

HIV, Disability and Human Rights:

**Opportunities offered by the
United Nations Convention on the Rights of Persons with Disabilities**

A Discussion Paper

March 2008

**Canadian HIV/AIDS Legal Network
Canadian Working Group on HIV and Rehabilitation
Interagency Coalition on AIDS and Development**



Canadian Working Group on HIV and Rehabilitation
Groupe de travail canadien sur le VIH et la réinsertion sociale



Acknowledgements

This discussion paper was prepared by the Canadian HIV/AIDS Legal Network, with input from the Canadian Working Group on HIV and Rehabilitation (CWGHR) and the Interagency Coalition on AIDS and Development (ICAD).

French translation: Jean Dussault, Nota Bene Communications

Spanish translation: Arturo J. Marcano

Funding for this publication was provided by the International Affairs Directorate, Health Canada. The opinions expressed in this publication are those of the author and do not necessarily represent the official views of Health Canada.

Canadian HIV/AIDS Legal Network

1240 Bay Street, Suite 600

Toronto, ON M5R 2A7

Ph: +1 416 595-1666

Fax: +1 416-595-0094

info@aidslaw.ca

www.aidslaw.ca

Canadian Working Group on HIV and Rehabilitation (CWGHR)

1240 Bay Street, Suite 600

Toronto, ON M5R 2A7

Ph: +1 416-513-0440

Fax: +1 416-595-0094

info@hivandrehab.ca

www.hivandrehab.ca

Interagency Coalition on AIDS and Development (ICAD)

1 Nicholas Street, Suite 726

Ottawa, Ontario (Canada) K1N 7B7

Ph: +1 (613) 233-7440

Fax: +1(613) 233-8361

info@icad-cisd.com

www.icad-cisd.com

ISBN: 978-0-9810430-0-5

Table of Contents

1. Introduction	4
2. HIV and disability: key links	4
3. HIV and disability in the international human rights system	6
3.1 International law and disability	7
3.2 International law and HIV	10
4. National anti-discrimination law: disability and HIV	11
5. Conclusion	13

ANNEXES

ANNEX 1: Questions for discussion	14
ANNEX 2: Examples of national laws on HIV and disability	16
ANNEX 3: WHO’s International Classification of Functioning, Disability and Health	21

1. Introduction

Stigma and discrimination constitute one of the greatest barriers to dealing effectively with the HIV epidemic, underlying a range of human rights violations and hindering access to prevention, care, treatment and support. Some have called for the creation of an international human rights convention to address discrimination and other human rights violations against people living with HIV or AIDS (PLWHAs). Others have felt that such an effort is impractical and unnecessary. Impractical, because it can take decades to develop and negotiate a treaty through the United Nations, even where there is interest among Member States. Unnecessary, because international human rights treaties have already been interpreted as prohibiting discrimination based on health status, including HIV and AIDS, which also means that discrimination in the enjoyment of all other human rights protected by these treaties is also prohibited. Nonetheless, the extent of states' obligations to address discrimination on the grounds of HIV status has not been comprehensively addressed in an international instrument.

In December 2006, the UN General Assembly adopted the *Convention on the Rights of Persons with Disabilities* ("Disability Convention"), which will come into force in May 2008. The Disability Convention addresses many of the issues faced by PLWHAs, but it does not explicitly include HIV or AIDS within the open-ended definition of "disability". As countries ratify the Convention, they are required to amend national laws and policies to give greater protection to people with disabilities.

The purpose of this paper is to provide background information and explore perspectives on the potential value, opportunities and challenges of recognizing HIV as a disability under the law, both nationally and through an explicit interpretation of the Disability Convention. This paper has been developed to promote discussion between AIDS, disability and human rights advocates of potential strategies for collaboration.

2. HIV and disability: key links

There are many links between HIV and (other) disabilities. As a result, there are growing calls for partnership between HIV activists and disability activists in responding to human rights concerns, including discrimination.

Although in the recent years the disability rights movement has made significant advances, similarly to PLWHAs, people with disabilities often encounter stereotyping, discrimination and other infringement of human rights. People with disabilities are among the most marginalized in the world, and the implications of HIV infection for people with disabilities have been largely ignored. Research has identified HIV as a significant but relatively unrecognised problem among people with disabilities worldwide.¹ It shows higher levels of illiteracy, unemployment and poverty among people with disabilities, factors linked to vulnerability to HIV and to a greater impact of

¹ The World Bank/Yale University Global Survey on HIV/AIDS and Disability. *HIV/AIDS and Disability: Capturing Hidden Voices* (2004). Also see N.E. Groce, "HIV/AIDS and People with Disability", *Lancet* 2006; 361: 1401-1402.

