



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

DRAFT DISCUSSION PAPER:
HIV/AIDS, HUMAN RIGHTS AND
ACCESS TO JUSTICE

Department of Justice & Constitutional Development
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Preface

The discussion paper on HIV/AIDS, Human Rights and Access to Justice was prepared by the Chief Directorate: Promotion of the Rights of Vulnerable Groups to inform the Department of Justice & Constitutional Development's 2009/ 2010 Strategy on HIV/AIDS. The strategy is two fold;

- Internally focused on the Department of Justice & Constitutional Development (referred to as the Department) as **employer** and as **service provider**; specifically, ensuring a human rights based legal framework to respond to the challenge of HIV/AIDS
- Externally focused on the Department's role as member of the South African National Aids Council (SANAC) and convenor of the SANAC Sectoral Coordinating Committee on Justice

The strategy is informed by the Department's constitutional mandate of ensuring accessible justice for all. Further, it resonates within government's mandate of responding to HIV/AIDS as a public health challenge; that in turn seeks to be responsive to South Africa's international and continental obligations. Taking direction from international and national context, the strategy will form part of government's overarching response to HIV/AIDS which includes multi-sectoral programmes involving partnerships among government departments (at three tier level), faith based and civil society organizations; including traditional healers and leaders, private sector and the media.

The scope of the discussion paper is limited to an analysis of the intersection between HIV/AIDS, Human Rights and Access to Justice. It does not address other aspects of HIV/AIDS such as socio-economic or health, although it locates



the discussion within this context. It recognizes government's broad policy and legislative framework that seeks to transform public and private spheres of society so as to uphold constitutional values and ethos. It places debates within current context of victim empowerment and restorative justice. It does not address policy perspectives on criminalization of HIV/AIDS, although recommendations are made for inclusion of this issue in the proposed strategy.

The discussion paper is intended for the Justice sector (Government departments and civil society organizations working on legal issues). It is premised on recognition of substantive contributions made by the Justice sector in advancing human rights of persons affected and infected by HIV/AIDS; through advocating for progressive legislation, supporting court challenges and pronouncing judgements that seek to entrench human rights. A limitation in contributions made thus far is coordination from the Justice Department. The discussion paper moves from this premise and identifies opportunities for strengthening legal responses to HIV/AIDS.

The discussion paper is organized into eight chapters. Chapter 1 provides an introduction to (conceptual and contextual) issues, setting the scope for discussion.

Chapter 2 provides a detailed analysis of contextual issues, essentially making observations about why HIV/AIDS undermines progress in the realization of human rights and access to justice.

Chapter 3 outlines South Africa's international obligations and highlights lessons for the strategy, particularly using international guidelines as a measure against which to inform our interventions as the Department and the Justice sector.



Chapter 4 gives an overview of Constitutional and legal frameworks that currently provide legal recourse and protection for those affected and infected by HIV/AIDS. It also provides information on HIV/AIDS case law. In addition, the chapter highlights equality and unfair discrimination by showing what implications are for the Justice sector. The chapter examines complexities of vulnerabilities for Black women and children.

Chapter 5 highlights current government framework for operationalization of its HIV/AIDS strategy. Specific responsibilities of the Department are noted.

Chapter 6 contains preliminary recommendations for the Department's strategy.

Consultation on the discussion paper is anticipated to be completed in June 2009.



List of Acronyms

ABC	Abstain, Be Faithful, Condomise
ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
ART	Antiretroviral therapy
ASSA	Actuarial Science Society of South Africa
AU	African Union
CBO	Community-based Organisations
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CGE	Commission for Gender Equality
CLRA	Communal Land Rights Act
COMESA	Common Market of Eastern and Southern Africa
CRC	Convention on the Rights of the Child
CRDP	Convention on the Rights of Disabled Persons
CSW	Commercial Sex Work
CTOP	Choice on Termination of Pregnancy
DOH	Department of Health
DCS	Department of Correctional Services
DOJ&CD	Department of Justice and Constitutional Development
GBV	Gender-based Violence
HIV	Human Immunodeficiency Virus
IAWJ	International Association of Women Judges
IDU	Injecting Drug Use
ILO	International Labour Organisation
IMC	Inter-Ministerial Committee on AIDS



IOM	International Organisation for Migration
JSCC	Justice Sector Co-ordinating Committee
LGBTI	Lesbian, gay, bisexual, transgender and inter-sex
MDG	Millennium Development Goals
M&E	Monitoring and Evaluation
MSM	Men who have Sex with Men
MTSF	Medium Term Strategic Framework
MTCT	Mother-to-child transmission
NACOSA	National AIDS Co-ordinating Committee of South Africa
NEPAD	New Partnership for Africa's Development
NGO	Non-Government Organisations
NPA	National Prosecuting Authority
NSP	HIV/AIDS and STI National Strategic Plan for South Africa 2007 - 2011
OPPEI	OVC Policy and Planning Effect Index
OVC	Orphaned and Vulnerable Children
PAJA	Promotion of Administrative Justice Act
PEP	Post-exposure prophylaxis
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PIC	Programme Implementation Committee (SANAC)
PLWA	People living with HIV/AIDS
PMTCT	Prevention of mother to child transmission
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SANAC	South African National AIDS Council
SADC	Southern Africa Development Community
SADC PF	SADC Parliamentary Forum
SANDF	South African National Defence Force



STI	Sexually Transmitted Infections
TAC	Treatment Action Campaign
TB	Tuberculosis
TCCs	Thuthuzela Care Centres
TLAC	Tshwaranang Legal Advocacy Centre to end violence against women
TRIPs	Trade-relates aspects of Intellectual Property Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNGASS	UN General Assembly Special Session on HIV/AIDS
VCT	Voluntary HIV Counselling and Testing
WHO	World Health Organisation
WTO	World Trade Organisation



CHAPTER 1 INTRODUCTION

1.1 Background

Within government's HIV/AIDS strategy of prevention, care, treatment and support, government departments are assigned responsibilities for implementation of the strategy. The Department of Justice and Constitutional Development (hereafter referred to as the Department), given its constitutional mandate of administration of justice, must contribute to the strategy through the creation of an enabling legal framework. With this responsibility, the question of the Department's fulfilment of its obligation has been subject for concern particularly from the South African National Aids Council and the Parliamentary Portfolio Committee on Justice and Constitutional Development.¹ Noting concerns, the Department through the Office of the Director-General tasked the Chief Directorate: Promotion of the Rights of Vulnerable Groups, to develop a HIV/AIDS Strategy 2009/ 2010.

The HIV/AIDS Strategy 2009/ 2010 is informed by secondary research conducted between January - March 2009 on 'HIV/AIDS, Human Rights and Access to Justice'. The research was informed by SANAC's priority area 4 - Human Rights and Access to Justice - which requires the Department, together with other stakeholders, to play a pivotal role in achieving priority area 4.

Legal research, particularly an analysis of Constitutional rights and legislation, together with case law, reveals significant strides made by government and civil society organizations in entrenching formal equality. However, notable gaps

¹ May 2008



which should be addressed relate to vulnerable groups that remain peripheral, unable to enjoy constitutional rights. Rigorous attention is required on substantive equality given government's strategy and the continued social victimization characterized by blaming of and apathy towards people infected and affected by HIV/AIDS.

The discussion paper is an interrogation of our role, both within national and international context.

1.2 Defining issues

The International AIDS Conference held in August 2008² concluded that human rights violations will continue to erode significant progress in countries responses to combating HIV/AIDS. Further, with limited 'access to legal aid, people living with HIV/AIDS because of lack of awareness of rights, and mechanisms' to address discrimination, countries fall short of creating appropriate legal responses to the HIV pandemic. In response, the South African government - through the Department of Justice and Constitutional Development - aims to strength legal solutions to the HIV pandemic and align itself with international standards.

What are issues that have legal implications for government's response to HIV/AIDS? At the heart of the debate lies the question of accessible justice to address human rights of persons affected and infected by HIV/AIDS. Accessible justice, a core mandate of the Department, concerns itself with groups that have been left outside of the formal justice system - because of limited resources

² AIDS 2008 XVIII International AIDS Conference 3 – 8 August, Closing Conference Statement



(financial, infrastructural, human) – and have implied Black, poor and rural communities.

The discussion paper uses an understanding of ‘accessible justice’ that is beyond access to legal aid or legal literacy. It begins with an interrogation of two key concepts; *equality* and *discrimination* that should be used as the vertebra of all legislation and policy.

People affected and infected by HIV/AIDS are similar to all, and are entitled to equality (before the law, protected by the law and benefiting from the law). Unlike others, they are denied equality because of stigma and discrimination. The law, and specifically the Department must respond to this inequality by ensuring that justice is accessible: from anti-discriminatory legislation, to legislation and policy that seeks to remedy social injustices.

1.3 Conceptual issues

The paper broadly focuses on two concepts; *access to justice* and *vulnerability*. Various characterizations and understandings of the concepts are presented in the paper. The intention is to highlight nuances so as to develop a working definition to guide the discussion.

1.3.1 Access to Justice

Taking direction from the Constitution, access to justice can be understood to include (collective) rights to equality (section 9), just administrative action (section 33), access to the courts (section 34), arrested, detained and accused



persons (section 35), and other matters concerning administration of justice (section 180). The constitutional guarantee is supported and defined in legislation and policy such as the Promotion of Administration Justice Act 3 of 2000 and the Batho Pele principles.

Beyond obvious calls from civil society to increase women's access to justice; judges and magistrates have echoed the call and gone a step further to making commitments to reform. The Arusha Declaration³ adopted by eleven African countries, including South Africa, acknowledges women's limited access to justice, citing reasons such as 'limited knowledge of rights, social disadvantages, and cost of litigation and complex procedural rules'. The Declaration makes a commitment by judges and magistrates to creating 'women-friendly courts'.

Mindful of the judiciary's role in transformation of justice, it was suggested that while 'it is imperative that a racial and gender mix be achieved, that by itself is not enough to make the courts more legitimate.'⁴ Judges and magistrates should, in addition, 'understand the South African society and its immediate past'. In order to ensure the accessibility of the courts, the judiciary is called upon to continually reflect on their own legitimacy and credibility with South Africans particularly those who are vulnerable. In essence, Deputy President Judge Mpati's call for racial and gender transformation as well as social orientation, as imperatives for making justice accessible.

The Department's understanding of access to justice, also includes considerations of restorative justice. Essentially, the paper argues for a restorative approach to

³ The Arusha Declaration of Commitments on the Role of the Domestic Judges on the Application of International Human Rights Law at the Domestic Level, 11 September 2003

⁴ Acting President Judge Mpati, Inaugural Lecture, University of Free State, 6 October 2004, 'Transformation in the Judiciary - A Constitutional Imperative'



justice rather than a restorative justice approach⁵. The former is concerned with how justice can be sued from a community perspective to address harm committed by a person against victim – both individual and collective (family and community). Restorative justice, as currently defined⁶ is regarded as restrictive. In the context of HIV discrimination, a restorative approach is more desirable because the harm (discrimination) is often based on fear, misinformation and prejudice. Correcting harm done by an individual should be informed by need to reconcile parties so as to prevent recurrence.

A different element to understanding access to justice is ‘cultural and linguistic appropriateness of the dispute resolution system’⁷ which brings an angle that goes beyond the court. However, traditionally, access to justice is understood in terms of legal rights, processes and procedure, often shadowing the socio-economic element, particularly that of poverty. The link between justice and poverty is the inevitable impact on poor and marginalized communities, the majority of whom are women, who are ‘deprived of choices, opportunities, and access to basic resources’.⁸

In the context of discussion paper ‘access to justice’ is defined as

- Access to court – facility, personnel, information, process and procedure

⁵ Department of Justice and Constitutional Development – Discussion Paper: Restorative Justice , 2008

⁶ Child Justice Bill - *“Means an approach to justice that aims to involve the offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent recurrence of the incident and promoting reconciliation ”*

⁷ ‘South African Justice Sector and Rule of Law’ – A Discussion paper, AfriMap and Open Society Foundation, November 2005, page 20

⁸ United Nations Development Programme (UNDP) Report: Access to Justice, March 2004



- Access to information about the justice system – court, police, prosecutors, correctional services
- Acknowledgement of differences among women in accessing justice

1.3.2 Vulnerability

Guidance on South Africa's qualification of 'vulnerability' is derived from policy frameworks, for example, the National Policy Guidelines for Victim Empowerment identifies 'vulnerability of women' and 'priority groups'⁹. Of significance, South African case law; particularly legal challenges to constitutional rights (religion and socio-economic rights: housing, health care and water) has categorized vulnerable groups along racial lines¹⁰, gender¹¹, sexual orientation¹², economic status¹³ and disability (physical and mental)¹⁴. The NSP includes a broad category of vulnerable groups. To support the qualification, population policies have defined vulnerability within gender and racial lines, recognizing that in the context of HIV/AIDS, 'women, particularly poor, Black women'¹⁵ are most vulnerable. Generally, vulnerability is understood as 'exposure to risk and stress and the lack of ability to cope with the

⁹ National Policy Guidelines for Victim Empowerment, December 2008, Department of Social Development

¹⁰ Tswelopele Non-Profit Organization v City of Tshwane Metropolitan Municipality SCA 2007

¹¹ Ntaka v The State 2008 SCA 20

¹² Geldenhuys v The State 2008 SCA 47

¹³ City of Johannesburg v Mazibuko 2009 SCA 20

¹⁴ City of Johannesburg v Rand Properties (Pty) Ltd 2007 SCA 25

¹⁵ 'Population, Poverty and Vulnerability – The State of SA's population report' National Population Unit, Department of Social Development, 2001



consequences of risk.’¹⁶ In the context of HIV/AIDS, vulnerability takes on a complex dimension given the nature of the HIV/AIDS pandemic.

Vulnerability is determined by factors such as underdevelopment, economic insecurity, poverty, lack of empowerment of women, lack of education, social exclusion, illiteracy, discrimination, lack of information and or commodities for self protection and all types of sexual exploitation of women, girls and boys, including for commercial reasons. Particularly for children, vulnerability is often a result of all forms of abuse, violence, exploitation and discrimination, trafficking and loss of inheritance.

