HIV-RELATED LEGAL SERVICES
Guide For University Legal Clinics
Tanzania

IDLO
Creating a Culture of Justice
International Development Law Organization

UNAIDS
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People living with HIV (PLHIV) and other key and vulnerable populations (KVPs) face many social and legal challenges. Thus, it is critical for lawyers and legal academics to be fully engaged in the response to HIV.

The objective of this handbook is to assist law lecturers, legal clinic managers and law students in Tanzania to respond effectively to the HIV epidemic. Effective responses include providing HIV-related legal advice and litigation support; leading in research on HIV-related law and human rights; and advising the government on HIV-related legislation, and the implementation of related laws and policies.

This handbook addresses a major challenge in scaling up legal services for PLHIV and other KVPs. It emphasizes the central legal and policy issues that lawyers, legal academics, legal clinic managers and law students might face when contributing their legal expertise to the national HIV response. This handbook is also a tool that those audiences can use to become active leaders on HIV-related legal issues, litigation, and law and policy reform in order to advance effective responses to HIV and AIDS in Tanzania.
Universities should be leading partners in the national response to HIV and AIDS. Within universities, particularly, faculties of law – both the academic community and the student body – must be informed and engaged. The student body typically comprises of the young population who are often at increased risk of HIV infection. Due to the HIV prevalence in our country, it is very likely that we also have faculty members and students who are living with HIV or have family members affected. Universities are therefore called upon both to build student capacity to respond to HIV as law graduates, and also to acknowledge and support members of our community who are living with HIV and its impact.

As this Guide demonstrates, the law has a central role to play in the national HIV response. Universities, and particularly Faculties of law, have a responsibility to ensure that our staff and graduates have the knowledge and skills to research, teach and advise about HIV-related legal issues. This Guide not only provides key highlights of the relevant national law and polices, it also situates the national response to HIV in the international legal and policy context. One Guide, however comprehensive cannot address all of the many challenging questions about HIV law and policy. We therefore anticipate and welcome further research in criminal law, family law, constitutional and administrative law, international human rights law, health and other areas of law raised by the HIV and AIDS epidemic by both students and staff. This research will again highlight the role of the law in addressing wider social challenges of inequality, injustice and discrimination. Other than the above outcomes, we see this Guide as a tool for improved service delivery within legal aid clinics. It will also usher in a new culture and understanding that access to justice for all groups in our communities is part and parcel of the protection and promotion of human rights. We therefore recommend this Guide to our academic staff, students of law and indeed to the wider University community. It is certainly an added tool and asset to the policy and related efforts to address HIV and AIDS in Tanzania.

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ABBREVIATIONS AND ACRONYMS

ACHPR  African Commission on Human and Peoples’ Rights
AIDS  acquired immunodeficiency syndrome
ARV  antiretroviral
HAART  highly active antiretroviral therapy
HAPCA  HIV and AIDS (Prevention and Control) Act, 2008
HIV  human immunodeficiency virus
IDLO  International Development Law Organization
ILO  International Labour Organization
KVP  key and vulnerable population
MSM  men who have sex with men
PWID  people who inject drugs
PLHIV  people living with HIV
PMTCT  prevention of mother-to-child transmission
SDG  Sustainable Development Goal
STI  sexually transmitted infection
TACAIDS  Tanzania Commission for AIDS
UN  United Nations
UNAIDS  Joint United Nations Programme on HIV/AIDS
PART ONE
UNDERSTANDING THE EPIDEMIC
1.1 WHAT ARE HIV AND AIDS?

HIV is a bloodborne virus that attacks the immune system. If untreated, a person infected with HIV can develop AIDS, which is a group of potentially life-threatening infections and cancers.

The first AIDS cases were identified in the United States of America in 1981, and the virus known as HIV was identified in 1985. HIV has now spread around the world, affecting individuals of all classes, sexes, sexual orientations and ethnicities.¹

The main ways by which HIV is transmitted are:

- Unprotected penetrative sexual contact (i.e. without the use of condoms or latex barriers).
- Direct blood contact, including drug injection using contaminated needles, blood transfusions or accidents in health-care settings.
- Vertical transmission (i.e. mother to fetus or baby, before or during birth, or through breastfeeding).

HIV can be transmitted from one person to another through various body fluids: blood, semen (including pre-ejaculate), vaginal secretions and anal fluids, and breast milk. It is not transmitted through casual social contact (e.g. by shaking hands, or sharing food or drinks); hence, there is no risk of HIV infection to university students or staff in providing advice and legal services to people living with HIV (PLHIV).

There is currently no cure for HIV infection and no vaccine to protect against infection. Highly active antiretroviral (ARV) therapy (HAART)—which involves the combination of at least three different ARV medications—stops HIV from replicating, allowing the immune system to maintain or recover its strength and keep the person healthy.

Although HAART does not eradicate HIV,¹ it is now accepted that PLHIV who are receiving HAART and who have undetectable viral load in their blood pose no public health risk of HIV transmission through sexual intercourse (3).

¹ There are guidelines for the clinical management of HIV, including recommendations about ARV treatment. Such guidelines also tailor recommendations to specific populations (e.g. infants and children, pregnant women, or men who have sex with men) and specific contexts (e.g. resource-limited settings); for example, WHO has produced guidelines on when to start antiretroviral therapy and pre-exposure prophylaxis for HIV (2).

1.2 EPIDEMIOLOGY OF HIV IN TANZANIA

According to UNAIDS, 1.4 million people in the United Republic of Tanzania were living with HIV in 2016—about 4.7% of the population (4). Reportedly, 55 000 people were newly infected with HIV and 33 000 people died from AIDS-related illnesses in the country in 2016 (5). The Tanzania Third National Multi-Sectoral Strategic Framework for HIV and AIDS (2013/14–2017/18) (6) provides a comprehensive picture of HIV in The United Republic of Tanzania.

Several behavioural, sociocultural and biomedical factors drive the epidemic (6: p 14):

- Behavioural factors
  - Multiple unprotected sexual relations.
  - Intergenerational or cross-generational sexual relations.
  - Early sexual debut.
  - Transactional sex.
  - Alcohol abuse.
  - Low levels of and inconsistent use of condoms.
  - Unprotected penetrative heterosexual anal intercourse.

- Sociocultural factors or dynamics
  - Stigma and discrimination.
  - Mobility and migration.
  - Gender inequalities.
  - Income inequality and poverty.

- Biomedical factors:
  - Low levels of uptake of voluntary medical male circumcision.
  - Low coverage of quality-assured blood transfusions.
  - Unsafe medical injections.
  - Prevalence of sexually transmitted infections (STIs).
  - Mother-to-child transmission of HIV infection.
  - High levels of discordance (i.e. one partner is HIV-positive and the other HIV-negative).
  - Low levels of knowledge of HIV serostatus (i.e. whether the person has the antibodies to HIV that result in a positive blood test).
PART TWO
HIV, HUMAN RIGHTS AND LAW
The United Nations (UN) Sustainable Development Goals (SDGs) are 17 goals with 169 targets that all 191 UN Member States have agreed to achieve by 2030 (7). Goal 3, the overarching goal on health issues, seeks to ensure healthy lives and promote well-being for all, at all ages. Target 3 of Goal 3 seeks to end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases, and to combat hepatitis, waterborne diseases and other communicable diseases. Ending AIDS by 2030 will only be achieved if the targets are met by 2020. In this context, the Joint UN Programme on HIV/AIDS (UNAIDS) has adopted a 2016–2021 strategy (8) to Fast-Track the end of the epidemic.

