

# Legal Protection of Vulnerable Groups

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- I. Vulnerable Groups
- II. Laws as Incentives or Disincentives
- III. The World Bank Response in the Caribbean
- IV. A Lesson from Australia

# I. Vulnerable Groups

- ❖ A public health approach: to ensure the health of the population, government must pay special attention to groups especially vulnerable to the pathogen, and therefore more likely to pass it on

❖ Groups that tend to be disproportionately affected by HIV/AIDS:

UNAIDS/OHCHR  
International Guidelines

women

children

those living in poverty

indigenous people

minorities

migrants

refugees and internally displaced persons (IDPs)

people with disabilities

prisoners

sex workers

men who have sex with men (MSM)

intravenous drug users (IDUs)

**people living with HIV/AIDS (PLWHA)**

Caribbean Regional Strategic  
Framework for HIV/AIDS 2002-2006

children

uniformed populations

mobile populations

people in the workplace

prisoners

sex workers

men who have sex with men (MSM)

drug & substance abusers

**people living with HIV/AIDS (PLWHA)**

- ❖ These are groups that already suffer from lack of human rights protections, from discrimination, and/or from marginalization of their legal status.  
*(International Guidelines, para. 75)*

## II. Laws as Incentives or Disincentives

- ❖ Different ways of thinking about law:
  - Law and order: emphasizes the police power of the state
  - Rule of law: government of law and not of people
  - Law as command with emphasis on implementation (“We have good laws but they are not implemented”):
    - largely an oxymoron
    - be careful what you ask for
  - Law as a set of incentives or disincentives

- ❖ Law as a set of incentives or disincentives
  - Promote good public health policies/practices
  - Promote responsible personal behavior
  - Avoid/remedy stigma, discrimination, exclusion
  - Remedy inequity and powerlessness

- ❖ Promote good public health policies/practices
  - Encourage voluntary testing
    - South Carolina - eliminated anonymous testing: voluntary testing of MSM dropped by 51%
    - Oregon - after starting anonymous testing: demand increased by 125%
    - CDC study at federally funded testing sites: over 50% of MSM tested anonymously (*Gostin 160-161*)

- Allow syringe exchange programs (SEPs)
  - NIH: reduction in risk behavior as high as 80%, with estimates of at least a 30% reduction of HIV in IDUs (*Gostin 269*)
  - Study of 29 cities on 4 continents with SEPs: decline in HIV incidence [among IDUs] by 5.8%, while in 52 cities without SEPs: increase of 5.9% (*Lancet 1997: 1797-1800*)
  - U.S.: “Since 1998, Congress has enacted numerous statutes that contain provisions prohibiting or restricting the use of federal funds for SEPs and their activities.” (*Gostin 268*)

- Protect homosexuals under discrimination statutes
  - U.S. Head of the Office of Special Counsel (the office created, *inter alia*, to protect whistleblowers in the federal government): in congressional testimony, he argued that sexual orientation is not among the “protected classes” since federal civil rights law bans employment discrimination on the basis of race, religion, sex, age, national origin, disability, and political affiliation. He said: “I am limited by the enforcement statutes that you give me.” (*Washington Post*, May 25, 2005)

- Compare the European Charter on Fundamental Rights and Freedoms: “Any discrimination based on any ground *such as* sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited.” (Art. 21.1) (emphasis added)

- ❖ Promote responsible personal behavior
  - Encourage voluntary testing
    - Statutes criminalizing purposeful or reckless transmission: in one Australian state, one month after passage of the new law, 12,000 fewer people were tested than in the previous month. (*Dwyer, 1993*)
    - Belize, 2001: passed a law criminalizing willful transmission; 2004: abrogation proposed (*Chair, Belize National AIDS Commission*)

- ❖ Avoid/remedy stigma, discrimination, exclusion
  - Outlaw hate speech against MSM
    - Jamaica 2001 national elections: the Labor Party chose Chi Chi Man as its campaign song (“rat-tat-tat every gay man will have to/Die, me and my niggas will make a pact/Gay men must die and that’s a fact”) and the ruling People’s National Party responded by adopting the campaign slogan “Log On to Progress,” a reference to a popular song and dance about kicking and stomping on gay men. (*HRW Jamaica at 13*)

