# Courts & Judges in the Era of HIV/AIDS - Introduction to Workshop

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**COURTS & JUDGES IN THE ERA OF HIV/AIDS[*] INTRODUCTION TO THE WORKSHOP**
**The Hon Justice Michael Kirby AC CMG[**]**

CONTEMPORANEITY

I applaud this initiative to involve the judiciary of India in this workshop on HIV/AIDS. In this workshop, we will explore the features of the epidemic and the many legal and law-related issues it presents to the courts and to the legal system of every country. Issues such as consent for testing; counselling of those at risk and those who are infected with HIV; issues of confidentiality and discrimination; the special problems of vulnerable groups, some of them subject to discrimination sustained by law; issues of the safety of the blood supply and of the work environment.

Just before I left Australia, the High Court granted special lave to appeal from the decision of the Federal Court of Australia in *X v The Commonwealth*. That is a case in which an ex-soldier who was otherwise fit and healthy alleges unlawful discrimination in employment when he was discharged after it was discovered that he was HIV positive. The government claims that he is unable to perform one of the essential requirements of his employment as a soldier, viz to "bleed safely" in circumstances of combat or training. The appeal will be heard in 1999 and decided according to law. It illustrates the fact that, for judges, HIV/AIDS is no longer a remote, exotic faraway problem. It is a regular visitor to the courts, whether in India, Australia, or elsewhere. Judges must be alert to its legal dimensions.

Judges, by definition, are leaders of their communities. They are invariably educated above the average. They ordinarily enjoy a privileged lifestyle. Typically, they are respected because of their offices. Their special positions in society impose upon them a responsibility of leadership. Nowhere more is that responsibility tested than when a completely new and unexpected problem presents itself to society. All the judges' instincts for legality, fairness and reasonableness must then be summoned up, to help lead society towards an informed, intelligent and just solution to the problem.

It is dangerous to generalise about the judiciary. In our region of the world several different legal systems may be found. In each of them, the role of the judiciary will be different. I discovered this fact in my work between 1993 and 1996 as Special Representative of the

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Secretary-General for Human Rights in Cambodia. A judge in Cambodia observes quite different legal traditions and conventions than does a judge in Australia or India. Typically, in common law countries which derive their legal systems from England, the judge enjoys a specially important place in the exposition, development and application of the law. The judge's creative role in developing the common law gives him or her opportunities and responsibilities of law-making, which are probably greater than in most countries of the civil law tradition.

But even within common law countries, the opportunities of legal development will differ at different levels of the judicial hierarchy. Thus, a judge of the final appellate court will have an enormously important role in applying the Constitution, in expounding basic human rights, in sometimes striking down legislation as unconstitutional, and in keeping the other branches of government in check. A judicial officer at the other end of the spectrum, a magistrate, will have much less opportunity to develop and expound new legal principles. He or she will generally be bound simply to apply statute law or common law as elaborated by the higher courts. Yet a magistrate will see many more citizens than higher court judges do. Typically, the magistrate's court processes about 90% of criminal and small debt proceedings. This is where most people see the judiciary. It is a mistake to conceive of the role of the judiciary as limited to judges of the highest courts.

As a judge of twenty-five years in a common law country (Australia), who once also served in another common law country (Solomon Islands), I am much more familiar with the role of the judiciary in common law countries. Although I am also quite familiar with the legal system of another country of the region (Cambodia) whose traditions are those of the civil law, for a workshop for judges in India I will concentrate in this introduction upon the case work of judges in common law countries. In the face of HIV/AIDS, judicial officers everywhere must give a measure of leadership. The epidemic presents many problems of a legal character; but still more problems of prejudice, ignorance and discriminatory attitudes. This is why discrimination against people living with HIV/AIDS, or thought to be in that position, is sometimes described as the "second epidemic".

I have organised my consideration of this topic in terms of the "6 Cs". These are Contemporaneity; Consciousness; Courts; Cases; Colleagues and Community. I will also offer some Conclusions. In each context, the judiciary has personal and collective responsibilities. They are universal, and not limited to any particular legal system. But necessarily, my treatment of cases will be confined to the system which I know best - that of the common law. Doubtless similar analysis could be presented in civil law systems.