The strategy identifies eight areas to ensure that the AIDS epidemic is ended as a public health threat by 2030:

- Children, adolescents and adults living with HIV access testing, know their status and are immediately offered and sustained on affordable quality treatment.
- New HIV infections among children are eliminated and their mothers’ health and well-being is sustained.
- Young people, especially young women and adolescent girls, access combination prevention services and are empowered to protect themselves from HIV.
- Tailored HIV combination prevention services are accessible to KVPs including sex workers, men who have sex with men (MSM), people who inject drugs (PWID), transgender people, prisoners and migrants.
- Women and men practise and promote healthy gender norms, and work together to end gender-based sexual and intimate partner violence.
- Punitive laws, policies, practices, stigma and discrimination that block effective responses to HIV are removed (e.g. overly broad criminalization of HIV transmission, travel restrictions, mandatory testing and those that block key populations’ access to services).
- AIDS response is fully funded and efficiently implemented based on reliable strategic information.
- People-centred HIV and health services are integrated in the context of stronger systems for health (e.g. HIV-sensitive universal health coverage schemes are implemented).

In its strategy, UNAIDS goes further to say that punitive laws, policies and practices continue to violate human rights and maintain structural conditions that leave populations without access to HIV services. HIV-related discrimination is often deeply interwoven with other forms of discrimination based on gender; sexual orientation and gender identity; race; disability; drug use; immigration status; being a sex worker; and being a prisoner or former prisoner.

Violations of women’s rights, including violence, continue to render women and girls more vulnerable to HIV, and prevent them from accessing services and care. These conditions are fostered and reinforced by these discriminatory laws and practices that restrict women’s equal access to decision-making, education, employment, property, credit or autonomy.

Protection against discrimination

One of the most effective legal interventions that can halt the spread of HIV is the protection against discrimination of persons living with or affected by HIV, and those most at risk of infection. Such protection can be achieved by promoting respect for human rights, dignity and equal opportunity for all, including preventing and challenging violations of human rights, and ensuring access to legal services. HIV is not transmitted casually; therefore, discrimination in access to employment, housing, education and other services cannot be justified on public health grounds.
2.1 UNDERSTANDING THE LAW AS IT RELATES TO HIV IN THE UNITED REPUBLIC OF TANZANIA

2.1.1 International and regional law

The United Republic of Tanzania is a Member State of the UN, the African Union, the Southern African Development Community and the East African Community. Thus, it is bound by and should draw guidance from its international obligations and internationally accepted best practices to ensure the promotion, protection and enforcement of the rights of PLHIV and key and vulnerable population (KVPs).1

The United Republic of Tanzania is categorized as a dualist state; therefore, all treaties, conventions and international instruments have to be domesticated into the country’s legal system before they can be causes of court action (11).

The Constitution of the United Republic of Tanzania at Article 63 (3) (e)2 gives the National Assembly the power to deliberate upon and ratify all treaties and agreements to which the United Republic of Tanzania is a party and the provisions of which require ratification. Courts in the United Republic of Tanzania have a rich legacy of not just using international law as an interpretative tool, but also applying principles enunciated in treaties and foreign case law.

Table 2.1 summarizes the United Republic of Tanzania’s international and regional obligations in the context of HIV and AIDS.3

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1 The United Republic of Tanzania’s HIV national guideline for a comprehensive package of HIV services for key and vulnerable populations (9) refers to the definitions of key populations and vulnerable populations in the (now outdated) WHO Global health sector strategy on HIV/AIDS 2011–2015. See also the WHO Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations (10). Key populations are defined as groups who, due to specific higher risk behaviours, are at increased risk of HIV, irrespective of the epidemic type or local context. Also, these key populations often have legal and social issues related to their behaviours that increase their vulnerability to HIV. WHO guidelines focus on five key populations: MSM, PWID, people in prisons and other closed settings, sex workers and transgender people. These key populations are important to the dynamics of HIV transmission. Also, they are essential partners in an effective response to the epidemic. Vulnerable populations are groups of people who are particularly vulnerable to HIV infection in certain situations or contexts; they include adolescents (particularly adolescent girls in sub-Saharan Africa), orphans, street children, people with disabilities, and migrant and mobile workers. These populations are not affected by HIV uniformly across all countries and epidemics: see references (9, 10).

2 Article 63 (3) (e) For the purposes of discharging its functions the National Assembly may; (e) Deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification.

3 See also publications from UNAIDS (12), and the Office of the United Nations High Commissioner for Human Rights (13)
Table 2.1. Tanzania’s international and regional obligations in the context of HIV and AIDS

<table>
<thead>
<tr>
<th>Document</th>
<th>Relevance to the response to HIV and AIDS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International Instruments</strong></td>
<td></td>
</tr>
<tr>
<td>The Universal Declaration of Human Rights (proclaimed by the UN General Assembly in Paris on 10 December 1948)</td>
<td>Sets out the fundamental human rights that are to be universally protected. It expresses the fundamental values shared by the international community and has influenced development of international human rights laws including those protecting PLHIV and key populations.</td>
</tr>
<tr>
<td>The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted in 1979 by the UN General Assembly; signed by Tanzania on 17 July 1980 and ratified on 20 August 1985)</td>
<td>Obliges states to take action to eliminate discrimination against women, including in the field of health care and during pregnancy (includes women living with HIV). See also: General Recommendation No. 15 (Ninth Session, 1990) on avoidance of discrimination against women in national strategies for the prevention and control of AIDS; General Recommendation No. 24 (20th Session, 1999) to elaborate Article 12 of the CEDAW on Women and Health.</td>
</tr>
<tr>
<td>The International Covenant on Economic, Social and Cultural Rights (ICESCR) (Tanzania acceded to the ICESCR on 11 June 1976)</td>
<td>Recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health. See also: General Comment No. 14 (2000) on the right to the highest attainable standard of physical and mental health, Article 12 of the ICESCR; General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health, elaborating Article 12 of the ICESCR.</td>
</tr>
<tr>
<td>The International Covenant on Civil and Political Rights (ICCPR) (Tanzania acceded to the ICCPR on 11 June 1976)</td>
<td>Relevant civil and political rights include the right to marry and found a family (Article 23); the right to privacy (Article 17); freedom of expression and information (Article 19); freedom of assembly and association (Article 22); freedom of movement (Article 12); the right to liberty and security of person (Article 9); and freedom from cruel, inhuman and degrading treatment or punishment (Article 9).</td>
</tr>
<tr>
<td>The Convention on the Rights of the Child (signed by Tanzania on 1 June 1990 and ratified on 10 June 1991)</td>
<td>Relevant measures to be taken include protection from HIV transmission, provision of education on sex and HIV, and protection for those orphaned by AIDS. The Committee on the Rights of the Child in 2003 issued General Comment No. 3 on HIV/AIDS and the Rights of the Child.</td>
</tr>
<tr>
<td>The Convention on the Rights of Persons with Disabilities (signed in 2007 and ratified in 2009)</td>
<td>Protects people from discrimination on the ground of disability. The Committee on the Rights of Persons with Disabilities has passed relevant general comments on equal protection of the law (Article 12) and women with disabilities (Article 6). Those with disabilities have the capacity to make decisions, including in the field of the right to health (Article 25). See also: UNAIDS, WHO and OHCHR Policy Brief: Disability and HIV, April 2009, UNAIDS 2017 Reference on Disability and HIV.</td>
</tr>
</tbody>
</table>

| Regional Instruments | |
| The African (Banjul) Charter on Human and Peoples’ Rights (ACHPR) (signed by Tanzania on 31 May 1982 and ratified on 18 February 1984) | Lays the foundation for human rights for African countries, and obligates state parties to promote and protect human and peoples’ rights and freedoms, taking into account the importance traditionally attached to those rights and freedoms in Africa. These rights include those of PLHIV and key populations as citizens of African countries. |
Various other international or regional documents are relevant, but are not legally binding. They include the following:

1. **The UN General Assembly Political Declaration on HIV/AIDS, 2016**, whereby countries commit to HIV and AIDS strategies that promote and protect human rights, eliminate gender inequalities, review inappropriate laws and address the specific needs of vulnerable populations (14).