In its *Report on the Global AIDS Epidemic*, UNAIDS¹⁷ examines two sets of societal factors that affect HIV risk and vulnerability, namely:

- gender inequality and the lack of empowerment of women and girls; and
- discrimination, stigma, and social marginalisation

Vulnerability is defined to include:¹⁸

“... societal factors such as human rights violations, or social and cultural norms. These norms can include practices, beliefs and laws that stigmatize and disempower certain populations, limiting their ability to access or use HIV prevention, treatment, care, and support services and commodities”.

Vulnerability is a determined by factors such as underdevelopment, economic insecurity, poverty, lack of empowerment of women, lack of education, social exclusion, illiteracy, discrimination, lack of information and or commodities for

¹⁶ ‘HIV/AIDS and Vulnerability: An overview of micro, meso and macro level implications’ TANGO International, 2003, paper prepared for UN Regional Inter-Agency Coordination Support

¹⁷ 2008.

¹⁸ UNAIDS 2007.



self protection and all types of sexual exploitation of women, girls and boys, including for commercial reasons.

A human rights-based approach to HIV/AIDS therefore ensures that matters often considered discretionary are recognised as legitimate entitlements of all individuals and groups. The discussion paper recognizes that often legal protection does not diminish a person's vulnerability. Persons affected and infected by HI/AIDS, despite progressive legislation have to contend with stigma and prejudice. Vulnerability, therefore, is the absence of legal protection as well as social exclusion.

In the context of HIV/AIDS, and for purposes of this discussion paper, groups defined as 'vulnerable' include; women, children, minorities, indigenous people, poor people, migrant workers, refugees, sex workers, disabled persons, injection drug users, men having sex with men, incarcerated persons and LGBTI community.¹⁹

1.4 Contextual issues

The Discussion paper seeks to address three pivotal questions;

- Why should the Department of Justice and Constitutional Development develop a programme on HIV/AIDS?
- What are implications of the programme for various branches within the Department?
- How the programme should be implemented for 2009/2010?

¹⁹ NSP,2008



Seeking responses to these questions was motivated by a growing concern for the Department to fulfil its constitutional obligation and secondly for the Department to respond to the HIV pandemic as employer and service provider.

The paper is presented at a time when

- South Africa has defined a legal response to HIV/AIDS through the National HIV/AIDS and STI National Strategic Plan for South Africa 2007 - 2011 (NSP)
- The Department currently employs one thousand five hundred employees²⁰ (1 500) and based on projections²¹, two hundred and eighty two (282) employees could be infected with HIV.
- The Department's management of HIV/AIDS is through the HIV/AIDS Policy²² and the Human Resources Employee Wellness Programme. The current HIV/AIDS Policy is not in line with the Public Service HIV/AIDS Policy and further, does not address human rights aspects of HIV/AIDS
- A number of anti-discriminatory laws have been enacted but challenges of implementation continue to hamper progress
- The judiciary has inconsistently interpreted legislation resulting in gains (in employment) but also losses (in education)
- Vulnerability continues to make rights less meaningful

Within this broad context, the discussion paper seeks to solicit responses so as to collectively define an appropriate socio-legal response to the challenges of HIV/AIDS. It recognises that despite progressive constitutional and legislative frameworks for advancing and protecting human rights, people infected and

²⁰ {Requesting confirmation from HR}

²¹ Estimated at 18.8% prevalence rate

²² Revised and approved in November 2008



affected by HIV/AIDS continue to experience unfair discrimination. Consequences of discrimination have included murder (HIV activist Gugu Dlamini, 1998), exclusion from the workplace²³ and refusal of HIV positive children to attend school. The gendered implication of discrimination is increasing levels of (domestic) violence against women who are blamed for spreading HIV.²⁴ In cases of children both infected and left orphaned, discrimination has been reported at school and within the community.²⁵

Importantly, people experiencing discrimination on the basis of HIV/AIDS have limited access to legal services (and aid) as noted in a national conference on 'HIV and Access to Legal Services'²⁶ and confirmed by case volumes; 343 during one year²⁷, handled by the AIDS Law Project's paralegal office.

Our response to HIV/AIDS as the Department should be informed by realities of those more vulnerable to the pandemic.

²³ See section on HIV/AIDS related case law

²⁴ Skinner D, S Mfecane 'Stigma, discrimination and the implications for people living with HIV/AIDS in South Africa' *Journal des Aspects Sociaux du VIH/SIDA*, vol1. No. 3 November 2004

²⁵ *Ibid*, page 36

²⁶ 17 - 18 February 2006, University of Witwatersrand

²⁷ AIDS Law Project, 18 Month Review: January 2006 - June 2007



CHAPTER 2

VULNERABILITY AND HUMAN RIGHTS: CONTEXTUAL ISSUES

What is the significance of HIV/AIDS vulnerability for the Department's strategy? Taking direction from government's broad HIV/AIDS strategy and mindful of the impact (disproportionate) on communities (i.e. affecting those who have limited access to resources), HIV vulnerability should inform priorities for legal intervention. Specifically addressing inadequacies in legislation to affirm equality and non-discrimination, HIV vulnerability explains why children²⁸, women (particularly those in abusive relationships), incarcerated persons, injection drug users, persons with disabilities and refugees, should be the focus of our strategy.

2.1 Children's vulnerability to HIV/AIDS

Global statistics indicate that by the middle of 2006, 1.5 million children under the age of 18 were orphans and 66% of these children had been orphaned as a result of HIV/AIDS.²⁹ Even though other causes of death might have contributed to children being orphans, AIDS remains the leading cause. It is estimated that by 2006, there were 260,000 children aged below the age of 15 living with HIV in South Africa and another 10 000 children already receiving ARV treatment.³⁰

Most children living with HIV have contracted it from their mothers through mother-to-child transmission (MTCT). It is however important to note that

²⁸ The discussion paper uses children as defined in the Children's Act 2007 as those between 0 – 18 years old.

²⁹ Biennial Report on the State of the South African HIV/AIDS Epidemic, issued by ASSA.

³⁰ <http://www.avert.org>.



children also contract HIV through sexual transmission, either as a result of sexual assault or engagement in consensual sex.

The section below deals with the HIV/AIDS vulnerability of children. The discussion begins with the rights of children as a framework, and then deals specifically with the right of HIV positive children not to be unfairly discriminated against. Lastly, legislation dealing with child headed households is analysed and evaluated.

2.1.1 Human Rights of children

Children are protected by various international instruments, most importantly, the Convention on the Rights of the Child (CRC). The CRC includes provisions for protection of children affected by HIV/AIDS.³¹ The Convention also notes the impact of discrimination on children, which includes decrease or loss of rights to access to education, health and social services.

UNGASS has identified young people (and especially young girls) aged 15-24 years as a priority group in reducing new HIV infections and has set a global target of reducing the incidence of HIV in this group by 20% by 2015 (2002). It is also noted in the NSP³² that the greatest increase in pregnancy and HIV infection is associated with school leaving.

UNICEF, USAID and the Futures Group have developed the *OVC Policy and Planning Effect Index* (OPPEI) that serves to measure the amount of effort put into place by governments, NGOs and other stakeholders in countries in response to

³¹ CRC/GC/2003/3 accessed at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.3.En?OpenDocument).

³² NSP p.38.



the needs of increasing numbers of orphans and children made vulnerable by HIV/AIDS. In their 2007 report it was noted that Southern African countries should do more in terms of law reform.

South Africa also has in place the *National Action Committee for Children Infected and Affected by HIV and AIDS* (NACCA). The structure consists of national and provincial government departments, NGOs, faith-based organizations, community-based organizations as well as donor and development agencies.

Since the advent of democracy, South Africa has passed a number of pieces of progressive legislation to address the situation of HIV orphans and OVCs. Key among these is the Constitution, specifically the right of children (section 28) and the Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007). The Children's Act safeguards children's right to HIV testing, confidentiality, disclosure and access to treatment and contraceptives.

2.2 Women

The National Gender Policy³³ lists HIV/AIDS related diseases as a major cause of death for women in South Africa. HIV infection among women is directly related (beyond obvious female physiology) to factors such as 'sexual violence within intimate relations' and 'women's inability to negotiate sexual practises'³⁴, together with unequal gendered relations in the context of employment,

³³ South Africa's National Policy Framework for Women's Empowerment and Gender Equality, (Gender Policy Framework), 2000

³⁴ Mathews, S and Abrahams, N 'Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No.116 of 1998) on Women', the Gender Advocacy Programme & the Medical Research Council (Gender & Health Research Group), November 2001



property and inheritance and harmful traditional practises.³⁵ The legal response to addressing violence, (particularly domestic violence) in intimate relations was the enactment of the Domestic Violence Act 108 of 1996. What is required for the strategy, beyond developing an indepth understanding of the link between HIV/AIDS and gender-based violence (which is provided in Chapter 6) is to use implementation of the Domestic Violence Act as a source for continuing research on experiences of women and HIV/AIDS, and for strengthening mechanisms for effective implementation of the Act. In addition, the Criminal Law Amendment (Sexual Offences and related matters) Act 32 of 2007 will be a focus on using a legal response to address some of the challenges of sexual violence and HIV infection.

Within the broad category of 'women', a recognition of varying differences that impact on vulnerability informs the discussion document. Groups such as sex workers³⁶, gay and lesbian women³⁷ and women living in rural communities³⁸ face additional barriers to asserting legal rights.

Of significance, international instruments such as CEDAW and the African Charter on Human and People's Rights³⁹ affirms gender equality and enjoin States to put measures in place for the attainment of equality. South Africa,

³⁵ Amnesty International Report, 2007, 'Women, HIV/AIDS and Human Rights'

³⁶ The NSP recognises discrimination faced by sex workers and one of the project activities, which will have impact on the strategy, is decriminalization of sex work. The SALRC is to release a Discussion Paper on Decriminalization in April 2009.)

³⁷ LGBTI women face a double burden of discrimination of gender and sexual orientation. Recently issues of race and class have been highlighted with 'corrective rape' of Black lesbians. Reddy V, Potgieter C and Mkhize N, 'Cloud over the rainbow: corrective rape and other hate crimes against black lesbians', HSRC, 2007

³⁸ Rural women face challenges of gendered nature of poverty and access to land. Drimie S 'The impact of HIV/AIDS on rural households and land issues in Southern and Eastern Africa' Integrated Rural and Regional Development, HSRC, 2002

³⁹ Protocol on the Rights of Women in Africa, article 8



through our Constitution (section 9 (3)) prohibits discrimination on the basis of sex and gender. However, the position of women at grassroots level requires further attention as unhealthy gender norms continue to perpetuate patriarchy and harmful traditional, cultural and religious practices.

The many and varied links between gender inequality and increased vulnerability to HIV infection among women and young girls have been well documented. Cultural or social norms often restrict women's access to basic information about sexual and reproductive health. Even if women do have access to information and commodities, gender norms that prescribe an unequal and more passive role for women in sexual decision-making undermine women's autonomy, expose many to sexual coercion, and prevent them from insisting on abstinence or condom use by their male partners.

In Southern Africa women and young girls are disproportionately affected by HIV/AIDS, suffering multiple forms of discrimination as a result of their vulnerability. On average, there are 13 women living with HIV for every 10 infected men and the gap continues to grow.⁴⁰ In most African countries women are being infected with HIV at earlier ages than men. The differences in infection levels between women and men are most pronounced among young people aged 15-24. Recent population based studies suggest that there are on average 36 young women living with HIV for every 10 young men.⁴¹ It is thus necessary to protect and uphold the rights of women and young girls as they remain the most vulnerable group.

⁴⁰ Nwonwe (ed.) *The Millennium Development Goals: Achievements and Prospects of Meeting the Targets in Africa* 2008 p.180.

⁴¹ Nwonwe p,180.



UNAIDS has established that gender inequalities are a key driver of the HIV/AIDS epidemic in several ways ⁴², from gender and cultural norms, violence, lack of access to resources, education and employment.

In addition, UNAIDS notes that many national HIV/AIDS programmes fail to address underlying gender inequalities. In 2008, only 52% of countries who reported to the UN General Assembly included specific, budgeted support for women-focused HIV/AIDS programmes.

In a submission by the *International Association of Women Judges (IAWJ)*, the key legal issues relating to gender inequality and HIV/AIDS were identified as:

- (a) Property and inheritance rights
- (b) Violence against women
- (c) Impact of certain traditional practices in the HIV/AIDS context

In respect of the role of the judiciary, it is imperative that gender and HIV/AIDS sensitivity training takes place. The challenges identified by the IAWJ⁴³ could serve as a guide:

- Some judicial officers continue to discriminate against women in the administration of justice;
- Non-judicial court personnel and others involved in the administration of justice are not sensitive to issues of gender and HIV/AIDS;
- Judges and magistrates lack access to case decisions that have upheld women's human rights or addressed issues of gender and HIV/AIDS;
- Women do not know their rights under domestic or international law and are reluctant to speak out against discriminatory practices;

⁴² http://www.who.int/gender/hiv_aids/en/.

⁴³ IAWJ p.16.



- There is a lack of coordination among relevant stakeholders, including all those involved in the administration of justice, the health and medical sectors, and so on;
- Litigants rarely disclose their HIV status or reveal that their cases involve an HIV/AIDS related matter in the pleadings or in open court; and
- Women lack access to justice – they do not know how to access the courts and feel intimidated by the legal process. They also face physical and financial difficulties in accessing the courts.

Interventions to address the specific vulnerability of women and young girls include: universal education initiatives; multicomponent efforts to change harmful gender norms and practices; action to reduce GBV; strategies to empower women and to improve income-generation and financial independence; and advocacy and support.

2.3 Sentenced Offenders, Inmates and Incarcerated Persons

Incarceration is a very high risk factor for HIV/AIDS infection and transmission and is connected with unprotected sex and injecting drug use (IDU) in correctional facilities, but may also include risk of blood exposure as a result of violence.⁴⁴ Interventions for risk reduction include provision of VCT and counselling, condom provision, addressing rape and IDU.⁴⁵

⁴⁴ NSP p.40.