HIV infection. Women, members of ethnic and other minority communities, youth, and people living in institutions are particularly at risk. It is often incorrectly assumed that people with disabilities are not sexually active and are unlikely to use illegal drugs in ways that carry a risk of HIV infection. Thus HIV education and other prevention efforts focussed on reducing transmission through sex or drug use are rarely specifically targeted to people with disabilities.² Over the last few years awareness of the importance of ensuring access to such services has increased, more HIV projects with a disability focus are being initiated, and more resources are becoming available.

However, analysis of discussions between the disability rights movement and HIV activists shows a gap between HIV activism and disability activism. A major factor leading to the lack of cooperation between the two movements is that both PLWHAs and people with disabilities are extremely stigmatised and marginalised.

Recently there are more and more calls for more unity between the two.³

Both disability and HIV movements could gain from increased diversity and perspective. People with disabilities are at an increased risk of contracting HIV; alliances with PLWHAs and AIDS organizations can strengthen HIV education and prevention efforts to protect people with disabilities. There are many advantages for inclusion of PLWHA as part of the disability rights movement. Recognition of HIV and

BOX 1: Evolution of perspectives on disability

Conceptions of disability have developed through several stages:

“The **impairment perspective** considers disability a health problem or abnormality that is situated in an individual’s body or mind. This perspective is best expressed by the *medical model* which views disability in terms of disease, illness, abnormality and personal tragedy. The medical model assumes that disability is an intrinsic characteristic of individuals with disabilities. This assumption translates into practices that attempt to *fix* individuals’ abnormalities and defects, which are seen as strictly personal conditions.

“The **functional limitations perspective** arose from attempts to expand the medical model to include non-medical criteria of disability, especially the social and physical environment. Nonetheless, the notion that impairments are the direct cause of disability remains central to this perspective.

“The **ecological perspective**... sees disability as resulting from the interaction of impairment, activity limitations and participation restrictions in a specific social or physical environment such as work, home or school. [...] There are many variations of the *social model*, but all portray disability as a social construct created by ability-oriented and ability-dominated environments.... According to the social model, even though impairment has an objective reality that is attached to the body or mind, disability has more to do with society's failure to account for the needs of persons with disabilities. The *human rights model* is a distinct subgroup of the social model. It understands disability as a social construct. The model is primarily concerned with the individual's inherent dignity as a human being (and sometimes, if at all, with the individual's medical characteristics).”

Office for Disability Issues, Human Resources Development Canada. *Defining Disability: A Complex Issue* (2003), online: www.hrsdc.gc.ca/en/hip/odi/documents/Definitions/Definitions.pdf

² Ibid.

³ M. Tataryn, *Bridging the gap: a call for cooperation between HIV/AIDS activists and the global disability movement* (19 August 2005), online: <http://v1.dpi.org/lang-en/resources/details.php?page=325>; C. Bell, *Is AIDS Really a Disability? Or What Can AIDS Lend to Disability Phenomenology and Culture?* (19 August 2005), online: <http://v1.dpi.org/lang-en/resources/details.php?page=324>.

AIDS as disabilities for legal purposes may entitle PLWHAs to health, employment or other benefits, as well as to the benefits from laws protecting against discrimination, including the requirement of *reasonable accommodation* (discussed below) of disability. Seeing commonalities in the stigma and discrimination experienced by both PLWHAs and people with disabilities will increase tolerance and better understanding across these (overlapping) communities, and will strengthen both in overcoming stigma and discrimination. Finally, working together in greater numbers will strengthen a common voice for changing public policy, in ways that benefit all people, those living with HIV and those living with (other) disabilities. Cross-disability coalitions highlight that these issues affect an even greater portion of the population, mobilizing greater support and more attention from decision-makers. For example, in the context of seeking changes to policies and programs providing income support to people with disabilities, collaboration between HIV advocates and advocates from other disability groups not only supports exchange of knowledge on the research, policies and models that affect both groups, but also increases the potential and opportunities to inform public policy, since it engages a much broader base of people than if HIV or disability groups are working on issues alone.

3. HIV and disability in the international human rights system

One such area for collaboration is in international advocacy for the human rights of people living with disabilities and PLWHAs, including using the mechanisms of the United Nations to claim and defend human rights. The UN human rights system consists of numerous instruments (e.g., declarations and treaties) and a number of different offices, agencies and mechanisms for trying to ensure governments live up to their human rights obligations.

The *Universal Declaration of Human Rights* sets out key human rights principles that shape the rest of international law on human rights, including the fundamental principle of non-discrimination. Numerous treaties on human rights create legally binding obligations on the governments that have agreed to those obligations by ratifying those treaties. Several “core” human rights treaties are widely ratified by most of the world’s countries. These protect *civil and political rights* (e.g., freedom from cruel, inhuman or degrading treatment; the right to privacy, the right to liberty, freedom to express and to seek information) and *economic, social and cultural rights* (e.g., the right to the highest attainable standard of health; the right to equal pay for work of equal value; the right to education; the right to social insurance). They also include treaties specifically addressing particular kinds of human rights abuses (e.g., torture, abduction) or discrimination (e.g., racial discrimination) and the rights of particular groups, such as women, children, migrant workers, and people with disabilities.