2. **The Human Rights Council resolutions on HIV and AIDS**, including encouraging the repeal of punitive laws that block effective responses to HIV 1.

3. **The International guidelines on HIV/AIDS and human rights (15)**, which provides guidance based on international legal obligations to assist states to develop an enabling legal and regulatory framework for HIV and AIDS. The guidelines contain specific guidance on (a) the creation of effective structures to manage the national response to HIV and AIDS; (b) the enactment of laws to protect basic human rights, reduce vulnerability to HIV and mitigate the impact of HIV on people’s lives; and (c) the promotion of access to justice through legal literacy campaigns, legal support services and monitoring and enforcement of human rights.

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4. The 2030 Agenda for Sustainable Development, and the SDGs (7). Of particular importance to HIV and AIDS are Goal 1 – No poverty; Goal 2 – Zero hunger; Goal 3 – Good health and well-being; Goal 5 – Gender equality; Goal 6 – Clean water and sanitation; Goal 8 – Decent work and economic growth; Goal 10 – Reduced inequalities; Goal 16 – Peace, justice and strong institutions; and Goal 17 – Partnerships for the goals.

5. The 2001 Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (16), which commits Member States to prioritize HIV and AIDS, and recognizes the impact of social and economic inequalities on women and girls, as well as the impact of and barriers created by stigma, silence, denial and discrimination. The United Republic of Tanzania also committed to allocating at least 15% of the national budget (0.7% of gross national product) to improve the health sector.


7. The 2001 African Commission on Human and Peoples’ Rights (ACHPR) resolution ACHPR/Res. 53 (XXIX) 01 on the HIV/AIDS pandemic – Threat Against Human Rights and Humanity (Resolution 53) (18). This resolution recognizes HIV as a human rights issue, and called on African governments and state parties to the charter to allocate national resources that reflect a determination to fight the spread of HIV, ensure human rights protection against discrimination for PLHIV, provide support to families for the care of those dying from AIDS-related illnesses, devise educational public health-care programmes and carry out public awareness activities, especially in view of free and voluntary HIV testing and appropriate medical interventions.

ACHPR also adopted the following:


c. ACHPR/Res. 163 on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (21), with a mandate of promotion and protection of rights (22).

d. At the 61st Ordinary Session of the ACHPR in November 2017 in Banjul, Gambia (23), the ACHPR considered and adopted a study on HIV, the law and human rights in the African human rights system, since published by UNAIDS (24).

2.2 THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977

The 1977 Constitution of the United Republic of Tanzania (25) has a Bill of Rights that includes rights to be enjoyed by all under Part III, which provides for basic rights and duties. The Constitution aims to build a nation of equal and free individuals enjoying freedom, justice, fraternity and concord through the pursuit of the policy of socialism and self-reliance, while ensuring human dignity and respect for human rights. It prohibits all types of discrimination, either through direct enactment of laws, or discriminatory acts and conduct. However, Article 7 (2) notes that—while it is the duty and responsibility of government and all its organs as well as all persons or authorities exercising executive, legislative or judicial functions to take cognizance of the above provisions—the fundamental objectives and directive principles of state policy outlined shall not be adjudicated. ¹ The effect of the foregoing is that no one can be held to account for failure to comply with the founding principles outlined in Part

¹ Article 7 (2) of the Constitution of the United Republic of Tanzania states “The Provisions of this part of this chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this part of this chapter.”
The Constitution as a whole protects PLHIV and KVPs and their rights. Table 2.2 summarizes some of the provisions in the Constitution of the United Republic of Tanzania that are particularly relevant in the realization of HIV-related rights.

Table 2.2. Summary of certain provisions in the Constitution of the United Republic of Tanzania relevant to realization of HIV-related rights

<table>
<thead>
<tr>
<th>Article</th>
<th>Provision</th>
<th>How the provision is relevant to PLHIV and KVPs</th>
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</table>
| 12      | Equality of human beings  
1) All human beings are born free and are equal  
2) Every person is entitled to recognition and respect for his dignity | Ensures that all members of the community, including PLHIV, are accorded respect and treated in a dignified manner |
| 13      | Equality before the law  
1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law |
| 4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office | Prohibits discrimination and ensures that PLHIV are not discriminated against because of their status, while recognizing their equal rights before the law |
| 14      | The right to life  
Every person has the right to live and to the protection of his life by society in accordance with the law | Ensures that the population is not denied the right to life through laws and policies that are unjust |
| 15      | Right to personal freedom  
1) Every person has the right to freedom and to live as a free person | Gives PLHIV power to make decisions about their health and HIV medical treatment |
| 16      | Right to privacy and personal security  
1) Every person is entitled to respect and protection of his person, the privacy of his own person, his family and his marital life and respect and protection of his residence and private communications | Relevant in ensuring that any information about a person's HIV status is treated with confidentiality, and that such information can only be released with informed consent |
| 17      | Right to freedom of movement  
1) Every citizen of the United Republic has the right to freedom of movement in the United Republic and the right to live in any part of the United Republic, to leave and enter the country and the right not to be forced to leave or be expelled from the United Republic | Ensures that government cannot impose restrictive measures on the movement of the population including PLHIV without just cause |
In February 2008, the Parliament of the United Republic of Tanzania passed the HIV and AIDS (Prevention and Control) Act (HAPCA), No. 28 of 2008 (26).

2.3 HIV AND AIDS (PREVENTION AND CONTROL) ACT, 2008

Under the general provisions of the Constitution, Article 29 stipulates that the above rights are for the enjoyment by all persons in the United Republic of Tanzania. Article 30 prescribes instances where rights can be limited. The rights cannot be exercised in a manner that causes interference with or curtailment of the rights and freedoms of others or public interest.
The Act provides for the prevention, treatment, care, support and control of HIV and AIDS, and for the promotion of public health in relation to HIV and AIDS. It also provides for appropriate treatment, care and support using available resources to people living with or at risk of HIV and AIDS.

Some of the salient provisions of the law are:

- **Duty to promote and protect HIV-related rights**: for example, rights to testing, treatment, privacy and confidentiality, nondiscrimination and access to basic health care.
- **Responsibility of individuals** to raise awareness and reduce the spread of HIV and AIDS.
- **Prohibition of mandatory testing for HIV**, and disclosure of HIV test results, stigma and discrimination.
- **Creation of offences** of breach of confidentiality, spreading of HIV and practices leading to spreading of HIV.

The Act makes provisions on legal and ethical issues to guide the HIV response in the United Republic of Tanzania. These provisions cover informed consent, and privacy and confidentiality, as discussed below.

