

**Notes to the Draft**  
**East African Community**  
**HIV and AIDS Prevention and**  
**Management Bill, 2010**

March 2010

A number of issues that were identified as being relevant for inclusion in an HIV law were controversial with arguments being made by different stakeholders for or against their inclusion. These notes serve to highlight some of these issues.

### **Definition of “most at risk populations” – Clause 2**

There was a big debate as to whether the definition of *most at risk populations* (MARPS) should extend from a generic definition to specific mention of certain groups and in particular, specific mention of men having sex with men, sex workers and injecting drug users. Those arguing for specific mention contended that it is widely acknowledged that the three specific groups are at high risk of infection with HIV and failing to mention them specifically amounts to denial and does not help the fight against HIV. The opposing view, held particularly by government legislative drafters, was to the effect that the proposed EAC HIV law could not be used to recognize or legitimize conduct which is expressly criminalized by the national laws of the partner states without facing opposition from the governments of the partner states. It was argued that sex work, homosexuality and injecting drug use are forms of conduct going beyond the proposed HIV law and any clauses in the draft Bill seeking to deal with these issues would be more appropriately located in the penal laws of each partner state. It was also argued that these were matters of the criminal law of each partner states and were not part of the “areas of co-operation” in terms of the EAC Treaty. Any matters which are not within the areas of cooperation can only be handled under the respective national jurisdictions. It was recommended that the law could refer to MARPS as those groups that are from time to time so defined under the national HIV policies and strategies of the partner states.

It was agreed that the Bill must emphasize the need for partner state governments to ensure access to health and HIV related services to all population groups.

### **General duty of persons – Clause 6**

There were some concerns that the provision for a general duty of persons to take reasonable steps to know their HIV status and to protect themselves and others from HIV infection amounted to stigmatization as no similar duties are provided for in respect other diseases. In support of the clause, it was argued that the nature of HIV and the modes of its transmission call for some action on the part of individuals and that it would be difficult for the law alone to succeed without behaviour and attitude change at the individual level.

### **Criminalization of Willful transmission with HIV**

It was agreed that the proposed law should not become a “penal statute.” Clauses creating criminal offences relating to wilful transmission of HIV should be avoided in the proposed EAC HIV law since they are matters of criminal law within the municipal competence of partner States.

It was advised that even where a partner state chooses to legislate on this issue, there is need to take note of the argument that the isolation of, and creation of HIV specific offences while not doing so for other similar diseases and conditions (e.g. hepatitis B) increases HIV related stigma and confirms the fact of negative criminalization. It was therefore advised that the drafting of any such criminal offences should be sufficiently generic and futuristic and take into account the possibility

that a cure or vaccine for HIV could be found and also that other diseases with similar characteristics as HIV do exist and may develop.

It was accordingly generally agreed -

- **That** any provisions addressing wilful infection should not be located in the HIV law but should be in the respective penal code of partner states and should be drafted in general language to cater for the characteristics of HIV without mentioning HIV.
- **That** the law should create an obligation to protect others through sharing information on status that will enable others to make choices that can protect them against transmission.
- **That** the law should specify the sexual offences, which if committed by a person who is aware of being infected with a life threatening disease may attract an enhanced penalty and the nature of such enhanced penalty.
- **That** the law should provide sufficient safeguards as to afford fair trial of accused persons under this law.
- **That** the law should not include any forms of vertical or other forms of involuntary transmission modes.
- **That** the law should provide for access to emergency health, including PEP, counselling and legal services to all victims of sexual abuse.

Since a Most of the countries in East Africa have either criminalized or are contemplating the criminalization of the willful transmission of HIV, it was suggested that advocacy strategies should be commenced by the CSOs and other stakeholders to get them to re-think these approaches to dealing with HIV to bring them in line with this advice.

#### **Clause 22(3) (b) - Pre- marital HIV testing**

There were strong sentiments by some stakeholders that there should be compulsory pre-marital HIV testing as a preventive measure. Others felt that mandatory HIV testing before marriage was inconsistent with international best practice and must not be allowed.

#### **Clause 24(4)-Disclosure of HIV status to third parties**

The possibility of disclosure by a healthcare provider of the HIV status of a tested person to a third party that may be at risk was discussed at length with a number of stakeholders feeling that it would be proper for such disclosure to take place while others felt that it would amount to a breach of confidentiality, a violation of the right to privacy and a contravention of the rights of those involved. It was also argued that the clause could discourage people from seeking to know their HIV status for fear of their status being shared with others. The international standards by the OHCHR

and UNAIDs recommend such disclosure but by professionals; and after ample guidance is given to the person who is HIV positive and the person fails or refuses to be responsible.

#### **Clause 27 HIV status and Employment**

There was some controversy as to whether an employer should have any right to demonstrate the relevance of HIV status to a job and thereby deny certain persons the job on the basis of that status. It was felt that any suggestion that HIV status may be a relevant consideration for the performance of a job may be used to exclude and discriminate against persons on the basis of HIV status. There are those however, who felt that there may be instances when AIDs may render a person incapable of performing certain tasks and the law should not be closed to this possibility.

#### **Clause 37 - Prisoners**

There are those that strongly felt that prisoners should be provided with appropriate HIV prevention and management materials (prevention package) as a matter of law; the other side of the argument was that sex in prison is not legal within the current framework of any of the partner states and any clause that overtly provides for availing material to facilitate illegal activities would be rejected by the various governments.