



Via email: OSD.UCMJ@mail.mil

July 1, 2014

Military Justice Review
Room 3B747
1600 Defense Pentagon
Washington, DC 20301-1600

William Sprance
Office of the General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Comprehensive Review of the Military Justice System

Dear Military Justice Review Committee:

The Center for HIV Law and Policy (“CHLP”), a national legal and policy resource and strategy center working to reduce the impact of HIV on marginalized communities and to secure the human rights of people affected by HIV, welcomes the opportunity to provide comments in connection with the Department of Defense’s (“DOD”) comprehensive review of the military justice system, including the structure and operation of the Uniform Code of Military Justice (“UCMJ”).

1. DOD HIV-Related Report Required Under Section 572 of the National Defense Authorization Act of 2014

As a threshold matter, CHLP respectfully reminds DOD that Section 572 of the National Defense Authorization Act of 2014 (NDAA), signed into law by President Barack Obama on December 27, 2013, provides 180 days for the Secretary of Defense to submit a report to the Committees on Armed Services of the Senate and House of Representatives on DOD personnel policies concerning servicemembers living with HIV or Hepatitis B. More specifically, the report must include:

- A description of policies addressing the enlistment or commissioning of individuals with these conditions and retention policies, deployment policies, discharge policies, and disciplinary policies regarding individuals with these conditions.¹
- An assessment of these policies, including an assessment of whether the policies reflect an evidence-based, medically accurate understanding of how these conditions are contracted, how these conditions can be transmitted to other individuals, and the risk of transmission.²

The NDAA directive requires the Secretary of Defense to examine and justify two major aspects of military policy that have subjected people with HIV to negative treatment based on their health condition: automatic exclusion from enlistment, and from certain assignments for servicemembers who are diagnosed with HIV after enlistment; and restrictions on consensual sexual relationships that can lead to the prosecution and expulsion of servicemembers living with HIV.

CHLP anticipates that the reporting required under Section 572 of the NDAA will result in concrete steps to modernize the military's HIV-related policies, and align those policies and the UCMJ with the current medical understanding of HIV and scientific assessment of the routes, risks, and consequences of HIV transmission. This will also prevent the unnecessary and costly criminal prosecutions of servicemembers living with HIV.

Since the NDAA was signed into law on December 27, 2013 – and 180 days have passed – CHLP respectfully urges the DOD to comply with the reporting required by this legislation forthwith.

2. Army Regulation 600-110

Additionally, CHLP notes that Army Regulation 600-110: Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (“AR 600-110”) was recently superseded by a version published in April 2014. A review of the revised AR 600-110 reveals minimal policy changes, all of which affect only reserve component personnel. The efficacy of AR 600-110 is questionable in light of Section 572 of the NDAA which, as discussed above, requires an assessment of whether military policies reflect an evidence-based, medically accurate understanding of HIV.

Moreover, the revised AR 600-110 continues to present serious instances of unwarranted discrimination, including unnecessary exceptions to confidentiality; opt-out HIV-related education and information programs; uncounseled mandatory HIV testing; institutional barriers to career advancement and training opportunities for servicemembers living with HIV; imposition of deployment and overseas assignment restrictions; and outright rejection of people

¹ Section 572 of the NDAA *available at* <http://www.hivlawandpolicy.org/resources/national-defense-authorization-act-fiscal-year-2014-section-572>.

² *Id.*

living with HIV seeking to serve their country. Notably, scientific and medical explanations and references are missing throughout AR 600-110.

Since the DOD has yet to comply with NDAA’s reporting requirements, CHLP respectfully submits that AR 600-110 should be reassessed in light of the Secretary of Defense’s submission in response to Section 572 of the NDAA.

3. Unnecessary and Costly Criminal Prosecution of Servicemembers Living with HIV

In connection with the UCMJ, CHLP has noted a concerning trend: there is an ongoing practice of charging servicemembers living with HIV with aggravated assault under UCMJ Article 128.³

A growing number of Americans, including medical and public health organizations, are deeply concerned with HIV criminalization – the use of criminal laws to prosecute and penalize people living with HIV for conduct that would be legal if they did not get tested or know their status. Public health leaders and global policy makers agree that HIV criminalization is unjust, bad public health policy, and fuels the epidemic rather than reducing it. In fact, major national players have issued statements against the criminalization of HIV, including the [Presidential Advisory Council on HIV/AIDS \(PACHA\)](#)⁴, the [American Medical Association \(AMA\)](#)⁵, [HIV Medicine Association \(HIVMA\)](#)⁶, the [National Alliance of State and Territorial AIDS Directors \(NASTAD\)](#)⁷, [U.S. Conference of Mayors](#)⁸, and the [Positive Justice Project](#)⁹, a national coalition of organizations and individuals working to end HIV criminalization in the United States. *See also Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (noting that “the views of public health authorities ... are of special weight and authority” in assessing the relevance or risk of HIV).

