



## **WHY ALL PEOPLE WITH HIV SHOULD BE PROTECTED UNDER THE DISABILITY PROVISIONS OF EU ANTI-DISCRIMINATION LAW**

### **Why should the EU act to end discrimination against people living with HIV?**

There are over 700,000 people living with HIV across the EU and discrimination against people with HIV is common in all EU member states. Discrimination can take many forms – in employment, housing, healthcare, access to goods and services, through breaches of confidentiality, in harassment or hate crime. Protections against discrimination for people with HIV across the EU are currently inconsistent, often weak, and infrequently accessed. This is a disaster both for human rights and public health.

The EU is committed to respect and protection of human dignity, equality before the law and non-discrimination [Articles 1, 20 and 21 EU Charter of Fundamental Rights].

Furthermore, the EU has committed itself to combating discrimination against people living with HIV. The Dublin Declaration on Partnership to Fight HIV/AIDS in Europe and Central Asia commits signatories to:

*'combat stigma and discrimination of people living with HIV/AIDS in Europe and Central Asia, including through a critical review and monitoring of existing legislation, policies and practices with the objective of promoting the effective enjoyment of all rights for people living with HIV/AIDS and members of affected communities.'*

This is reaffirmed in the Vilnius Declaration where there is a commitment to:

*'continue to develop and implement relevant legislation, in particular with a view to prohibiting discrimination, inter alia in employment, on the grounds of HIV status.'*

In brief, if the EU can lawfully act to end discrimination against people living with HIV, then, according to both its principles and its commitments, it must act.

### **How can the EU protect people with HIV from discrimination?**

Under Article 13 of the EC Treaty the Community can legislate to combat discrimination across all EU member states on a number of defined 'grounds' – sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. HIV status is not explicitly mentioned, but, as is demonstrated further below, it does come within the concept of disability. Disability discrimination is already

prohibited in employment, and a proposed Directive now under consideration would extend prohibition of discrimination for disabled people (and others) in relation to social protection, social advantages, education, and access to goods and services, including housing. In brief, the EU has powers to legislate to prohibit discrimination against people with HIV since they come within the concept of disability.

**But is HIV infection a disability in all circumstances, even when there are no symptoms or physical problems such as difficulties with mobility?**

Yes. The most up-to-date description of disability in international law is found in the 2006 UN Convention on the Rights of Persons with Disabilities. The Convention is cited, along with other UN human rights instruments, in the Preamble to the proposed EU equality Directive currently under consideration. The Convention states that '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' [Article 1].

HIV infection is a long-term physical impairment of the immune system which in interaction particularly with social stigma and prejudice results in discrimination and hindrances to full and equal participation of people living with HIV in society. So all people with HIV are disabled for the purposes of the rights set forth in the UN Convention.

Some people may not naturally think of HIV infection as a disability but it is important to note how the concept of disability had developed significantly in recent years. As the UN Convention states, 'disability is an evolving concept'. EU law must keep up with these developments in thinking on disability.

**Did the UN have stigma and prejudice in mind as 'barriers' when it referred to disability as resulting from the interaction of impairment and barriers?**

Yes. Recital (e) to the Convention makes clear that barriers need not just be 'environmental' or physical – they can be 'attitudinal'. This understanding of disability is often called the 'social model' of disability.

**What has the European Court of Justice said about the definition of disability for the purposes of EU law?**

The European Court of Justice (ECJ) has never had to rule as to whether or how people with HIV are protected by the disability provisions of EU equality legislation. But in one case (*Chacon Navas v Eurest Colectividades SA* Case C-13/05) the Court had to provide some definition of disability to distinguish it from 'sickness', in the context of protections against disability discrimination in the workplace ('professional life').

The ECJ stated that 'the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. The Court went on to state that 'for the limitation to fall within the concept of 'disability' it must ... be probable that it will last for a long time'.

It is clear that the ECJ definition of disability is consistent with that of the UN Convention, and that HIV infection can be considered a disability as defined by the ECJ.

Some people have mistakenly thought that HIV infection might be a 'sickness' for the purposes of the ECJ definition. This is not the case. HIV infection can cause specific diseases or conditions if left untreated for a long time, but is not described or conceived of as a sickness itself. The overwhelming majority of instances of discrimination have nothing to do with sickness or opportunistic disease which may result from HIV infection, and relate simply to the fact that someone has the long-term impairment of being HIV positive.

