freedom from inhuman treatment (s 36); protection of the law (s 37); liberty of the person (s 42); freedom from arbitrary search and entry (s 44); freedom of expression (s 46); (xi) freedom of assembly and association (s 47); (xii) freedom of

14.4 Conclusions and recommendations

The HAMP Act enshrines the human rights principles underpinning the national HIV response in legislation, particularly the rights to non-discrimination, privacy, informed consent and to access means of protection such as condoms and lubricant. The existence of the HAMP Act has provided a framework for educational measures to be taken to combat stigma and discrimination and to reduce the likelihood of human rights violations occurring. For example, many employers have introduced workplace policies that reference the HAMP Act, and over 1,000 employers have received training from the Business Coalition Against HIV/AIDS (BAHA) on the HAMP Act. BAHA rely on the HAMP Act as the basis of much of their educational and advocacy activities with corporations, including intervening to help companies and employees resolve workplace issues without the need to resort to the legal system.

However, at a practical level, very few PLHIV have been able to use the HAMP Act to obtain a remedy for specific incidents of human rights violations.

Many of the obstacles to use of the HAMP Act are the same as those confronted by all citizens seeking to access the PNG justice system – the expense of lawyers, lack of legal aid services, the limited reach of the courts to rural areas, court delays and complexity of the formal legal system. Some obstacles are specific to HIV, particularly the fear that engaging a lawyer and taking a matter to court will only lead to further experiences of stigma and disclosure of HIV status in the community or media.

Although there may be benefits from updating the HAMP Act at a future date, there is much else that can be done to strengthen implementation. Christine Stewart (who was involved in drafting the HAMP Act) points to the limitations of law reform by itself as a strategy to address human rights issues in the context of PNG:

(A) legal regime is at best no more than an enabling device. It is only the first step in a three-stage process. The second is implementation. The third is the monitoring and, where necessary, enforcement of implementation. Even the best law reform cannot achieve, by several strokes of the pen, such wholesale social change as the empowerment of women. Nor can law reforms reach all levels of society. This is all the more so in a country such as Papua New Guinea, with over 800 different societies, most of them located both physically and conceptually far from the centre of government power; where the provision of government services is inexorably deteriorating and economic opportunities are limited; where the introduced common law system competes with or has achieved uneasy syncretism with custom and its more modern manifestation 'customary law'; and where state law, if it has penetrated to any degree at all, is ill-understood and inadequately applied by law and justice institutions and enforcers.⁴³³

employment (s 48); (xiii) right to privacy (s 49); (xiv) right to vote and stand for public office (s 50); (xv) right to freedom of information (s 51); (xvi) right to freedom of movement (s 52); (xvii) protection from unjust deprivation of property (s 53); (xviii) equality (s 55).

433 Stewart C., (2010), *op cit.*, p.277.

Recommendations

Leadership and coordination

- i. Implementation of recommendations listed below requires leadership from government at all levels. NACS has a role in ensuring Provincial AIDS Councils are supported in addressing the legal and human rights aspects of the epidemic. Coordination across government requires the engagement of the Minister for Health and HIV/AIDS, the Minister for Community Development, Religion and Youth and the Minister for Justice and Attorney General. UNDP has a role in briefing senior officials and key Ministers. This should include briefing in relation to the conflict between the aspirations of the HAMP Act and the obstacles to HIV prevention created by laws and police practices relating to sex work and homosexuality. It is particularly important that there is ownership of HIV-related human rights issues in the law and justice sector. HIV-related human rights issues and the HAMP Act are sometimes misunderstood as issues only for the National AIDS Council, rather than responsibilities of all sectors of government.