Inevitably, in a brief introduction, I cannot do justice to all of the aspects of the judiciary's response to the HIV/AIDS epidemic. That response is not confined to interpreting, developing and applying HIV/AIDS law. The judiciary must do more than this, for the epidemic is fundamentally about human beings, fellow citizens. It is not about statistics. It is not about law, as such. Jurists, as educated leaders of the community, must understand this.

CONSCIOUSNESS

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The first responsibility of the judiciary is consciousness about HIV/AIDS, and about the relevant legal principles which affect the performance of their professional tasks.

At the outset of this epidemic, I was taught by Dean June Osborn, of the Michigan School of Public Health, that the first rule in HIV/AIDS law and policy is to base all action and responses upon sound data. That data will require those involved in relevant decisions and the exercise of governmental power (including in the judiciary) to know what they are dealing with, and what they are talking about.

This is why it is important that all judicial officers today, in every country, should have more than a layman's understanding of HIV/AIDS. As I shall demonstrate, the epidemic is beginning to affect millions of people. It will have enormous implications for the running of courts, the decision-making in cases, relationships with colleagues, and the judiciary's role in the community.

In my own jurisdiction, in Australia, the Judicial Commission of New South Wales in 1992 published an *HIV Outline - Source Material for Judicial Officers in New South Wales*. This is an excellent work. It starts with basic facts about AIDS and HIV infection, with rudimentary information on what AIDS is; when it first appeared; how HIV is transmitted; how many people in Australia have been affected; which groups of people have been particularly infected; what the life expectancy of a person with HIV or AIDS is; how it is diagnosed; what are its symptoms; whether health care workers and other professionals are at risk of HIV infection; and what risk still exists in donated blood, blood products or human tissue.

This booklet continues with basic information on public health legislation applicable to people with HIV/AIDS, and with chapters on relevant statutory and common law principles applicable to such topics as liability for HIV transmission; application of anti-discrimination laws; the rules on confidentiality; the relevance of HIV/AIDS to sentencing; and the impact of HIV/AIDS on family law.

Doubtless, with the passage of time, some of the data concerning the epidemic has been overtaken. Certainly, much of the treatment of particular legal issues would now have to be elaborated by reference to recent developments. But the beginning of wisdom is a knowledge of the features of the epidemic which I have mentioned. Judicial officers, by their privileged position, and responsibilities to make decisions relevant to the lives of people with HIV/AIDS, owe it to their communities to inform themselves about the basic facts. They should not rely solely upon the general media, for it is often guilty of misinformation and extravagant reporting on this topic. That is why the first step in the role of the judiciary in this area is consciousness about HIV/AIDS. That consciousness should extend globally, but should be supplemented by a detailed knowledge of the best data available on the spread of the epidemic in the judge's own jurisdiction, as well as the most relevant statutory and common law principles, that a judge, suddenly facing in court or elsewhere a problem involving HIV/AIDS, will need to be aware of.

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It is the responsibility of the Executive Government in every jurisdiction to provide to judicial officers the basic information contained in the HIV outline mentioned above. If it does not, the judges must inform themselves.

COURTS

The judicial function is typically performed in courts, and sometimes in chambers. It is here that the judge, as jurist, meets citizens involved in legal cases, and their representatives. Some of those citizens will have (as I will show) problems relevant to HIV/AIDS. These will call for sensitive application of statute law and general legal principles. But before the judge gets to this, he or she will have to know how to conduct a case which concerns an infection which is not just an ordinary medical condition. Around various medical conditions there can gather elements of prejudice and stigma. It is found in community attitudes to various venereal conditions, inherited disabilities, and even to cancer. But HIV/AIDS in the courtroom is specially sensitive. In part, this is because of its association with death. In part it is also because the modes of transmission are frequently by sexual intercourse and injecting drug use. The association of HIV/AIDS with drugs, sex, and in particular, groups which have often been (and sometimes still are) the subject of stigma and even criminalisation (homosexuals, drug-addicted persons, sex workers etc) makes community responses to the epidemic highly sensitive, and sometimes over-reactive. The judiciary are members of their communities. They cannot be entirely free from the attitudes, fears and prejudices of the societies they live in. But it behoves the judiciary to be better informed, and especially to so perform their functions as to reduce unnecessary burdens upon those who come before them who are living with HIV/AIDS.