Several different mechanisms exist to monitor whether and how countries are living up to their obligations under each of these treaties, and to encourage them in doing so:

- Each of the core human rights treaties is overseen by a **committee** that consists of independent experts that regularly review countries' progress under the treaties. In some cases, these committees can receive complaints from individuals or groups about specific human rights violations by government, and can issue findings and recommendations to governments to remedy the situation. An *optional protocol* to the Disability Convention creates such a committee that could receive and “judge” complaints.
- The **Office of the UN High Commissioner for Human Rights** (OHCHR) is an agency given the lead mandate within the UN system to protect and promote human rights, including working with governments, undertaking investigations and studies, and being an advocate publicly and within the UN for human rights.
- The **Human Rights Council** consists of representatives from different countries belonging to UN. It is the top body within the UN for dealing with human rights issues, and reports to the UN General Assembly. It meets regularly over the year, and periodically reviews each country's progress in meeting its human rights obligations.
- The Human Rights Council can also appoint **special rapporteurs** and **independent experts** who have specific mandates to investigate and monitor the performance of specific countries or to work on specific human rights issues (e.g., the right to health). Special rapporteurs have also been given mandates by other UN bodies. For example, the UN General Assembly adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993, which provide for appointing a special rapporteur to monitor their implementation. The Special Rapporteur reports yearly to the UN Commission for Social Development.

These different parts of the UN human rights system can be used to protect and promote the human rights of PLWHAs and people with disabilities — including the rights recognized and protected by the Disability Convention.

3.1 International law and disability

There is no one universally accepted definition of “disability” in international law. A number of different definitions are commonly used. While none explicitly recognizes HIV or AIDS as disabilities, a number of them could be interpreted as including HIV and AIDS. For example:

- The 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities state: "People may be disabled by physical, intellectual, or sensory impairment, medical conditions or mental illness."⁴
- The *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities* (1999) declares that the term “disability” means “a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential

⁴ UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the General Assembly Resolution A/RES/48/96 (1993).

activities of daily life, and which can be caused or aggravated by the economic and social environment.”

Beyond the 1993 UN Standard Rules (which are not legally binding on governments), what about the human rights of people with disabilities in the UN human rights system?

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is one of the core human rights treaties. It does not refer explicitly to persons with disabilities. However, the UN Committee on Economic, Social and Cultural Rights, the expert committee with the job of interpreting the treaty and monitoring states' progress in its implementation, has clarified that the rights it sets out "will be exercised without discrimination of any kind" based on certain specified grounds or on "other status". The Committee has adopted a number of "General Comments", which are authoritative expert interpretations of the treaty. In its General Comment on this subject, the Committee has stated its expert opinion that this clearly includes discrimination on the grounds of disability.⁵

The General Comment makes clear that "disability-based discrimination" includes any distinction based on disability, or denial of *reasonable accommodation* of a disability, which limits or denies any of a person's economic, social or cultural rights set out in the ICESCR. It recognises that

...through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.⁶

The Committee recommended that "comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties."⁷

The *Convention on the Rights of the Child* expressly prohibits any discrimination in respect of the enjoyment of Convention rights on the ground of disability and most importantly, explicitly mentions the rights of children with disabilities.⁸ Until recently, it was the only core human rights treaty to mention disability explicitly.

⁵ United Nations Committee on Economic, Social and Cultural Rights. *General Comment No. 5: Persons with Disabilities* (Eleventh session, 1994), U.N. Doc E/1995/22, at para 5.

⁶ *Ibid.*, para 15.

⁷ *Ibid.*

⁸ *Convention on the Rights of the Child*, 1577 UNTS 3, adopted by United Nations General Assembly Resolution 44/25 (20 November 1989), Articles 2 and 23.

However, in December 2006, the UN General Assembly adopted the *Convention on the Rights of Persons with Disabilities* (“Disability Convention”).⁹ The Convention does not include a definition of “disability” or “persons with disabilities”, and does not expressly mention HIV or AIDS. The preamble recognises that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” Article 1 states: “Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”. Discrimination on the basis of disability is defined in the Convention as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.¹⁰

The Convention does not recognise any additional human rights, but clarifies the obligations of states to respect and ensure the equal enjoyment of all human rights by all persons with disabilities. It covers many areas where persons with disabilities have been discriminated against including access to justice, participation in political and public life, education, employment, freedom from torture, exploitation and violence, freedom of movement, etc. The Convention identifies areas where adaptations have to be made so that persons with disabilities can exercise their rights and areas where the protection of their rights must be reinforced because those rights have been routinely violated.