Law reform

- ii. The HAMP Act is well drafted and there is no urgent need to update it. It is more important to focus instead on measures to promote the greater use and enforcement of the existing law. If more cases are brought to court, the boundaries of the law will be clarified.
- iii. Amendments to the *Criminal Code* and *Summary Offences Act* to decriminalize sex work and homosexuality should be given a higher priority than updating the HAMP Act.
 - If it has not already done so, the Attorney-General's Department should, without further delay, provide a reference to the Constitutional and Law Reform Commission to review and make recommendations on the need to revise the *Criminal Code* and *Summary Offence Act* as directed by the National Executive Council.
 - Given that law reform in these areas is likely to be a lengthy and controversial process, intermediate measures should be taken to reduce the adverse impacts of criminalization on HIV responses. Such measures may include education of police on the HIV prevention needs of people who sell sex and MSM, and the issuing of official instructions to police to ensure that health promotion efforts among people who sell sex and MSM are not interfered with by police conduct in enforcing these laws. For example, such instructions could ensure that possession of condoms is not used as evidence, that police harassment of these populations must not occur and that prosecutions be restricted to exceptional circumstances.
- iv. Enforcement of the HAMP Act could be supported by regulations defining specific standards e.g., in relation to non-discrimination in provision of health care services and HIV testing. Section 34 of the Act provides that regulations may be

- made in relation to standards, procedures and guidelines. Regulations should be promulgated that provide detailed guidance for specific sectors, such as schools, health care services and prisons, and to address specific issues of concern such as approaches to provision of pre-test information in the context of provider-initiated counselling and testing (PICT). This does not require going back to Parliament and would promote understanding and ownership of the Act's requirements. The implementation of the PICT approach to HIV testing in health facilities requires active monitoring to ensure that requirements for pre-test information and post-test support are met. This is particularly important as efforts are increasingly focused on promoting 'test and treat' as both a treatment and prevention approach. Concerns have been raised that implementation of the PICT approach could give rise to non-consensual testing, particularly in ante-natal settings.
- v. Should the HAMP Act be updated, it could be strengthened by:
 - Removal of the defence that allows discrimination no more detrimental than for other serious conditions.
 - Strengthening the anti-discrimination provisions of the Act by including a requirement of reasonable adjustment or accommodation to the needs of the PLHIV, as required by the *International Convention on the Rights of Persons with Disabilities*.
 - Removal of the legal requirement to disclose HIV status to sexual partners.
 - A specific provision clarifying responsibility for provision of legal aid for PLHIV seeking to enforce rights under the Act, education of PLHIV about their rights, and monitoring of implementation and enforcement of the Act.
 - vi. The National Human Rights Commission Bill, which the government aims to table in parliament in 2013, will define the powers of the National Human Rights Commission to accept complaints and resolve disputes. This will provide an alternative to the more formal processes of the District Court and National Court. The National Human Rights Commission should be specifically empowered to address HAMP Act violations, so as to provide PLHIV with a more accessible alternative than the formal courts. The National Human Rights Commission Bill could include 'consequential amendments' to the HAMP Act to achieve this outcome. The National Human Rights Commission should also be given responsibility for promoting HAMP Act human rights protections to PLHIV communities, as well as the human rights protections of the Constitution.
 - vii. It is not recommended that the HAMP Act be amended to enable Village Courts to exercise a specific mandate under the HAMP Act (e.g., to address unlawful discrimination and HIV testing issues). Rather than law reform, formal guidance should be issued and training provided to Village Court magistrates and officials regarding the application of a human rights-based approach in the exercise of existing Village Court powers (in relation to disturbing the peace, spreading false reports, insults etc.) to resolve HIV-related disputes. Guidance and training can focus on issues such as promotion of gender equality, and respect for privacy and the

specific needs of key HIV-affected populations such as MSM and sex workers. General efforts to strengthen the capacity of Village Courts to apply human rights-based approaches will help the Village Court system to offer improved justice to PLHIV and key populations. Strengthening the capacity of Village Court magistrates to protect women and girls from violence and to make decisions that are sensitive to the needs of PLHIV and key populations will help to promote a rights-based approach. HIV should be addressed within general measures undertaken to improve the capacity of Village Court magistrates and officials to apply human rights principles such as gender equality to their work.

Legal aid

- viii. Government partners and donors should support a model in which PLHIV can choose to access legal aid either from government services (i.e., OPS) or from non-government legal services (e.g., PNGDLA legal service). PLHIV are likely to be more confident in attending a non-government legal aid service if they are seeking advice about a complaint against government. It is important for PLHIV to have access to legal aid from non-government services so that fully independent advice can be provided about taking legal action against government agencies that violate human rights. The OPS should ensure that all OPS staff are sensitized on HIV and are aware of rights and responsibilities under the HAMP Act.