### 2.3.1 Informed consent

Part 1 of the HAPCA defines informed consent as the voluntary agreement of a person to undergo or be subjected to a procedure based on full information, whether such agreement is written, conveyed verbally or indirectly expressed. HIV testing is different from other blood tests because it presents serious psychosocial risks, such as rejection by family, discrimination in employment, restricted or no access to health care, and insurance denial or restriction. In recognition of the above circumstances, and to encourage testing and treatment, service providers are required to obtain informed consent for a HIV test.

Section 15 of the HAPCA prohibits compulsory HIV testing. For testing of children, written consent must be obtained from the parents or a recognized guardian. Consent, however, is not required on HIV testing: (a) under a court order, (b) of the donor of human organs and tissues, and (c) of sexual offenders. The section further provides that all pregnant women, and men responsible for the pregnancies, and the spouses and all persons attending a health-care facility shall be counselled and offered voluntary testing.

### 2.3.2 Privacy and confidentiality

The Constitution at Article 16 guarantees the right to privacy and personal security. In medical and legal practice, most medical information is considered confidential. However, due to the sensitivity of HIV-related information, it is important that those providing HIV-related services observe additional protection to HIV-related medical records and information.

Section 16 of the HAPCA affirms the confidentiality of the results of a HIV test and that such results can only be released to the person tested. However, it provides exceptions and lists of instances where the HIV test results may be released as follows: (a) in the case of a child, to his or her parent or a recognized guardian, (b) in the case of a person with inability to comprehend the results, his or her spouse or recognized guardian, (c) a spouse or a sexual partner of an HIV-tested person, or (d) the court, if applicable. Section 17 further provides for medical confidentiality, particularly the identity and status of persons living with HIV and AIDS.

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1 For further reference, see various national guidelines and standard operating procedures (27-29).

2 Section 17 (1) All health practitioners, workers, employees, recruitment agencies, insurance companies, data recorders, sign language interpreters, legal guardians and other custodians of any medical records, files, data or test results shall observe confidentiality in the handling of all medical information and documents, particularly the identity and status of persons living with HIV & AIDS. (2) A person who received results under Section 16 shall be obliged to observe confidentiality in respect of the HIV result received by him under that section.
Conversely, Section 18 of the HAPCA provides for instances where confidentiality can be breached, including for purposes of reporting, treatment, and court or legal proceedings.

The standard operating procedures for HIV testing and counselling services provide that:

- Disclosure of HIV test results to a third person shall only be done with written consent of the person tested.
- Counselling will be provided in private where the conversation between the client and counsellor cannot be overheard.
- Individuals’ confidentiality will be protected in conversations between counsellors and other staff members.

The foregoing is also provided for the national guidelines on HIV and AIDS, and prevention of mother-to-child transmission of HIV (27, 28). Some of the sections of the Act that are considered by PLHIV and activists as punitive and discriminatory are discussed below.

Mandatory partner notification of HIV-positive status: Section 21

Section 21 makes it mandatory for anyone who is aware of their HIV-positive status to inform their spouse or sexual partner of their HIV status and take necessary steps to avert transmission. There are concerns that this provision may cause people to shy away from testing for HIV because of fear of the requirement to disclose their status immediately after discovering their HIV-positive status (30: p 67). UNAIDS encourages disclosure and notification that is voluntary, respects the autonomy and dignity of the affected individuals, maintains confidentiality, and leads to beneficial results for the individual and partner. Such disclosure and notification should meet ethical imperatives so as to maximize good for both the uninfected and the infected (31).

In 2010, the HIV and AIDS (Counselling and Testing, Use of ARVs and Disclosure) Regulations (32) came into operation. This document provides regulations for offering HIV counselling and testing, protection against forced testing, procedure for administration of post-exposure prophylaxis, confidentiality and protection against mandatory disclosure.

Intentional transmission of HIV infection: Section 47

Section 47 of the HAPCA creates the offence of intentional transmission of HIV. In law, the offence of intentional transmission requires that both HIV transmission and intent be proved, which requires proof that the accused knew that they are HIV-positive, understood how HIV is transmitted and that they might be infectious, had sex with someone who did not know that the accused had HIV and did not use any protective measures (e.g. use of a condom), and that the accused is the only person who could have transmitted HIV to the complainant. This section as it stands is punitive and its continued existence might stop people from being tested and knowing their status, because knowing it would mean that the person could be targeted for prosecution (3).

The Global Commission on HIV and the Law, in its 2012 report on HIV and the law (33), noted that such laws as described above are unjust, morally

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1 Section 18—The medical confidentiality shall not be considered breached in:
   a) Complying with reportorial requirements in conjunction with the monitoring and evaluation programmes;
   b) Informing other health practitioners directly involved or about to be involved in the treatment or care of a person living with HIV and AIDS;
   c) Responding to an order of the court over legal proceedings where the main issue is HIV status of an individual; or
   d) Giving information to the appointed member of the deceased’s family.

2 Section 21 of the HAPCA: (1) Any person who has knowledge of being infected with HIV after being tested shall, (a) immediately inform his spouse or sexual partner of the fact and (b) take all reasonable measures and precautions to prevent the transmission of HIV to others.

3 Section 47 of the HAPCA states that “Any person who intentionally transmits HIV to another person commits an offence, and on conviction shall be liable to imprisonment to a term of not less than five years and not exceeding ten years.”

4 The Global Commission on HIV and the Law was launched in June 2010 to develop actionable, evidence-informed and human rights based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV.
harmful and virtually impossible to enforce with any semblance of fairness. The law does not take into account the success of antiretroviral therapy in significantly reducing transmission risk.

In 2013, UNAIDS released its guidance note Ending overly broad criminalisation of HIV non-disclosure, exposure and transmission: critical scientific, medical and legal considerations (3).

This guidance advises states to (3: p 2):

- Concentrate their efforts on expanding the use of proven and successful evidence-informed and rights-based public health approaches to HIV prevention, treatment and care.
- Limit any application of criminal law to truly blameworthy cases where it is needed to achieve justice.

Routine testing of pregnant women: Section 15 (5)

In the United Republic of Tanzania, as in many African countries in sub-Saharan Africa, pregnant women are expected and encouraged to undergo an HIV test to ascertain their HIV status for the protection of the fetus from infection. Pregnant women and their spouses are offered counselling services and are thereafter voluntarily tested for HIV as provided for in Section 15 (5) of the HAPCA.1 The Ministry of Health has developed guidelines for the care and treatment of pregnant women living with HIV, aimed at reducing HIV transmission from mother to child.2 However, as noted in The report on the legal environment assessment in response to HIV and AIDS within the United Republic of Tanzania (30), although the law prescribes voluntary testing for pregnant women and their partners, in practice it is a mandatory requirement. This results in stigmatization of those women who refuse to undertake the HIV test and who are then neglected during childbirth by health-care workers. This practice is discriminatory. “Voluntary” HIV testing implies testing free from coercion and with full informed consent.

The act of testing pregnant women for HIV without their informed consent is punitive and does not work well for the women, especially in their preparedness to live positively with the virus and their uptake of HIV medication. It also puts the fetus at risk, if the mother is not psychologically prepared to deal with the outcome of the test results, to ensure that the fetus is prevented from vertical HIV transmission (34).

2.4 CRIMINAL LAW IN THE HIV RESPONSE IN THE UNITED REPUBLIC OF TANZANIA

Criminal law is a body of rules, mostly statutory, that prohibits conduct that is deemed threatening or harmful to public safety and welfare. It also establishes punishment to be imposed for the commission of such acts. Some of these offences were created before independence, well before HIV and AIDS was discovered, and have not been reviewed or amended to take into account the scientific and medical evolution of the AIDS epidemic.

