



## **Kenya Legal and Ethical Issues Network on HIV & AIDS**

Your Ref: TBA

Our Ref: C/KELIN/2010

Date: 30<sup>th</sup> November 2010

1. **Hon. Esther Murugi Mathenge E.G.H., M.P**  
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2. **Hon. S. Amos Wako EGH, EBS, FCI Arb, SC,**  
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**NAIROBI.**

Dear Madam and Sir,

**RE: ADVISORY NOTE ON THE PROVISIONS OF SECTION 24 of THE HIV & AIDS PREVENTION AND CONTROL ACT 2006.**

The Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) is a nongovernmental organization that works on the legal, ethical and human rights concerns relating to health and HIV. KELIN works with different vulnerable populations including Women, Orphans and Vulnerable Children (OVC), Persons Living with HIV & AIDS (PLHIV) and employs the rights based approach to promote multi-sectoral strategies to mitigate the effects of HIV on the society.

This is to submit our humble advisory note to you following the gazettelement of Legal Notice Number 180, dated 4<sup>th</sup> November 2010, that seeks to bring into operation the provisions of sections 14, 18, 22 and 24 of the HIV & AIDS Prevention and Control Act 2006 on 1<sup>st</sup> December 2010. Our Advisory note concerns Section 24 of the HIV and AIDS Prevention and Control Act 2006.

The provisions of Section 24 of the Act have been controversial since the passing of the law. They have been criticized as “criminalizing people living with HIV” and have formed part of the text that is used by many speakers in International AIDS conferences on the negative aspects relating HIV laws. PLHIV in Kenya and elsewhere have in the past been quoted in their criticism of the law. Indeed the inclusion of this clause among those that were embargoed was partly on the strength that the clause has been widely criticized.

From a legal point of view, the law acknowledges and is driven by the belief that there are people who have, may and will engage in irresponsible behavior as maliciously and deliberately seek to harm others by will full premeditated infecting with HIV.

Whereas it's the States responsibility to provide protection against criminal acts that may include deliberate infection, and whereas the background of this section stems from representations of the different stakeholder to the task force that drafted this law, we wish to advice on the danger of this law being misused to perpetuate stigma and discrimination and the possible negative effect that it will have on the efforts to enhance protection against new transmissions. In particular, the following:

- I. The provisions of this section are likely to undermine the already existing HIV Prevention methods, as it will discourage people from getting tested and finding out their status as lack of knowledge of ones status can be used as defence in criminal cases.
- II. The section allows medical practitioners to disclose the HIV status of their patients to other sexual contacts; this will interfere with the delivery of health care and will frustrate the efforts of people from coming forward for testing for the reason that they may fear that information regarding their HIV status may be used against them in the criminal justice system.
- III. The section is likely to promote fear and stigma as it imposes a stereotype that PLWHIV are immoral and dangerous criminals. It will negate the efforts made so far to encourage people to live openly about their HIV status and this will definitely affect the uptake of HIV related services in health care facilities.
- IV. It is important to note that the reduction of the spread of HIV is more likely to accrue from the information and education efforts at the community level and

our willingness to confront issues occasioning the concentration of the epidemic among certain vulnerable and most at risk populations rather than the prosecution of suspected violators of Section 24. This is because in order to slow the spread of the HIV epidemic, vast numbers of people would have to be prevented from having unsafe sex, sharing syringes, or engaging in other risky behaviors, which no HIV-specific criminal law could possibly do.

- V. KELIN as an organization of lawyers understands that in cases when individuals purposely or maliciously transmit the virus with the intent to harm others, they should face the law; however even in these extreme cases, best practice now indicates that the appropriate framework for processing such cases should be the general criminal laws rather than the HIV law.
- VI. The placing of a legal responsibility exclusively on a PLWHIV for preventing transmission of the virus will undermine the Public Health message that everyone should practice safer behaviours regardless of their HIV status. It may create a false sense of security as people may assume (wrongly) that their partners are negative because they have not disclosed their status as required by law and hence they may not take measures to protect themselves.
- VII. The application of this law will endanger and further oppress women as the law is likely to be used to prosecute women more often than men for the reason that they are more likely to know their HIV status before their partners, due to the current HIV testing policy that almost compels pregnant women to undergo HIV tests. The women are more likely to be blamed by their intimate partners, their partners' families, and their communities for "bringing HIV into the home" than men and this will increase the HIV related violence against women as in the frequent evictions, ostracism, loss of property and inheritance, and loss of child custody for many women infected and affected by HIV.

### **The International Position**

The International Guidelines on HIV and AIDS and Human rights (Guideline Number 4) advise States to:

*"review and reform criminal laws and correctional systems to ensure that they are consistent with International Human Rights obligations and are not misused in the context of HIV/AIDS or targeted at vulnerable groups"*

The guidelines further advise against specific HIV offenses on intentional transmission of HIV; rather they encourage the use of general criminal offenses but quickly add that:

*“such application should ensure that the element of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and /or harsher penalties”*

International guideline 3 on Public Health legislation also cautions against inappropriate application of provisions applicable to casually transmitted diseases to HIV. It provides as follows:

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

The guidelines view the move to create HIV specific crimes and offenses as being retrogressive, negating efforts on de-stigmatization of HIV and undermining the overall HIV prevention strategy.

## **OUR RECOMMENDATIONS**

In view of our submissions above we wish to make the following recommendations with regard to Section 24 of the HIV & AIDS Prevention and Control Act 2006.

- I. There is need to take note of the argument that the creation of an HIV specific offense while not doing so for other similar diseases (e.g. hepatitis B or any other that may come with HIV like characteristics) increases the HIV stigma and confirms the fact of negative criminalisation.
- II. That the Ministry for State and Special Programmes should seek to move an amendment to repeal Section 24 of the HIV and AIDS Prevention and Control Act 2006 .
- III. In the event that Parliament accepts this amendment unconditionally; the development of the law on willful transmission should be left to develop from practice by the courts.

- IV. In the event that parliament finds it difficult to do away with Section 24, the offence of wilful infection/transmission should be located in the penal code and drafted in general language to cater for any disease with the characteristics of HIV without mentioning HIV.
- V. The drafting of a general law should be futuristic and take into account the possibility that a cure for HIV could be found and also that other diseases with characteristics of HIV do exist and may develop.
- VI. The law should provide sufficient safeguards as to afford fair trial of affected accused persons including reasonable penalty that is not disproportionate as to also add to the stigma.
- VII. The Kenyan Parliament should then be advised to repeal Sections 24 in return for an amendment in the penal code that can provide as per our recommendation.

KELIN is willing to participate or even facilitate the drafting of a clause for the penal code that can be used to negotiate the repealing of Section 24.

Yours Faithfully,



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