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SYMPOSIUM INTERNATIONALE DE REFLEXION SUR LE SIDA

PARIS 22-23 OCTOBRE 1987

THE OPPORTUNITIES OF AIDS LAW AND THE AIDS CHECKLIST

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Australia

THE PROBLEM: LOCAL LAW - INTERNATIONAL DANGER

Law is primarily local. Rules, institutions, traditions and personnel tend to be confined to operating in their own jurisdictions. AIDS is international. In the last WHO report (September 1987) 60,653 cases of AIDS had been notified in 124 countries. WHO says that this represents only a fraction of the actual global total and only one or two percent of the 5 to 10 million people probably carrying the AIDS virus. Australia has notified 562 confirmed "Category A" AIDS cases. There have been 319 deaths. Between 50,000 and 100,000 people in my country are estimated to carry the virus. In the latest Australian Budget an increase of AIDS related expenditure of 76% was approved by Parliament, with widespread support. AIDS stories in the media have begun to nudge aside stories on police corruption, sporting heroes and the Royal Family. Public awareness is high and growing.

The law has a relatively minor place to play in the global and national strategies against AIDS. Until there is a vaccine

and a cure, legal provisions, both at local, national and international level address the problems and needs presented by the continuing spread of the virus. There are no universal truths. At this stage, it is not even possible to say that identifiable patterns of legislation dealing with AIDS have emerged. Furthermore, AIDS related legal problems arise incidently to other issues, including in the courts. In my own country three recent court cases illustrate this proposition:-

- \* It was held in my own Court (by majority) that the virtual isolation of a prisoner with a positive antibody test did not warrant reduction in his prison sentence on the ground of added intensity of hardship. I dissented and would have reduced the period of imprisonment.
- \* A judge has refused to grant access to Red Cross records to permit identification of a donor of blood later found to have been infected with the virus.
- \* A patient who received infected blood was held to be out of time to sue the blood bank when AIDS was diagnosed more than three years later.

Laws on AIDS - whether made by legislators, judges or bureaucrats - must fit into already developed, complex legal systems - including national and international public health laws. Generalisations are therefore dangerous.

#### THE OPPORTUNITIES

Nevertheless, three generalisations can be offered concerning the opportunities which are presented to law makers

by the AIDS epidemic:-

- (1) International Co-Operation: The very international character of the infection, and the modern means by which it may be rapidly spread, imposes an obligation of close international cooperation in developing laws and health strategies to combat AIDS. Having regard to the nature of the virus, going at it alone is a strategy which is bound to fail.
- (2) Anti-Discrimination: Because there is no vaccine or cure, initial strategies must be targeted on the prevention of the spread of the virus.  
Laws must be mobilised to support and advance that target. This means public education in prevention. Because this involves health and sex education, it may contribute, uniquely, to destroying, rather than reinforcing, stereotypes and prejudice. For once, public health objectives coincide neatly with human rights and anti-discrimination objectives. By being forced to deal with the problems of high risk groups, more rational laws and policies on human sexuality and drug use may be forced on the international community by the sheer necessity of containing a deadly, and so far, incurable virus.
- (3) Behaviour modification by law: Until now, laws have tended to be made with relatively little consideration to the science of jurisprudence. Designing legal sanctions and remedies which will

work (as distinct from those that will simply have a symbolic value or be relatively ineffective) has not been closely attended to in any country. All too often, laws are enacted or made with little consideration as to how they will differentially achieve specified social objects. Too many people think that by making a law, the sought for object will be secured. A simplistic illustration is a criminal law barring antibody positive people from having sex without warning their partner, upon sanction of a criminal penalty. Such a law may have symbolic value. But it is scarcely likely to be effective in large scale behavior modification. The very urgency of the sudden advent and spread of the AIDS virus, adds a new urgency to identifying the objects of AIDS related laws and then to targeting those laws, with precision and accuracy, at achievable goals. To put it quite bluntly, so long as there is no vaccine or cure for AIDS, it would probably be a greater contribution on the part of the legal system to preventing the spread of AIDS to mandate the widespread availability of condoms and condom vending machines and the provision of lubricants with packeted condoms (to prevent breakage) than solemnly to enact criminal laws or laws from mandatory testing. Yet in Australia, one State government recently sent the police to a university student building to remove a

condom vending machine from a toilet on the grounds that it was illegal. In the United States, citizen groups have denounced early education warnings to school children. Yet what is at stake is not sex education but instruction in the art of survival in the face of a deadly virus. Many decent citizens call for universal testing, although it would be fearfully expensive, lead to no preventive measures and risk discrimination.

