

# The Outcomes of Legal Environment Assessment ('LEA') on HIV in Mauritius

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# The objective of Legal Environment Assessments

- To clarify how laws and/or regulations impact on HIV and how they protect rights or on the contrary they create barriers to access;
- Raise awareness, build consensus and a foundation for constructive actions

# Equality/Anti-Discrimination Law and Policy

## Foreigners and Migrants

Section 8(1) (entitled “Prohibited Immigrants”) of the Immigration Act 13 of 1970 provides that:

*“persons afflicted with **any** infectious or contagious disease, other than citizens and residents of Mauritius, shall be deemed to be prohibited immigrants and shall not be admitted to Mauritius”*

Section 8(2) of the Immigration Act provides that:

*“the Minister may in writing authorize the admission to Mauritius of any of the persons referred to in the preceding paragraph who satisfies the immigration office that he intends to marry a citizen of Mauritius to whom he has disclosed that he is HIV positive or has AIDS”*

Current position in Mauritius is therefore as follows in respect of “foreigners/migrants”:

With the exception of tourists and non-citizens entering Mauritius for the purpose of marrying a citizen to whom they have disclosed their HIV status, **no person living with HIV may enter Mauritius for the purpose of residence, work or study.**

# Why these restrictions?

These restrictions are often justified on the grounds of safeguarding public health.

In fact, as of 2016, 35 countries still place HIV-related restrictions on entry, stay and residence for people living with HIV (vide LEA Report, page 38)

# What does the empirical evidence say?

The Global Commission on HIV and the Law (the 'GCHL Report') argues that the evidence shows that they do no such thing.

In fact, such policies create the dangerous mistaken impression that “outsiders” are contaminated and citizens are pure, and that their health is secure so long as the borders are secured (vide the GCHL Report)

# What do the international conventions say?

*“Migrant workers and their families the right —to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with national of the State concerned”*, vide The International Labour Organization’s 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*

*“Migrant workers should not be required by countries of origin, transit or destination to disclose their HIV-related information nor should they be excluded from migration on the basis of their real or perceived HIV status”*, vide ILO. 2010. Recommendation Concerning HIV&AIDS in the World of Work at paras. 27 and 28

# **The case of Justice Edwin Cameron, Judge of the Constitutional Court of South Africa**

- Has lived with HIV for the past 30 years;
- Hailed by Nelson Mandela as “one of South Africa’s new heroes”

# Recommendations of the LEA

- Repeal those provisions of immigration legislation and regulations that exclude migrant workers from employment or foreigners from residing or studying in Mauritius solely on the basis of their HIV status.
- Ensure that medical examinations for purposes of immigrant or study visa applications do not include a compulsory HIV test,
- Implement regulatory reform to ensure that migrant workers and foreigners can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens. All HIV testing and STI screening for migrant workers and foreigners must be confidential, voluntary and with informed consent.
- Ensure that employers' contracts with migrant workers and foreigners make provision for the employer to assume responsibility for all health care costs of the employee during the period of the employee's employment with the employer.
- Ensure that migrant workers and foreigners can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens.



# Access to Insurance/Bank loans

## The context:

Insurance companies routinely require applicants for life insurance to undergo medical assessment, including an HIV test, with a view, *inter alia*, to determining the terms of the cover.

# What does the law say?

- Section 18 of the Equal Opportunities Act (under the heading “Provision of goods and services”) provides that:
- *“No person who, for payment or otherwise, provides goods, services or facilities, shall discriminate against another person:*
- *(a) by refusing or failing to provide him with those goods, services or facilities; or*
- *(b) In the same terms and conditions on which, or the manner in which, he provides that other person with those goods, services or facilities.”*

# The exception to Section 18 of the EOA

- Section 4 (1) (a) of the same Act stipulates that:
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- *“Nothing in this Act shall:*
- *Prohibit the provision of **different treatment** to a person in relation to an annuity, life insurance policy, accident insurance policy, or similar matter involving the assessment of risk, whether the treatment:*
- *(a) is determined by actuarial or other data from a source on which it was reasonable to rely; and*
- *(b) is reasonable having regard to those data and any other relevant factors.”*

# The legal consequence of Section 4 and Section 8 of the EOA when read together

An insurance company may impose more stringent conditions on the life insurance policy of the HIV positive person, it cannot **altogether refuse** granting him the insurance cover by purporting to rely on the provisions of Section 4 (1) (a) of the Equal Opportunities Act as such a refusal would constitute discrimination on the basis of impairment under the Equal Opportunities Act.