⁴⁵ Jurgens “HIV/AIDS and HCV in prisons: A select annotated bibliography” (2006) *International Journal of Prisoner Health* 131-149.



Statistics which are available indicate that approximately 41% of the inmates in South Africa's prison system are HIV-positive. Since 1995, reported cases of HIV/AIDS in South African prisons have risen by 750%, and the number of natural deaths in prison has risen by about 600% over the same period.⁴⁶

2.4 Injection Drug Users

Internationally there has been increasing attention paid to the direct and indirect role of drug abuse in HIV transmission. Many countries have been experiencing growing HIV/AIDS epidemics through the sharing of needles by IDUs.⁴⁷ Researchers are now also paying increased attention to the effect of drug use on risky sexual behaviour because of the way in which drugs reduce inhibitions and impair judgment.

There exists a gap in South African law with respect to IDU and vulnerability to HIV infection. The NSP recommends under Priority Area 4 that the Prevention of and Treatment for Substance Abuse Bill be reviewed in order to incorporate HIV harm reduction measures and that the Bill be fast tracked for enactment and promulgation.

The latest version of the Prevention of and Treatment for Substance Abuse Bill (B12C-2008) recognises in section 8(2)(d) that prevention services and programmes must focus on “the link between substance abuse and HIV/AIDS”. There is, however, no provision made to address the particular vulnerability of IDUs, including difficulties in accessing HIV/AIDS treatment.

⁴⁶ http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=16138.

⁴⁷ UNODC, 2005 *World Drug Report 2005* Vienna: United Nations Office on drugs and Crime 2005 www.unodc.org/unodc/world_drug_report_2005.html.



2.5 Persons with Disabilities

Government adopted the White Paper on an Integrated National Disability Strategy in November 1997. The National Strategy introduced a social model of disability which is essentially a 'human rights approach to disability'.⁴⁸ Persons with disabilities constitute a significant part of the South African population (4%)⁴⁹ and are identified as a vulnerable group in the NSP.⁵⁰ HIV/AIDS is also understood as a *cause* of disabilities as more people's lives are prolonged while infected. The special needs of disabled persons demand a conscious effort to ensure equitable access to information and legal services.

The UN Convention on the Rights of Persons with Disabilities (CRPD) sets out norms meant to "promote, protect, and ensure the full and equal enjoyment of all human rights by persons with disabilities," including self-determination, physical and programmatic access, personal mobility, health, education, employment, habilitation and rehabilitation, participation in political life, and equality and non-discrimination.

The CRPD and its Optional Protocol deal with both development and human rights issues and both were ratified by South Africa in November 2007. The emphasis is on the recognition of the dignity of disabled persons.

⁴⁸ Report 'Situation Analysis of Disability integration in 18 National Government Departments', Office of the Status of Disabled Persons, Presidency, August 2000

⁴⁹ Statistics South Africa, Community Survey, 2007

⁵⁰ NSP pg.39.



Due to the particular vulnerability of disabled PLWA and the fact that HIV can lead to a lack of impairment, it is essential that legislative review takes place in order to determine the nature of legal reform in this area, included the necessity to classify HIV/AIDS as a disability.

Although section 9(3) of the Constitution explicitly prohibits discrimination against disabled persons, the Constitutional Court avoided making a finding that HIV is a disability in *Hoffmann v SAA* 2001 1 SA 1 (CC), despite trends in the USA and Canada where courts have accepted that HIV may be viewed as a disability.⁵¹

2.6 Migrants and Refugees

The relationship between migration and HIV/AIDS is complex. Although some people think that migrants bring HIV when they enter countries, evidence usually shows the opposite, suggesting that migrants are more vulnerable than local populations. The links between mobility and HIV/AIDS are related to the conditions and structure of the migration process.

The International Organisation for Migration (IOM)⁵² provides for Migration Health Services (MHS). The main activities developed under MHS in Southern Africa are:

- HIV/AIDS and Population Mobility
- Counter-Trafficking and Health
- Migration Health and Travel Assessments

⁵¹ *Bragdon v Abbott* (1998) 524 US 624; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)* 2000 SCC 27.

⁵² <http://www.iom.org.za/MigrationHealth.html>.



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- MIDA (Migration for Development in Africa) Health
 - Post-Emergency Migration Health Assistance

In September 1999 the IOM signed a Co-operation Framework with UNAIDS which was renewed in 2002. The framework is aimed at ensuring that the needs of migrant and mobile populations are fully integrated into national and regional AIDS strategies, and that mobile populations and migrants have access to adequate HIV/AIDS prevention as well as treatment, care, support and access to justice. The framework promotes initiatives designed to effectively respond to the spread of HIV and at reducing the risk and vulnerability of migrant and mobile populations.

One of the key concerns for IOM policy and programme development is the connection between the trafficking of human beings for sexual exploitation and the exposure to STIs, including HIV/AIDS.⁵³ It has been recommended that national programmes and policies should look at both the prevention of the phenomenon of human trafficking and respond to it in terms of health care and service delivery. IOM's main activities in this area are awareness raising, health promotion, health examination and diagnosis and direct health care. This is yet another reason for the promulgation of legislation dealing with human trafficking that addresses issues relating to migration, trafficking, gender inequality and HIV/AIDS.

In the case of refugees, it has been established that most refugees, due to their difficult circumstances, have limited information about HIV/AIDS and are often

⁵³ See the discussion above relating to HIV and the trafficking of persons.



not familiar with local legal services and systems available in South Africa.⁵⁴ In addition, while their legal status guarantees the right of access to HIV-related information and services at the same level as South Africans, barriers such as language, cultural traditions and xenophobia often preclude their ability to access these services.

A key decision in respect of permanent residents is *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC). This case dealt with an application alleging that exclusion of non-citizens from social grant entitlements was unconstitutional on basis of Sections 9, 10, 11, 27 and 28 of the Constitution.

The Court held that the Constitution gives “everyone” the right to have access to social security, and that “everyone” would include those residing in the country legally. The court highlighted the interdependence and interconnectedness of rights and observed that the right to equality was implicit in the Section 27 entitlement of everyone to have access to social security. The Court stated that, due to the permanent residents’ position as people who have become part of South African society and made their homes in South Africa, their exclusion from the legislative scheme amounted to unfair discrimination in violation of s.9(3). Applying the “reasonableness test” in s27(2) the Court found the scheme's exclusion of permanent residents to be unreasonable, stating that the importance of providing access to social assistance to all who live permanently in South Africa, as well as the impact upon life and dignity that a denial of such access would have, far outweighed financial and immigration considerations.

With regard to section 28, the Court confirmed that the exclusion of children from access to these grants amounted to unfair discrimination on the basis of

⁵⁴ NSP pg.41.



their parents' nationality and that the denial of support in such circumstances to children in need infringes upon their rights under section 28(1)(c). The Court thus ordered that the relevant legislative provisions be read as though the words "or permanent resident" appeared after "citizen".

The legislation at issue in *Khosa* has since been repealed and replaced by the Social Assistance Act 13 of 2004. The new Act does not incorporate the Constitutional Court's 'reading in' of "permanent residents" as recommended in *Khosa*, but the Act does incorporate a ministerial discretion which may be employed to bring permanent residents within the protection of the Act.

2.7 MSM and LGBTI

Experiences of social isolation and marginalisation are common to many people who experience same-sex attractions. This isolation is often fuelled by a sense of insecurity about the reaction of others, such as the church, community or family members. As a result, many lesbian, gay, bisexual and transgender identifying young people will go to great lengths to avoid others finding out about their sexual orientation. This process of "passing" as heterosexuals can promote feelings of self-hate, depression and suicide. As a consequence, high-risk conduct is dramatically increased across the board, from drug and alcohol abuse to harmful sexual practices. All of these factors profile a possible and real increase in the exposure to HIV/AIDS and STIs. Many who identify as homosexual face discrimination through lack of employment opportunities and being victims of violent physical and sexual assaults. Similarly, society tends to blame MSM for the spread of HIV/AIDS.



Biologically, MSM who practice receptive anal intercourse have an elevated risk for HIV infection. MSM practices are also more likely to occur in institutional settings such as prisons, often underpinned by discrimination, coercion and violence.⁵⁵

In a study conducted at University of British Columbia it was found that lesbian and bisexual youth are up to seven times more likely to fall pregnant than their heterosexual peers.⁵⁶ The data used for the research was gathered from adolescent health surveys done in British Columbia schools in 1992, 1998, and 2003. The heightened risk is explained by several factors, including an attempt among closeted gay, lesbian and bisexual teens to prove they are heterosexual to avoid harassment and discrimination.

Results from the survey, which was conducted anonymously among about 30,000 students in grades 7 through 12, indicated that boys are more likely to cause a pregnancy if they identify as gay or bisexual. In the survey, 10.6 per cent of girls who identified as bisexual reported pregnancy, and 7.3 per cent of lesbians reported pregnancy. Among the heterosexual girls, 1.8 per cent reported pregnancy. In total, more heterosexual girls fell pregnant, but the likelihood was greater among lesbian or bisexual girls, who made up 3.5 per cent of the females surveyed.

It is clear that MSM and LGBTI communities are particularly vulnerable to HIV infection and transmission.

⁵⁵ NSP p.40.

⁵⁶ 1998 *Canadian Journal of Human Sexuality*.



Government has taken positive strides in terms of the protection of the rights of the gay and lesbian community. South Africa's Constitution is the first in the world to prohibit unfair discrimination on the grounds of sexual orientation (section 9(3)). It thereby guarantees equality for gay and lesbian people. Just 10 years ago sex between two people of the same sex was a crime and public displays of affection were considered indecent.

Parliament has, in keeping with the equality clause, passed legislation to prevent discrimination in a range of areas. For example, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, commits the government to "promote equality" on all the grounds in the equality clause.

Other statutes that give recognition to the rights of gays and lesbians include the Domestic Violence Act of 1999, the Rental Housing Act of 1999, the Employment Equity Act of 1998, the Medical Schemes Act of 1998, the Labour Relations Act of 1995 and The Civil Union Act of 2006.

In order to consolidate these progressive developments in the law, it is essential to strengthen continued efforts to deal with prejudice and the stigmatisation of MSM and the LGBTI community. Education and public awareness initiatives should include the participation of members of these communities and address harmful gender norms.



CHAPTER 3 INTERNATIONAL FRAMEWORK

A detailed framework of international instruments; charters, conventions, declarations, protocols and guidelines, provide a reference for ensuring government action on issues of HIV/AIDS, human rights and access to justice. At times, the framework deals with issues separately but essentially, the human rights framework acknowledges HIV/AIDS as a human rights issue. It further addresses rights within a legal system. The chapter highlights the international framework with intent to show implications for the strategy, i.e. levels at which South Africa's reporting on legal and human rights achievements would be informed by country obligations. (Importantly, South Africa has either ratified or signed most of the instruments highlighted.)

The chapter emphasizes the International Guidelines on HIV/AIDS and Human Rights as it is a useful tool for defining the strategy.

3.1 Access to justice

International instruments that address right of 'access to justice' can be traced to the United Nations Declaration on Human Rights (hereafter referred to as the UN Declaration), 1948, which forms the foundation of international obligation for increasing access to justice as collectively included in rights to equality before the law (article 6), equal protection (article 7) and just administrative action (articles 8 - 11). Other instruments such as the Convention on the Elimination of Discrimination Against Women (CEDAW), 1979, enjoins all States to ensure that women are not subjected to 'distinction, exclusion or restriction' when they



appear 'before the law'. In addition, CEDAW requires all States to ensure that all courts and tribunal procedures should apply equally to women and men.

Beijing Declaration and Platform of Action, September 1995, acknowledged that throughout the world, groups, particularly women are increasingly using the legal system to assert their rights. However several challenges continue to hinder access to justice. A general challenge is lack of awareness of rights which is compounded by information and resources to legally challenge rights violations.

Within the continent, the African Charter of Human and Peoples' Rights, 1985, incorporates implicitly, the right to access to justice under the collective rights to equality (article 3), equal legal protection (article 7) and just administrative action (article 66). The Charter makes provision for the enactment of protocols and guidelines to supplement rights within the Charter. Of significance is the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 1999.⁵⁷ The Principles compel States to ensure accessibility of justice, particularly for rural communities and women and requires all law enforcement and judicial officers to be trained to 'deal sensitively and professionally with the special needs and requirements of women'.

3.2 Human Rights and HIV/AIDS

An extensive international framework on human rights has not implicitly until recently, dealt with HIV/AIDS. The Declaration of Commitment on HIV/AIDS as adopted by the UN General Assembly Special Session on HIV/AIDS, 2001 is the first instrument to put HIV/AIDS firmly on the agenda of national governments. The Declaration was followed up by the Political Declaration of the

⁵⁷ Also known as the Legal Assistance Principles



2006 High level meeting on AIDS at the General Assembly. Previous (before the Declaration) international instruments on human rights provided for HIV/AIDS under broad understanding of the right to health and non-discrimination. In the case of the right to health, the International Covenant on Economic, Social and Cultural Rights, 1976 (ICESCR) provides for the right to 'highest standard of physical and mental health'.⁵⁸ Other instruments which include non-discrimination make provision for 'other status'⁵⁹ and 'any other field'.

3.3 Regional and Sub-Regional Responses

There have been a number of initiatives in Africa to respond to the international guidelines as outlined above. In this section, the focus rests on these regional and sub-regional responses, including Southern African and SADC instruments that encompass norms that serve to guide legal and other responses to HIV/AIDS in Southern Africa.

In the *Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (2001)* African leaders declared an "emergency in the continent" and formulated responses thereto. This Declaration was followed up by the *Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS, Tuberculosis and Malaria Services in Africa (2006)*. Another commitment, *Africa's Common Position to the UN General Assembly Special Session on AIDS (2006)* identifies human rights for vulnerable people as a guiding principle.

The *Solemn Declaration on Gender Equality in Africa (2004)* deals with the vulnerable position of women and girls, focussing on conflict, poverty (land,

⁵⁸ Article 12

⁵⁹ ICESCR (article 2(2)), Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights



property, inheritance and housing), harmful traditional practices, refugee women, violence against women, illiteracy and limited access to education.