Legislators, public policy makers and lawyers must maximise these three opportunities. International cooperation. Promotion of health saving anti-discrimination. Provision of laws which actually work because of the fine tuning of the sanctions and remedies provided by such laws. The enactment of legislation can have symbolic value. It is seen to be doing something. In democracies, particularly at election times, this can be attractive to politicians and those who advise them. But if we are really serious about containment of the AIDS virus, the primary thrust of our laws, if they are to be effective, must be, at this stage, promotion of knowledge of the risk and of the means of preventing the acquisition of the risk. A realisation of this basic reality presents very real problems for a rational and effective policy of legislation on AIDS.

#### A LEGAL CHECK LIST

By reference to presently enacted or proposed laws, the following legal check list can be provided, in summary form. It is not exhaustive. It is not meant to provide a badge of approval, or disapproval of the legislation referred to. It is

simply a list of some of the chief measures which have been adopted in various jurisdictions, in response to the sudden presentation of AIDS.

International

- \* Laws prohibiting or limiting travel.
- \* Laws providing for international certification.
- \* Laws providing for notification of statistical and epidemiological data to WHO and regional agencies.

Human Rights

- \* Laws providing specific prohibitions against discrimination on the grounds of AIDS or AIDS related conditions (ARC).
- \* Laws providing protection against discrimination for specified high risk groups, notably homosexuals, handicapped persons, drug addicts etc.
- \* Laws and judicial decisions extending previously enacted protection, eg on the basis of homosexuality or handicap, to AIDS.
- \* Laws promoting or supporting the removal of media misinformation, hype or the incitement of hatred and contempt against stigmatised groups with AIDS or ARC.
- \* Laws requiring notification of rights and privileges to persons with AIDS and ARC.

Criminal Laws

- \* New laws, or the extension of old laws, punishing knowing transmission of the AIDS virus, without warning.
- \* Laws and prosecution policies for charging offenders

with attempted murder, eg in cases of biting police officers.

- \* Laws and prison policies governing mandatory testing of prisoners, with consequences for isolation and differential punishment.
- \* Laws and prison policy concerning the provision of condoms and clean syringes in prisons to prisoners to prevent the transmission of AIDS.

#### Notification Laws

- \* Laws requiring medical practitioners etc to notify in statistical or identifiable form reports of patients found positive to the antibodies test.
- \* Law and judicial decisions relating to warnings and advice to patients, their families, children and others concerning the presence of antibodies.
- \* Laws controlling the dissemination of the above data, including in public or private health insurance systems.

#### Public Health

- \* Laws controlling donation of blood to blood banks.
- \* Laws controlling the management, of or requiring closure of, high risk venues (bath houses, massage parlours etc).
- \* Laws authorising tracing of sexual partners.
- \* Laws forbidding acupuncture and organ transplantation.
- \* Laws authorising the provision of clean syringes for intravenous drug users.
- \* Laws and hospital and other practices concerning antibody testing prior to surgery (including dental surgery).



- \* Modification of mental health laws to deal with end stage AIDS patients.
- \* Mandatory testing laws for particular identifiable groups.
- \* Compulsory detention and quarantine laws for particular identifiable groups.
- \* Censorship laws on pornography displaying unprotected sex acts.

Employment

- \* Laws and policies controlling discrimination in employment, including provisions for reinstatement of persons dismissed on the grounds of AIDS or ARC.
- \* Laws and general policies concerning the testing of employees for antibodies, particularly in the public sector.
- \* Specific policy on compulsory testing of members of the armed forces and refusal of employment to antibody positive applicants as recruits in such services.