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1 Section 15 (5) of the HAPCA states that “Every pregnant woman and the man responsible for the pregnancy or spouse and every person attending a health care facility shall be counselled and offered voluntary HIV testing.”

2 Section 25 of the HAPCA states that, “(1) The Ministry shall regulate the care and treatment of HIV infected pregnant women, mothers infected with HIV while giving birth and measures to reduce HIV transmission from mother to child. (2) In an endeavor to prevent the mother to child transmission of HIV (a) trained and authorised persons shall provide counselling services to HIV infected pregnant and breast feeding women and to men responsible for the pregnancies or spouses respectively; (b) health care facilities shall monitor, provide treatment and apply measures necessary to reduce HIV transmission from mother to child; (c) prevention of mother to child transmission of HIV health services should be parent friendly.”
On the use of criminal law in the HIV response, UNAIDS advised that the following should be considered: (a) it should be guided by the best available scientific and medical evidence relating to HIV; (b) it should uphold the principles of legal and judicial fairness (including key criminal principles of legality, foreseeability, intent, causality, proportionality and proof); and (c) it should protect the human rights of those involved in criminal law cases (3).

In the United Republic of Tanzania, PLHIV and KVPs are at risk of being in conflict with the law because of the existence of criminal offences regulating sexual behaviour and drug use. According to the Tanzania Third National Multi-Sectoral Strategic Framework for HIV and AIDS (NMSF III) (6: p 18), discrimination against key populations poses enormous challenges to their health-care access. NMSF III also acknowledged that stigma and discrimination remain high against PLHIV who are commercial sex workers, prisoners, street and homeless populations, of same-sex orientation or drug users. This poses a significant challenge to outreach and delivery of friendly health services, ultimately reducing the HIV response in the country.

Various criminal law provisions have a significant negative impact on PLHIV and KVPs as shown by the discussion below.

2.4.1 The Penal Code Cap. 16, 2002

On sex workers

Prostitution and sex work is not an offence under the Penal Code (35); however, Sections 139,1 1462 and 1483 create offences including procuring a person for purposes of prostitution, living wholly or partly on the earnings of prostitution and keeping house for purposes of prostitution. In 2013, the Tanzanian Commission for AIDS (TACAIDS) noted that, although health service providers have programmes to reach out to sex workers with necessary health services, police have reportedly interrupted these services and arrested the sex workers. The attitude of health-care workers to sex workers has also impeded the delivery of health and HIV services to sex workers (30). In the absence of health services, HIV prevention information and condoms, sex workers may acquire and transmit HIV and other STIs. According to the Tanzania Demographic and Health Survey 2010, over half (51.7%) of female sex workers reported experiencing physical violence in the past 12 months. Among these, 33.3% reported being beaten by their clients. More than one third of female sex workers had ever been forced to have sex (36).

UNAIDS, in its 2014 guidance note Services for sex workers (37), advises governments to provide universal access to comprehensive HIV prevention, treatment, care and support; build supportive environments and strengthen partnerships and economic empowerment of sex workers; and reduce vulnerability and address structural issues, including enabling legal and policy environments.

On people who practise anal sex (Including men who have sex with men)

Section 1541 of the Penal Code criminalizes anal intercourse for both men and women. TACAIDS notes that MSM fear being arrested when attending health-care facilities to access health and HIV-related services (30: p 65). These men also reported that disclosing their sexual behaviour to health-care workers exposes them to stigma and negative treatment (30: p 65). This makes it difficult for MSM and women who engage in anal sex with

1 Section 139 of the Penal Code addresses procurement of any person for prostitution.
2 Section 146 of the Penal Code states “A woman who knowingly lives wholly or in part on the earnings of prostitution or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, commits and offence.”
3 Section 148 of the Penal Code states “Any person who keeps a house, room, set of rooms or place of any kind whatsoever for the purposes of prostitution commits an offence.”

1 Section 154 of the Penal Code states that “(1) Any person who: (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than 30 years. (2) Where the offence under subsection (1) of this section is committed to a child under the age of ten years the offender shall be sentenced to life imprisonment.”
men to access health and HIV prevention services, increasing their risk of HIV infection, and fuelling the HIV epidemic (38).

2.4.2 The Drugs and Prevention of the Illicit Traffic in Drugs Act Cap. 95

On people who inject drugs

Section 12(d)1 of the Drugs and Prevention of the Illicit Traffic in Drugs Act stipulates that it is an offence for any person to possess and use any narcotic drugs specified in the Act. TACAIDS has reported that PWID may share needles while injecting drugs, which carries a high risk of HIV transmission if one of those sharing is HIV-positive. UNAIDS, in its guidance note Services for people who inject drugs (39), notes that—given the breadth of injecting drug use and the disproportionate HIV-related risks among PWID—preventing HIV and other harms among PWID, and providing them with effective treatment, care and support are essential components of a sound and effective national response. TACAIDS reports that access to health and HIV services by PWID is low, although health-care workers reported to TACAIDS that harm reduction services (including clean needles and syringes) were available but not on a sufficient scale. One deterrent may be police practices: the police have reportedly arrested PWID accessing health services (30: p 65). The limitations in access to health and HIV prevention services thus put PWID at risk of HIV infection and at a greater risk of infecting others, including their sexual partners (39).

In the 2014 guidance note Services for people who inject drugs, on addressing human rights, UNAIDS identifies examples of human rights violations directed at PWID as compulsory drug testing, forced treatment and arbitrary detention. In addition, PWID are frequently denied basic health care, either as a result of exclusion by health-care workers or because the life-saving, evidence-based interventions that could help them are illegal. UNAIDS urges that it is essential to ensure that law enforcement and criminal justice authorities are included in policy discussions and are aware of the need for a public health approach to PWID (39: p 13).

2.5 EMPLOYMENT LAW AND HIV

The right to work is provided in the Constitution of the United Republic of Tanzania (Article 22). Discrimination on grounds of HIV status in the workplace is outlawed under Section 7 (4) of the Employment and Labour Relations Act No. 8 of 2006 (41).3 Section 30 (1) of the HAPCA prohibits the denial of any person an employment

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1 Section 12 (d) of Cap. 95 states “Any person who: (d) produces, possesses, transports, imports into the United Republic, sells, purchases, uses or does any act or omits to do anything in respect of poppy straw, coca plants, coca leaves, prepared opium, opium poppy, cannabis, manufactured drug or any preparation containing any manufactured drug, psychotropic substance, narcotic drug, such act or omission amounting to contravention of the provisions of this act or rule or order made under this act, commits an offence and upon conviction is liable to a fine of one million shillings or three times the market value of the prohibited plant, whichever is greater, or to imprisonment for a term not exceeding twenty years or to both the fine and imprisonment.”

2 The term “harm reduction” refers to a comprehensive package of policies, programmes and approaches that seeks to reduce the harmful health, social and economic consequences associated with the use of psychoactive substances. The elements in the package are as follows: needle and syringe programmes; opioid substitution therapy; HIV testing and counselling; HIV care and antiretroviral therapy for PWID; prevention of sexual transmission; outreach (information, education and communication for PWID and their sexual partners); viral hepatitis diagnosis, treatment and vaccination (where applicable); and tuberculosis prevention, diagnosis and treatment (40).