### **Are there national jurisdictions which include all people with HIV under disability protections?**

Yes. In a recent survey of legislation and judicial systems in relation to HIV across the WHO European region, to which 36 countries responded, including 24 EU member states, 16 responses stated that people with HIV were protected from discrimination under disability legislation.<sup>1</sup> Finland, Portugal, Sweden, the United Kingdom and Ireland were amongst the EU respondents who stated that people with HIV were protected under disability law. Furthermore, national jurisdictions such as New Zealand, Australia, Canada, the United States and Hong Kong all include HIV infection within the concept of disability irrespective of symptoms or stage of infection.<sup>2</sup>

### **Why do we need a clearer description of disability in the proposed Directive 'on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation'?**

Current EU law does not define disability nor refer to the laws of member states for the definition of the concept. As stated by the European Court of Justice in its judgment in Chacon Navas, the 'principle of equality' requires an 'autonomous and uniform interpretation [of disability] throughout the Community..'

Even though both international law and the ECJ support a concept of disability which includes people with HIV, the lack of a clear definition or description of disability in EU legislation means that this fact is not properly understood nor always reflected in national laws and practice. Instead of a 'uniform interpretation' we have inconsistency across the EU.

The lack of a definition or full and up-to-date description of disability in EU law, which takes account in particular of the UN Convention on the Rights of Persons with Disabilities, can only undermine the purposes of the Community to provide consistent and equal protections for all EU citizens. It is unacceptable that currently someone with HIV can enjoy full protection from discrimination under disability law whilst, for example, in Ireland, but lose it when travelling elsewhere in the EU for employment or other purposes.

If we are to establish a fuller and consistent description of the concept of disability for the purposes of Article 13 EC, the principles of human dignity, equality before

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<sup>1</sup> 'Legislation and Judicial Systems in relation to HIV and AIDS' Results of a European Survey AIDS Action Europe/NAT 2007

<sup>2</sup> See 'HIV, Disability and Human Rights' Canadian HIV/AIDS Legal Network et al March 2008 [www.aidslaw.ca](http://www.aidslaw.ca)

the law and non-discrimination, all found in the EU Charter of Fundamental Rights, require a 'levelling up' of explicit disability protections to the most comprehensive standard consistent with current conceptions and practice, as well as with international law.

People living with HIV face particular barriers in accessing justice and legal redress, including loss of confidentiality in the legal process, lack of funds to fight cases, and legal systems with poor understanding of, and sometimes hostility towards, people living with HIV.<sup>3</sup> It is already hard for people with HIV to seek justice. Confusion over whether anti-discrimination law protects them or not just makes it that much harder.

**But many people living with HIV do not think of themselves as 'disabled' and maybe do not want to be thought of as disabled by others.**

The inclusion of all people with HIV within the legal definition of disability is about the promotion and protection of their human rights. It does not constrain how individuals or communities choose to define themselves in everyday life. People with HIV already enjoy protection under disability provisions in some EU countries, and greatly value such legal rights.

**How can the EU ensure that the proposed equality directive provides clear protection from discrimination for all people living with HIV?**

The text of the final Directive must include a full description or definition of disability in line with the social model outlined in the UN Convention on the Rights of Persons with Disabilities. It should for example state in terms that:

*'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers, whether attitudinal or environmental, may hinder their full and effective participation in society on an equal basis with others'.*

The Council must also make clear its view that the disability protections of Article 13 EC apply to all people living with HIV, either in the substantive text of the final Directive or in its recitals ("whereas" clauses). For example:

*'Persons with disabilities, even in the absence of environmental barriers, may experience attitudinal barriers alone, such as stigma, prejudice, stereotyping or discriminatory treatment, which interacting with their impairments hinder their full and effective participation in society on an equal basis with others, for example in the case of asymptomatic HIV infection'.*

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<sup>3</sup> See for example 'Legislation and Judicial Systems in relation to HIV and AIDS' Report of a Seminar 19-21 April 2007 AIDS Action Europe/NAT