The Convention prohibits any discrimination, including denial of “reasonable accommodation.” *Reasonable accommodation* according to the Convention means “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

Reasonable accommodation could include the obligation of an employer to:

- provide a desk which can accommodate a wheelchair
- allow a flexible work schedule for medical purposes
- modify instructions or reference manuals
- provide equipment that will enable a person with a visual or hearing impairment to do his or her work.

The interpretation of the Convention and review of states progress in the implementation of the Convention are the roles of the Committee on the Rights of Persons with Disabilities, which will be formed when the Convention comes into force. Resolutions of bodies such as the Human Rights Council will also be persuasive in the interpretation of the Convention. The states that have ratified the Convention will meet regularly to consider any matters with regard to the implementation of the Convention. The Optional Protocol gives individuals and groups of individuals the possibility of filing complaints with the Committee about governments’ actions that breach the Convention.

⁹ *International Convention on the Rights of Persons with Disabilities*, adopted by UN General Assembly Resolution 61/106 (13 December 2006).

¹⁰ *Ibid.*, Art. 2.

3.2 International law and HIV

There are several non-binding international documents (declarations and recommendations) addressing discrimination on the basis of HIV. Major international human rights treaties have been interpreted to include HIV as a ground on which discrimination is prohibited. As has been the case with disability, the term “other status” in the ICESCR has been interpreted by the UN Committee on Economic, Social and Cultural Rights to include HIV. However, there is no one international binding document expressly prohibiting discrimination on the basis of HIV or AIDS.

The *International Guidelines on HIV/AIDS and Human Rights* were first issued in 1998 by UNAIDS and the Office of the UN High Commissioner for Human Rights (OHCHR) and supported repeatedly by UN Member States through resolutions adopted at the UN Commission on Human Rights.¹¹ The *International Guidelines* emphasise that states should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, as well as provide for speedy and effective administrative and civil remedies for discrimination. In affirming the *International Guidelines*, the UN Commission on Human Rights has repeatedly urged states to take all necessary measures to eliminate stigmatisation and discrimination against those infected and affected by HIV/AIDS. The Commission has confirmed that discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term “or other status” in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS.¹²

There is a growing consensus that HIV should be considered to fall within the definition of “disability.” For example, in its 1996 statement before the UN Commission on Human

“The so-called disabling feature either does not disable at all, but is perceived as disabling; or it may disable somewhat, but could be addressed with reasonable accommodation. The main thing is that there is no justification for differential treatment. The disabilities consequences of asymptomatic HIV is that often people living with HIV, as well as those suspected of being HIV positive, are very often discriminated against because they are wrongly perceived as being unable to perform; they are wrongly perceived as being a threat to public health; or they are perceived as being, or indeed are, a member of some group already suffering discrimination. Thus, if they are not actually disabled by HIV-related conditions, they are often disabled by the discriminatory treatment they receive because of their HIV status. The result is that they are denied the possibility of being productive, self-reliant, full and equal members of society.... Thus, the clinical, social and cultural elements of HIV/AIDS, including the impairment which can result from it and the ignorance, discrimination and stigma which surround it, confirm that it is appropriate to consider HIV/AIDS as a disability for purposes of protection against discrimination”.

- Statement by the UNAIDS HIV/AIDS and Disability. United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session (August 1996).

¹¹ UNAIDS and OHCHR, *International Guidelines on HIV/AIDS and Human Rights*, Consolidated version, 2006, available at www.unaids.org.

¹² UN Commission on Human Rights, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, Resolutions 2005/84, 2003/47, 2001/51 and 1999/49.

Rights, the Joint United Nations Program on HIV/AIDS (UNAIDS) recommended that HIV/AIDS should be considered a disability in terms of the discrimination that occurs because of HIV/AIDS, and in terms of the legal protection needed to guard against that discrimination. It also stated that in order to protect fully the people who face discrimination because of actual or perceived notions regarding their abilities due to their health status, definitions of disability should move beyond functional limitations to cover medical conditions, such as HIV/AIDS.¹³

In 2001, the UN General Assembly adopted the *Declaration of Commitment on HIV/AIDS*,¹⁴ in which states committed to enacting, strengthening and enforcing legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV/AIDS and members of vulnerable groups. They reaffirmed this commitment in the *Political Declaration on HIV/AIDS* (2006).¹⁵

More recently, the *Handbook for Parliamentarians on HIV and AIDS*, updated in 2007 by UNDP, UNAIDS and the Inter-Parliamentary Union (IPU), recommended as one of the components of anti-discrimination legislation consider providing protection against discrimination on the grounds of disability, widely defined to include AIDS.¹⁶ In March 2008, the Africa Campaign on Disability and HIV/AIDS adopted the Kampala Declaration on Disability and HIV/AIDS, which calls for HIV/AIDS to be included as “a cause of disability.”¹⁷

4. National anti-discrimination law: disability and HIV

There are several ways to deal with discrimination related to HIV in national legislation (and see Annex 2 for examples of national laws with different approaches):

- *General anti-discrimination laws* prohibit discrimination against classes of persons, based upon factors such as race, gender, religion, and health status and/or disability. These last two terms could be interpreted as including HIV and/or AIDS. Not many countries explicitly include HIV or AIDS as stand-alone grounds on which discrimination is prohibited. In some cases, it may only include AIDS or opportunistic infections and other health conditions related to HIV infection.