Rights education & HIV sensitization

- ix. *Community legal education*

Programmes that educate PLHIV about their legal rights under the HAMP Act and how to enforce these rights through the legal system are essential to support greater use of the law to protect rights. The PNG-Australia Law and Justice Partnership has developed pamphlets on HIV-related rights. In addition to written materials, PLHIV communities would benefit from educational sessions e.g., presentations provided by paralegals or trained peer educators through community outreach.

There is a need for a user friendly guide on the HAMP Act and other mechanisms for HIV-related human rights protection (e.g., Human Rights Track of the National Court) that explains how to lodge a complaint and achieve redress, and the practical application of the Act in different sectors – identifying the specific responsibilities of health professionals, people in the community, police, prison officials, educational institutions, landlords etc. The peer education approach of Save the Children Fund's Project and Igat Hope have been effective in promoting awareness of rights among people living with HIV, sex workers and MSM.

In addition to targeted rights education for PLHIV and key populations, broader community education on HIV should include anti-stigma messages, avoid relying on fear as a motivation for behaviour change, and should depict positive and empowering images of people living with HIV. It is important to recruit local community leaders to provide education in the local vernacular to combat stigma and discrimination, (rather than using foreign sportsmen or imported campaigns). NACS emphasized the need for such campaigns to occur to provide a more

supportive social climate for PLHIV to come forward and challenge discrimination in the courts.

x. *Legal profession*

Education of lawyers, prosecutors and the judiciary on HIV and the HAMP Act will support greater use of the law to protect rights. Education and training should include information on the community impacts of HIV, the specific impacts on the human rights of key populations (sex workers and MSM) and women and girls (e.g., exposure to violence), and use of the HAMP Act, enforcement of constitutional rights, and the Human Rights Track of the National Court to address violations of the rights of PLHIV. Guest speakers (such as staff of the PNGDLA Legal Service) have provided information on HIV on an *ad hoc* basis to law students at the Legal Training Institute. This should be provided in a more systematic way through inclusion of HIV-related issues in the Legal Training Institute curriculum.

xi. A priority should be given to sensitizing Village Court magistrates on human rights-based approaches to resolution of cases involving HIV-related issues. Data on HIV-related cases addressed by Village Courts should be systematically analysed by the VCS to inform education and training.

xii. The Judicial Education Committee or equivalent body should be encouraged to provide educational resources to the judiciary on jurisprudence relating to HIV, human rights and gender-based violence and opportunities for training on these issues.

xiii. *Parliamentarians and other duty bearers*

HIV issues should be mainstreamed within the work of parliamentary committees to ensure broader ownership of HIV-related human rights issues among legislators. HIV is relevant to the work of several parliamentary committees, including those addressing health and welfare, education, justice, gender and employment. The work of UN agencies in providing support to parliamentarians should include opportunities for parliamentarians to develop their capacities as advocates and leaders on HIV-related human rights issues.

xiv. Training and educational resources should be provided to health care workers, teachers and school administrators, police, prison authorities and employers on their responsibilities regarding non-discrimination, privacy, and the avoidance of compulsory testing. The Police Training Manual should be revised to include a component on HIV and the HAMP Act.

Annex I. Persons interviewed: PNG case study

Agency	Persons
UNDP	Mr David McLachlan-Karr, Resident Representative Ms Carol Flore, Deputy Resident Representative Mr Peterson Magoola, Programme Specialist
NACS	Dr Moale Kariko, Deputy Director Mr Wep Kanawi, Former Director
Kapul Champions and Igat Hope	Ms Anne Macpherson, Director, Igat Hope Mr Don Liriope, Igat Hope Mr Nick Avera, Kapul Champions
PNG Australia Law and Justice Sector Partnership	Mr Apolosi Bose, Adviser, Family and Sexual Violence
Ombudsman Commission	Ms Phoebe Phoebe Sangetari, Ombudsman Mr Joseph Molita, Director, Complaints Mr Patrick Niebo, Anti-Discrimination and Human Rights Unit Team Leader
Village Courts and Land Mediation Secretariat, Department of Justice and Attorney General (DJAG)	Mr Peni Keris, Executive Director of the Village Courts and Land Mediation Secretariat Mr John Takuna, Deputy Director Ms Elizabeth Morgan, Adviser
Porosapot / Save the Children	Ms Ayi Farida, Project Manager Ms Lydia Seta, Senior Project Officer Ms Veronica Ericho, Peer Counselor Coordinator
PNG Development Law Association	Ms Sarah Nahidi Stocks, Lawyer Ms Priscilla Teko, Trainee Lawyer
International Development Law Organization	Ms Naomi Burke-Shyne, Programme Manager, Health and HIV
OHCHR	Ms Christina Saunders, Human Rights Adviser
UN Human Rights Task Team	Representatives of DJAG, the National Court, various NGOs and government agencies
UNAIDS	Ms Joanne Robinson, Leadership and Advocacy Adviser
Business Coalition Against HIV/AIDS	Ms Caroline Bunemiga, CEO
National Dialogue on HIV and the Law	Ms Julie Hamblin, Consultant