When AIDS first came along, there was often gross over-reaction to its presence in the courtroom. In some countries, prisoners, actually infected, or suspected of being infected, with HIV/AIDS, were brought into court by guards wearing space suit protection, completely unnecessary and highly prejudicial to the fair trial rights of the accused. There is no need for such special courtroom procedures, as the wearing of surgical masks or gowns or protective gloves, still less for the exclusion of the defendant from the courtroom. In the United States it has been suggested that such courtroom precautions, without any scientific basis, would be a violation of constitutional rights to due process of law. Requests by court staff for the testing of prisoners, or for the provision of special gloves and uniforms to sheriff and bailiff officers, should ordinarily be rejected. It is a duty of the presiding judicial officer to make sure that his or her court staff are protected from risks of infection, or exposure to such risks. But it is now well known that casual social contact will not transmit HIV. The judiciary should not permit court process to be distorted, invariably to the disadvantage of the litigant, by generally unnecessary isolation, or disadvantageous treatment:

Because of the nature of the sensitive questions that can arise in cases involving HIV/AIDS, it will often be the duty of the judge to afford a measure of confidentiality to the persons involved. This is because it is usually permissible and proper to report court proceedings

which are open. It would be wrong to close every court proceeding which involved some issue concerning HIV/AIDS, or concerned a person living with the virus. The principle of open justice is fundamental to the role of the judiciary. On the other hand, the need to protect confidentiality and personal privacy can be secured by judicial orders in appropriate cases, forbidding the naming of those who are infected. In such cases, the courts try to balance the public interest in protecting confidential information against the public interest which favours disclosure. In *X v Y*, the English Court of Appeal considered the public interest exception in relation to the disclosure of information about a person's HIV status. An injunction was sought to prevent a newspaper from publishing the names of two doctors infected with HIV who were working in a particular hospital. The newspaper had obtained the information from confidential hospital records. The newspaper argued that there was an overriding public interest in disclosing the information, because the public was entitled to know that the doctors had HIV. However, the court held that the public interest in preserving the confidentiality of hospital records outweighed the public interest in the freedom of the press to publish the information, because people with HIV must not be deterred from seeking appropriate testing and treatment. This decision is important because the judges recognise that confidentiality in relation to a person's HIV status, could be important, not only to protect the interests of the infected person, but also for public health strategies generally against the spread of the epidemic.

In Australia, there have been similar orders by the superior courts protecting the confidentiality of people infected with HIV. Sometimes these have proved controversial. Occasionally, the media attack the confidentiality orders of the judge. But the judiciary will know, and give value to, the competing interests at stake. So it was in the Bombay High Court where an interim order was issued suppressing the information of the identity of a person infected with HIV. Both were allowed to sue by pseudonyms (Mr M X and Ms Z Y). The applicants challenged a public corporation's dismissal of Mr M X because he had tested HIV positive. The corporation's policy permitted discrimination on that basis. Mr M X had been a casual labourer for a public sector corporation. He was cleared for promotion, subject to a medical. The medical examination declared him to be fit. He was then required to undergo a further examination for permanency. He was again found to be physically fit. But the HIV test revealed that he was sero-positive. The corporation sought to justify its discriminatory policy, although it is hard to see how, before any onset of disability, such a policy could be justified especially in the case of a labourer. Mr M X challenged the policy as contrary to law and a violation of the non-discriminatory clauses (ss 14, 15 and 16 of the *Constitution of India*). The Bombay High Court showed considerable sensitivity in its name suppression order. Some people, denied confidentiality, would simply abandon their rights at law or never come to court.

Early in my service as a Justice of the High Court of Australia, a case was presented which concerned an allegation of direct discrimination in the provision of local government planning permission concerning people living with HIV/AIDS: *IW v The City of Perth*. The City Council of Perth in Western Australia, by 13 votes to 12, rejected a proposal to establish a drop-in centre for people with HIV. The applicant and his colleagues complained to the

Commissioner for Equal Opportunity on the ground that the City Council had discriminated unlawfully contrary to the *Equal Opportunity Act* 1984 (WA). The Tribunal established by that Act found that five of the majority votes had been impermissibly based on "the AIDS factor". By majority, the High Court of Australia dismissed the claim that the Council had discriminated contrary to the Act. The majority of the Court held that the Council was not "providing a service" within the meaning of the Act. It also held, by majority, that the applicant was not an "aggrieved person" within the Act as the actual applicant for town planning approval was an association, a distinct legal person, not the members of it, including the appellant. The case shows once again the technical hurdles which must often be overcome if claimants under discrimination legislation are to recover redress. The decision of the Full Court of the Supreme Court of Western Australia denying redress for the vote found to have been affected by discriminatory considerations, was affirmed.