¹³ United Nations Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities, “HIV/AIDS and Disability” Statement by the UNAIDS. 48 Session, August 1996.

¹⁴ United Nations General Assembly. Declaration of Commitment on HIV/AIDS “Global Crisis — Global Action”. UN doc. No. A/RES/S-26/2, 2 August 2001.

¹⁵ United Nations General Assembly. Political Declaration on HIV/AIDS. UN doc. No. A/RES/60/262, 15 June 2006, at p. 29.

¹⁶ Inter-Parliamentary Union, UNAIDS, UNDP. “Taking action against HIV”: A Handbook for Parliamentarians. No. 15/2007.

¹⁷ Second meeting of the Africa Campaign on Disability and HIV and AIDS. Kampala Declaration on Disability and HIV/AIDS, Kampala, Uganda, 11-13 March 2008.

- *HIV-specific laws* often address a wide range of HIV-related legal issues, and usually include provisions that prohibit discrimination based on HIV status and/or AIDS diagnosis. In some cases, this is the only protection in a country's law against such discrimination. In other cases, the section on discrimination in the country's "AIDS law" may clarify or reinforce protection already found in other anti-discrimination laws, where these exist and include HIV or AIDS in one way or another.

In some countries where the law prohibits discrimination based on "disability" (or, in some cases, "handicap"), the protection afforded by the law depends on proving that a person's ability to perform life functions, such as work or education, is limited. Some use broad definitions covering minor disabilities, while others use detailed definitions that limit coverage to people with substantial disabilities. To narrow the scope of protection too much could mean excluding people who suffer from episodic illness or disability, or the discrimination that manifests from stereotypes, prejudice and general social stigma such as that faced by PLWHAs and those with other disabilities and that limits that person's participation, for example, in the workforce or school.

A handful of countries (mainly common law jurisdictions such as Australia, Canada, the United Kingdom, the United States, Ireland and New Zealand) explicitly define *asymptomatic HIV infection* as a disability under laws against discrimination. Some of them cover "disability which exists at present, previously existed but no longer exists, or which may exist in the future or which is imputed to a person", and also cover disability which is "suspected or assumed or believed to exist".¹⁸ In many European countries, there are general prohibitions on discrimination where disability is mentioned but not defined. In the EU Framework Directive the issue of disability definition was deliberately left to the Member States in order to give them opportunity to use their own national disability definitions.¹⁹

The inclusion of HIV in national disability laws has been one of the most effective means by which to address discrimination based on HIV status or AIDS.²⁰ UNAIDS notes, that the most effective laws have the following elements:

- they address people with HIV, including the full spectrum from asymptomatic infection to AIDS;
- they include people merely perceived as having HIV or AIDS;
- they prohibit employers and providers of services from refusing to hire, from refusing to promote, from firing, and from denying services because a person is HIV positive or may become sick in the future or may cause an increase in health-care or insurance costs;

¹⁸ New Zealand law (see Annex).

¹⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation.

²⁰ United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. 48 Session, Statement by the UNAIDS. HIV/AIDS and Disability, (August 1996).

- they are applicable to a broad range of public and private sector employers and service providers;
- they require that a person be qualified for the job and be well enough to perform the job adequately, but also that employers provide reasonable accommodations to facilitate ability to perform.²¹

5. Conclusion

This paper provides background information on the multi-faceted relationship between HIV and disability, as well as the ways in which international and national laws deal with discrimination related to both HIV and disability. In so doing, it provides a basis for considering the implications, challenges and opportunities of recognizing HIV as a disability, including seeking such an explicit interpretation of the UN's Disability Convention. Through a process of consultation and discussion with AIDS advocates, disability rights advocates, people living with HIV and with other disabilities, and other interested actors, the ultimate goal is to identify and develop potential strategies for achieving better protection and promotion of the rights of people living with HIV and with disabilities.

²¹ Ibid. Similarly, the World Bank. *Legal Aspects of HIV/AIDS: A Guide for Policy and Law reform* states, that the most comprehensive laws extend protection to “actual, perceived, or suspected HIV status to cover those who are discriminated against due to actual or perception that they are infected because of proximity to others perceived to be infected or association with groups stereotypically linked with HIV infection”.