The *Continental Framework for Harmonisation of Approaches Among Member States and Integration of Policies on Human Rights and People Infected and Affected by HIV/AIDS in Africa (2005)* identified similar priorities as established by UNGASS.

The *Brazzaville Commitment on Scaling Up Towards Universal Access to HIV and AIDS Prevention, Treatment, Care and Support in Africa by 2010 (2006)* emphasises legal and policy protection against stigmatisation, discrimination, or gender-based violence of the most vulnerable individuals and groups.

The *NEPAD Framework Document (2001)* adopted in Lusaka states in Article 49 that African leaders will take joint responsibility for the promotion and protection of human rights; the provision of education, training and health services with a high priority given to HIV/AIDS; and the promotion of the role of women in development. Related to this is the *NEPAD Health Strategy (2003)*; the *African Peer Review Mechanism (APRM)*; and the *Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration, 2001)*.

Treaty of SADC (1992/1993) lists amongst the Objectives in Article 5 the combating of HIV/AIDS and other communicable diseases. Article 10 deals specifically with STDs and states that in order to deal effectively with the HIV/AIDS/STD epidemic in the region and the interaction of HIV/AIDS/STD's with other diseases, parties shall co-operate and share information.



The ongoing attempt to arrive at model legislation in Southern Africa deserves attention here as this region is the epicentre of the HIV/AIDS pandemic.⁶⁰ Of the fourteen member states of SADC, nine have an adult prevalence rate higher than 10%;⁶¹ six states, higher than 20%;⁶² and one state (Swaziland) has an adult prevalence rate higher than 30%.⁶³

A number of national HIV/AIDS specific laws and bills have been adopted in Southern Africa, but the responses are not uniform, some do not conform to supra-national human rights norms and standards, and most fail to address the rights of vulnerable groups and individuals adequately. SADC member states (excluding South Africa) HIV/AIDS specific legislation includes:

- Angola: Law 8/06 on HIV and AIDS (2004) protects the rights of PLWA and focuses on the right to employment, free public health care and confidentiality
- Madagascar: Law 2005 - 040 on the Fight Against HIV/AIDS and the Protection of Rights of People Living with HIV (2005)
- Mauritius: HIV and AIDS Act 31 of 2006 that focuses on the prevention and containment of HIV/AIDS
- Mozambique: Law 5/2002 prohibits employment discrimination on grounds of HIV and prohibits pre-employment testing

⁶⁰ UNAIDS *Facing the Future Together: Report of the Secretary-General's Task Force on Women, Girls and HIV and AIDS in Southern Africa* (2004) 8.

⁶¹ Malawi, Mozambique, Zambia, Lesotho, SA, Zimbabwe, Botswana, Swaziland, Namibia. See UNAIDS *Report on the Global AIDS Epidemic: A UNAIDS 10th Anniversary Special Edition* (2006) 506-507.

⁶² Lesotho, Zimbabwe, SA, Namibia, Botswana and Swaziland (UNAIDS 2006).

⁶³ UNAIDS 2006.



Currently, most SADC national legislation fails to address the root causes of HIV/AIDS and does not address issues of property rights, inheritance, harmful cultural practices and gender-based violence that make women and children more vulnerable to HIV/AIDS.⁶⁴

Due to the fragmented - and at times non-compliant - response by some SADC member states, the SADC Parliamentary Forum (SADC-PF), together with the National Democratic Institute (NDI), organised a survey in 2004 to assess the legislative efforts to address HIV/AIDS in SADC.⁶⁵ After considering the results of this survey, SADC PF recommended specific aspects for legislative review and reform. The contents of this report were disseminated at the seventeenth SADC PF Plenary Assembly in Tanzania, and it was suggested that the SADC PF should propose model laws for enhancing national member state responses to HIV/AIDS.⁶⁶

With the technical assistance of the AIDS and the Human Rights Research Unit, University of Pretoria, and with the involvement of various stakeholders and regional civil society groups, SADC PF embarked on a project of developing a Regional Model Law on HIV in June 2007. To ensure its legitimacy, this process has been inclusive and consultative, involving MPs, legal drafters, other representatives of branches of government, the judiciary, law reform bodies, national human rights commissions, national AIDS councils, PLWA and civil society in member states.

⁶⁴ Viljoen "Model Legislation and Regional Integration: Theory and Practice of Model Legislation Pertaining to HIV in the SADC" 2008 (41:2) *De Jure* 383.

⁶⁵ SADC PF "Findings of the SADC PF's survey of legislative efforts to combat HIV/AIDS in the SADC region" (2004). Other similar surveys can be found at www.csa.za.org and <http://www.arasa.info>.

⁶⁶ SADC PF Communiqué *The Model Legislative Deliberative Session for Members of Parliamentary and legal Drafters on Model Legislation for HIV and AIDS in the SADC Region 2007-11-10-14*, Dar es Salaam, Tanzania.



On 24 November 2008, SADC PF adopted the *Model Law on HIV in Southern Africa* (hereinafter referred to as the Model Law) that aims to reflect best practices, address legislative and policy gaps and challenges, and to provide a human rights framework for the protection of vulnerable individuals and groups. The main objective of the Model Law is three fold: to serve as a guide, a yardstick, and as an advocacy tool for legislators in the region.⁶⁷

The Model Law integrates the protection of human rights as a key element of an effective response to HIV/AIDS, apart from dealing with patterns of transmission, prevalence rates, as well as specific barriers to prevention, treatment and care.

This new regional initiative can serve to inform further legal developments in South Africa, a SADC member state that has already adopted many of the best practices reflected in the Model Law.

3.4 International Guidelines on HIV/AIDS and Human Rights

The *International Guidelines on HIV/AIDS and Human Rights* were first adopted by the Second International Consultation on HIV/AIDS and Human Rights in 1996. In 2001, the UN Commission on Human Rights (UNCHR) adopted a Resolution in which it stated that the right to the highest attainable standard of health includes access to antiretroviral therapy (ART) for HIV/AIDS. Following this, in 2002, OHCHR and UNAIDS sponsored the Third International Consultation on HIV/AIDS and Human Rights that adopted the *International Guidelines on*

⁶⁷ SADC official announcement, Windhoek, 9 December 2008.



HIV/AIDS and Human Rights (Consolidated Version 2006) (hereinafter referred to as the *International Guidelines*).

The Guidelines contain action-oriented measures to promote and protect human rights and to achieve HIV-related public health goals. The International Guidelines are not a UN document; hence, there is no enforceability or reference to the guidelines in the UNGASS Declaration or other UN documents. However, the UN Commission on Human Rights has asked all member states to report on their progress in promoting and implementing the Guidelines.

The *International Guidelines* aim to assist States in creating a positive response to HIV/AIDS that is effective in reducing the impact of HIV/AIDS and that is consistent with human rights and fundamental freedoms.⁶⁸ However, it remains the responsibility of States to identify how they can best meet their human rights obligations and promote public health within their respective political, cultural and religious contexts.⁶⁹

In terms of the scope of this discussion, the following guidelines are of particular relevance and importance:

- Guideline 4 – review and reform of criminal law and correctional systems
- Guideline 5 – strengthen anti-discrimination and other protective laws
- Guideline 6 – enact legislation to regulate HIV related goods, services and information
- Guideline 7 – implement and support legal support services to educate about HIV and rights

⁶⁸ *International Guidelines* p. 13.

⁶⁹ *International Guidelines* p. 16.



- Guideline 11 – monitor and enforce protection of human rights
- Guideline 12 – share knowledge and experience concerning HIV related human rights issues

In addition, the United Nation’s General Assembly Resolution in September 2000 set targets for the Millennium Declaration. The *Millennium Development Goals (MDG)* – Goal 6 deals with the combating of HIV/AIDS, Malaria and Other Diseases in terms of which Target 7 requires that the spread of HIV/AIDS would have been halted and begun to reverse by 2015 and Target 8 requires that universal access to treatment for HIV/AIDS for all those who need it is achieved by 2010. In addition, goal 3 calls for nations to “promote gender equality and empower women”.

Despite these high level international commitments, the situation remains grave, with a doubling of PLWA worldwide to over 40 million; with women now comprising half of those living with HIV/AIDS; with young people - particularly young women - having the fastest rates of infection; and with some 14 million children having been orphaned by AIDS. In addition, HIV prevalence has grown among those groups in society who are most vulnerable and marginalised, such as *inter alia* women, children, disabled persons, commercial sex workers, injection drug users, man having sex with men (MSM), migrants and incarcerated persons.



CHAPTER 4 CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

As HIV/AIDS affects individuals (and communities), thus the realization of constitutional provisions of human dignity, achievement of equality and advancement of human rights and freedoms, is foremost in our consideration of the legal aspects of the pandemic. An analysis of the constitutional and legal framework begins with an identification of constitutional rights as they relate to HIV/AIDS, followed by a presentation of relevant legislation that specifically addresses HIV/AIDS and finally, an analysis of case law is provided.

The framework highlights significant progress that has been achieved in advancing human rights, and more specifically human rights of persons affected and infected by HIV/AIDS. Notably, the framework suggests that the right to equality and non discrimination are measures that can be used to test levels of human rights of persons affected and infected by HIV/AIDS.

4.1 The Constitution of the Republic of South Africa Act 108 of 1996

The South African Constitution⁷⁰ is widely accepted to be one of the most progressive constitutions in the world and contains a comprehensive list of fundamental human rights that protect persons living with HIV/AIDS and other vulnerable persons.

⁷⁰ Act 108 of 1996.



The following human rights are directly or indirectly related to HIV/AIDS:

Table 1: Human Rights Framework for HIV/AIDS

Section 9	Equality	Although HIV-status is not a listed ground in s9(3), it has been established by the Constitutional Court that no-one may be discriminated against on the basis of their HIV status and that such discrimination is unfair.
Section 10	Dignity	Every person's inherent dignity must be respected and protected. The right to dignity is especially critical in the case of vulnerable and marginalised individuals and is closely connected to s9 equality rights in the recognition of equal human worth.
Section 12	Freedom and Security of the Person	Includes the right to: <ul style="list-style-type: none"> ▪ Make decisions about reproduction ▪ Security of control over the body ▪ Not to be subjected to medical or scientific treatment without consent ▪ Not to be treated in a cruel, inhumane or degrading way
Section 14	Privacy	The right to privacy and confidentiality in respect of HIV-status has been extensively dealt within terms of case law.
Section 16	Freedom of Expression	This includes the right to receive and impart information and ideas, but is limited by the section 14 right to privacy, which protects disclosure of HIV-status. Hate speech is expressly prohibited
Section 18	Freedom of Association	This includes the right to form a part of any community and not to be excluded on the basis of HIV-status.
Section 21	Freedom of Movement And Residence	This includes the right to move about freely; to enter, remain in or leave the country; and to reside anywhere in the country. No restrictions may be placed upon HIV + persons based solely on their status.
Section 22	Freedom of Trade, Occupation and Profession	This right prevents unfair restrictions from entering into any trade, occupation or profession, including on the basis of HIV-status
Section 23	Labour Relations	No-one may be unfairly discriminated against in the workplace. Case law is detailed in this regard and deals with pre-employment testing and unfair dismissals based solely on HIV-status.
Section 24	Environment	Everyone is entitled to an environment that is not harmful to their health or well-being, including prisoners and the mentally ill. Environmental factors tend to influence HIV/AIDS risk and vulnerability.
Section 25	Property	As socio-economic circumstances and poverty increase HIV/AIDS risk and vulnerability, property rights address some of these issues. Women's property and inheritance rights require attention in this regard.
Section 26	Housing	Everyone has the right to access to adequate housing and no-one may be evicted from their home or have their home demolished. No-one may be evicted on the basis on HIV status and the



		improvement of socio-economic circumstances would reduce HIV/AIDS risk and vulnerability.
Section 27	Health Care, Food, Water and Social Security	<p>No-one may be refused emergency medical treatment. Everyone has to right of access to:</p> <ul style="list-style-type: none"> ▪ Food and water ▪ Health care services, including reproductive care ▪ Social security, including appropriate social assistance <p>A number of issues arise here, including ART and PEP treatment, treatment for STIs and TB, ensuring food security for vulnerable persons and improving social assistance to PLWAs.</p>
Section 28	Children	<p>Every child (person under the age of 18 years) has the right to:</p> <ul style="list-style-type: none"> ▪ family care or parental care, or to appropriate alternative care when removed from the family environment; ▪ basic nutrition, shelter, basic health care services and social services; ▪ be protected from maltreatment, neglect, abuse or degradation; <p>A child's best interests are of paramount importance in every matter concerning the child. Children have been identified as a particularly vulnerable group in the NSP and protection of their rights is paramount in ensuring a human rights approach to HIV/AIDS.</p>
Section 29	Education	Everyone has the right to education, including adult basic education. This includes education, communication and public awareness relating to the HIV/AIDS epidemic and prevention, treatment, care and support.
Section 32	Access to Information	Everyone has the right to access to information that may effect their rights. This includes access to information relating to HIV/AIDS.
Section 33	Just Administrative Action	Everyone whose rights have been negatively affected by administrative action has the right to request reasons in writing and to challenge such action. This includes PLWAs.
Section 34	Access to Courts	Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Attention should be paid in particular to vulnerable persons' access to courts and access to justice.
Section 35	Arrested, Detained and Accused Persons	Arrested, detained and accused persons must be treated in a manner that is consistent with their dignity and may not be unfairly discriminated against on the basis on their HIV status. Duties exist in relation to access to HIV/AIDS treatment, protection from rape and medical parole.