A factor in such cases is often the need for urgency in the judicial decision. Particularly at an advanced stage of AIDS, unless judges become pro-active, and take control of litigation involving people suffering from HIV/AIDS, the litigant may be improperly denied a right or remedy, and such loss may prove irreparable:

It is the duty of a judge, as the exemplar of due process, to insist upon fairness in the court, and to prevent discrimination from showing its face.

An article in the *Victorian Law Institute Journal* described the kind of problem that can arise in the context of a litigant's sexual orientation. The same problem might arise in the context of HIV/AIDS status:

I was once greatly affected by a Canadian judge (Justice Louise Arbor, lately the Prosecutor before the International Criminal Tribunal for the Former Yugoslavia) when she told a conference of judicial colleagues in Quebec that she never tolerated sexism in her court - whether it came from a litigant, a lawyer or a colleague. She always intervened to correct the perpetrator and the record, and to insist upon manifestly equal justice under the law. The judiciary must do so in the courtroom upon every ground of irrational discrimination, including the HIV/AIDS status of litigants, witnesses or others in front of the court.

CASES

The cases involving aspects of HIV/AIDS are now legion. Whole texts are written about AIDS and the law. From something which began rather modestly, this is now a very large enterprise. In many countries, including my own, special legal series are now published on aspects of HIV/AIDS and the law. Thus, in Australia, there is a quarterly newsletter on HIV/AIDS law and policy called *HIV/AIDS Legal Link*. There is a similar journal in Canada called *Canadian HIV/AIDS Policy and Law Newsletter*. There are many similar publications in the United States.

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I cannot attempt in this brief paper to analyse the role of the judiciary in responding to the many issues which HIV/AIDS has presented to the law. A number of examples may, however, illustrate the way in which informed judges, and other quasi-judicial decision makers, can render a service by the sensitive application of the law to novel problems presenting as a result of HIV infection.

Let me start in the criminal law area. In common law countries, bail before trial is quite normal. It is not always a feature of most civil law traditions. In the United States, it has sometimes been argued that the defendant's HIV status is relevant to whether or not he or she should be released pending trial. This is because of the shortened lifespan of most people found HIV positive. Typically, constitutional and statutory standards refer to the central question of whether the defendant will return to court to face the charges. Few, if any, refer specifically to HIV status. According to one analysis, it is not so much the category in which the person belongs, as the behaviour in which he or she engages, which is relevant. The stereotyping views about dangers to the public should be expelled by the judge, who should confine his or her decision to the actual known conduct of the applicant. An appellate court in New York held that it was an abuse of discretion to impose a condition of a negative HIV/AIDS test prior to release on bail, in so far as this was not mentioned in the statutes, and could involve an injustice to the particular applicant.

Increasingly, judges are being faced by applications of the general criminal law, with special HIV/AIDS statutes designed to penalise persons who know that they are infected, but proceed to have unprotected sex and spread the virus. A Kenyan visitor was recently convicted in New Zealand under the general law. But in Victoria, Australia, a judge directed a jury to acquit a person accused, following consensual, unprotected intercourse, because he considered the risks of infection unreasonably slight.

In the criminal area, the main questions which have come before judges involve issues such as sentencing persons who are known to be infected with HIV, and ordering parole release of such persons. In Australia, the principle that has been applied was stated by King CJ in the South Australian Court of Criminal Appeal in *R v Smith*:

In *R v McDonald*, the accused had been aware at the time of his original sentencing that he had HIV, but did not disclose the fact to the court. Evidence as to his HIV status was brought out in an appeal. There was also evidence that the appellant, by reason of his HIV infection, had been transferred to a special wing of the prison, where conditions were more restricted than in any other part of the prison system. The New South Wales Court of Criminal Appeal said:

The Queensland Supreme Court ordered that an HIV positive prisoner should have his application for parole reconsidered. It overruled the Parole Board's original determination that special circumstances had not been shown by reason of HIV status.