Annex II. Key references

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Annex III. Rights recognized by international instruments

Human rights principles relevant to HIV are, *inter alia*:

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and to found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatment or punishment.

The key human rights principles that are essential to effective State responses to HIV are to be found in existing international instruments, such as the *Universal Declaration of Human Rights*, the *International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention against Torture and Other Cruel, Inhuman or Degrading*

Treatment or Punishment, the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

In addition, conventions and recommendations of the International Labour Organization are relevant. *Recommendation Concerning HIV and AIDS and the World of Work* (Recommendation 200 of the International Labor Organization) is a labour standard that prohibits coerced or compulsory workplace HIV testing and addresses the need to provide: comprehensive occupational health and safety measures to minimise HIV risk; prevention and access to treatment; social protection; and protection from discrimination. This recommendation applies to formal and informal workers including sex workers.

UN Committees have defined the application of international treaties to HIV as follows:

- *International Covenant on Civil and Political Rights (ICCPR)*. In its General Comment 20 (2009), the Committee on Economic, Social and Cultural Rights recognized prohibited grounds of discrimination under the ICCPR to include health status, including HIV, as well as disability, marital and family status, sexual orientation and gender identity. With respect to discrimination on the basis of HIV status, it urged states to ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant.
- *International Covenant on Economics, Social, and Cultural Rights (ICESCR)*. In its General Comment 14 (2000), the Committee on Economic, Social and Cultural Rights recognized that the spread of HIV has created new obstacles to the realization of the right to health and provided states parties with guidelines for ensuring access to health facilities, goods and services. The Committee focused on Article 12(2) (c), which requires prevention and education programs for STIs, including HIV, and implies a right to treatment. The Committee elaborates on the right to non-discrimination on the basis of health status and equal treatment in the exercise of the right to health.
- *Convention on the Rights of the Child (CRC)*. In General Comment 3 (2003), the Committee on the Rights of the Child undertook a comprehensive review of HIV and its impact on the human rights of children. The Committee reaffirmed its recommendation to States parties to modify laws or enact new legislation to prohibit discrimination based on real and perceived HIV status.
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* General Recommendation No. 24 (1999), the Committee on the Elimination of Discrimination defined the application of CEDAW Article 12 : Women and health. The Committee stated that States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls. In particular, States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their rights to privacy and confidentiality

Annex IV. Example of comprehensive anti-discrimination provision

India's *HIV/AIDS Bill 2007*

"Discrimination" includes any act or omission including a policy, law, rule, practice, custom, tradition, usage, condition or situation which directly or indirectly, expressly or by effect, immediately or over a period of time:

- i. imposes burdens, obligations, liabilities, disabilities or disadvantages on, or
- ii. denies or withholds benefits, opportunities or advantages, from, or
- iii. compels or forces the adoption of a particular course of action by, any person or category of persons, based on one or more HIV-related grounds.

HIV-related grounds are:

- i. HIV status, actual or perceived; or
- ii. actual or perceived association with an HIV-positive person; or
- iii. actual or perceived risk of exposure to HIV infection; or
- iv. any other ground where discrimination based on that ground causes or perpetuates or has a tendency to perpetuate systemic disadvantage in respect of a category of persons, undermines human dignity or adversely affects the equal enjoyment of a protected person's rights and freedoms in relation to HIV/AIDS.