ANNEX 1: Questions for discussion

What are the opportunities presented by the UN Convention on the Rights of Persons with Disabilities to recognise HIV as a disability? What are the benefits in going beyond the existing recognition in international law, and getting HIV recognized as “disability” for the purposes of the Disability Convention?”

Both protections based on disability and “health status” are applied in such major areas as education, employment, the workplace, health care, immigration, prisons, housing, insurance and benefits, access to credit and civil and political rights. Anti-discrimination protection on the ground of health status is long entrenched in international law. However, it is not guaranteed that protection against discrimination on the ground of “health status” will be interpreted broadly, so as to include HIV, in national legislation and by national courts or tribunals.

Here are some reasons for inclusion of HIV in the interpretation of the Disability Convention:

- Existing international documents recommend that HIV is included (as form of health status) in anti-discrimination protection, but this “soft law” is not binding on countries. If HIV is included as a protected ground in legally binding international treaty, protection will be obligatory for countries that ratify the treaty.
- Including HIV in the category of “disability” will strengthen efforts to ensure access to social and other services and supports available to persons with disability.
- Access to the Optional Protocol of the Disability Convention will give individuals and organizations a tool for trying to enforce their rights.

2) Why should HIV (as opposed to just AIDS or HIV- or AIDS-related disability) be included as a protected ground?

As it progresses, HIV can result in mental and physical conditions that impair ability. In addition, HAART (highly active antiretroviral therapy) and other treatments, while saving and prolonging the lives of PLHIV, can also cause side effects that can be disabling. In such cases, legal protection against discrimination on such grounds as AIDS, or HIV-related disability might suffice. However, people with HIV who are asymptomatic may experience discrimination regardless of the fact that HIV does not significantly (or at all) limit their activities, and it is instead the prejudice of others which causes difficulties (e.g., in employment, housing, or services), rather than HIV infection itself.

3) In what circumstances would it be better to use HIV specific laws to address HIV-related discrimination, and when would it be more appropriate to use laws on disability-related discrimination?

- 4) What are the advantages to ensuring that national laws which implement the Convention include HIV?**
- 5) Some countries explicitly exclude disability from their legislation. What the reasons for this might be? What concerns, if any, exist with including HIV and AIDS within the scope of national laws prohibiting discrimination on the grounds of disability? How can these concerns be addressed?**
- 6) What support is needed by advocates at the country level to get HIV recognized as a disability under national laws (where this is not already the case)?**
- 7) What strategies should be used in advocating for the inclusion of HIV as disability within the Disability Convention, both at the international level (e.g., within the UN system) and at the national level (i.e., to influence specific governments to take this interpretation of the Convention)?**

ANNEX 2: Examples of national laws on HIV and disability

Below are examples of definitions and laws which, explicitly or through interpretation, prohibit discrimination on the basis of HIV or perceived HIV-positive status or AIDS diagnosis.

In **Australia**, the Commonwealth Disability Discrimination Act (1992) defines disability in the following way:

- A) total or partial loss of the person's bodily or mental function; or
- B) total or partial loss of a part of the body; or
- C) *the presence in the body of organisms causing disease or illness; or*
- D) *the presence in the body of organisms capable of causing disease or illness; or*
- E) the malfunction, malformation or disfigurement of a part of the person's body; or
- F) a disorder of malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- G) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour.”²²

In **Canada**, no single definition exists at the federal level: different statutes include different definitions for their purposes. The Government of Canada notes that different disability laws and policies have different goals, and single definition of disability is neither recommended nor effective.²³ The *Canadian Human Rights Act* (1977) defines disability as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug” (s. 25). The definition has been interpreted broadly to include perceived disability as well as actual disability. The Canadian Human Rights Tribunal has held that discriminating against someone because of a perception of disability has the same effect as discriminating against someone that is disabled. In 2000, the Supreme Court of Canada held that, in light of the non-discrimination section of the *Canadian Charter of Rights and Freedoms*, in interpreting the term «*handicap*» in Quebec's provincial anti-discrimination law: “Whatever the wording of definitions used in human rights legislation, Canadian courts tend to consider not only the objective basis for certain exclusionary practices (i.e. the actual existence of functional limitations), but also the subjective and erroneous perceptions regarding the existence of such limitations. Thus, tribunals and courts have recognized that even though they do not result in functional limitations, various ailments such as congenital physical malformations, asthma, speech impediments, obesity, acne and, more recently, being HIV positive, constitute grounds of discrimination...”²⁴

France passed a general law prohibiting discrimination on the grounds of health or disability in 1990. It stemmed from an outcry over discrimination against PLWHA, but

²² *Commonwealth Disability Discrimination Act*. Acts of the Parliament of the Commonwealth of Australia, 1992;3:2792-849. (1992).

²³ Human Resources Development Canada. *Defining Disability: A complex issue*. Report by the Office for Disability issues, 2003.