- Compare with South Africa Human Rights Commission: “...the advocacy of violence against gays and lesbians [is] as repugnant and unacceptable as the advocacy of violence against racial groups that are specifically protected by the Constitution.” (in Freedom Front v. SAHRC and Another (2003))
- Tighten up definition of lesser sexual offences to prevent harassment of homosexuals, trans-gendered individuals, and sex workers. Many documented examples of use of the prohibition on “gross indecency” in Jamaican law to serve as a pretext for harassment by the police. (HRW Jamaica, 2004)

- ❖ Remedy inequity and powerlessness
  - Women: property [e.g. ownership/inheritance/contracting); marital relations (entering into marriage or divorce; marital rape; division of assets); equal treatment (including pay) in the workplace; protection from sexual violence and harassment; reproductive and sexual rights]

- Children: protection from trafficking, sexual abuse, and economic exploitation; right to information and to be heard; access to voluntary counseling and testing; access to health and education services; representation and vindication of rights  
*(<http://www4.worldbank.org/legal/orphans/html>)*
- Disabled people: all the standard forms of discrimination, and then some
- People living with HIV/AIDS:
  - Discrimination:
    - health care (refusal to treat; different treatment; testing without prior consent; right to be informed of results of HIV test; quarantine, segregation; compulsory notification of sexual partners; compulsory contact tracing; non-confidentiality)

- employment (mandatory testing at recruitment or during employment; denial of employment; lifestyle questions during interview; lack of confidentiality; dismissal or change in conditions of employment)
- justice and legal process (inequality before the law, e.g. tolerated discrimination; difference in sentencing; prosecutorial harassment; prison administration)
- issues at the border (mandatory testing, declaration, certification; visa restrictions; expulsion without procedural safeguards)

- social, cultural, educational rights (denial of social benefits; conditions on access to social housing; denial of access to education; segregation in educational settings; mandatory premarital testing; mandatory abortion/sterilization; custody/inheritance rights; restrictions on public accommodations or facilities such as sports events or burial services)
- insurance and financial services (denial or restrictions on social security; denial or restrictions on insurance; denial or restrictions on access to credit)

- Access to information, therapeutic goods and services:
  - special importance of rights to information and education
  - freedom of expression and association
  - access to care and treatment
  - ethical research (non-discrimination in selection; informed consent; confidentiality; equitable access to information and benefits from research)
  - access to legal support services (human rights commissions; ombudsoffices; health boards; legal aid services)
  - access to affordable drugs and treatment (including diagnostics)

# III. The World Bank Response in the Caribbean



- ❖ Some Facts
  - GNI/capita:

# Classification of Economies

	Nation/Territory	Gross National Income (GNI) per capita*
<b>Low-Income</b> (\$765 or less)	Haiti	380
<b>Lower Middle-Income</b> (\$766 - \$3,035)	Guyana	NA
	Suriname	NA
	Dominican Republic	2,070
	Jamaica	2,760
<b>Upper Middle-Income</b> (\$3,036 - \$9,385)	Barbados	NA
	Belize	NA
	St. Vincent and the Grenadines**	3,300
	Dominica**	3,360
	Grenada**	3,790
	St. Lucia**	4,050
	St. Kitts and Nevis	6,880
	Trinidad and Tobago	7,260
	Antigua and Barbuda	9,160
<b>High-Income</b> (\$9,386 or more)	Bahamas	NA
	Montserrat	NA

\* World Bank Atlas methodology; per capita GNI (Gross National Income, formerly GNP) figures are in 2003 U.S. dollars.

\*\* An exception to the GNI per capita operational cutoff for IDA eligibility (\$895 for FY05) has been made for some small island economies, which otherwise would have little or no access to Bank Group assistance because they lack creditworthiness. For such countries, IDA funding is considered case by case for the financing of projects and adjustment programs designed to strengthen creditworthiness.

- Outside of Africa, 8 of the top ten countries in terms of HIV/AIDS prevalence are in the Caribbean:

Nation/Territory	Prevalence Rate (% adults 15-49 years old)
Haiti	5.6
Trinidad and Tobago	3.2
Bahamas	3.0
Cambodia	2.6
Guyana	2.5
Belize	2.4
Honduras	1.8
Suriname	1.7
Dominican Republic	1.7
Barbados	1.5

Source: UNAIDS, 2004 *Report on the Global AIDS Epidemic*.  
(Note: several Caribbean countries did not report)

