

**MEMORANDUM ON A BILL TO PROHIBIT STIGMATIZATION AND
DISCRIMINATION AGAINST PEOPLE LIVING WITH HIV/AIDS AND TO
REGULATE THE PRACTICE OF HIV AIDS COUNSELLING AND TESTING AND
FOR OTHER MATTERS CONNECTED THEREWITH.**

**PRESENTED BY
LAWYERS ALERT
IN**

**DURING THE PUBLIC HEARING BY THE AKWA IBOM STATE HOUSE OF
ASSEMBLY**

4TH SEPTEMBER, 2024.

BACKGROUND

This memorandum is submitted in response to the call for public hearing on the proposed bill by the Akwa Ibom State House of Assembly concerning the protection of persons living with HIV & AIDS (PLHIV) from stigmatization and discrimination. As advocates for human rights and community rights and gender response to HIV/AIDS, Lawyers Alert support the intent of this bill, which seeks to safeguard the rights of PLHIV by prohibiting discrimination in various settings, including employment, healthcare, education, and social services. The bill aligns with international human rights standards, including the United Nations Declaration of Commitment on HIV/AIDS and the HIV/AIDS Anti-Discrimination Act of 2014. We commend the initiative to address this critical issue and present our perspectives and recommendations to ensure the bill effectively achieves its intended objectives. Lawyers Alert has put together this memoranda highlighting certain alterations that will address some salient provisions of the Bill and strengthen it.

MEMORANDUM ON BILL

Criminalization of HIV Infection

Section 37 on Intentional transmission of HIV/AIDS provides that *“Any person who wilfully, intentionally and out of carelessness transmits HIV/AIDS to another person commits an offence and upon conviction shall be liable to community service”*. It is agreed that the use of such words as “intentionally”, “wilfully”, “knowingly”, and “deliberately” to couch legislations that criminalize HIV as contained in Anti-Stigma Bill can pose a lot of hindrance in the way of interpretations. Besides, the elusive nature of the operative words usually takes away the required objectivity. It is difficult to arrive at an objective measure of what constitutes wilful, intentional or even careless transmission as intended by the piece of legislation. HIV criminalization can foster torture, inhumane and degrading treatment of PLHIV which are contrary to or in violations of the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Anti-Torture Act 2017, and numerous international instruments to which Nigeria is signatory and has ratified.

The language of the section is quiet problematic because it conflates "willful" and "intentional" transmission with "carelessness," thereby failing to distinguish between different levels of culpability. Carelessness is a subjective term and can be interpreted broadly, leading to inconsistent and potentially unjust applications of the law. This ambiguity could result in prosecutions based on misunderstandings of HIV transmission risks or situations where transmission was accidental, rather than intentional. For instance, the concept of "carelessness" could be applied to individuals who were unaware of their HIV status or who did not have access to adequate information about prevention methods. Criminalizing such behaviors could disproportionately impact vulnerable groups, further marginalizing PLHIV.

It has been established across the world that criminalizing HIV is counter-productive. Rather than yield the desired results, the move has always ended up adding salt to the injury of victims of criminalization. This supports the call for an end to criminalization and the need for law and policy makers to refrain from dabbling into the arena. Indeed, arguments that support decriminalization far outweigh those that discourage it. From a public health standpoint, punitive measures like those outlined in Section 37 are counterproductive. They do not address the root causes of HIV transmission, such as lack of access to healthcare, education, and prevention services. Instead, they may discourage people from getting tested or disclosing their status, thereby increasing the risk of transmission rather than reducing it.

Inline with the UNAIDS recommendation on fewer punitive laws and more supportive policies in favour of expanding programmes proven to reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV-negative. Any section that criminalizes the transmission of HIV can lead to human rights violations by increasing stigma, discouraging testing, and disproportionately affecting vulnerable groups. This approach is contrary to public health goals and human rights principles.

Instead we advocate for the removal of any criminalization clauses. Instead, emphasize prevention, education, and support for PLHIV.

Breach of Confidentiality

Section 31 of the Bill introduces a provision that permits a medical practitioner or other authorized officer to notify the sexual partner of an individual who has tested positive for HIV/AIDS if the practitioner reasonably believes that the individual poses a risk of transmission and has failed to inform their partner despite being given the opportunity to do so. This provision raises significant concerns regarding the duty of confidentiality, which is a cornerstone of medical ethics. The duty of confidentiality obligates healthcare providers to protect the privacy of patients' health information, including their HIV status, unless there is a compelling legal or ethical reason to disclose it. Breaching this duty can undermine trust in healthcare systems, deter individuals from seeking testing or treatment, and potentially expose them to stigma and discrimination.

While the provision aims to protect the health of the sexual partner, it creates a conflict between public health interests and the individual's right to privacy and autonomy. The decision to disclose a patient's HIV status without their consent can be seen as a violation of their right to confidentiality and may lead to legal and ethical dilemmas. The individual's right to privacy is protected under various human rights frameworks, which emphasize that any interference with this right must be lawful, necessary, and proportionate. In this context, the provision could be challenged for potentially infringing on the individual's rights, especially if the criteria for breaching confidentiality

are not clearly defined or if less intrusive means of protecting the partner's health are available.