3 Section 7 (4) of the Labour Relations and Employment Act, 2006 (41) prohibits discrimination against an employee in any employment policy or practice, on one or more grounds including: colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or religion, sex, gender, pregnancy, marital status or family responsibility, disability, HIV/AIDS, age, station of life.
opportunity on the grounds of the person’s actual, perceived or suspected HIV and AIDS status. However, TACAIDS reports that some employers reportedly require HIV testing as a prerequisite for employment (30, 42). Employers are encouraged to take into account internationally recognized best practices that respect human rights in responding to HIV in the workplace.

The International Labour Organization (ILO), in 2015, developed a handbook to assist judges and legal professionals on matters related to HIV and AIDS, with a focus on employment and occupation (43). The ILO noted that HIV-related stigma and discrimination persist in many workplaces, and violations of fundamental rights are widespread. Key groups that are already disadvantaged or marginalized may experience increased levels of stigma and discrimination.

Further, ILO Recommendation No. 200 calls on national judicial authorities to be involved in the development, adoption and effective implementation of national and workplace policies and programmes on HIV and AIDS, including the development and application of national legislation (44). The ILO also encourages employers to take into account internationally recognized best practices that respect human rights in responding to HIV in the workplace.

2.6 LAND, PROPERTY AND INHERITANCE IN THE CONTEXT OF HIV

The right to property ownership and usage is enshrined in the Constitution of the United Republic of Tanzania at Article 24, which guarantees the individual’s right to property ownership and protection. The Constitution makes it unlawful for any person’s property to be acquired compulsorily by the state without provision for compensation. The Land Act Cap. 113 (45) at Section 19 provides for the right to occupancy of land.

In 2013, TACAIDS, in its report on the legal environment assessment in response to HIV and AIDS (30), observed that, in some parts of the country, widowed women are denied the right to inherit property of their deceased husbands because of their real or perceived HIV status, which in turn limits their economic power and increases their vulnerability to HIV. For some orphans whose parents have died from AIDS-related deaths, their right to inherit property has been violated by their relatives and guardians, disempowering them economically.

The 2017 report on the links between women’s property and inheritance rights and HIV in rural Tanzania revealed that violation of women’s property and inheritance rights are significantly associated with HIV transmission (18, 46). In its report on risks, rights and health (33), the Global Commission on HIV and the Law noted that countries must reform property and inheritance laws to mandate that women and men have equal access to property and other economic resources, including credit.

The report urged governments to ensure that, in practice, property is divided without gender discrimination upon separation, divorce or death, and establish a presumption of spousal co-ownership of family property. Further, where property and inheritance practices are influenced or determined by religious or customary legal systems, the leaders of these systems must make reforms to protect women, including widows and orphans.

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1 On discrimination of PLHIV in the field of employment, see the South African case of Hoffman v South African Airways 2000 (1) BCLR 1211 (CC); 2001 (1) SA (CC); the Namibian case of N v. Minister of Defence (2000) ILJ 999 (Labour court of Namibia); I. B V Greece (European Court of Human Rights, Application No. 552/10); and the Kenyan case of AIDS Law Project v Attorney General and Others, Petition 97/2010.
2.7 VULNERABLE POPULATIONS AND HIV AND THE LAW

2.7.1 Undocumented immigrants and HIV

Persons illegally residing in the United Republic of Tanzania are classified as prohibited immigrants and are therefore not recognized by the law, a situation that puts them in constant conflict with the law.1 According to the study conducted by TACAIDS on the legal environment in response to HIV and AIDS, undocumented and prohibited migrants in the United Republic of Tanzania mingle with the local communities, yet they do not adequately receive HIV and health services (30). Hence, they do not have access to health and HIV services and are thus at a high risk of both contracting infections and fuelling transmission.

Also, due to their status, the migrants engage in low income earning activities, which are sometimes considered illegal, putting them at additional risk of HIV and STIs, and in conflict with the law.

With regard to migrants, the report on risks, rights and health recommended that—to ensure an effective, sustainable response to HIV that is consistent with human rights obligations—countries should offer the same standard of protection to migrants, visitors and residents who are not citizens as they do to their own citizens (33). The report also urged countries to implement regulatory reform to allow for legal registration of migrants with health services, and to ensure that migrants can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens. All HIV testing and STI screening for migrants must be informed and voluntary, and all treatment and prophylaxis for migrants must be ethical and medically indicated.

2.7.2 Prisoners and other people in correctional facilities and HIV

People in prison settings are at risk of HIV infection and transmission because of factors such as tattooing with unsterile equipment, drug use and needle sharing, high-risk sex and rape. In addition, overcrowding increases the spread of opportunistic infections (33).

TACAIDS observed that prisoners have limited access to HIV services (30). Such limitations include lack of basic services—particularly in detention facilities located in remote areas—making it impossible for detainees to access HIV-related health services. Those detained experience a lack of nutritional and dietary supplements. For those arrested and detained awaiting arraignment and trial, there is no policy on provision of health services, nor is there a provision in law to ensure provision of health and HIV services to these individuals. TACAIDS also noted that many prisoners engage in anal sex, in all cases without any form of protection, thereby increasing their risk of HIV infection and of transmitting HIV.

In responding to HIV in places of detention, the document on risks, rights and health recommended that countries must ensure that necessary health care is available (including HIV prevention and care services), regardless of laws criminalizing same-sex acts or harm reduction (33). Such care includes provision of condoms, comprehensive harm-reduction services, and voluntary and evidence-based treatment for drug dependence and antiretroviral therapy.

Further, any treatment offered must satisfy international standards of quality of care in detention settings. Health-care services, including those specifically related to drug use and HIV, must be evidence based, voluntary and offered only where clinically indicated.

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1 Section 10, Immigration Act, Act No. 7 of 1995 (47).
2.7.3 Adolescent girls and women in the HIV response

HIV and AIDS in Tanzania affect women more severely than men. The reasons for this include biological and social inequalities, and general vulnerability of women in the context of HIV. Systemic social exclusion and gender inequality experienced by girls and women in the country is partly perpetuated by harmful cultural and traditional norms and practices, which reinforce their lower socioeconomic status (30). Adolescent girls and young women are substantially affected owing to gender roles prevalent in society, social norms, and their limited access to education and resources, all of which prevent them from making decisions about their health and lives. Harmful laws and practices in relation to early marriage, early pregnancy, and lack of access to confidential sexual and reproductive health services prevent adolescent girls and young women from obtaining essential HIV prevention information and services (48).

The Law of the Child Act, 2009 stipulates the rights of the child (including adolescent girls), and seeks to promote, protect and maintain the welfare of the child. It prescribes a child as any person under the age of 18 years. The HAPCA specifically provides protection for children (which includes adolescent girls) at Section 34, to ensure that they access education, basic health and livelihood services.

The report on risks, rights and health recommended that countries must act to end all forms of violence against women and girls, remove legal barriers that impede women’s access to sexual and reproductive health services, reform property and inheritance laws, and ensure that social protection measures recognize and respond to the needs of HIV-positive women and women whose husbands have died of AIDS (33). Labour laws, social protection and health services must respond to the needs of women who take on caregiving roles in HIV-affected households. Laws prohibiting early marriage should be enacted and enforced. The enforcers of religious and customary laws must prohibit practices that increase HIV risk, such as widow inheritance, “widow cleansing” and female genital mutilation.

In its guidance note on HIV prevention among adolescent girls and young women, UNAIDS urges states and stakeholders to implement programmes that aim to reduce HIV infection among adolescent girls and young women (48). The programmes should aim to reduce HIV infection, and remove legal barriers that prevent them from seeking health services, empowering them to seek HIV and health services, and to seek legal redress when rights are violated.