## ❖ Regional initiatives

- 1998: creation of Caribbean Task Force on HIV/AIDS
- 2001: Nassau Declaration on Health 2001: The health of the region is the wealth of the region (adopted by the heads of government of the Caribbean Community)
- 2001: creation of the Pan Caribbean Partnership against HIV/AIDS (PANCAP): one of the first multi-sectoral, multi-regional partnerships to combat HIV/AIDS, linking governments, businesses, regional and international NGOs, bilateral and multilateral donors, and multilateral organizations. Named an international best practice by UNAIDS

- 2001: World Bank US\$155 million MAP (HIV/AIDS Prevention and Control Program) approved with loans/credits/grants to Barbados (2001), Dominican Republic (2001), Jamaica (2002), Grenada (2002), Guyana (2004), St. Kitts and Nevis (2003), St. Lucia (2004), St. Vincent and the Grenadines (2004), Trinidad and Tobago (2003), and CARICOM/Pan Caribbean Partnership against HIV/AIDS (2004)
- 2002: adoption of Caribbean Regional Strategic Framework for HIV/AIDS 2002-2006. It identifies 7 priority areas. The first one is “Advocacy, policy development and legislation” and it includes: “To promote the incorporation of human rights and non-discrimination practices in policy and *legislation*, in accordance with international guidelines, best practice and commitments.” (emphasis added)

- 2002: adoption of Action Plan on Law, Ethics and Human Rights to support implementation of Priority Area #1
- 2004: Global Fund proposal approved US\$12.663 million to combat the spread of HIV/AIDS in the Caribbean Region through efforts at prevention and reduction, care and support, and human rights issues

## ❖ Legislative assessments

- Assessment of the legislative framework for stigma and discrimination included in 7 country HIV/AIDS Prevention and Control Projects in the Caribbean and in the Pan Caribbean Partnership against HIV/AIDS Project

Among the country initiatives, the one in Trinidad and Tobago is most advanced and is being managed by UNDP T&T Country Office. It is aimed at the rights of PLWHA, young people, commercial sex workers, MSM, and other persons affected by HIV/AIDS

- The T&T assessment is organized as follows:
  - Two basic elements:
    - comprehensive desk review of existing laws; and
    - social analysis activities: national consultations plus focus groups

- The desk review must include a review of legislation and government policies on:
  - *general:*
  - public health (confidentiality, counseling and testing, partner notification, blood safety)
  - housing
  - employment (testing, discrimination, dismissal, benefits, health insurance) (use the ILO Code of Practice on HIV/AIDS in the Workplace) (In one survey conducted in Trinidad and Tobago in 2001, “50 per cent of the respondents had not applied for a job since learning about their HIV status, because of fear of HIV testing and discrimination.” *(Working Brief for the CARICOM/UK Champions for Change Conference: Reduce Stigma and Discrimination Related to HIV/AIDS, Nov. 2004)*)
  - education (access to information in schools)
  - insurance
  - all other relevant social services

- *willful infection*
- *immigration laws*
- *legal support services and mechanisms for redress*
- *criminal law and the correctional system*
- *discrimination against women*
- *court decisions and outcomes of other dispute settlement mechanisms*
- *an advocacy action plan (together with social scientist)*

The legislative review will culminate in proposed new or revised statutory provisions.