Social Security

- \* Provision of legal aid or other counselling to persons contending discrimination or other breach of the laws relevant to people with AIDS.
- \* Modification of pension provisions in relation to the premature retirement of young persons with AIDS and ARC.
- \* Laws governing the provision of housing, nursing care, transport and other accommodation for persons with AIDS or ARC.

- \* Provision of mental and dental care for indigent persons with AIDS or ARC.
- \* Modification of pension laws providing pensions for "carers", although not married or otherwise related to AIDS patient.
- \* Provision of counselling, psychiatric and other care.
- \* Provision of hospices for the dying and grossly disabled, including amendments to taxation and other laws to facilitate the provision of such service.
- \* Provision of a fund for compensating health workers who acquire AIDS.
- \* Provision of a fund for compensating haemophiliacs and other victims of AIDS.
- \* Provision of universal health cover.

#### Regulatory Provisions

- \* Modification of laws on the use of experimental therapeutic drugs.
- \* Modification of laws relating to the importation of therapeutic drugs cleared overseas but not yet available locally.

#### Immigration and Travel

- \* Laws and policies adopted in government airlines concerning carriage of passengers with AIDS and ARC.
- \* Laws governing mandatory testing of foreign visitors.
- \* Laws governing mandatory testing of prospective immigrants.

#### Family Law

- \* Amendment of divorce laws to provide for grounds of

divorce on the basis of acquisition by one party of AIDS or ARC.

- \* Laws and judicial decisions on the award or denial of custody of a child to a parent with AIDS.
- \* Consideration of laws on intestacy of young persons who die with AIDS and provision for the passing of property, in default of a will, to carers and others in a defacto relationship.
- \* Amendment of family support legislation to provide for claims on the estates of AIDS victims of carers and others.

#### Insurance

- \* Laws forbidding or controlling discrimination in the provision of insurance on grounds related to AIDS or ARC.
- \* Laws limiting questions and precautions that may be taken by insurers, eg limiting questions to relevant behavior rather than whether the proposer has undergone an antibody test or is a member of a high risk group.
- \* Laws strictly controlling the dissemination of personal data provided in relation to insurance and AIDS related questions.
- \* Provision of laws on publicly funded and national health insurance assistance schemes.

#### Euthanasia

- \* Modification of laws on suicide and provision of new laws on euthanasia to permit assistance to terminal AIDS patients who so decide, to bring their lives to an end.

- \* Provision of a "living will" by which terminal AIDS patients can forbid life sustaining measures in certain circumstances.

Education and Positive Measures

- \* Laws to permit education of school children and others concerning the AIDS virus and its risks and means of prevention.
- \* Laws to provide widespread availability of condoms and to render lawful condom vending machines, and sale of condoms in supermarkets etc.
- \* Laws controlling the quality of condom manufacture.
- \* Laws to guarantee confidentiality of AIDS test results, including in social security, medical insurance and other computerised personal data systems.
- \* Laws targeted on alcohol sale in particular circumstances, where inhibition of "safe sex" conduct may give rise to particular risks.
- \* Laws to facilitate and promote public education generally concerning the risks of AIDS and methods of prevention.
- \* Laws to provide research, including social research, particularly in relation to the causes and circumstances of sero-conversion.
- \* Laws providing high level, multi disciplinary and representative advisory bodies to monitor medical, social and other research so as to ensure that future laws and policies will avoid inefficiency, discrimination and counterproductive consequences.

TURNING DISASTER TO AN ACHIEVEMENT

The above is a check list of the kinds of laws which have already been made to deal with AIDS. But we are only at the brink of the legal responses to this challenge to the international community. Learning from the inefficiencies and counterproductive stigmatisation and discrimination of previous legal responses to earlier epidemics, lawyers and law-makers should endeavour, on this occasion, to be more scientific in the development of laws and policies to combat AIDS. Out of the urgent needs for international co-operation in implementing effective, well targeted laws may arise a positive contribution to international peace and understanding born of shared necessity. Whatever else divides humanity, we can all unite in the defence of our species facing this specially dangerous peril. Out of our international co-operation (and despite much individual suffering and death), some good may come from this terrible epidemic.