This provision undermines the autonomy and dignity of PLHIV by placing their personal health information in the hands of medical practitioners who are empowered to make subjective judgments about the "risk" they pose to others. This can lead to arbitrary and inconsistent applications of the law, where the decision to breach confidentiality may be influenced by personal biases or misunderstandings about HIV transmission. The duty to protect public health should not override the individual's right to privacy without clear and compelling evidence that such a breach is necessary and proportionate. In many cases, encouraging open communication and providing counseling and support to PLHIV to disclose their status voluntarily would be a more effective and rights-respecting approach. The provision's requirement that a person has been given a "reasonable opportunity" to inform their partner is vague and subjective, raising questions about what constitutes "reasonable" and who determines this standard.

The lack of clear guidelines and safeguards in Section 31 opens the door to potential abuses of power and unjustified breaches of confidentiality. To align with human rights principles, the Bill should emphasize the importance of voluntary disclosure and informed consent while providing support mechanisms for PLHIV to safely communicate their status. The protection of partners from transmission should be pursued through non-coercive, rights-based approaches that respect the confidentiality and dignity of all individuals involved.

Moreover, the provision might inadvertently exacerbate stigma and discrimination against persons living with HIV/AIDS. By allowing for disclosure without consent, it could reinforce negative stereotypes and fears associated with HIV, leading to social ostracization and discrimination against those affected. This outcome would be contrary to the broader objectives of public health and human rights, which aim to combat stigma and ensure that persons living with HIV/AIDS are treated with dignity and respect. It is essential that the Bill balances the protection of third parties with the rights and confidentiality of a person, ensuring that any disclosure is carried out in a manner that is ethical, lawful, and justifiable. To align with human rights principles, the Bill should emphasize the importance of voluntary disclosure and informed consent while providing support mechanisms for PLHIV to safely communicate their status. The protection of partners from transmission should be pursued through non-coercive, rights-based approaches that respect the confidentiality and dignity of all individuals involved.

Community, Rights, Gender-Transformative and Gender-Affirmative Approach to Health to address stigma and discrimination

We recommend that there is a need to institutionalize gender equality and human rights in the ending stigma and discrimination with regards to HIV/AIDS. We recommend the establishment of a dedicated Gender and Human Rights Department/Unit within the Akwa Ibom State Agency for the Control of AIDs. responsible for coordinating HIV/AIDS

efforts with regards to women, girls and other vulnerable groups. This department should be tasked with ensuring that all HIV/AIDS policies, programs, and initiatives are designed and implemented in ways that empower women, girls and marginalized groups. The adoption of a community, rights, gender-transformative, and gender-affirmative approach towards ending stigma and discrimination, particularly through the establishment of a Gender and Human Rights Department within the State Agency, will represent a significant step forward in the fight against HIV/AIDS.

This approach will not only empower women and other vulnerable groups but also ensure that they are treated equally and with dignity in all health interventions free from stigma and discrimination. It will also ensure that all health policies are gender-responsive and uphold the rights of women, including their right to access quality healthcare without discrimination. By institutionalizing these practices, Akwa Ibom State will set a precedent for other states, demonstrating a gender transformative and gender affirmative approach to HIV/AIDS that is both effective and equitable.

Forced HIV Testing for accused person in criminal charge

Section 23 of the Bill permits the mandatory HIV/AIDS testing of individuals charged with sexual offenses for the purpose of criminal investigation, regardless of their consent. This provision raises several critical concerns when analyzed through the lens of the presumption of innocence, the right to confidentiality, and other fundamental human rights principles.

The principle of the presumption of innocence is a cornerstone of criminal justice, asserting that an individual is considered innocent until proven guilty. Section 23 challenges this principle by subjecting individuals charged with, but not yet convicted of, sexual offenses to mandatory HIV testing. This pre-emptive measure treats the accused as though they have already been found guilty, thereby undermining their right to be presumed innocent. The imposition of mandatory testing without a conviction not only stigmatizes the accused. From a legal standpoint, the provision may also lead to disproportionate and unjust outcomes. It could result in the criminalization and further marginalization of persons based on their health status, rather than focusing on the actual offense they are charged with. The relevance of a person's HIV status to the investigation of a sexual offense is questionable and could be misused to unfairly influence the outcome of legal proceedings.

Mandating HIV testing without consent violates a person's right to privacy and confidentiality, it involves the disclosure of highly sensitive personal health information. This provision treats a person's HIV status as a tool for criminal investigation rather than a matter of personal health, potentially leading to further stigmatization and discrimination against those who test positive. By bypassing the need for consent, Section 23 strips individuals of their autonomy and agency, imposing a medical procedure that may not be in their best interest and which they may not agree to. This

coercive approach not only violates individual rights but also sets a dangerous precedent where state interests are placed above personal freedoms and rights.

Instead of mandatory testing, the law should prioritize voluntary testing and counseling, respecting individuals' rights while providing appropriate support and services. In event that testing of the accused person becomes expedient given the circumstances of the case and trial, it should only be directed by the court after due consideration

Conclusion

It is the firm belief of Lawyers Alert, that the passage of this bill represents a significant step toward upholding the rights and dignity of PLHIV in Akwa Ibom State. We urge the House of Assembly to consider our recommendations to enhance the bill's effectiveness. We remain committed to supporting the implementation of this law and advocating for the rights of all persons living with HIV & AIDS.

Rommy Mom President,

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For: **LAWYERS ALERT**