³ UCMJ Article 128 available at <http://www.ucmj.us/sub-chapter-10-punitive-articles/928-article-128-assault> (stating that “[a]ny person subject to this chapter who (1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or (2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct”).

⁴ PACHA Statement available at <http://hivlawandpolicy.org/resources/resolution-ending-federal-and-state-hiv-specific-criminal-laws-prosecutions-and-civil>.

⁵ AMA Statement available at <http://www.hivlawandpolicy.org/news/ama-adopts-a-resolution-opposing-hiv-criminalization>.

⁶ HIVMA Statement available at <http://www.hivlawandpolicy.org/fine-print-blog/hiv-medicine-association-urges-repeal>.

⁷ NASTAD Statement available at <http://www.hivlawandpolicy.org/resources/national-hivaids-strategy-imperative-fighting-stigma-and-discrimination-repealing-hiv>.

⁸ U.S. Conference of Mayors Statement available at <http://hivlawandpolicy.org/resources/us-conference-mayors-resolution-hiv-criminalization-adopted-june-25-2013>.

⁹ Positive Justice Project Statement available at <http://www.hivlawandpolicy.org/resources/positive-justice-project-consensus-statement-criminalization-hiv-united-states-positive>.

Bringing attempted murder and aggravated assault charges against servicemembers living with HIV reflects outdated and erroneous beliefs and misconceptions about the routes, risks, and consequences of HIV transmission. The legal standards applied in HIV criminalization cases regarding intent and harm deviate from generally accepted criminal law principles, and reflect long-outdated attitudes about HIV and servicemembers living with HIV. Prosecutions involving allegations of non-disclosure, exposure, or transmission of HIV conflict with public health priorities and violate basic principles of justice. Punishments imposed for non-disclosure of HIV status, exposure, or transmission of HIV are grossly out of proportion to the actual harm inflicted, and reinforce the fear and stigma associated with HIV.¹⁰

Notably, the U.S. Court of Appeals for the Armed Forces has questioned whether servicemembers living with HIV should be subjected to aggravated assault charges under UCMJ Article 128. *See United States v. Dacus*, 66 M.J. 235, 241 n.1 (C.A.A.F. 2008) (Ryan, J., concurring) (“There is at least a question whether traditional notions of aggravated assault comport with current scientific evidence regarding HIV and AIDS.”). In *Dacus*, medical evidence presented at trial showed that the servicemember’s likelihood of transmitting HIV was extremely low due to his low viral load. *Id.* at 240 (noting that the “low viral load was below the limits of what current testing methodologies can detect”). According to expert testimony in the *Dacus* case, the probability of “transmission of HIV through unprotected sex was approximately 1 in 10,000...if [servicemember] used a condom, the chance of transmission would diminish to 1 in 50,000.” *Id.* at 240. As the concurring judges found: “it would not appear that the statutory element – ‘means or force likely to produce death or grievous bodily harm’ – should be satisfied where the record shows that the likelihood of death or grievous bodily harm from a particular means is statistically remote.” As the concurring judges concluded, there are “grave doubts that the statutory element should be deemed satisfied where the statistical probability of the consequence of an act is so low as to approach being no more than merely a fanciful, speculative, or remote possibility.” *Id.*

The concurrence in *Dacus* reflects the fact that, three decades into the HIV epidemic, there is clear consensus among medical, scientific, and public health professionals that HIV is not easily transmitted; that condom use and effective medical care and treatment can reduce the already low per-act risk of HIV transmission; and that HIV is one of the least transmissible of all sexually transmitted infections.¹¹ While HIV remains a disease of consequence requiring lifelong

¹⁰ The Center for HIV Law and Policy, *Comparative Sentencing on HIV Criminalization in the United States* (comparing the sentencing schemes for non-disclosure, exposure and/or transmission of HIV in the United States with laws punishing drinking and driving, reckless endangerment of others, and vehicular homicide), available at <http://hivlawandpolicy.org/resources/chart-comparative-sentencing-hiv-criminalization-united-states-center-hiv-law-and-policy>. In comparison with HIV exposure, which often carries minimal risk, the danger posed by these crimes is similar or significantly greater. However, the punishment for HIV exposure can be much more severe than those for the other crimes.