Note:

“impairment” defined as, inter alia, *“the presence in the body of organisms that may cause disease”*

# Recommendations

- HIV should not be treated differently from analogous medical conditions for insurance purposes. Legal provisions should be enacted to prohibit exclusion from life, health and other insurance solely on the basis of HIV status and to ensure that in the context of insurance, HIV should not be treated differently from analogous chronic medical conditions.

# Health laws, policies and plans

- The Public Health Act 1925 defines the term “infectious or communicable disease” is defined as “any disease declared as such by regulations”.
- The Public Health (Infectious or Communicable Diseases) Regulations 1987 include HIV and AIDS in the definition of the term “infectious or communicable disease”.
- Furthermore, the word “patient” under the Public Health Act is defined as “a person suffering from an infectious or communicable disease”.

# Notification of Infectious or Communicable Disease

- Section 41 of the Public Health Act stipulates that:
- (a) The occupier of any premises in which resides a patient shall as soon as he becomes aware of the fact, give notice to the Sanitary Authority or the Health Inspector of the relevant district.
- (b) Where the occupier is prevented by illness or otherwise from giving notice, the nearest relative of the patient present on the premises or being in attendance on the patient, and where there is no relative, any person in charge of or in attendance on the patient shall give notice.
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- “Premises” includes, inter alia, any land, house, building, structure, open place, covered or enclosed place, any vehicle, ship or floating craft.

# Powers of Entry of the Sanitary Authority (vide Section 46)

- The Sanitary Authority and/or any Health Inspector, as the case may be, may
- (a) enter during the day or night and inspect any premises where he may have reasonable grounds to believe that an infectious or communicable disease exists or has recently existed with regard to which no notice, certificate or report has been received;
- (b) enter upon any premises between sunrise and sunset to exercise such supervision and control as may be necessary over any case of infectious or communicable disease existing upon the premises;
- (c) enter upon any premises between sunrise and sunset to enforce due observance of the Public Health Act; and
- (d) enter any common lodging house.



- There is no evidence that the provisions of the Public Health Act relating to notification or entry and inspection have ever been invoked in respect of HIV and AIDS.

But should they be invoked, does same constitute a breach of privacy of people with HIV Status?

“Except with his own consent, no person shall be subjected to the **search of** his person or **his property** or **the entry by others on his premises**”, vide Section 9(1) of the Constitution

# Section 9(2)(a) of the Constitution

- Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

*(a) **in the interests of** defence, public safety, public order, public morality, **public health**, town and country planning, the development or utilisation of mineral resources or the development or utilisation of any other property in such a manner as to promote the public benefit;*

# Recommendation

- It is critical that the Public Health Act be amended to exclude HIV and AIDS from the definition of an infectious disease.

## Isolation and detention of patients

- Section 48 of the Public Health Act, “Where, in the opinion of the Sanitary Authority, any person, certified by a medical practitioner to be suffering from **an infectious or communicable disease**, is not accommodated or is not being treated or nursed so as to guard against the spread of the disease, that patient may, on the order of the Sanitary Authority, be removed to and **detained in a hospital or temporary place which, in the opinion of the Sanitary Authority is suitable for his reception** until the Sanitary Authority or any medical practitioner authorised by the Permanent Secretary of the Ministry of Health is satisfied that he is free from infection or can be discharged without danger to the public health”.

Should Section 48 of the Public Health Act be enforced, would same constitute a breach of Section 5 of Constitution [Protection of right to personal liberty]

- *“No person shall be deprived of his personal liberty save as may be authorised by law for the purpose of preventing the spread of an infectious or contagious disease” (vide Section 5(1)(g) of the Constitution*

# Recommendations

It is critical that the Public Health Act be amended to exclude HIV and AIDS from the definition of an infectious disease.

A way forward?

Case of **Daniel Nd'etich v/s Attorney General Petition No. 329 of 2014** – applying the Siracusa Principles on the Limitation and Derogation Provisions in the international Covenant on Civil and Political Rights ('the Siracusa Principles') – Relying on same, Court held that “public health may be invoked as a ground for limiting rights BUT such measures **MUST** be least restrictive and intrusive means.

## **Confidentiality, HIV Testing and Treatment and Informed Consent**

### **Confidentiality**

**Section 13(4) of the HIV and AIDS Act 2006** provides that:

*No person shall disclose any information concerning the result of an HIV test or related medical assessments to any other person except -*

*(a) with the written consent of that person, or his legal administrator or legal guardian, as applicable;*

*(b) to a medical practitioner, nursing officer, paramedical staff who is directly involved in the treatment or counselling of that person, where the HIV or AIDS status is clinically relevant;*

*(c) for the purpose of an epidemiological study or research approved by the Permanent Secretary;*

*(d) upon an order of a court where the information contained in the medical file is directly relevant to the proceedings before the court.*

**Section 18 of the HIV and AIDS Act 2006** states that:

- Any person who contravenes section 4(1), 6(1), 7(1), 12, 13(2), (3) or (4) or 14(2) shall commit an offence and shall, on conviction, be liable to fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 12 months.