2.7.4 People with disabilities and the HIV response

People with disabilities include those who have long-term physical, mental, intellectual or sensory impairments that, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others (49).

In July 2004, the Tanzania Ministry of Labour, Youth Development and Sports developed the National policy on disability (50), and in 2010 Tanzania passed and enacted the Persons with Disability Act, 2010 (Act No. 9 of 2010) (51). This Act makes provisions for the health care, social support, accessibility, rehabilitation and promotion of basic rights among others of people with disabilities in the United Republic of Tanzania.

The Tanzania Third National Multi-Sectoral Strategic Framework for HIV and AIDS (2013/14–2017/18) considers disabled people in all forms to be among those who deserve special consideration in HIV programming (6). Access to HIV prevention, care, treatment and support, and sexual and reproductive health and rights services is important for people with disabilities as compared with their peers without disabilities. This is because of stigma and discrimination, exclusion from violence prevention, inaccessibility of health and education services, exclusion from sexuality education and increased economic vulnerability.

UNAIDS urges the inclusion of disability in the HIV response and commitment to counteract underlying inequality and discrimination, and the integration of HIV with disability and rehabilitation services (52).
PART THREE

LEGAL AID PROVISION AND ETHICAL CONSIDERATIONS
3.1 SAMPLE HIV-RELATED LEGAL ISSUES

In the provision of legal advice and litigation support to PLHIV and KVPs, clients may not immediately recognize or disclose their HIV status, or may not realize that their legal issues are HIV related. Pertinent legal issues may be directly related to living with HIV (e.g. discrimination in the workplace) or may be less directly related (e.g. gender-based violence that exposes the client to HIV infection).

3.1.1 Examples of legal issues that may be HIV related

The following are examples of legal issues that may be HIV related, based on a toolkit on scaling up HIV-related legal services (53: p 13):

- Discrimination on the grounds of HIV status, sexual orientation, gender—including transgender status, HIV-related disability, illicit drug use or sex work.
- Problems in accessing treatment, care and support services.
- Problems involving breaches of privacy and confidentiality.
- Violence against women, PLHIV, MSM, transgender people, sex workers, PWID and other KVPs.
- Domestic disputes where one party is living with HIV or is affected by HIV (e.g. child custody, maintenance and property division laws).
- Guardianship and identifying caregivers for orphaned children.
- Forced sterilization or forced abortion.
- Criminal laws concerning HIV transmission.
- Criminal laws that affect sex workers, MSM, transgender people and people who use illicit drugs.
- Illegal police practices, including harassment, rape, violence, arbitrary arrest and extortion.
- Sentencing and prisoners’ rights (including access to condoms, prevention education and HIV treatment).
- Partner notification and contact tracing.

3.2 HIV-RELATED LEGAL SERVICES

Legal information
Clients may seek information about the issues given in Section 3.1 or other issues in the context of HIV. Legal information can be provided orally, or through simple printed materials and other means. The information can be provided by students, or disseminated through a health centre or nongovernmental organization.

Legal advice and counselling
Legal advice is tailored to the specific circumstances and needs of the client, and is provided by a qualified legal practitioner, or by students under their supervision.

Legal representation and litigation support
Forums may be either informal or formal justice settings including courts, quasi-judicial bodies, tribunals, traditional councils, mediations and arbitrations. Representation by the legal representative may be in-person or through written submissions or memoranda. The use of alternative dispute-resolution mechanisms in resolving HIV-related legal issues is encouraged, especially where family members...
are involved and the case is not of a criminal nature. This is because such mechanisms are faster and cheaper, and encourage reconciliation, whereas the court system is adversarial in nature.

Representation and litigation support can also extend to public interest and strategic litigation cases. These cases are undertaken because of their public policy implications—a positive outcome will benefit not only the client, but also the community at large, and may lead to changes in law and policy.

3.2.1 Other strategic services that can be provided by the legal clinic

Stakeholder engagement and education
To ensure the success of the multisectoral approach to HIV, all relevant stakeholders must be involved. In the justice sector these stakeholders include lawyers, the judiciary and law enforcement officers. Other relevant stakeholders include communities of PLHIV and KVPs, health-care workers, law enforcement officers and parliamentarians. The education that could be provided includes building capacities on rights-based approaches in the HIV response, their obligations and what they can do to advocate for and to implement laws that can create an enabling legal environment for PLHIV.

Legal research
Legal clinics and legal academics attached to them can conduct legal research on the implementation of and gaps in the laws used in the HIV response. They can also conduct legal research for drafting court papers to support litigation of cases brought by PLHIV or in support of PLHIV.

Engaging in national dialogues on HIV and advising parliament on legislating on HIV and AIDS. Legal academics supported by legal clinics can engage in national and community debates and dialogues on HIV-related law and policy. Law lecturers can advise the legislature and executive on key HIV-related legal issues.

3.3 LEGAL AND ETHICAL OBLIGATIONS IN THE PROVISION OF LEGAL SERVICES

In provision of legal services to PLHIV and KVPs, legal clinic staff and students should ensure that they advance human rights and the rule of law, protect the rights of their clients and foster the administration of justice. To carry out these tasks, students attached to legal clinics and their supervisors must act in accordance with the law and the recognized standards and ethics of the legal profession in the United Republic of Tanzania. Legal ethics and professional responsibility set out the standards, which comprise ethical principles and duties that legal professionals owe to their clients.

3.3.1 Principles in HIV-related legal service delivery

Nondiscrimination
Students and managers attached to the legal clinic should ensure that there is no discrimination against the clients in the provision of clinic services on the grounds of their real or perceived HIV status, or membership of a KVP group. A nonjudgemental attitude is essential—clients must feel welcomed and respected at all times. Legal service providers are ethically bound by the “cab rank” rule, which obliges a practitioner to act for any person who seeks assistance without discrimination.

Independence
The legal clinic (students and clinic managers) must be independent in representing the interests of the client. The clinic must be free of the state and other powerful interests, to gain the client’s trust and that of other parties, including the court. They must also remain independent of the client, especially emotionally, in order to properly represent the client’s case.
Honesty, integrity and fairness
Those providing legal services at the legal clinic should be honest with the client, respect the fair administration of justice and act with courtesy towards the client.

Loyalty to the client’s interests
The ability to act in the best interests of the client is essential. This is reflected in other ethical duties; for example, the duty to avoid conflicts of interest, maintain confidentiality and maintain independence from external influences.

Confidentiality
The legal clinic managers and supervisors will ensure that all information provided and received in the course of seeking legal services is protected and not disclosed to any third party without the informed consent of the client. Any information shared should be for the benefit of the client and only for the advancement of the case at hand.

Other issues
Other important aspects for consideration in legal support and litigation include the identification of legal issues and choice of forum (i.e. the use of court and quasi-judicial bodies). Collection, preservation and presentation of evidence is important in the provision of litigation support on HIV-related legal issues, including the use of medical and scientific evidence.
ANNEXES
Sample confidentiality agreement

This agreement is made between __________________________the ("receiving party") and ______________ its successors ("disclosing party").

The student or legal clinic manager understands that the client (disclosing party) has disclosed or may disclose information that is strictly private and confidential in nature. This information may include health information “as well as confidential client information” that is protected from disclosure under lawyer–client privilege.

Health information may include, for example, HIV status, and spouse or sexual partner HIV status; medical history; intimate details of sexual partners; and correspondences.