4.2. HIV/AIDS Specific National Legislation

Within the context and framework of the supreme Constitution, a number of legislative efforts have been made to respond to HIV/AIDS on a national level. It should be noted that there exists no comprehensive legislation dealing with HIV/AIDS in South Africa, but that the Legislature has promulgated various individual pieces of legislation that incorporate protective measures that directly address issues of HIV/AIDS and human rights.⁷¹

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is the definitive law on discrimination in public sphere. PEPUDA gives effect to the constitutional right to equality (section 9). Importantly, PEPUDA contains definitions of equality and discrimination. Equality is both formal and substantive equality. Included in its definition of *discrimination* is 'policy, law, rule or practise' that can impact directly or indirectly on a person. Although HIV/AIDS is not included as one of the list grounds for non discrimination, PEPUDA (section 34) directs the Minister of Justice and Constitutional Development to list HIV/AIDS in the list of prohibited grounds.

Within the public space of employment, various pieces of legislation expressly prohibit unfair discrimination on the basis of HIV status and provide guidance for minimizing occupational exposure to HIV⁷². As required by the Employment

⁷¹ Direct reference can be found to the *International Guidelines* in the five reports of the SALRC Project 85 on *Aspects of the Law Relating to AIDS*. The recommendations of the SALRC have been used by government to guide law reform around HIV/AIDS. See www.doj.gov.za/salrc (accessed 19/11/2008).

⁷² Occupational Health and Safety Act 85 of 1993, Compensation for Occupational Injuries and Diseases Act 130 of 1993, Labour Relations Act 66 of 1995, Mine Health and Safety Act 29 of 1996 and Employment Equity Act 55 of 1998.



Equity Act⁷³ and the Labour Relations Act, a 'Code of Good Practise: Key aspects of HIV/AIDS and employment'⁷⁴ together with 'Technical Assistance Guidelines on Managing HIV/AIDS in the workplace' have assisted employment sector development of regulations and policies.⁷⁵

4.3 HIV/AIDS Specific Case Law

South African courts, as the guarantors, upholders and protectors of the Constitution, have developed a substantial jurisprudence on HIV/AIDS and these precedents have gone a long way in addressing issues of constitutional compliance and reform of law. The section below provides a brief analysis of how the courts have interpreted human rights of persons affected and infected with HIV/AIDS. Specific rights as interpreted by case law include:

- Equality and non-discrimination
- Health care, specifically medical (HIV related) treatment and HIV testing
- Dignity, particularly incarcerated persons
- Privacy (and issues of confidentiality)
- Freedom and security of the person (HIV infection through sexual violence)
- Freedom of expression

⁷³ Section 6 (1), 'no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of his or her HIV status.'

⁷⁴ No. R 1298

⁷⁵ For example the Public Service Regulations 2001



4.3.1 HIV related discrimination

Two cases illustrate the difference in court's interpretation of the right to equality and non-discrimination; *Hoffman v South African Airways*⁷⁶ and *Karen Perreira v Buccleuch Montessori Nursery School*⁷⁷. In *Hoffman*, the court had to decide whether the allegation of South African Airways that HIV positive people pose a risk to passengers and should not be employed, was fair. The Court dismissed the allegation and held that Hoffman's right to equality was violated when South African Airways refused to employ him on the basis of his HIV status. An order of reinstatement was made by the court.

Contrary to *Hoffman*, *Perreira's* case showed how institutions can be given leeway to discriminate where they claim 'lack of readiness' as the basis for exclusion of HIV positive persons. *Perreira* highlights some problems that may arise in respect of unfair discrimination against HIV infected children. In this case the child's caregiver challenged the school's decision to defer Tholakele's application for admission until she was three years old and "past the biting stage". The court found that the school had indeed expressed concerns about its readiness to deal with learners with HIV and the lack of training undergone by its teachers in this regard. On this basis, the court found that the school had not taken a final decision to exclude Tholakele and dismissed the application with costs.

⁷⁶ 2001 (1) SA (CC)

⁷⁷ Case No. 4377/02



4.3.2 Health care: Access to HIV-related treatment and HIV testing

In *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 717 (CC) the Constitutional Court ordered government to modify its programme for the prevention of mother-to-child transmission (MTCT) of HIV in order to ensure that nevirapine; an antiretroviral drug is widely available in the public health sector.

Criminal penalties may be enforced against anyone who sells or advertises a medicine in contravention of the Medicines and Related Substances Control Act 101 of 1965 (as amended). In the case of *Treatment Action Campaign and Another v Rath and Others* (12156/05) [20080 ZAWCHC 34 (13 June 2008) it was held that that the products being distributed by Mathias Rath as treatments for HIV were being unlawfully distributed. Additionally, the TAC and SAMA filed suit against the Minister of Health and the Director-General of the DoH to compel them to ensure the enforcement of the Medicines Act against those distributing products in contravention to the Act. The court clearly held that the Minister of Health and the Director-General are under a duty to take reasonable measures to prevent unauthorised clinical trials and the distribution of such unauthorised products.

In *C v Minister of Correctional Services* 1996 (4) SA 292 (T) the court found that Johannesburg Prison did not comply with the National Strategy regulating HIV /AIDS in prisons and this deviation from the norm of informed consent. The lack of pre-test counselling was held to be material and wrongful.

In *Joy Mining Machinery v National Union of Metal Workers of South Africa and Others* 2002 (23) ILJ 391 (SALC) the Labour Court granted Joy Mining Machinery



permission to conduct HIV testing among its staff as it was going to be voluntary and anonymous and was not to be used for discriminatory purposes.

4.3.3 Incarcerated prisoners

Case law has also dealt extensively with the rights of prisoners in the context of the HIV/AIDS epidemic. In the case of *C v Minister of Correctional Services* 1996 (4) SA 292 (T), a prisoner was given an HIV test without pre- or post-test counselling. The Court held as a result that the prisoner had not been able to give informed consent to the test.

In *W and Others v Minister of Correctional Services* (1996), the court ordered the Minister of Correctional Services, the Commissioner of Correctional Services, the Commander of Pollsmoor Prison and the Provincial Minister of Health to respect the rights of prisoners with HIV or AIDS. The Court ordered them to:

- Observe confidentiality about the status of all persons who are HIV positive or suffering from AIDS.
- Protect, as far as possible, prisoners from stigmatization on account of their HIV status or sexual orientation.
- Provide, or cause to be provided, condoms to all prisoners.
- Provide or make available the necessary and appropriate medical attention and treatment to HIV positive prisoners. This principle was confirmed in two leading cases; *Van Biljon and Others v Minister of Correctional Services and Others* EN and *Others v Government of RSA and Others*⁷⁸

⁷⁸ 1997 (4) SA 441 (C) and 2007 (1) BCLR 84 (D)



- Carry out and permit testing for HIV or AIDS only with the informed consent of the prisoners involved.
- Not deprive any prisoner of access to work solely on the basis of his or her HIV status.
- Not discriminate against HIV positive prisoners compared to other prisoners as far as the provision of accommodation and ablution facilities are concerned.
- Provide appropriate education and information about the HIV and AIDS condition to staff and prisoners. Education for staff, particularly when dealing with medical parole, was reaffirmed in two cases; *Stanfield v Minister of Correctional Services and Others* and *Mazibuko v Minister of Correctional Services*⁷⁹ where the court held that refusal to release the prisoner on medical parole is unjust, unlawful and procedurally unfair.

The principles enunciated by our courts are clear and unobjectionable. The primary problem besetting incarcerated persons from a legal perspective is not that of the existence - or even the contents - of rights, but rather on implementation. This recommendation requires further attention given the extreme vulnerability of prisoners (including vulnerability in the context of rape, IDU and HIV/AIDS).

4.3.4 Privacy

In *Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) the then Appellate Court held that communications between Drs. Van Heerden and Vos relating to the HIV status of a patient was unreasonable and an unjustified infringement of his right to privacy. Similar reasoning was followed in *NM and Others v Smith and*

⁷⁹ 2004 (4) SA 43 (C) and 2007 JOL 18957 (T)



*Others*⁸⁰; the court held that the disclosure of the applicants' names in a book without their consent was a violation to their rights to privacy and dignity and that it infringed on their right to keep their HIV status confidential.

4.3.5 Freedom and security of the person

In *Snoti v S* 2007 JOL 19383 (E) the appellant was sentenced to life imprisonment for raping his nine year old daughter with full knowledge of his HIV status. His appeal was dismissed despite the fact that the complainant was HIV negative.

4.3.6 Freedom of expression

In *South African Human Rights Commission v SABC and Another* (SABCT 2003) the Broadcasting Commission Tribunal held that since the parents of the minor had granted permission for the footage showing the child's identity - as well as divulging his status on national television - the SABC was not in contravention of their broadcasting code.

In the case of *Costa Gazidis v Minister of Public Services and Administration TPD Case No. A2050/04* the court found that public comments made by a medical doctor practicing in public health related to the failure of the MOH to provide pregnant women with AZT were not prejudicial to the DOH.

⁸⁰ (*FXI as Amicus Curiae*) 2007 (5) SA 250 (CC)



4.4 Equality and unfair discrimination: Jurisprudence and discourse for the judiciary and legal sectors

It is imperative that the judiciary is sensitised – in ways consistent with principles of judicial independence – on the legal, ethical and human rights issues relative to HIV/AIDS within a broad societal and multisectoral context. This applies equally to all role players in the legal and human rights sectors.

Through training, specifically social context, the judiciary is provided with sensitization required for cases dealing with HIV/AIDS. However, training is limited⁸¹ and mainstreaming of HIV/AIDS in all courses is required.

This section addresses two issues that relate to equality jurisprudence, namely unfair discrimination (women, children and LGBTI) and harmful cultural, religious and traditional practices.

Firstly, a person's HIV status remains the object of much stigmatisation and unfair discrimination based upon a lack of information and/ or misinformation. It is thus imperative that the rights of persons infected and affected – particularly women and young girls - are protected as their status and position in society renders them particularly vulnerable.

Secondly, certain cultural, religious and practices tend to be especially harmful and may increase vulnerability to HIV infection. Thus, despite the equal constitutional protection of religions and cultures, it is necessary, as part of the

⁸¹ A preliminary audit of Training courses offered by Justice College show only one course on HIV/AIDS. The course 'HIV/AIDS Training for Judicial Officers' is provided for magistrates in criminal and family courts. The course is offered twice a year to a maximum of sixty participants. Other course (Advanced Interpreters Course) includes a section on 'HIV Awareness'. Courses for Masters, Clerks and Prosecutors are not specifically on HIV/AIDS.



constitutional balancing process, to introduce measures that regulate harmful practices and protect the fundamental rights of the most vulnerable and marginalised.

4.4.1 Equality and Discrimination

Equality is entrenched both as a right and as a value in the South African Constitution. In addition to being the first substantive right (section 9), the importance of equality is recognised repeatedly throughout the text and in the operational provisions of the Bill of Rights. The attainment of an open and democratic society based on human dignity, equality and freedom is the yardstick for both interpreting and limiting other constitutional rights.

The interpretation of Section 9 of the Constitution has resulted in the development of a unique set of norms to assist in the dual objectives of ending unfair discrimination and of attaining substantive equality⁸² by identifying and eradicating entrenched patterns of discrimination and disadvantage.

4.5. The role of Equality Courts

PEPUDA aims to eradicate the legacy of inequality South Africans experience and posits the equality courts as a key mechanism in achieving this aim. Section 16 provides for the creation of equality courts within the existing High Court and Magistrates Court jurisdictions. During the drafting process, a separate specialist

⁸² See in particular *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Harksen v Lane* NO 1998 1 SA 300 (CC) and *Pretoria City Council v Walker* 1998 2 SA 363 (CC).



tribunal was proposed as the enforcement forum, but this proposal was not adopted because of resource constraints. Ideally, equality courts are to operate with innovative and creative procedural and evidentiary rules that aim to maximise access to justice for victims of unfair discrimination.

In terms of section 31, no proceedings may be instituted in such a court in terms of the Act unless a presiding officer has been designated by the Minister, taking into careful consideration her training, experience, expertise and commitment to the values of equality and human rights. Presiding officers are currently appointed after completing a training course offered by the Law, Race and Gender Unit at the University of Cape Town in conjunction with the Justice College in Pretoria. The course covers social context and diversity training as well as training on the unique procedures of the courts.

The Act is drafted in such a manner as to assist unrepresented litigants. Section 4 of the Act requires the speedy and informal processing of cases, participation by all parties and access to justice. In addition, it provides that corrective and restorative measures be put in place in conjunction with measures of a deterrent nature.

As unfair discrimination cases are notoriously difficult to prove, the onus traditionally placed on litigants in civil cases to prove their cases on a balance of probabilities has been shifted. The Constitution sets out the onus for discrimination claims, stating that discrimination on one or more grounds listed in section 9(3) is unfair unless it is established that the discrimination is fair. In other words, a complainant has to prove a case of discrimination, whereafter the burden would shift to the respondent to establish that the discrimination was



fair. Section 13 of the Equality Act sets out a different burden of proof. This is a lesser onus than the constitutional onus and the complainant is merely required to make out a *prima facie* case of discrimination and not to prove a case of discrimination. If the complainant establishes that the discrimination is based on one of the listed grounds in section 9 of the Constitution, there is a presumption of unfair discrimination, which must be rebutted by the respondent. It is for the latter party to then prove that the discrimination did not take place or that it was fair. If the discrimination alleged is not based on a listed ground, then there is no shift of onus and it is for the complainant to prove that the differentiation is unfair and impairs his or her dignity and human worth. This heavier onus would apply to HIV/AIDS as an unlisted ground.

The equality courts are such a central feature of this legislation that the effectiveness or otherwise of this law can be judged to the extent and the efficiency with which these courts deliver justice. In order to monitor the trends in this regard, the DOJ&CD is obliged to collect data from the equality courts as to the profile of complainants, the profile of respondents, and the nature of the cases lodged and cases finalised in terms of Regulation 23(1).⁸³

It is evident that some of the courts are under-utilised or not utilised at all. No information exists as to the number of Equality Court cases dealing with HIV/AIDS discrimination.

⁸³ Regulation 23(1) of the Regulations published in GN No R764, *Government Gazette* No.25065, 2003-06-13, as amended by GN No 563, *Government Gazette* No. 26316, 2004-04-30, and read with s25(3)(c) of the Act, obliges the DOJ&CD to collect the following data from operational equality courts: the number of cases lodged; the number of cases finalised; the ground of discrimination; the category of discrimination involved; the area from which the complainant originates (rural or metropolitan); the age, gender, race, and, where applicable, the disability of the complainant; the gender and race of the person against whom the allegations are made; and the finding and order of each finalised complaint. See Annexure B of the Regulations.