²⁴ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*.

its scope is wider. The law made a succession of amendments to the Penal and Labour Codes, adding the words “health or disability” to existing prohibitions on discrimination on grounds of race, nationality, religion, morals or marital status. The use of the expression ‘health or disability’, and the history relating to HIV, suggests that any medical condition or impairment may be covered, whether or not it has a substantial effect on a person’s activities. The scope of the 1990 law was recently extended by Law No 2001-1066 in 2001 and by Law No. 2005-102. The first law amended the Labour Code to include a wider range of discriminatory grounds, covering disability, health and physical appearance; the second strengthened participation and social assistance provisions. 25[1]”

The **Hong Kong Disability Discrimination Ordinance** prohibits discrimination, harassment or vilification based on disability in several areas, including employment and education. The definition of “disability” includes the presence of organisms in the body that cause or are capable of causing disease or illness. This definition includes HIV/AIDS when the individual is asymptomatic.²⁶

In **Ireland**, the law dealing with discrimination in employment defines "disability" to mean:

- “(a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body, or
- (b) *the presence in the body of organisms causing, or likely to cause, chronic disease or illness, or*
- (c) the malfunction, malformation or disfigurement of a part of a person’s body, or
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) a condition, disease or illness which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.”²⁷

In **Mauritius**, the *HIV and AIDS Bill* (2006) expressly declared that HIV and AIDS are not disabilities, while also contemplating that a person with HIV or AIDS might nonetheless be entitled to a disability pension benefit if disabled.²⁸ Article 3 provides:

²⁵ Anti-discrimination Act, no. 2001-1066 of 16 November 2001, and Law No. 2005-102 of 11 February 2005 on equal rights and opportunities for disabled persons and on their participation and citizenship. France.

²⁶ See Hong Kong Special Administrative Region, *Disability Discrimination Ordinance*, 1995.

²⁷ *The Irish Employment Equality Act* (1998). Section 2(1).

²⁸ The Republic of Mauritius. *HIV and AIDS Bill* (2006).

- (1) Any person who is HIV-positive or has AIDS shall not be considered as having a disability or incapacity by virtue of any enactment and his status or presumed status shall not be used as a ground to discriminate against that person.
- (2) Subsection (1) shall not affect the operation of a pension law if that law provides for a benefit accruing to a person according to the degree of disability which entitles him to such benefit.

According to **New Zealand's** *Human Rights Act*, the concept of disability includes:

- “(1) - physical disability or impairment,
 - physical illness,
 - psychiatric illness,
 - intellectual or psychological disability or impairment,
 - any other loss or abnormality of psychological, physiological, or anatomical structure of function;
 - reliance on a guide dog, wheelchair or other remedial means;
 - *the presence in the body of organisms capable of causing illness.*”

(2) Each of the grounds specified in subsection (1) of this section is a prohibited ground of discrimination, for the purpose of this Act, if

- (a) it pertains to a person or to a relative or associate of a person; and
- (b) it either
 - i. currently exists or has in the past existed; or
 - ii. is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.”²⁹

In **South Africa**, the Integrated National Disability Strategy White Paper, Office of the Deputy President (November 1997)³⁰ stated that: “People who are HIV positive suffer from social discrimination similar to that experienced by people with disabilities. This does not, however, imply that they are necessarily disabled. For the purpose of the *Integrated National Disability Strategy* therefore, they are not included in the definition of disability, except where symptoms, such as prolonged fatigue, interfere with their normal functioning.”

The **United Kingdom's** *Disability Discrimination Act* (DDA) of 1995³¹ defines a disabled person as someone who "has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". In 2005, amendments to the DDA extended discrimination protection for those living with HIV to the moment of diagnosis. The Act clearly includes HIV as category of disability protected from discrimination; “a person who has cancer, HIV infection or multiple sclerosis is to be deemed to have a disability, and hence to be a disabled person”.³² The DDA then goes on to place a duty on employers and providers of

²⁹ New Zealand, *Human Rights Act* (1993) (section 21, (no. 82)).

³⁰ Republic of South Africa. Office of the Deputy President. *The Integrated National Disability Strategy White Paper*, November 1997.

³¹ United Kingdom, *Disability Discrimination Act 1995*, amended 2005 c. 50.

³² *Ibid.*, Chapter 13, s. 18.

goods and services to make reasonable adjustments for disabled people. This reflects a central purpose of the DDA — placing the onus on society to remove barriers faced by disabled people. Reasonable adjustments are considered in the chapters on employment, access to goods and services, education and travel.