No person shall be subject to discrimination in any form by the State or any other person in relation to any sphere of public activity including:

- a. Denial of, or termination from, employment or occupation unless in the case of termination:
 - i. a person, who is otherwise qualified, in the written assessment of an independent healthcare provider qualified to make such an assessment, poses a significant risk of transmission of HIV to other persons in the workplace, or is unfit to fulfill the duties of the job; and
 - ii. the employer is unable to provide reasonable accommodation due to undue administrative or financial hardship and the employer shall along with the letter of dismissal provide a written statement to such person stating the nature and extent of such hardship.
 - iii. Provided that if the employer fails to provide such written statement, it shall be presumed that there is no such undue administrative or financial hardship;

- b. Unfair treatment in, or in relation to, employment or occupation;
- c. Denial or discontinuation of, or unfair treatment in, healthcare services;
- d. Denial or discontinuation of, or unfair treatment in, educational services;
- e. Denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public, whether or not for a fee including shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads, burial grounds or funeral ceremonies and places of public resort;
- f. Denial or discontinuation of, or unfair treatment with regard to, the right of movement;
- g. Denial or discontinuation of, or unfair treatment with regard to, the right to reside, purchase, rent, or otherwise occupy, any property;
- h. Denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office;
- i. Denial of access to, removal from, or unfair treatment in, a State or private institution in whose care or custody a person may be;
- j. Denial of, or unfair treatment in, the provision of insurance unless such unfair treatment is based on and supported by actuarial studies;
- k. Isolation or segregation of a protected person;
- l. HIV testing as a pre-requisite, for obtaining employment, or accessing healthcare services or education or, for the continuation of the same or, for accessing or using any other service or facility.

Annex V. Example of legislative statement of human rights-based principles

HIV/AIDS Decree 2011 of Fiji

Section 3. Guiding principles

When interpreting or applying any provision of this Decree, and when exercising any prescribed power, duty or function, all persons and courts should as far as possible –

- a. ensure that full regard is had to the recognised universal human rights standards and public international law applicable to the protection of rights and ensure that those standards and laws are applied to the fullest extent possible to protect all such right including the highest attainable standard of physical and mental health including the availability and accessibility of HIV prevention and HIV/AIDS treatment, care and support for all persons regardless of age, gender, gender orientation or sexual orientation;
- b. apply as far as practicable and subject to any written law and available resources currently accepted international practices and universal standards identified in the context of HIV/AIDS and, in particular, the United Nations International Guidelines and Declaration of Commitment saved from time to time and ensure that all persons living with or affected by HIV/AIDS receive health services that are consistent with their rights; and
- c. apply, to the fullest extent possible within Fiji subject to written laws and available resources, the principles, rights and obligations of ICCPR, ICESCR, CEDAW, CRC⁴³⁴ and CRPD in the administration of health facilities and the provision of health services to all persons living with or affected by HIV/AIDS.

⁴³⁴ *International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on Elimination of all forms of Discrimination Against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities.*

Annex VI. Legal systems of Asia and the Pacific

The legal systems of the region are highly diverse. Broadly, there are four major legal systems: civil law, common law, religious law and customary law. Each country is unique and may combine elements of these four categories.

In civil law systems, the central sources of law are codes enacted by legislatures. Civil law applies in the former French colonies of the Mekong sub-region, Indonesia, New Caledonia and French Polynesia. Socialist law is an adaptation of civil law that applies in the communist countries of East Asia (Viet Nam, Lao PDR, People's Republic of China, and Democratic People's Republic of Korea). Chinese law is a mixture of civil law and socialist law.

In common law systems, law is made through a combination of decisions of judges ("case law") and legislation enacted by parliament. Common law systems operate in the former British colonies including Australia, India, Pakistan, Bangladesh, Fiji, Hong Kong SAR (China), Singapore, Solomon Islands, Samoa, Tonga and Papua New Guinea. In addition to these countries, others have adapted the common law system into a mixed system e.g., Malaysia, Sri Lanka. India follows a mixture of common law and customary or religious law. In India, separate personal law codes apply to Muslims, Christians and Hindus.

The Pacific island countries and territories adopted legal systems from British, French or American colonisers. Some also adopted legislation from Australia or New Zealand. In most Pacific island countries, customary law systems also operate that incorporate norms and values based on pre-colonial customs and traditions. Customary law is often more important than state law in resolving local and family disputes, particularly in rural and remote communities.



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