Despite the promise of access presented by the creation of equality courts, there are a number of problems with regards to the operation of these courts.⁸⁴ Some challenges include: location and information about the court to the public, underutilization and financial constraints faced by most complainants.

In the light of the problems highlighted above the following is recommended:

- Investment in dedicated staff with the necessary expertise
- Stop the practise of sharing equality court clerks with the Magistrates' Court
- Creation of email listservers and databases for the sharing of information
- Create certainty as to the location of the courts and cease to decommission courts but rather utilise more resources on education, especially reaching the poor and vulnerable.

4.6 Constitutional Protection Against Harmful Cultural, Religious and Traditional Practices

It has been established⁸⁵ that African women and young girls are most vulnerable to HIV/AIDS as infected and affected persons. Other than the multi-dimensional nature of race, gender and class discrimination (triple-discrimination), African women and young girls also have to contend with harmful customary law and practices, especially in rural areas.

⁸⁴ Kaersvang "Equality Courts in South Africa: Legal Access for the Poor" 2008 *The Journal of the International Institute* 4.

⁸⁵ As recognized by the UN General Assembly Resolution 52/99 which calls upon States to fulfill their commitment to eliminating harmful traditional practices affecting health of women and children



Section 1 of the Recognition of Customary Law Marriages Act 120 of 1998 defines customary law as follows:

“Customary law means the customs, usages and traditions observed among the indigenous African peoples of South Africa which forms part of the culture of these peoples.”

In terms of the Constitution a process of balancing of rights is necessary when dealing with aspects of customary law. The rights in question are:

- Section 8(1) that determines that all law, including customary law, is subject to the Constitution⁸⁶
- Section 9(3) provides that no-one may be discriminated on the basis of *inter alia* sex, gender, sexual orientation, marital status, culture, belief, and ethnic and social origin.
- Section 30 states that “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.

Section 31 which deals with rights of cultural, religious or linguistic community

- Section 36 provides for a balancing process and the limitation of rights when reasonable and justifiable.

In terms of the constitutional principle of the balancing of rights and values:

- Every person has a right to continue their customary practices and beliefs.
- But some customary practices put people at risk of HIV infection. These practices should be transformed in order to reduce the risk of HIV

⁸⁶ See also the Preamble and section 2 (the supremacy clause) of the Constitution.



infection or, if they constitute unreasonable abuse of people's rights, they should be declared unconstitutional.

There are a number of customary practices that cause vulnerability amongst women and young girls. These include:

- *Ukungena*: This practice determines that when a husband dies a male relative of the husband could be appointed as the *ukungena*-partner and have sexual intercourse with the wife to produce a male heir
- *Seantlo*: When a wife dies without having produced a male heir, her parents have to give the widower a substitute wife (*seantlo*) who is usually a younger sister. Where no *seantlo* is provided the *lobolo* must be returned.

The following are further examples of customary practices that contribute to HIV/AIDS vulnerability in South Africa:⁸⁷

- The often preferred "tight, dry sex", as practiced by men and women in some communities, can lead to vaginal tearing which places women at greater risk of contracting HIV.
- Polygyny, a legitimate and socially accepted form of customary marriage, allows for a man to have multiple wives. An infected partner in a polygynous marriage predisposes all other members of the union to contracting the virus.
- Ritual circumcision for young boys as part of initiation ceremonies heralding the boys' "coming of age", often entails using the same instrument for the circumcision of a number of boys.
- Several other skin-piercing procedures ('scarification') utilised in health, therapeutic, ceremonial and aesthetic practices carry the potential risk of

⁸⁷ Louw *HIV/AIDS and Human Rights in South Africa* (2004) Centre for the Study of AIDS.



HIV transmission through infected blood if hygienic instruments are not used.

Other customary practices such as virginity testing, mostly conducted in the province of Kwazulu-Natal, also render women more vulnerable to infection owing to the myth that sex with a virgin can cure the disease.

In order to address some of the problems outlined above, Section 12 of the Children's Act 2005 deals with social, cultural and religious practices as follows: minimum age for marriage, prohibition against virginity testing below 16 years and where testing or circumcision is done, standards are prescribed. Further, the Act prohibits genital mutilation or female and male (below 16 years) circumcision.

In addition, the issue of access to courts remains an important one and in this regard traditional courts could play an important role as they are inexpensive and accessible. The Traditional Courts Bill (B15-2008) is intended to regulate the role and functions of traditional leaders in the administration of justice, in accordance with Constitutional imperatives. The Bill will facilitate the repeal of Sections 12 and 20 of the Black Administration Act, 1927, which currently regulate the role of Traditional Leaders in some areas of the country.

It is recommended that the finalisation of the Traditional Courts Bill is prioritised, and that traditional leaders, headmen and elders are trained in such a way as to ensure sensitisation in human rights, gender and HIV/AIDS issues.

4.7 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007



The greater part of this Act (hereinafter referred to as the Sexual Offences Act) commenced on 16 December 2007. Chapter 5 (Services for Victims of Sexual Offences and Compulsory HIV Testing) came into effect on 21 March 2008 and Chapter 6 (National Register for Sex Offenders) on 16 June 2008.

The Sexual Offences Act aims to review and amend the laws relating to sexual offences and to deal with all legal aspects of sexual offences in a single statute.

The three issues relating to HIV/AIDS vulnerability addressed by the Act, namely compulsory HIV testing of alleged sex offenders (sections 28, 30 and 31), commercial sex work (CSW) (section 11) and the trafficking of persons (section 71) are discussed the next few paragraphs in more detail.

4.7.1 Compulsory HIV testing of alleged sex offenders

There are two sections in the Sexual Offences Act, which deal with the compulsory HIV testing of alleged sex offenders:⁸⁸

- Section 28 provides that a victim, who has been exposed to the risk of being infected with HIV as a result of a sexual offence being committed against him or her, may apply to a magistrate for an order that the alleged offender be tested for HIV at the State's expense. However, this application can only be made where the victim lays a charge with the SAPS in respect of an alleged sexual offence or reports

⁸⁸ Part 1 of the Regulations published in the GG No. 31075 on 22 May 2008 (R561) deals with the regulations on services for victims of sexual offences and compulsory HIV testing of alleged sex offenders.



an incident in respect of an alleged sexual offence at a designated health establishment within 72 hours of the offence having taken place. In addition, in terms of section 30, the application must be brought within 90 days after the alleged commission of the sexual offence.

- Section 32 provides that an investigating officer may apply to a magistrate for an order that an alleged offender be tested for HIV for the purposes of investigating or prosecuting an offence.

In addition, section 34, which deals with the use of results of HIV tests, states that the tests may be used to enable an investigating officer to gather information with a view to using it as evidence in criminal proceedings (s34(1)(b)).

In the *Policy Brief on the Criminalisation of HIV*⁸⁹ UNAIDS recommends to governments that they repeal HIV-specific criminal laws which directly mandate the disclosure of HIV status. UNAIDS recommends that governments rather use general criminal laws to address the intentional transmission of HIV. It is further recommended that governments redirect legislative reform, and law enforcement, towards addressing sexual and other forms of violence against women rather than focussing on the criminalisation of HIV/AIDS.

4.7.2 Commercial Sex Work

The UNAIDS definition of “sex work” reads as follows:

“Female, male and transgender adults and young persons who receive money or goods in exchange for sexual services, either regularly or occasionally, and

⁸⁹ 2008.



who may or may not consciously define those activities as income-generating.”

Commercial sex workers are particularly vulnerable to the risk and transmission of HIV infection. The main problems related to sex work, HIV, discrimination and health have been identified as invisibility of sex work, stigma, criminalisation, abuse, and most importantly, vulnerability to contracting HIV/AIDS.⁹⁰

In the case of *Jordan and Others v The State* 2002 (6) SA 642 (CC) the Constitutional Court failed to declare section 20(1)(aA) (the prostitution provision) and section 2 (the brothel provision) of the Sexual Offences Act 43 of 1957 unconstitutional. All the judges held that the prostitution provision does not infringe the rights to human dignity and economic activity, and that if it does limit the right to privacy, such limitation is justifiable. They differed, however, on the question of whether the prostitution provision constitutes unfair gender discrimination. The minority judgment held that it is indeed an infringement of the right to equality that clients are not prosecuted.

Section 11 of the Sexual Offences Act provides that sex work remains illegal, but that clients can now be prosecuted (in response to the *Jordan* minority judgment).

Currently the SALRC Issue Paper on Adult Prostitution⁹¹ considers three options:

- Criminalisation of all aspects of commercial sex

⁹⁰ Richter “Sex Work, Johannesburg’s ‘Den of Iniquity’ and HIV/AIDS”, paper delivered at *HIV and the Working World Conference*, Wits Business School on 29 March 2008.

⁹¹ Issue Paper 19 (Project 107): Sexual Offences: Adult Prostitution.



- Legalisation within certain narrowly prescribed conditions
- Decriminalisation which would involve the removal of all laws that criminalise prostitution

In 2001 the Health Sector responded to the links between sex worker vulnerability and the criminalisation of the industry by committing itself to the decriminalisation of sex work.

The NSP explicitly:

- Rejects discrimination against sex workers
- Acknowledges the increased vulnerability of sex workers towards HIV/AIDS
- Recommends the rolling out of customised prevention packages for sex workers

In addition, section 11(4) of the Model Law provides that “[t]he State shall consider the decriminalisation of commercial sex work ... as specific measures that enhance HIV prevention”.

In the light hereof, recommendations would be to:

- Implement the provisions of the NSP and the guidelines in the Model Law
- Amend the Sexual Offences Act to decriminalise sex work
- Implement and fund sex worker-specific programmes
- Strengthen the civil society response to sex work
- Effectively engage in cross-border migration issues

4.7.8 Trafficking of Persons



With the increase in migration across the world, and the continued restrictions on movement of labour, irregular migration such as trafficking and smuggling has increased significantly. According to the International Labour Organisation (ILO), “trafficking is also perhaps the most flagrant of societal and labour market failures that arise in the context of contemporary globalisation”.⁹²

The ILO estimates that 2.5 million women, men and children are trafficked within and across borders at any point in time and that “at the very least, one third of these are trafficked for economic purposes other than sexual exploitation”.⁹³ Transnational trafficking has been estimated at 600,000 to 800,000 persons annually, of which 80 percent are women and 50 percent are minors,⁹⁴ but recent research has shown that most figures are often no more than ‘guesstimates’.⁹⁵

A human rights approach to trafficking needs to focus on the trafficked person, pay particular attention to the protection of the victim and safeguard his/her rights. Men and women are differently situated when accessing human rights. They are also trafficked in different ways and for different reasons. Trafficking violates the right to dignity and integrity of the trafficked person but is also a specific gender-based harm. Advocating for a human rights approach to trafficking does not diminish the importance of a criminal justice approach to human trafficking but rather integrates human rights into prevention, protection and prosecution.

⁹² ILO 2005 p.69.

⁹³ ILO 2005 p.46.

⁹⁴ US Department of State, 2006,

⁹⁵ Laczko, 2005:11, Piper, 2005 p.219.



There is another relevant layer: Since trafficking predominantly involves migrants in search of employment, it cannot be isolated from the broader migration framework and the violation of the rights of migrant workers (see a more detailed discussion on this below). At the heart of the matter is the exploitation suffered by the trafficked person, whether for sexual or other economic exploitation.

In terms of the international framework the following instruments are applicable:

- *United Nations Convention Against Transnational Organised Crime (2003)*
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Palermo Protocol' 2003)*

Article 3 of the Palermo Protocol defines trafficking as follows:

- The action of the recruitment, transportation, transfer, harbouring or receipt of persons
- By means of the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim
- For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices, and the removal of organs

The Palermo Protocol places the following obligations on ratifying States, of which South Africa is one:

- Criminalise trafficking
- Investigate, prosecute and convict traffickers
- Undertake border control measures



The *Vienna Declaration and Programme of Action (1993)* similarly highlights the need to eliminate international trafficking through international cooperation in economic and social development.

In addition, the International Organisation for Migration (IOM)⁹⁶ mentions the following key points in its *Report on Health and Human Trafficking*:

- Trafficking in persons is a violation of human rights. Most trafficked persons are denied the right of access to health care.
- Trafficked persons are not criminals.
- Health can be affected throughout the trafficking process.
- Trafficked children and adolescents are particularly vulnerable to sexual and reproductive health problems including HIV, due to separation from their families, deprivation of a protective environment, and challenges communicating their health needs.
- Lack of access to health care affects the achievement of the Millennium Development Goals, including combating HIV and other diseases, improving maternal health, and promoting gender equality and empowering women.
- The clandestine nature of the trafficking process greatly complicates research on health needs of trafficked persons.
- Factors that make women and children particularly vulnerable to trafficking include: lack of access to education, poverty, war, demand for cheap labour and prostitution and other forms of sexual exploitation, social inequality and gender discrimination.

To effectively address human trafficking and HIV/AIDS, the IOM recommends better coordination in national efforts to address both issues, which are often

⁹⁶ http://iom.org.za/site/index.php?option=com_docman&task=doc_view&gid=86.



dealt with separately, by focusing on factors such as gender inequalities and violence, social marginalisation, poverty, and education. Other recommendations include: better conceptual clarity on the issues concerned; integrating trafficking and HIV interventions into key sectors; and laws and policies to address both HIV and trafficking.

Article 4 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* obliges States to take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators, and protect women most at risk. The heads of state and government of the African Union, agreed in the *Solemn Declaration on Gender Equality in Africa* (2004):

“to initiate, launch and engage within two years sustained public campaigns against gender-based violence as well as the problem of trafficking in women and girls [and] reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women in a manner that will change and positively alter the attitude and behaviour of the African society”.