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Other areas where judges are called upon to make sensitive decisions include in family law; in immigration decisions on permanent residence or refugee status; in adoption; in disturbance of a will which fails to make provision for a life partner and is contested by the family; in discrimination cases involving employment, including in the military; in superannuation rights; in insurance benefits; and in industrial cases concerned with family leave entitlements. All of these, and doubtless many other, cases call forth understanding by the judge of the high passions which tend to be engendered by the element of HIV/AIDS. In such cases especially, judges need to ground all decisions upon sound data resting on the evidence - not on prejudice, stereotypes, myths or pre-judgment.

Many cases are now coming before the courts concerning claims for negligence. The cases may involve an accusation that a medical practitioner did not test the patient for his or her HIV status; did not inform the patient's partner of a positive HIV test of a patient, so as to warn him or her of the risk of infection; and the failure to advise against the risks of exposure to accidental infection. The cases are virtually infinite in their variety. Whilst it is unlikely that some of the more esoteric cases will come before courts in many countries of the Asia/Pacific region, claims in negligence provide the vehicle for assertions that medical practitioners, other health workers, public authorities, and the like, have not acted with due care. Where a person has become HIV-infected, it is natural that he or she should look to others who are felt even partly to blame to provide financial protection during life, and protection for dependants thereafter.

Some of the most difficult decisions arise in the area of family law. Cases have been decided whereby access to a child was denied to a father found to be HIV-positive. The basis of the decision, however, was not any real risk to the child, but that it was "not unreasonable" for the child's mother to have concerns without the risk of infection from fatherly social contact. This was an irrational fear, and the judge should not have given effect to it. A better approach was suggested in another case, where a wise judge held that it was a more appropriate response to the risk of stigmatisation to bring the child up in a way that assists him or her in coping with it, and not to shield the child from reality altogether.

The call to the proper judicial function in all of the cases which I have mentioned, and doubtless many others, is to rest the decision, as all good judges do, upon sound evidence. In so far as the judge may take judicial notice, he or she must inform the decision about the real nature of HIV/AIDS, so that prejudice is replaced by knowledge; and stereotyping by the judicial commitment to equal justice under the law.

COLLEAGUES

It is inevitable that as HIV/AIDS penetrates more societies and every branch of society, the judiciary will become aware of colleagues who are living with HIV/AIDS, either in the judiciary, or in the legal profession. Because the judiciary is still generally made up, in most countries, of middle aged to elderly males, the modes of transmission of the virus may be less likely to have consequences affecting judges, than other groups in society. But this is not necessarily so. These suppositions sometimes collapse in the face of reality.

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I myself have known a number of legal practitioners who have been infected with HIV. In Sydney I have sat at the hospital bedside of one, a fine attorney, born in New Zealand, who acquired the virus in a time that he worked in New York in the early days of the epidemic. He was an outstanding lawyer. He told me how he was determined to "beat the virus". He did not. But it is important that jurists should reach out to their colleagues facing this predicament. They should ensure that they are received without discrimination, but with support, where that is appropriate, and accommodation where it is necessary. Bar Associations, in Australia, and doubtless elsewhere, have provided special assistance to members of the legal profession who cannot continue in their professional work because of HIV/AIDS. Judges, as leaders of the profession, must not forget their duties of professional comradeship and support where colleagues are affected. This means not just other judges, but advocates, court staff, police and bailiffs, their families and friends.

COMMUNITY

Finally, judges are members of their communities. They must give a lead to community discussion of HIV/AIDS, its causes, and the behavioural modifications that are necessary to arrest the spread of the epidemic.

Judges cannot be interested in everything. But many of the features of HIV/AIDS are relevant to the professional duties of judges. Typically, laws stigmatise, and sometimes criminalise conduct which is relevant, eg the sexual activities outside marriage; prostitution; homosexual activities; and injecting drug use. It is therefore the duty of judicial officers to reflect upon the effectiveness of current laws, in so far as they are relevant to the epidemic. Where law has become part of the problem, judicial officers (being better informed and usually more powerful) have a responsibility to add their voices to the discussion of law reform. In default of a cure for, or vaccine against, HIV/AIDS, the only weapon in society's armoury is behaviour modification. Alas, it is the lesson which judges can tell society that strong criminal sanctions are only of limited use in securing and reinforcing behaviour modification in such basic activities as sex and drug use.