# Present shortcomings

Despite clear provisions of the law, in practise, the HIV status of individuals is often compromised in certain settings:

E.g. In prison:

It has been reported that, for example, prisoners are called out publicly in the prison courtyard to ‘come and fetch their ARVs (antiretroviral drugs)’ (vide Page 49 of the LEA)

# Informed consent to testing and treatment

## A. Testing

In terms of **section 7 (2)(b) of the HIV and AIDS Act of 2006**, *a minor (defined as being under the age of 18 in Mauritian law) requires the informed consent of his or her parent or legal guardian in order to have an HIV test.*

But under **section 7(5) of the HIV and AIDS Act of 2006** *'A person may undertake an HIV test on a minor without the consent of his legal administrator or guardian where the minor makes a written request for such test and that person is satisfied that the minor understands the nature of his request'.*

## B. Access to Treatment

A minor **cannot access** treatment for HIV or for any other condition without the consent of his or her parent or legal guardian [vide **Medical Council (Code of Practice) Regulations 2000 Schedule Part II (3)**]

### **Access to Treatment**

Research shows that very few young people are willing to seek their parent's permission to access services (vide Page 49 of the LEA)

# Age of consent v/s Informed consent – Re Access to treatment

The age of consent in Mauritius is 16 (vide Article 249(4) of the Criminal Code) which reads:

*“Any person who has sexual intercourse with a minor under the age of 16 or a mentally handicapped person, even with his consent, shall be liable to penal servitude for a term not exceeding 20 years.”*

## **The Anomaly:**

Although a young person of 16 and above can legally consent to sexual intercourse, he or she would still require parental consent in circumstances where they may require HIV treatment.

# Recommendations

- Consideration should be given to amending the law to align the age of HIV treatment to that of consent to sexual intercourse.
- Ensure that health care providers and prison service members are provided with training on regular basis to ensure that testing is only conducted with informed consent and that confidentiality regarding HIV status is maintained and all times.

# Persons who use drugs – The Mauritian Context

Mauritius is experiencing a concentrated HIV epidemic in People Who Inject Drugs' ('PWID'). HIV infection rates among PWID stand at 44.5 percent (vide Page 66 of LEA);

The HIV and AIDS Act, No31 of 2006 makes specific provision for needle exchange programmes:

*“Section 14(1) provides that ‘an institution or non-governmental organisation may supply, syringes and needles to any person dependent on a dangerous drug”.*

*“The HIV/AIDS Policy (2012) provides at para 5.11 that ‘HIV prevention efforts through Harm Reduction Programs for People who inject Drugs shall be strengthened and expanded to reach more People who inject drugs, as well as other populations who are at high-risk of problematic drug use. [...]”*

*The two pillars of the Harm Reduction Program shall be the Needle Exchange Program and the Opioid Substitution Program.”*

In the Needle Exchange Program, Government and non-Government actors shall provide clean needles, syringes and paraphernalia, and safely dispose of used ones for People who inject Drugs

# HIV and AIDS Act v/s Dangerous Drugs Act

- The NEP is an efficient way to reduce the incidence of HIV and AIDS among Injecting Drug Users and it is cheap and easily applicable’.

BUT

The Dangerous Drugs Act (DDA), No 41 of 2000 is however at odds with the HIV and AIDS Act, 2006



# Example

**Section 16 of the HIV and AIDS Act** states that *‘A person who is in possession of a syringe or needle, in compliance with this Act, shall not, by reason only of that possession, be considered as having committed an offence under the Dangerous Drugs Act’.*

Yet:

Focus group discussions with people who use drugs revealed that people are still arrested by police for being in possession of needles and syringes obtained at needle exchange programmes.

The Police for their part rely on **Section 34(1) of the DDA** which reads, *inter alia*, “Any person who unlawfully has in his possession any pipe, syringe, utensil, apparatus or other-article for use in connection with smoking, inhaling, sniffing, consuming or the administration of any dangerous drug, **shall commit an offence** and shall, on conviction, be liable to a fine not exceeding 10,000 rupees [...]”

# Recommendations

- Amend the Dangerous Drugs Act to bring it in line with the HIV and AIDS Act and decriminalise the possession of needles and syringes as part of a needle exchange programme.
- Reconsider the location of methadone distribution at police stations and increase the hours that methadone distribution points are open to ensure that all who need it are able to access methadone without fear of persecution.

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PILS!