The South African national response, in the form of the Sexual Offences Act, provides only interim measures with regard to the trafficking of persons:

- Part 6 sections 70 to 71: Transitional provisions relating to trafficking in persons (adults and children) for sexual purposes only
- Inclusion of pornography under ‘purposes’
- Victims not to be prosecuted for any directly related offence, e.g. contravention of immigration laws or prostitution



Chapter 18 of the Children's Act 2005 deals with the trafficking of children. The relevant sections are:

- Section 281: The purposes of this Chapter are-
 - (a) to give effect to the UN Protocol to Prevent Trafficking in Persons; and
 - (b) generally to combat trafficking in children.
- Section 282
UN Protocol to Prevent Trafficking in Persons to have force of law

The SALRC has released a Discussion Paper and a Draft Bill on the trafficking of persons. Currently, the drafting of the Commission's report on Trafficking in Persons is being finalised, after which it will be submitted and taken through the legislative process. The overall purpose of the Draft Combating of Trafficking in Persons Bill 2006 is to criminalise trafficking in persons by identifying the various offences and setting out the accompanying penalties, providing for the identification and protection of victims of trafficking, including a range of services and compensation to victims of trafficking, as well as set of national instructions and directives that determine how trafficking cases are to be investigated, how to identify victims, and so on. The Bill also provides for extra-territorial jurisdiction that will make it possible for perpetrators to be prosecuted even if the act is committed in another country. With respect to the prevention of trafficking, the Bill provides for public awareness programmes and other measures to inform and educate persons of the risk of becoming victims of trafficking, to inform victims of their rights and to discourage the demand that fosters the exploitation of victims, especially women and children.



Chapter 5

Government Framework for Implementation

Cabinet is the highest political authority that carries the responsibility of dealing with HIV/AIDS related matters. This responsibility has been delegated to the Inter-Ministerial Committee on AIDS (IMC) composed of eight Ministries. In addition to the IMC, Cabinet approved (in 2003), a Comprehensive National Plan on HIV/AIDS Care, Management and Treatment (NACOSA). This Plan was evaluated and revised in 2006 and a new strategy was published, namely the *HIV/AIDS and STI Strategic Plan for South Africa (NSP 2007-2011)*. The NSP was published in response to the internationally agreed ‘Three Ones’ Strategy that provides for:

- One agreed HIV/AIDS action framework as the basis of coordination
- One agreed country-level M&E system
- One national AIDS coordinating authority with a broad-based multi-sectoral mandate

SANAC serves as the South African country structure that is to ensure a concerted national effort to meet the primary aims of the NSP, namely:

- Reduce the rate of new HIV infections by 20% by 2011
- Reduce the impact of HIV/AIDS on individuals, families, communities, and society by expanding access to appropriate treatment, care and support by 80% by 2011



Priority Area 4 of the NSP states that HIV/AIDS is a human rights issue. A major objective of the NSP is to create a social environment that encourages many more people to test voluntarily for HIV and, when necessary, to seek and receive medical treatment and social support. *Respect for, and the promotion of, human rights must be integral to all the priority interventions of the NSP.* In addition, active and ongoing campaigns that promote, protect, enforce and monitor human rights must be linked to every intervention and mounted at district, provincial and national level. The NSP identifies a range of activities to improve access to justice, in order that people can challenge human rights violations immediately and directly. It sets out issues for law reform to create a legal framework that uniformly assists HIV prevention, treatment, research and surveillance.

The national response to HIV/AIDS receives leadership in the form of the IMC and SANAC. This is in compliance with Guideline 1 of the *International Guidelines* that recommends the establishment of such bodies. SANAC sectors (of which one is the Justice Sector lead by the DOJ&CD) are responsible for the operationalization of the NSP.

SANAC is the highest national body that provides guidance and political direction, as well as support and monitoring of sector programmes. SANAC operates at three levels, namely:

- High-level council - SANAC, chaired by the Deputy President
- Sector level - with sectors taking responsibility for their own organisation, strategic plans, programmes, monitoring and reporting to SANAC
- Programme-level organisation - led by the social cluster.



The DOJ&CD, as the leader of the Justice Sector Coordinating Committee (JSCC), has a central role to play within the context of a national multisectoral response to HIV/AIDS, as it is widely recognised that HIV/AIDS is a legal and human rights issue. This requires not only a sound policy framework, but also legislative review, reform and intervention, in particular with regard to the position of vulnerable and marginalised individuals and groups.

As stigma and discrimination continue to present challenges in the management of HIV/AIDS, Priority Area 4 of the NSP seeks to mainstream programmes to mitigate these fundamental human rights challenges. The four main goals of this priority area are to:⁹⁷

- Ensure public knowledge of and adherence to the existing legal and policy framework
- Mobilise society, and build leadership of HIV positive people, to protect and promote human rights
- Identify and remove legal, policy and cultural barriers to effective HIV prevention, treatment and support
- Focus on the human rights of women and girls, including those with disabilities, and mobilise society to stop gender-based violence and advanced equality in sexual relationships

In assessing needs, the NSP mentions the following as contextual factors to be considering when instituting legal responses to HIV/AIDS:⁹⁸

⁹⁷ NSP p.16-17.

⁹⁸ NSP p.32-36.



- (a) Poverty
- (b) Gender-based violence
- (c) Cultural attitudes and practices
- (d) Stigma, denial, exclusion and discrimination
- (e) Mobility and labour migration
- (f) Informal settlements

The following vulnerable groups that require protection are identified in the NSP:⁹⁹

- (a) Women
- (b) Adolescents and young adults (15-24 years)
- (c) Children 0-14 years
- (d) People with disabilities
- (e) Incarceration and HIV
- (f) Men who have sex with men (MSM)
- (g) Commercial sex workers (CSW)
- (h) Mobile, casual and atypical forms of work
- (i) Refugees
- (j) Injecting drug users

The key NSP recommendations for government departments include:¹⁰⁰

- Review the approach and content of the ABC strategy behind the design of information
- Strengthen the implementation of HIV/AIDS plans and establish an interdepartmental framework to record experiences

⁹⁹ NSP p.36-41.

¹⁰⁰ NSP p.46.



- Consolidate and build existing partnerships, concentrating on the increasing contribution of the private sector
- Strengthen co-operation agreements among SADC member states and create a regional framework
- Strengthen the co-ordination and M&E of the sector within the framework of SANAC

The Guiding Principles of the NSP confirm those articulated in the Constitution, the NACOSA Plan, the DOH *White Paper for the Transformation of the Health System in South Africa (1997)*, the Comprehensive Plan, and *Batho Pele*.¹⁰¹

Priority Area 4 promotes respect for, and the promotion of, human rights and encourages active and ongoing campaigns that promote, protect, enforce and monitor human rights at district, provincial and national level. Goals 16-19¹⁰² of the NSP deal directly with human rights challenges.

In terms of Monitoring and Evaluation (M&E), the NSP also determines that each sector is required to develop a monitoring schedule that ensures that common definitions and standards are developed, and that the necessary capacity is available for the M&E of the sector.¹⁰³ In this regard, each sector must:

- Assess the state of readiness of existing M&E mechanisms
- Gather the baseline for all indicators in terms of standard tools
- Report to SANAC twice a year on sector specific indicators in the form of midyear and end of year reports

¹⁰¹ NSP p.54-55.

¹⁰² NSP p.59.

¹⁰³ NSP p.102.



In terms of the Reporting Schedule, a mid-term review of the NSP will be conducted during 2009 and the five year review will be conducted in 2011. Such reviews should focus on challenges, role players and interaction between sectors and lead agencies and address questions such as population reach, resource audits for implementation, and obstacles and challenges in reaching targets.¹⁰⁴

Lastly, the NSP outlines the following practical and policy issues that have to be addressed in order to ensure the effective implementation of the plan.¹⁰⁵ These include the following issues pertinent to the Justice Sector and DOJ&CD:

- The legal and policy issues relating to higher risk groups needs to be addressed as a matter of urgency. In other words, the legal barriers to accessing HIV prevention and treatment services as a result of the criminalisation of activities must be removed. An audit of criminal laws, and their amendment with a view to ensuring non-discrimination and harm reduction, is recommended.
- The introduction of a Chronic Disease Grant that will promote adherence by supporting people with long term medical needs
- The Amendment of the Patents Act to permit compulsory licensing in accordance with Revised Guideline 6 of the *International Guidelines on HIV/AIDS and Human Rights* and the WTO's *Declaration of the TRIPS Agreement and Public Health* and the decision on the implementation of the *Doha Declaration on the TRIPS Agreement and Public Health*.

In establishing the way forward, the NSP encourages sectors to:¹⁰⁶

- Effectively co-ordinate across the sectors in implementing the plan

¹⁰⁴ NSP p.103-104.

¹⁰⁵ NSP p.113-117.

¹⁰⁶ NSP p.117.



- Develop sector-specific strategies and operational plans
- Identify gaps that need to be addressed to ensure the effective implementation of the Plan
- Establish technical AIDS committees guided by and according to the requirements of the SANAC structures

In Government's most recent response to UNGASS¹⁰⁷ the following national challenges were mentioned

- Issues of inequality, stigmatisation and prejudice.
- Operationalisation of the HIV/AIDS & STI Strategic Plan by SANAC sectors through the development of sector plans at national, provincial and district level with annual operational plans that would be based on realistic objectives that are linked to the NSP's objectives, interventions and targets.

In order to assess what still needs to be done to address the issues of HIV/AIDS, human rights and access to justice, and to comply with the NSP, it is necessary to evaluate and analyse the current status of HIV/AIDS in the Justice Sector.

Although the discussion paper focuses on HIV/AIDS vulnerability in the context of human rights and access to justice, the paper herein must, however, be read within the context of other departmental policies, plans and programmes in order to ensure a comprehensive and integrated multisectoral response.¹⁰⁸

¹⁰⁷ *Progress Report on Declaration of Commitment on HIV and AIDS, reporting period January 2006 – December 2007.*

¹⁰⁸ Dept of Health Report to UNGASS.



In *Vision 2000* the Department recognised the importance of ensuring that all South Africans are entitled to the full benefits of citizenship as provided for in the Constitution. In furthering a vision of “Justice for All”, the DOJ&CD emphasised accessibility of justice – rooted in principles of inclusivity and constitutional values – to the poorest of the poor and the vulnerable. In this context accessibility can be understood as including the affordability of legal services, physical access to courts, citizen participation and legal education. The main ethos of this vision is furthered in the Medium Term Strategic Framework (MTSF)¹⁰⁹ of the Department that recognises the need to ensure a “better life for all”.¹¹⁰ This requires facilitation of the development of programmes, policies, guidelines and uniform standards relating inter alia to the protection of the rights of the vulnerable, including persons infected and affected by HIV/AIDS.

¹⁰⁹ MTSF 2005/2006-2008/2009.

¹¹⁰ See the Preamble to the 1996 Constitution.



CHAPTER 6

PRELIMINARY RECOMMENDATIONS

National governments occupy a central leadership role in combating the negative effects of the HIV/AIDS epidemic. In addition, PLWA, communities affected by the epidemic, and marginalised groups particularly vulnerable to HIV infection, should all have special roles to play by bringing their experiences into the process of developing national priorities and policies, and actively participating in the provision of services. Civil society more broadly brings distinct skills and perspectives to the response to HIV/AIDS, and national ownership must therefore include the role of civil society.

The *Global Task Team on HIV/AIDS* has encouraged States to improve, enhance and refine their national HIV/AIDS responses and to scale up prevention, treatment, care and support programmes. The challenge to countries is articulated as follows:¹¹¹

“To secure ownership by developing capacity to identify problems, set priorities, and establish accountable systems to enable the rapid scaling up of a multisectoral response to AIDS”.

It is thus up to governments to ensure that problems are identified, that priorities are set, and that accountable systems are created in order to scale up a multisectoral and multi-disciplinary response to HIV/AIDS. It goes without saying that these efforts must occur within a human rights framework.

¹¹¹ Global Task Team “On Improving AIDS Coordination among Multilateral Institutions and Institutional Donors” (2005) <http://www.aidsportal.org/store/284.pdf>.



Government's comprehensive response to the HIV/AIDS epidemic and the *International Guidelines* is in the form of the NSP that must be operationalised by SANAC. The interventions needed to reach the NSP's goals are structured under four key priority areas, namely:

- Prevention;
- Treatment, care and support;
- Research, monitoring, and surveillance; and
- Human rights and access to justice

Priority Area 4 of the NSP addresses a number of issues related to HIV/AIDS human rights.

In order to provide guidance in terms of compliance with the NSP, and reporting to SANAC, this document attempts to sketch the current status of HIV/AIDS in the Justice Sector (lead by the DOJ&CD), and then addresses a number of issues relating to the protection of the rights of vulnerable groups within the context of the HIV/AIDS epidemic. Existent legislation and case law is analysed and attention is paid to equality jurisprudence.

Research from this analysis that much has been done nationally to address the legal and human rights implications of HIV/AIDS in the form of strategies, policies, plans, and progressive legislation and case law. However, further research is necessary in order to keep up with international trends and developments in this regard, and to assess new ways in which HIV/AIDS inequality, stigmatisation and prejudice can be addressed.



6.1 Preliminary Recommendations

In terms of the NSP it is clear that a supportive legal and policy framework is crucial to implementing the plan. The following level is proposed:

- A discussion with the women and HIV/AIDS sector on implementation of the Sexual Offences Act, particularly the issue of criminalisation of HIV/AIDS
- The implementation of the recommendation of the Equality Review Committee to amend PEPUDA to include 'HIV-status' as an express ground of non-discrimination
- The amendment of the Patents Act to permit compulsory licensing of medicines when deemed necessary
- The review of legislation aimed at increasing the affordability of medicines (including parallel importing)
- Addressing the legal status of HIV/AIDS as a disability and the legislation of a Chronic Diseases Grant

6.2 Responses to HIV/AIDS Vulnerability

SANAC sectors are expected to operationalise the NSP through the development of sector plans at national, provincial and district level, with annual operational plans that would be based on realistic objectives that are linked to the NSP's objectives, interventions and targets.