¹¹ The Center for HIV Law and Policy, *HIV, STIs & Relative Risks in the United States* (illustrating that other sexually transmitted infections can pose similar, and sometimes equally great or greater, risks than HIV), available at <http://www.hivlawandpolicy.org/resources/download/681>; see also Brief of The Center for HIV

care and treatment, for most affected people, it is not a “death sentence,” but rather a chronic, manageable condition. There is neither medical nor legal support for singling out HIV as a factor in a crime, particularly in view of the higher transmission rates and sometimes quite serious consequences that other sexually transmitted infections pose.

CHLP urges DOD to include in the UCMJ a clear and firm statement that HIV – including HIV exposure and/or transmission – cannot be used to trigger or support a charge for assault or aggravated assault under Article 128.

3. Safe-Sex Orders

CHLP notes that servicemembers living with HIV receive specific “safe sex” orders limiting their allowable sexual activities. In many cases, prosecutors have charged servicemembers with violating or disobeying a “safe sex” order under UCMJ Article 90¹² or Article 92¹³. These safe sex orders may at times prohibit conduct that is scientifically and medically safe. For example, in *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996), the accused was told that HIV could be transmitted by oral sex. To put realistic probability of transmission into perspective, the theoretical possibility of HIV transmission during oral sex performed by an HIV affected person is equivalent to the odds of a person fatally slipping in the bath or shower.¹⁴ See, e.g., *Henderson v. Thomas*, No. 11-CV-224, slip op. at 2 (M.D. Ala. Dec. 21, 2012) (“A person would have to drink a 55-gallon drum of saliva in order for it to potentially result in a transmission.”).

Additionally, safe sex orders implicate Constitutional privacy rights affirmed in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding consenting adults have a “full right to engage in [private sexual conduct] without intervention of the government”). In *Lawrence*, the U.S. Supreme Court rejected government intrusion into the “personal and private life of the individual.” *Id.*

Law and Policy et al. as *Amici Curiae* Supporting Appellant in *Rhoades v. Iowa*, No. 12-0180, 2014 Iowa Sup. LEXIS 71 (Iowa June 13, 2014), *amicus brief available at* <http://www.hivlawandpolicy.org/resources/rhoades-v-state-iowa-amicus-brief-supreme-court-iowa-national-alliance-state-and> (noting that public health policies and practices encourage risk reduction through condom use and other safer sex practices, and that mandatory HIV disclosure places individuals at risk of harm without advancing legitimate public health goals).

¹² UCMJ Article 90 *available at* <http://www.ucmj.us/sub-chapter-10-punitive-articles/890-article-90-assaulting-or-willfully-disobeying-superior-commissioned-officer> (concerning assaulting or willfully disobeying superior commissioned officer).

¹³ UCMJ Article 92 *available at* <http://www.ucmj.us/sub-chapter-10-punitive-articles/892-article-92-failure-to-obey-order-or-regulation> (concerning failure to obey order or regulation).

¹⁴ The Center for HIV Law and Policy, *Risk of HIV Infection Per Single Sexual Exposure to An Individual Living With HIV, And Other Life Events With Comparable Risk of Occurrence* (2011) (comparing risk of HIV transmission to other unlikely, yet fatal life events with comparable risk of occurrence), *available at* <http://www.hivlawandpolicy.org/resources/view/849>.

CHLP urges DOD to rescind all “safe sex” orders for servicemembers living with HIV. In lieu of “safe sex” orders, CHLP urges DOD to issue a universal sexual health guidance to all servicemembers regardless of HIV status, consistent with that provided through the Centers for Disease Control and Prevention, addressing the prevention and diagnosis of all sexually transmitted infections and risks, including HIV.¹⁵ Guidance on sexual health far more effectively promotes the sexual health of all servicemembers while protecting those living with HIV from being singled out unnecessarily for disparate treatment or threatened with UCMJ action.

It is imperative that military officials end the silence about sex, sexuality, and sexual health, and encourage individual power and responsibility for personal health care and health maintenance. DOD should issue a clear statement that understanding sexual health options and consequences are central to adult personal responsibility, and bring armed forces policy more in line with the modern understanding and treatment of sexual health.

In conclusion, CHLP would welcome an opportunity to discuss these concerns and suggestions in more depth at your convenience, and to contribute concretely to any of the recommendations outlined above.

Respectfully submitted,

Ivan Espinoza-Madrigal, Esq.
Legal Director

¹⁵ Notably, the CDC has produced fact sheets containing useful guidance on sexually transmitted infections, including HIV. See CDC’s Fact Sheets, available at, http://www.cdc.gov/std/healthcomm/fact_sheets.htm; see also CDC’s Fact Sheet on Condoms, available at http://www.cdc.gov/condomeffectiveness/docs/Condoms_and_STDS.pdf.