This is why, in many countries, the advent of HIV/AIDS has led to a rare, and long delayed, re-examination of rules of law long established. Although the law in most countries no longer punishes (as once it did) adultery, as a criminal offence, legal vestiges from the same time intrude upon other consensual adult conduct of citizens. Because judges are the instruments of enforcing such laws, their moral sense is bound to be enlivened by what they are required by the law to do. This gives them both the motivation and the legitimacy to add their opinions to the suggestions of reform.

It is surely no coincidence that, since the advent of HIV/AIDS, very significant pressures have built up, particularly in developed countries, for re-examination of laws concerning sex and drug use. In several parts of Australia, including my own State, New South Wales, prostitution (paid sex work) and the running of brothels has been decriminalised so far as it affects adult consensual conduct. Similar moves have occurred in other States of Australia[31]. But the reforms are uneven. In many countries, people are asking what business it is of the law to

intervene in such matters, save to prevent oppression, and to protect minors. The AIDS paradox teaches that criminalisation and stigmatisation make it more difficult to reach the minds of those affected. The first step on the path to effective behaviour modification will often be decriminalisation, and the provision of educational messages. It is in this sense that informed judges can contribute to AIDS prevention by participating in discussion of legal reform.

The same message is relevant to the re-evaluation of laws on homosexual conduct and drug use. In Australia, leading judges have begun to contribute to public discussion about the problems of homophobia, and the causes of injustice to fellow citizens by reason of their sexual orientation. Although HIV/AIDS is a human virus, and not limited to any sub-group, its early unequal impact upon homosexuals in Western countries has directed a lot of attention to the alienation of this group of the community, and the need to redress the unequal laws and policies which drive its members into a dangerous ghetto where HIV/AIDS dwells. It may not be wholly coincidental that there is a challenge before the Delhi High Court concerning the constitutionality of s 377 of the *Indian Penal Code* punishing homosexual crimes. A recent decision of the Constitutional Court of South Africa unanimously ruled that equivalent colonial relics in South African statute law were unconstitutional when measured against the constitution of the new South Africa.

In a number of parts of Australia, the advent of the AIDS epidemic has promoted a debate on euthanasia. In two jurisdictions (the Australian Capital Territory and the Northern Territory) the criminal law was modified to permit assistance to aid peaceful death under given conditions. A significant part of the momentum towards law reform in this area has been the predicament of young people dying prematurely by reason of HIV/AIDS. In this connection, the judicial function remains: of protecting the vulnerable and defending their human dignity against well-meaning, or avaricious, family and friends.

CONCLUSIONS

The judiciary has an important role to play in the response to the HIV/AIDS epidemic. It should be aware of the causes of HIV/AIDS, and familiar with the body of law that is growing up as a consequence of its unexpected advent. It should ensure justice and equality in every courtroom, and be alert to the differential way general laws fall upon those who are living with HIV/AIDS, their families and dependants. Because judges have choices in deciding cases, where their decisions are relevant to HIV/AIDS, they should rest them upon sound data. They should expel from their minds the stereotypes, the myths and the prejudice. This does not, of course, mean automatically deciding the case in favour of the person living with HIV/AIDS. The law must be observed and judges must remain professional and neutral in the performance of their tasks. But it does mean that the judges should be generally aware of the features of HIV/AIDS and approach legal and factional problems without the blinkers of prejudice or ignorance. The judiciary should be particularly alert to colleagues in the court process who suffer because of the epidemic. To the best of their ability, they should reach out

with help and understanding. And as leaders of the community, they should contribute to the discussion of law reform which the HIV/AIDS epidemic demonstrates to be needed.

We are only at the beginning of this unpredicted challenge to our species. The Asia/Pacific region, which hoped for economic growth in the decades ahead, faces both economic and individual challenges unless behaviour can be modified and the spread of HIV contained. Harsh laws will not achieve these objectives, as any judge can tell. Instead, sensible policies, effective redress for discrimination and suitable law reform - as well as unyielding honesty - will be the chief weapons against the spread of HIV/AIDS.

Judges, as leaders and teachers, must play their part in responding to HIV/AIDS[35].