Section 11.6 of the NSP¹¹² places emphasis on the creation and operation of HIV/AIDS Units in Government Departments. These Units, headed by a focal person who manages the implementation of relevant HIV/AIDS programmes, are responsible for bringing HIV/AIDS issues to the attention of the Inter-Ministerial Committee on AIDS (IMC) and SANAC via the PIC. It is the responsibility of these Units to:

- Prepare briefing documents for the national forums
- Attend meetings to provide further information in aid decision-making in national committees and bodies
- Development of relevant strategies, policies and programmes
- Ensuring availability of financial and other resources
- Providing support to implementing agencies in their departments

The DOJ&CD, as leader of the JSCC, plays a leading role in the legal response to HIV/AIDS. As HIV/AIDS affects all South Africans, but particular groups are increasingly vulnerable, this strategically places the Chief Directorate: Promotion of Rights of Vulnerable Groups as the appropriate Directorate within Justice to facilitate the development of a National Policy Framework on HIV/AIDS, Human Rights and Access to Justice.

6.3 Proposed Priorities and Strategies

1. Alignment of policies/structures/programmes

- Intersectoral and multi-disciplinary co-ordination (through the JSCC) that would facilitate improved co-ordination and a multi-disciplinary response to the management of HIV/AIDS

¹¹² NSP p.100.



- Develop uniform HIV/AIDS norms and standards/guidelines in order to ensure accountability and efficiency
- Analyse and review all government policies to ensure the mainstreaming HIV/AIDS vulnerability
- Develop guiding principles taking into account vulnerable and marginalised groups as outlined above

2. Capacity Building

- Support the work and build the capacity of paralegals and community justice workers, particularly in under-resourced and rural communities, to ensure improved access to information about HIV/AIDS and human rights. Such capacity building should be conducted within an ethos of equal partnership
- Greater government funding for the Legal Aid Board, particularly in respect of human rights matters related to HIV/AIDS, in order to ensure the constitutional right to have disputes settled in a court of law or other appropriate legal forum

3. Promoting the law to ensure justice

- Enact, review and reform HIV/AIDS related legislation in the light of guidelines contained in the SADC PF Model Law on HIV in Southern Africa (2008)
- Implement legislation and ensure compliance with case law, through a process of monitoring and evaluation
- Make better use of the designated Equality Courts, and utilise alternative *fora* such as the SAHRC and CGE as an effective way of advancing substantive equality and the protection of the rights of vulnerable groups



- Build on current *pro bono* initiatives in collaboration with the legal profession, and encouraging private practitioners to engage in more *pro bono* work

4. Information Management Systems

- Develop an integrated and automated case management information system, including a reliable database of HIV/AIDS related cases

5. Monitoring and Evaluation

- Assess the state of readiness of existing M&E mechanisms
- Gather the baseline for all indicators in terms of standard tools

6. Research

- Undertake research to explore further implications of HIV/AIDS vulnerability
- Undertake research to determine which vulnerable persons (target groups) are not being reached and the reasons for this
- Promote the use of epidemiological data and community information in the development of policy, programs, and legal services
- Undertake research in order to determine which of the enforcement mechanisms in the SADC-PF Model Law should be adopted
- Continuous research into developing international, regional and sub-regional trends and legal jurisprudence

7. Training

- Generic training on HIV/AIDS and human rights that includes the involvement of PLWA
- Inclusion of HIV/AIDS discrimination in training of Equality Court clerks



- Curriculum development and training for judicial and other court officers that focuses on gender- and diversity-sensitivity
- Develop a database of personnel and judicial officers trained as well as the nature and content of training on HIV/AIDS
- Develop and enhance capacity of personnel in developing and managing monitoring and evaluation systems in HIV/AIDS

8. Communication

- Develop a comprehensive communication strategy for governmental as well as external stakeholders
- Take advantage of international, regional and sub-regional experiences through the consolidation and creation of networks between the government and external stakeholders and participation in regional and international bodies

9. Public Awareness

- Raise awareness on services offered by the Department on HIV/AIDS, legal processes and how to access such services
- Contribute to government's World AIDS Day programme by introducing a focus on HIV/AIDS, Human Rights and Access to Justice



REFERENCES

1. Legislation

- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)
- Employment Equity Act 55 of 1998 (EEA)
- The Occupational Health and Safety Act 85 of 1993
- Mine Health and Safety Act 29 of 1996
- Compensation for Occupational Injuries and Diseases Act (COIDA)
- Public Services Regulations 2001
- Medicines and Related Substances Control Amendment Acts 90 of 1997 and 59 of 2002
- National Health Act 61 of 2003
- Children's Act 38 of 2005 (as amended by Children's Amendment Act 41 of 2007)
- Criminal Procedure Second Amendment Act 85 of 1997
- Criminal Law Amendment Act 105 of 1997
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
- North West Provincial Council on HIV/AIDS Act 5 of 2001
- Social Assistance Act 13 of 2004
- The Medical Schemes Act No 131 of 1998

2. Policy

- National Policy Guidelines for Victim Empowerment, December 2008



3. Regulations

- Medical Schemes Regulations: Government Gazette 20556
- Public Service Regulations 2001 - 'HIV/AIDS in the workplace'

3. Case Law

- Hoffmann v South African Airways 2001 (1) SA (CC)
- Karen Ferreira v Buccleuch Montessori Nursery School Case No. 4377/02
- Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 717 (CC)
- Treatment Action Campaign and Another v Rath and Others (12156/05) [20080 ZAWCHC 34 (13 June 2008)
- Van Biljon and Others v Minister of Correctional Services and Others 1997 (4) SA 441 (C)
- Stanfield v Minister of Correctional Services and Others 2004 (4) SA 43 (C)
- EN and Others v Government of the Republic of South Africa and Others 2007 (1) BCLR 84 (D)
- Mazibuko v Minister of Correctional Services 2007 JOL 18957 (T)
- Van Vuuren and Another NNO v Kruger 1993 (4) SA 842 (A)
- NM and Others v Smith and Others (FXI as Amicus Curiae) 2007 (5) SA 250 (CC)
- C v Minister of Correctional Services 1996 (4) SA 292 (T)
- Joy Mining Machinery v National Union of Metal Workers of South Africa and Others 2002 (23) ILJ 391 (SALC)
- Irvin and Johnson Ltd v Trawler and Line Fishing Union and Others 2003 (4) BLLR 379 (SALC)
- VRM v Health Professions Council of South Africa and Others 2003 JOL 11944 (T)



- Venter v Nel 1997 (4) SA 1014 (D)
- Magida v S Case No 515/2004 (26 August 2005 Unreported but Reportable)
- S v Nyalungu 2004 JDR 189 (T) / JOL 13254 (T)
- Snoti v S 2007 JOL 19383 (E)
- Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)
- Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA)
- K v Minister of Safety and Security 2005 (9) BCLR 835 (CC)
- S v Baloyi 2000 (2) 425 (CC)
- Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC)
- South African Human Rights Commission v SABC and Another (SABCT 2003)
- Costa Gazidis v Minister of Public Services and Administration TPD Case No. A2050/04
- Allen v SAFM (SABCT 2006)
- De Vos v Talk Radio 702 (SABAT 2006)
- Khosa and Others v Minister of Social Development and Others 2004 (6) BCLR 569 (CC)
- President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC); Harksen v Lane NO 1998 1 SA 300 (CC) and Pretoria City Council v Walker 1998 2 SA 363 (CC)
- Tswelopele Non-Profit Organization v City of Tshwane Metropolitan Municipality SCA 2007
- Ntaka v The State 2008 SCA 20
- Geldenhuys v The State 2008 SCA 47
- City of Johannesburg v Mazibuko 2009 SCA 20
- City of Johannesburg v Rand Properties (Pty) Ltd 2007 SCA 25



4. Research Reports

- Jurgens R “HIV/AIDS and HCV in prisons: A select annotated bibliography” (2006) *International Journal of Prisoner Health* 131-149
- Viljoen F “Model Legislation and Regional Integration: Theory and Practice of Model Legislation Pertaining to HIV in the SADC” 2008 (41:2) *De Iure* 383.
- Kaersvang D “Equality Courts in South Africa: Legal Access for the Poor” 2008 *The Journal of the International Institute* 4
- Louw ‘HIV/AIDS and Human Rights in South Africa’ (2004) Centre for the Study of AIDS.
- Skinner D, S Mfecane ‘Stigma, discrimination and the implications for people living with HIV/AIDS in South Africa’ *Journal des Aspects Sociaux du VIH/SIDA*, vol1. No. 3 November 2004
- Dunkle K, Jewkes R, Brown H ‘Gender-based Violence and HIV infection among Pregnant women in Soweto’ Medical Research Council of South Africa, 2003
- Mathews, S and Abrahams, N ‘Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No.116 of 1998) on Women’, the Gender Advocacy Programme & the Medical Research Council (Gender & Health Research Group), November 2001
- Reddy V, Potgieter C and Mkhize N, ‘Cloud over the rainbow: corrective rape and other hate crimes against black lesbians’, HSRC, 2007



- Drimie S 'The impact of HIV/AIDS on rural households and land issues in Southern and Eastern Africa' Integrated Rural and Regional Development, HSRC, 2002

5. Other Reports / Books

- Biennial Report on the State of the South African HIV/AIDS Epidemic, issued by ASSA
- Report: UNODC, 2005 World Drug Report 2005 Vienna - United Nations Office on drugs and Crime 2005
- UNAIDS Facing the Future Together: Report of the Secretary-General's Task Force on Women, Girls and HIV and AIDS in Southern Africa (2004) 8
- UNAIDS Report on the Global AIDS Epidemic: A UNAIDS 10th Anniversary Special Edition (2006) 506-507.
- National Department of Health 'Progress Report on Declaration of Commitment on HIV and AIDS, reporting period January 2006 – December 2007. Dept of Health Report to UNGASS'
- United Nations Development Programme (UNDP) Report: Access to Justice, March 2004
- Nwonwe (ed.) The Millennium Development Goals: Achievements and Prospects of Meeting the Targets in Africa 2008 p.180.
- Amnesty International Report, 2007, 'Women, HIV/AIDS and Human Rights'

6. Conference and Discussion papers



- Acting President Judge Mpati, Inaugural Lecture, University of Free State, 6 October 2004, 'Transformation in the Judiciary – A Constitutional Imperative'
- 'South African Justice Sector and Rule of Law' – A Discussion paper, AfriMap and Open Society Foundation, November 2005, page 20
- 'HIV/AIDS and Vulnerability: An overview of micro, meso and macro level implications' TANGO International, 2003, paper prepared for UN Regional Inter-Agency Coordination Support
- Richter "Sex Work, Johannesburg's 'Den of Iniquity' and HIV/AIDS", paper delivered at *HIV and the Working World Conference*, Wits Business School on 29 March 2008.

7. International Instruments: Conventions, Declarations, Guidelines etc. Convention on the Rights of the Child

- The International Covenant on Civil and Political Rights, 1976
- The International Covenant on Economic, Social and Cultural Rights, 1976 (SA has not yet ratified, but has signed.)
- African Charter on Human and Peoples' Rights, 1981
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979
- Convention on the Rights of Persons with Disabilities, 2006
- UN Convention against Transnational Organized Crime, 2003



- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2003
- The International Convention on the Protection and Rights of All Migrant Workers and Members of their Families, 1990
- African Charter on the Rights and Welfare of the Child, 1990
- International Guidelines on HIV/AIDS and Human Rights
- Declaration of Commitment Adopted by the UN General Assembly Special Session on HIV/AIDS, 2001 (UNGASS)
- Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, 2001
- Solemn Declaration on Gender Equality in Africa 2004
- Continental Framework for Harmonisation of Approaches Among Member States and Integration of Policies on Human Rights and People Infected and Affected by HIV/AIDS in Africa 2005
- Brazzaville Commitment on Scaling Up Towards Universal Access to HIV and AIDS Prevention, Treatment, Care and Support in Africa by 2010 (2006)
- Africa's Common Position to the UN General Assembly Special Session on AIDS (2006)
- NEPAD Framework Document (2001) and NEPAD Health Strategy (2003); the African Peer Review Mechanism (APRM); and the Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration, 2001)
- United Nations Millennium Declaration, General Assembly Resolution 55/2, 8 September 2000
- SADC PF adopted the Model Law on HIV in Southern Africa, 24 November 2008



ANNEXURE 1:

CONCEPTUAL FRAMEWORK

Gender: Refers to social roles allocated respectively to women and to men in particular societies and at particular times. Such roles and the differences between them, are conditioned by a variety of political, economic, ideological and cultural factors and are characterized in most societies by unequal power relations. Gender is distinguished from sex which is biologically determined. National Gender Policy Framework, the Presidency, 2007

HIV/AIDS Discrimination: “any measure entailing an arbitrary distinction among persons depending on their confirmed or suspected HIV serostatus or state of health.” UNAIDS

HIV/AIDS Mainstreaming: A continuum of processes for analysis of how HIV and AIDS impact on all sectors, at different times, both internally and externally, to deeming how each sector should respond based on its comparative advantages.

Secondary victimisation: Attitudes, processes, actions and omissions that may intentionally or unintentionally contribute to the re-victimisation of a person who has experienced a traumatic incident as a victim through:

- failure to treat the victim with respect and dignity;
- disbelief of the person’s account;
- unsympathetic treatment;
- blaming the victim; and
- lack of (or insufficient) support services to assist the victim at



interpersonal, institutional and broad social level.

Restorative Justice: “Means an approach to justice that aims to involve the offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent recurrence of the incident and promoting reconciliation.” Child Justice Bill, No B49B of 2008

Rights-based approach: “Rights determine the relationship between individuals and groups with a valid claim (rights holders) and the state with correlative obligations (duty-bearers). Groups are no longer beneficiaries but rights holders entitled to exercise their rights.” UNHCR, 2007

Victim empowerment: An approach that facilitates access to a range of services for all people who have individually or collectively suffered harm, trauma and/or material loss through violence, crime, natural disaster, human accident and/or through socio-economic conditions. Empowerment may be defined as having (or taking) control, having a say, being listened to, being recognized and respected as an individual and having the choices one makes respected by others (moving from victim to survivor). National Victim Empowerment Policy Guidelines, 2008, Department of Social Development



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