In consideration of the parties’ discussions and any access the receiving party may have to the health information or confidential information of the disclosing party (or both), the receiving party hereby agrees as follows:

1. The receiving party agrees to: (a) hold the disclosing party’s health or confidential information in strict confidence, and take all reasonable precautions to protect such information; (b) not divulge any such health or confidential information to a third party; (c) not make any use whatsoever at any time of such health or confidential information, except for the sole limited purpose of providing legal advice and litigation support. Any person given access to such information must have a legitimate “need to know” and shall be similarly bound in writing.

2. Except to the extent required by law or as expressly agreed to in writing by the disclosing party, the receiving party shall not disclose the existence or subject matter of the legal issue or relationship contemplated by the parties hereto.

3. This agreement is governed by the Laws of the United Republic of Tanzania. It supersedes all prior discussions and writings, and constitutes the entire agreement between the parties with respect to the subject matter thereof.

4. No waiver or modification of this agreement will be binding upon either of the parties unless made in writing and signed by a duly authorized representative. No failure or delay in enforcing any right will be deemed a waiver, and the obligations contained herein shall continue in perpetuity.

SIGNED by the DISCLOSING PARTY

SIGNED by the RECEIVING PARTY

In the presence of:
Client Details Form

Date: 
Information received and compiled by: 

Interviews of witnesses:
  - No
  - Yes
    If yes, by ___________________ on ______________________________

1. Location of human rights violation(s)
   1.1 Date and time of alleged violation(s):
   1.2 District:
   1.3 Institution or person responsible:
   1.4 Address (if applicable):

2. Nature of HIV-related human rights violation
   Number of victim(s):
   Briefly describe the facts of the case (include the events immediately before and after the alleged violation):

   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________

3. Alleged offender
   Who is/are the alleged offender(s) (e.g. law enforcement officers, health-care workers or family members)
   Names (include nicknames, if any):

   ____________________________________________________________
   Profession/occupation:

   ____________________________________________________________
   Address (if known):

   ____________________________________________________________

4. Evidence available
   List of witnesses:

   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
Forensic evidence (state whether taken by police, e.g. skin sample, blood sample, hair sample or semen):

Court records (state case number, parties and name of court or judicial body), if any

Hospital records (e.g. admission and discharge records, P3 forms or police abstract), if any:

Photographs:

Other:

5. Has the case been reported to any authority or organization?

Complaint lodged:

Have any investigations been carried out? If yes, by whom?

When?

Where?

What measures are being taken to address the case?

Have you tried any form of alternative dispute resolution to resolve the matter? (If so, please give details)
6. Client identification information
  6.1 Name (optional):
  6.2 Age:
  6.3 Sex:
  6.4 Profession/occupation:
  6.5 Address/ telephone no:
  6.6 Nationality:
  6.7 Religion (optional):
  6.8 Other identity-related status (please explain):
REFERENCES

Key references
(note: documents are listed in reverse chronological order)

SALC. HIV criminalisation case compendium. Johannesburg, South Africa: South African Litigation Centre (SALC); 2018 (55)
This publication aims to support lawyers acting for those who are alleged to have put others at risk of HIV. Based on research conducted in late 2017, it includes criminal cases from all over the world where strong defence arguments have resulted in an acquittal or reduced penalty for people living with HIV who have been accused of HIV exposure, nondisclosure or transmission.

Right to health (UNAIDS, 2017) (56)
In November 2017, the Joint United Nations Programme on HIV/AIDS (UNAIDS) launched a new report showing the progress made on access to treatment. The report, Right to health, highlights that the people most marginalized in society and most affected by HIV are still facing major challenges in accessing the health and social services they need. The report makes it clear that states have basic human rights obligations to respect, protect and fulfil the right to health.

This handbook aims to assist judges and legal professionals in handling matters related to HIV and AIDS, with a focus on employment and occupation. It provides information on relevant national and international law and its application in domestic courts operating in diverse legal traditions and frameworks. The handbook and its accompanying training materials and discussions of cases will assist legal academics, lawyers and students in ensuring effective and transparent access to social justice and observance of the fundamental labour rights of all those living with or affected by the epidemic.

This book examines the multidisciplinary field of health law within the broader health-related legal and policy frameworks. It employs rights-based approaches to address some of the major health challenges in Uganda. HIV and the law is discussed in Chapter 5 under public health law and human rights.

Judging the epidemic: a judicial handbook on HIV, human rights and the law (UNAIDS, 2013) (1)
This document articulates critical legal and human rights considerations and best practices. Each chapter provides an overview of applicable international, regional and national laws and human rights norms; suggests key considerations that are relevant to the adjudication of HIV-related cases; and summarizes pertinent cases from different jurisdictions.

The United Nations Development Programme (UNDP) convened the Global Commission on HIV and the Law to examine the impact of the law on HIV responses. Some of the key topics examined include:

- Criminalization of HIV transmission, exposure and non-disclosure.
- The impact of discrimination on people living with HIV (PLHIV).
- The criminalization of behaviours and practices such as drug use, sex work and same-sex sexual relations; and issues of prisoners and migrants.
- The impact of discriminatory laws and practices related to women and girls as well as children and youth in the context of HIV.
- Intellectual property in the context of access to treatment.
The report analyses the critical role of the laws and human rights based legal environments in the well-being of PLHIV and those vulnerable to HIV.

**Toolkit: Scaling up HIV-related legal services (IDLO, UNAIDS, UNDP, 2009) (54)**

This toolkit provides a practical resource to help improve the quality and impact of HIV-related legal services, and to expand the availability of such services. It provides guidance on factors to consider when designing and scaling up legal service programmes related to HIV. It also provides guidance about different models and approaches for delivering, monitoring and evaluating HIV-related legal services, and gives information about resource mobilization.

**The HIV and AIDS Tribunal Compendium of cases, 1st edition (UNDP, Kenya Legal and Ethical Issues Network (KELIN) and The HIV and AIDS Tribunal, undated) (57)**

The compendium is intended to support lawyers, judges, legal researchers, students and the general public in understanding and appreciating how the law has been applied and interpreted to protect and promote the rights of PLHIV.

**Other international and regional documents**

2. UNAIDS (2017) Disability and HIV (53)
4. WHO (2016) Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations (38) (6)
5. The 2030 Agenda for Sustainable Development, Sustainable Development Goals (6)
7. UNAIDS terminology guidelines (2015) (37)
10. UN General Assembly (2016) Political Declaration on HIV/AIDS (10)
Statutes

- The Employment and Labour Relations Act, 2006 (41)
- Persons with Disabilities Act, 2010 (26, 51)
- The HIV and AIDS (Prevention and Control) Act, 2008 (26)
- The Penal Code, Cap. 16, 2002 (35)
- The Land Act, Chapter 113 (1999) (45)
- The Drugs and Prevention of the Illicit Traffic in Drugs Act Cap. 95, 1996 (58)
- The Constitution of the United Republic of Tanzania, 1977 (25, 51)
- The Immigration Act, Act No. 7 of 1995 (47)

National policies and guidelines

4. The report on the legal environment assessment in response to HIV and AIDS within the United Republic of Tanzania, 2013 (30)
5. National guidelines for comprehensive care services for prevention of mother-to-child transmission of HIV and keeping their mothers alive, 2013 (27)
8. National policy on disability, 2004 (50)

Full list of references


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57. UNDP. Compendium of judgements: background material – judicial dialogue on HIV, human rights and