In the **United States**, the *Americans with Disabilities Act* (ADA)³³ does not mention HIV or AIDS, or any other disabling conditions directly, but in their interpretations of the ADA, courts have confirmed that HIV and AIDS both qualify as disabilities. Under the ADA, “the term “disability” means, with respect to an individual (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such impairment.”³⁴

In the **former Soviet Union countries** (e.g., Russia) there are specific HIV laws, which provide protection against discrimination to people with HIV.³⁵ There are specific articles that prohibit employment discrimination, denial of medical care and other limitations of rights and interests of people living with HIV, including their and their families housing rights. A person with HIV is considered disabled only if HIV or AIDS causes physical impairments or full or partial loss of employment abilities. Thus, according to the law, AIDS-related complications, rather than HIV-positive status *per se*, is a ground for protection. The *Law on the social protection of disabled people in the Russian Federation* defines “persons with disabilities” as persons with health impairments caused by disease, traumas or other reasons, which have long lasting effect on bodily functions and lead to limitations of activity and necessitate social protection.”³⁶ There are no specific anti-discrimination provisions. The law provides people with disabilities with employment benefits, and establishes a quota system, reserving a certain number of places for persons with disabilities in the training and employment programs in all public and private entities of more than 20 staff members. (Similar quota systems exist in countries such as Germany, France and India.)

The Canadian HIV/AIDS Legal Network has proposed **model legislative provisions**³⁷ on HIV-related discrimination. There are two options, one or both of which could be selected.

Option 1: Prohibition on discrimination relating to HIV/AIDS status. It is prohibited [in the areas prescribed by anti-discrimination legislation] to discriminate against a

³³ See *Americans with Disabilities Act of 1990*, 42 U.S.C., s. 2101-122113. See, also, *Bragdon v. Abbott*, US Sup. Ct. No. 97-156 (6/25/98) where the U.S. Supreme Court upheld the view that a person’s asymptomatic HIV infection is a disability under the *Americans with Disabilities Act of 1990*.

³⁴ United States *Americans with Disabilities Act*, 1990.

³⁵ State Duma of the Russian Federation, Federal Law of the Russian Federation *On the Prevention of the Spread in the Russian Federation of diseases caused by the Human Immunodeficiency Virus (HIV-infection)* of 30.03.1995 No. 38 FZ, amended 22 August, 2004, No. 122-FZ.

³⁶ State Duma of the Russian Federation, *Law on the Social Protection of Disabled People in the Russian Federation*, 181-FZ, 20 June 1995, amended 29 December 2004.

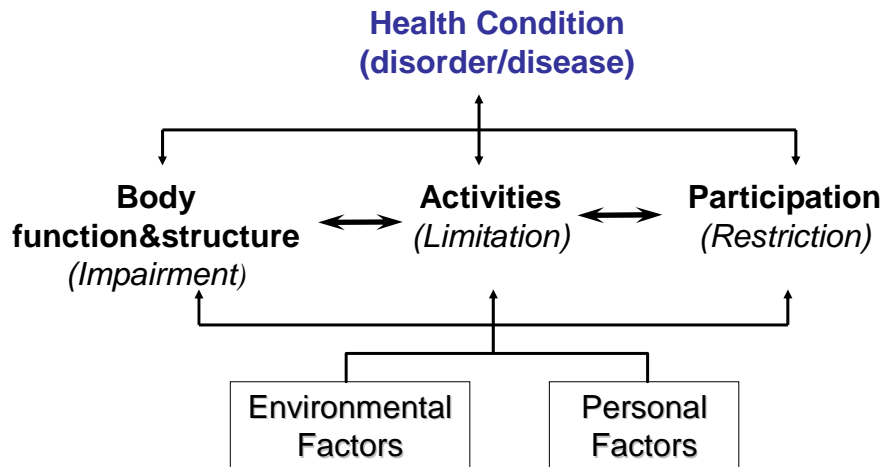
³⁷ Canadian HIV/AIDS Legal Network. *Legislating for Health and Human Rights: Model law on Drug Use and HIV/AIDS*. Module 7: Stigma and Discrimination, 2006.

person, or a relative or associate of the person, on the ground that the person lives with HIV or AIDS, or is perceived to live with HIV or AIDS.

Option 2: Article 3(b). **Extension of the meaning of the term “disability” in existing anti-discrimination legislation.** For the purpose of [anti-discrimination legislation] the term “disability” [or “handicap”, “health status” or equivalent term] includes living with HIV or AIDS, or perceived to be living with HIV or AIDS.

ANNEX 3: WHO's International Classification of Functioning, Disability and Health

International Classification of Functioning, Disability and Health - ICF (WHO 2001)



Examples of Disability ICF Framework

Impairments:

- pain, weakness, cognitive impairment, decreased endurance, fatigue, neuropathy, diarrhea

Activity Limitations:

- difficulty walking or carrying groceries, difficulty with daily self care activities such as bathing

Participation Restrictions:

- difficulty engaging in work, employment or education, recreation or leisure activities,
- discrimination, stigma (environmental)