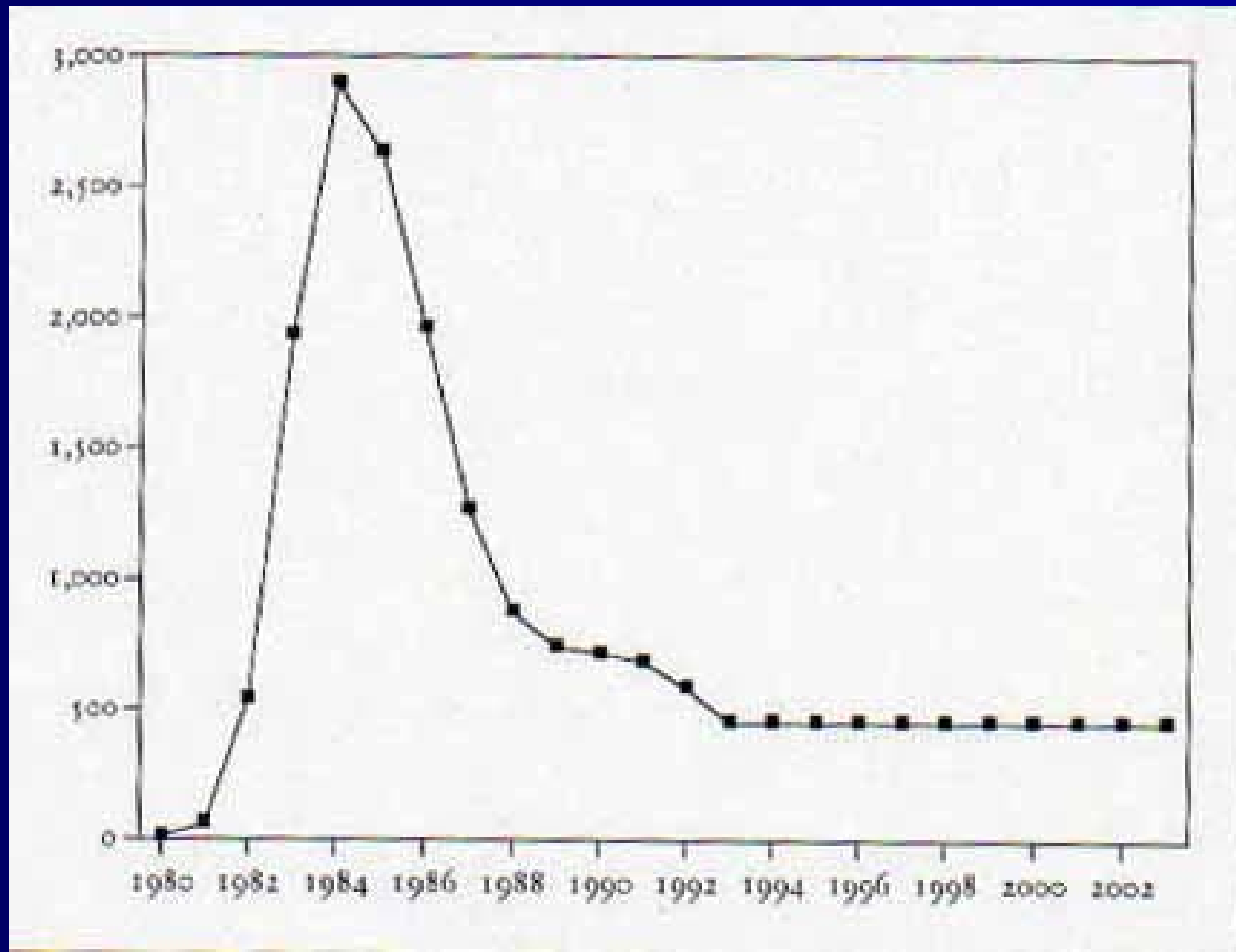
➤ Social analysis activities :

- Focus group sessions with key stakeholders: PLWHA and PLWHA NGOs; AIDS-affected families and children; MSM; women NGOs and CBOs; the Law Association of Trinidad and Tobago; trade unions.
  
- Two national consultations on each island: one to solicit views, clarify needs, facilitate national dialogue, and generate public support for law and policy reform; one at the end of the exercise to discuss the draft assessment report and recommendations, and to stimulate buy-in across all sectors.

- The TOR contemplate two consultants: one lawyer and one social scientist, with logistics support from the UNDP T&T Country Office. The social scientist selected is a psychologist and human rights activist. The Attorney General decided to have the legal work done by one of the lawyers on his staff.
- Government ownership through the National AIDS Coordinating Committee (NACC), which is chaired by the Prime Minister. NACC created a subcommittee (“Technical Oversight Committee”) specifically to oversee this work. The Technical Oversight Committee is chaired by a representative of the Attorney General. The Technical Oversight Committee approved the selection of the consultant; the initial workplan, and will receive and, if appropriate, approve, the draft and final reports.

# IV. A Lesson from Australia

- ❖ HIV incidence in Australia:



Lawrence O. Gostin, *The AIDS Pandemic: Complacency, Injustice, and Unfulfilled Expectations* (The University of North Carolina Press 2004)

❖ What happened in 1984?

- “Honesty replaced silence. Education reached all sections of the community. Sex education was introduced in schools. Condom distribution was stepped up. Law reforms were passed to proscribe HIV discrimination. Laws on homosexual offenses, drugs, and commercial sex work were changed. The picture was by no means perfect. But compared to the reactions elsewhere ... Australia’s response was admirable.” *(The Hon. Justice Michael Kirby, Justice of the High Court of Australia, March 2003, Foreword in Gostin 2004)*

# Sources

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